THE CRIMINAL OFFENCE IN INTERNATIONAL LAW

By

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ABSTRACT

The purpose of this thesis is to provide a study of a much neglected concept in international law, namely the criminal offence. The work consists of four parts which incorporate ten chapters. Part I introduces the study by examining the way in which the concept of criminal offence has developed through the various recognised sources of international law. The difficulties involved in distinguishing the criminal offence from other unlawful acts in international law, as well as the problem of defining the concept, are issues which are addressed in Part II. Part III examines seventeen classified criminal offences and practices in international law in order to determine the juridical indicia of the concept. Finally, Part IV addresses the legal consequences engendered by the concept of criminal offence, namely international criminal responsibility. Individual as well as State criminal responsibility in international law are discussed, particularly, in the light of the substantial contributions made by the International Law Commission in this field.

The author has limited his research to source material available up to July 1991.

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ABBREVIATIONS

ABA Jnl	American Bar Association Journal
Ad. Op.	Advisory Opinion
AJ	Acta Juridica
AJIL	American Journal of International Law
AJIL (Supp.)	Supplement of the American Journal of International Law.
Albany LR	Albany Law Review
All E.R.	The All England Law Reports
Am.Pol.Sc.Rev.	American Political Science Review
Am.ULR	American University Law Review
Annales FDI	Annales de la Faculte' de Droit D'Istanbul
Ann. Dig.	Annual Digest and Reports of Public International Law Cases
Annuaire	Annuaire de l'Istitut de Droit International
Annuaire AAA	Annuaire de l'Association des Auditeurs et Anciens Auditeurs de l'Academie de Droit International de la Haye
Annuaire FDI	Annuaire Francais de Droit International
ASILS-ILJ	Association of Student International Law Societies International Law Journal
Aust.LJ	Australian Law Journal
BFSP	British and Foreign State Papers
BYIL	British Yearbook of International Law
Cal.LR	California Law Review
Can.YIL	Canadian Yearbook of International Law
Case Western	Case Western Reserve Journal of International Law
Chitty's LJ	Chitty's Law Journal
CLP	Current Legal Problems
CLR	Commonwealth Law Reports
Cmd/Cmnd	United Kingdom, Command Papers
Col.JTL	Columbia Journal of Transnational Law
Col.LR	Columbia Law Review
Cor.ILJ	Cornell International Law Journal
CTS	Consolidated Treaty Series
Dal.LJ	Dalhousie Law Journal
De Paul LR	De Paul Law Review
Diss.Op.	Dissenting Opinion
ECHR Rep	European Commission of Human Rights: Decisions and Reports
Ency.PIL	Encyclopaedia of Public International Law
ETS	European Treaty Series (Council of Europe)
F.Supp.	Federal Supplement
F.2d.	Federal Reporter (Second Series)
GA	General Assembly of the United Nations
Ga.JICL	Georgia Journal of International and Comparative Law
GAOR	United Nations General Assembly Official Records
GA Res.	United Nations General Assembly Resolution
Georgtwn LJ	Georgetown Law Journal
Grotius Trans.	Transactions of the Grotius Society
GYIL	German Yearbook of International Law
Hague Receuil	Receuil des Cours de l'Academie de Droit

	International
HILJ	Harvard International Law Journal
HLR	Harvard Law Review
Hof.LR	Hofstra Law Review
HR Qrtly	Human Rights Quarterly
IAPL	International Association of Penal Law
ICAO	International Civil Aviation Organisation
ICJ	International Court of Justice
ICJ Pleadings	International Court of Justice: Pleadings, Oral Arguments, Documents
ICJ Rep.	Reports of Judgments, Advisory Opinions and Orders of the International Court of Justice
ICLQ	International and Comparative Law Quarterly
IJIL	Indian Journal of International Law
ILA	International Law Association
ILA (1934)	Report of the Thirty-Eight ILA Conference (Budapest)
ILA (1970)	Report of the Fifty-Fourth ILA Conference (Hague)
ILA (1974)	Report of the Fifty-Sixth ILA Conference (New Delhi)
ILA (1976)	Report of the Fifty-Seventh ILA Conference (Madrid)
ILA (1980)	Report of the Fifty-Ninth ILA Conference (Belgrade)
ILA (1982)	Report of the Sixtieth ILA Conference (Montreal)
ILA (1984)	Report of the Sixty-First ILA Conference (Paris)
ILA (1986)	Report of the Sixty-Second ILA Conference (Seoul)
ILA (1988)	Report of the Sixty-Third ILA Conference (Warsaw)
ILC	International Law Commission
ILC Yrbk.	Yearbook of the International Law Commission
ILM	International Legal Materials
ILQ	International Law Quarterly
ILR	International Law Reports
IMO	International Maritime Organisation
IMT	International Military Tribunal
Int.Affs.	International Affairs
Ind.LR	Indian Law Review
Ind. Op.	Individual Opinion
Ind.YIA	Indian Yearbook of International Affairs
Int.RCP	International Review of Criminal Policy
Iowa LR	Iowa Law Review
Israel LR	Israel Law Review
Israel YHR	Israel Yearbook on Human Rights
JAIL	Japanese Annual of International Law
JDI	Journal du Droit International
Jnl. ALC	Journal of Air Law and Commerce
Jnl. BIIA	Journal of the British Institute of International Affairs (continued as Journal of the Royal Institute of International Affairs)
Jnl.Int.Affs.	Journal of International Affairs (formerly

	Columbia Journal of International Affairs)
Jurid. Rev.	Juridical Review
KLR	Kentucky Law Review
LASTS	League of Arab States Treaty Series
L.Ed.	Lawyers' Edition
LN	League of Nations
LN Doc	League of Nations Document
LNOJ	League of Nations Official Journal
LNTS	League of Nations Treaty Series
LOSI	Laws of the State of Israel
LQR	Law Quarterly Review
Mich.LR	Michigan Law Review
Ned.Juris.	Nederlands Juristenblad
NILR	Netherlands International Law Review (Nederlands Tijdschrift Voor Internationaal Recht)
NYIL	Netherlands Yearbook of International Law
NYULR	New York University Law Review
NYLSLR	New York Law School Law Review
OAS	Organisation of American States
OAS Doc.	Organisation of American States Document
OAS Res.	Organisation of American States General Assembly Resolution
Ohio NULR	Ohio Northern University Law Review
PCIJ Rep	Permanent Court of International Justice
Ser. A/B	Reports, Series A/B
Pol.YIL	Polish Yearbook of International Law
Proc.ASIL	Proceedings of the American Society of International Law.
Q.B.	Queen's Bench Division
RBDI	Revue Belge de Droit International
RDPCrim.	Revue de Droit Penal et Criminologie
RDI Sc. Dip. Pol.	Revue de Droit International de Sciences Diplomatiques et Politiques
RDI Leg. Comp.	Revue de Droit International et de Legislation Comparee
Rev.ICJ	Review of the International Commission of Jurists
Rev.Rom.	Revue Roumaine d'Etudes Internationales
RGDIP	Revue Generale de Droit International Public
RH	Revue Hellenique de Droit International
RIDP	Revue Internationale de Droit Penal
Sep.Op.	Separate Opinion
S.African YIL	South African Yearbook of International Law
SC	Security Council of the United Nations
SC Res.	United Nations Security Council Resolution
Stan. LR	Stanford Law Review
St. Louis ULJ	Saint Louis University Law Journal
Temp.LQ	Temple Law Quarterly
Tenn.LR	Tennessee Law Review
Tex.ILJ	Texas International Law Journal
Tex.LR	Texas Law Review
TS	Her Majesty's Treasury Solicitor's Office
Tul.LR	Tulane Law Review
UCLR	University of Chicago Law Review
UN Doc.	United Nations Document

UKTS	United Kingdom Treaty Series
UN	United Nations
Univ. CLR	University of Cincinnati Law Review
UNTS	United Nations Treaty Series
UN Yrbk.	United Nations Yearbook
USC	United States Code Annotated
US Dept.Bull.	United States Department of State Bulletin
US Sup.Ct.Rep.	United States Supreme Court Reports
Va.JIL	Virginia Journal of International Law
Va.LR	Virginia Law Review
Vand.JTL	Vanderbilt Journal of Transnational Law
Wayne LR	Wayne Law Review
WC Law Rep.	Law Reports of Trials of War Criminals of the United Nations War Crimes Commission
Yale JWPO	Yale Journal of World Public Order
Yrbk ECHR	Yearbook of the European Convention on Human Rights
ZAORV	Zeitschrift fur auslandisches Offentliches Recht und Volkerrecht

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PART I

CHAPTER 1

The Sources of International Law and the Concept of the Criminal Offence

The criminal offence in international law, like all other concepts in international law, has developed through the various recognised sources.[1] This chapter will review the relationship between a particular source and the concept of a criminal offence in international law.

1.(a) International Custom

The difficulties traditionally associated with the definition and meaning of custom in international law are ever present. A debate persists on whether State practice and opinio juris are both necessary elements for the creation of a customary norm of international law.[2] There is a considerable degree of disparity in doctrine (extreme in some cases[3]) on this issue. The debate gives rise to a number of controversial questions including: what constitutes State practice? How and by what means do we tell whether States are following a particular practice?

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1 See Article 38(1) of the Statute of the International Court of Justice (hereafter cited as ICJ Statute) which enunciates guidelines to be applied by the International Court in the determination of disputes formulated for decision, but is widely acknowledged as an accurate statement of the sources of international law. Also see: Brownlie, Principles of Public International Law, (hereafter cited as Principles) 1990, p.1; O'Connell, International Law, v.1, p.3 and Virally, writing in Manual of Public International Law, Sorensen, M., (ed.), 1968, p.118.

2. See Van Hoof, Rethinking the Sources of International Law, 1983, p.85.

3. For instance, Professor Gross, Essays on International Law and Organisation, 1984, v.I, p.323, insists that State practice alone is not sufficient for the formation of customary international law. He contends that the consent and acquiescence of States is equally necessary. On the contrary Professor Cheng (see Van Hoof, op.cit., p.86) considers opinio juris to be sufficient.

How often must a practice be repeated before it matures into custom? Furthermore, what is the meaning of opinio juris? Is it evidence of States' belief in a particular practice as being legally required?[1] Notwithstanding all uncertainties, it is generally recognised that customary rules of international law reflect a particular practice adopted, followed and accepted as law (opinio juris) by States.[2]

The concept of a criminal offence in international law is the result of a combination of certain acts or omissions and the response of States thereto. Accordingly, physical persons can perpetrate acts which may become criminal offences under customary law if States recognise the character of such acts as penal. Such recognition may be expressed through unilateral or bilateral action. States may, individually through legislative, judicial and diplomatic practice, or collectively through international agreements, proscribe certain practices as criminal offences. Such classification eventually comes to form part of customary international law. Piracy is the classical criminal offence in international law. The concept has developed from judicial decisions and State practice, and not solely from Article 15 (which defines piracy) in the 1958 Geneva Convention on the High Seas.[3]

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1. On these issues generally see, Akehurst, 47 BYIL (1974-75) 1 and Villiger, Customary International Law and Treaties, 1985, pp.4-35.

2. See Brownlie, Principles, pp.5-9; Van Hoof, op.cit.; O'Connell, op.cit., pp.15-16; the Asylum Case, ICJ Rep., 1950, pp.276-277, the Case Concerning the Continental Shelf (Libyan Arab Jamahiriya v Malta) hereafter referred to as Libya v Malta Continental Shelf Case, ibid., 1985, p.29 para.27 and the Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America) (Merits), Judgment, (hereafter referred to as the Nicaragua Case), ibid., 1986, p.97 para 183 and pp.108-109 para 207.

3. UN Doc. A/Conf. 62/122, 1982. Text also at 21 ILM (1982) 1261.

Some treaties, however, are so reflective of majority State practice that either singly or collectively they are an evidence of custom.[1] Treaties are not only a separate source of international law but in certain cases can play a significant part in the development of international customary norms. For example Hague Convention IV of 1907 Respecting the Laws and Customs of War on Land[2] was cited as evidence of the proscription of violations of the laws and customs of war in the Judgment[3] of the International Military Tribunal[4] delivered at Nuremberg.

(b) Treaties

International agreements are a rich source from which acts have come to be recognised as crimes under international law.[5] Broadly classified, they may be depicted in three divisions. In the first category we find international instruments which have had a pioneering effect in the development of crimes in international law.

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1. Keenan and Brown, Crimes Against International Law, 1950, p.84, in the course of determining whether aggressive war is criminal in international law, acknowledge that "....treaties, recognising the same moral standard, give rise to customary international law." The principle was affirmed by the International Court in the North Sea Continental Shelf Cases (Denmark; Federal Republic of Germany v Netherlands), ICJ Rep., 1969, p.41 para.71, but it was not found to apply to the facts of the case before the Court.

2. Hereafter referred to as Hague Convention (IV) 1907.

3. Cnd 6964 p.40. Hereafter referred to as Nuremberg Judgment.

4. Hereafter referred to as IMT.

5. A detailed study of some of the relevant international instruments concerned with crimes in international law and not just their status as a "source" is found in Part III infra.

an indirect effect on the criminal proscription of acts at the international level. They oblige State Parties to make certain practices criminal offences under their laws rather then expressly declaring them to be criminal offences in international law. Categorical description of their status under international law is often avoided, although acknowledgement of the criminal character of the particular act is likely to be found either in the travaux preparatoires and in the preambles, or implied in the provisions of the treaty text. These traits are evident in instruments such as the Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons Including Diplomatic Agents[1], the International Convention Against the Taking of Hostages[2], and in more recent instruments such as the Convention on the Suppression of Unlawful Acts Against the Safety of Maritime Navigation[3] and the Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances.[4]

An important question which concerns treaties and the development of criminal offences in international law is the following: must acts be stipulated in international agreements in order to qualify as criminal offences in international law? The present writer believes not. To answer otherwise would be tantamount to dismissing the relevance and importance of customary international law. But there is some disagreement on this point. There are those who maintain that unlawful acts may only graduate in international law as criminal offences through the faculty

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1. 1035 UNTS 168. Text also at 13 ILM 41.

2. Adopted by GA Res. 34/146, December 7th, 1979. Text also at 18 ILM 1456.

3. Adopted by the International Maritime Organisation (hereafter referred to as IMO) in Rome, March 10th, 1988. See IMO Doc.SUA/CON/15. Text also at 27 ILM 672.

4. See UN Doc.E/Conf.82/15, 1988. Text also at 28 ILM (1989) 497.

of international instruments. In 1922 a sub-committee of the American Society of International Law was entrusted to report on "offences which may be characterised as international crimes". The sub-committee found:

> "There first appeared a difficulty as to the conception of an international crime. That conception as ordinarily set forth in text books of international law, upon investigation and discussion, seemed not to set forth an international crime in a strict sense, but rather an offense recognised by international usage as 'international' largely because of its universality. For instance, the making of the slave trade piracy by international agreement, or later those acts denounced under the white slave convention, such acts to be punished as crimes in accordance with the municipal legislation of each of the Powers signatory to the Convention. We did not think, ... that this general type of offense was particularly in mind. Rather the subcommittee's work involved the consideration of certain acts to be designated as crimes, international in a strict sense .... (Crimes) are strictly speaking international, (when they) are, by the signatories to the Convention denominated as crimes with a penalty affixed."[1]

The sub-committee concedes that an act is a crime in international law if it is so declared in an international convention. Further still, the sub-committee requires that the drafters of international instruments attach a penalty to the act in question.

The sub-committee's criteria for the development of crimes in international law are somewhat rigid. Thus, if a treaty text, without specifically describing a practice as a crime and without stipulating the punishment attached to that crime, simply requires State Parties to enact appropriate legislation providing for prosecution and punishment of the said practice, then the conduct is not to be considered a criminal offence under international law. However, acts do develop as criminal offences in international law separately from any efforts to render the

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[1]. 16 Proc. ASIL (1922) 69-70.

same activities criminal under domestic law,[1] although national criminal legislation common in a large number of States may embody general principles of law which, as a separate source, may contribute to the development of criminal offences under international law.

The concept of a criminal offence in international law cannot be construed solely within conventional law. An act

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[1]. Cf. draft article 2 of the International Law Commission's (hereafter referred to as ILC) current project entitled Draft Code of Crimes Against The Peace and Security of Mankind (hereafter referred to as Draft Code). (Formerly, the title of the ILC's project on the Draft Code was: Draft Code of Offences Against the Peace and Security of Mankind. All references in this thesis to the ILC's Draft Code between 1950 and 1954 is referred to as Draft Code of Offences. The term "Offences" was eventually substituted by the more accurate term "Crimes" by virtue of GA Res. 42/151, 1988.)

Draft article 2 reads:

> " Characterization
>
> The characterization of an act or omission as a crime against the peace and security of mankind is independent of internal law. The fact that an act or omission is or is not punishable under internal law does not affect this characterization."

See ILC's Report on the work of its forty-second session (1990) to the UNGA, GAOR, Supp.No.10 (A/45/10) p.54. This article was provisionally adopted by the ILC at its thirty-ninth session (1987). See ILC Yrbk., 1987, v.II, pt.II, p.14. For summary records of the debate on draft article 2 see ibid., v.I, meetings: 1992-2001. See also Sixth Committee views, UN Doc. A/CN. 4/L. 420, 1988, pp.17-18.

Cf. also Principle II of Principles of International Law Recognized in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal, adopted by GA Res. 95(I) 11th December, 1946, (hereafter referred to as Nuremberg Principles), ILC Yrbk., 1950, v.II, p.374. For the discussion of Principle II by the ILC see ibid., v.I, p.37. See also replies of Governments, ibid., 1951, v.II, p.104.

Is this saying other factors must be present as well as ?

is a criminal offence under international law not simply because it is so declared in an international instrument. Multilateral agreements may act as a thermometer to gauge the international community's consideration of the juridical nature of certain conduct. However, they are not necessarily conclusive evidence of the criminal character of particular practices. Other sources and principles of international law equally have a contribution to make to the development of acts as criminal offences under international law. In re List and Others (Hostages Trial) the US Military Tribunal sitting at Nuremberg in 1945 responded to the accusation that it was applying ex post facto law by stating:

> "It is not essential that a crime be specifically defined and charged in accordance with a particular ordinance, statute or treaty if it is made a crime by international convention, recognised customs and usages of war, or the general principles of criminal justice common to civilised nations generally."[1]

(c) General Principles of Law Recognised by Civilised Nations[2]

An unlawful act may be described as an international crime because it is punished as a criminal offence in a

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1. WC Law Rep., vol. VIII, p.53.

2. See Article 38(1)(c) of the ICJ Statute. There is much debate among publicists on the meaning of this phrase. Some writers believe that it refers solely to municipal law rules. Others interprete them as international law rules within domestic legal systems. A further group advocates that they are a mixture of international and national legal rules. A valuable presentation of the various doctrinal expositions is given by Lammers writing in Essays on the Development of the International Legal Order, Kalshoven, F., (ed.), 1980, p.53. Also see Brownlie, Principles, pp.15-19, and Van Hoof, op.cit., pp.131-150.
The Canadian Commission of Inquiry on War Criminals interpreted this source as including, "at least", principles common to all legal systems and which have been elevated to the level of international norms. See its Report published 30th December 1986, Part I, p.131.

number of municipal criminal codes and laws.[1] This does not automatically mean that it constitutes a criminal offence under international law. However, its recognition as a crime in the laws of a substantial number of States is evidence of a general consensus that it merits to be prohibited and punished as such.

The presence of a rule or principle of law common to a substantial number of national legal systems may emerge as a rule or principle of international law. Van Hoof explains that "the source of international law which is called 'general principles of law' draws upon a reservoir consisting in the national legal systems of the States."[2] Accordingly, municipal criminal laws may trigger the process by which practices are adopted as criminal offences under international law. In addition, criminal offences defined under municipal laws may also serve as models on which criminal offences in international law may be defined. Illustrations of this development include: the concept of "crimes against humanity" defined in the Nuremberg Charter, the concept of crimes committed against internationally protected persons including diplomats and the crime of "mercenarism".

Furthermore, in as much as municipal laws are legally binding within their own sphere of application they manifest a sense of righteousness, of a willingness to mete out punishment for whomsoever commits such acts. National laws, which may reflect general principles of law accepted by States, may be considered evidence of State practice which in turn leads to the creation of customary law.[3] Thus, in some cases the criminal offence in international law is the result of the combined effort of more than one source: general principles of law recognised by civilised

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1. See Sui Generis Meaning of "International Crime" in Part II, Chapter 2, infra.

2. Op.cit., p.140.

3. See Akehurst, op.cit., pp.8-10.

nations and international custom.

It is necessary, however, to make two important reservations to the above principles. First, acts may be deemed criminal offences in international law regardless of whether or not national penal law provides for the punishment of same offences. The second reservation, already stated, but which deserves some elaboration, is that a crime contained in the national legal systems of almost all States does not render it automatically a criminal offence under international law. Thus, for instance, it is safe to say that homicide is considered to be a criminal offence under the laws of every member of the international community. But, it would be wrong to identify it as a criminal offence in international law.

For instance, were the crime of murder to be committed on board an aircraft in flight, many States may have a claim to exercise criminal jurisdiction over the offender including, the State of registration, the national State of the offender or of the victim, or even perhaps the State of the aircraft's destination. In such circumstances the concept of a criminal offence in international law may not necessarily feature, although a crime with an international element is certainly present.

However, the systematic killing of an ethnic group of people by government forces in national territory presents a totaly different perspective of the crime of homicide. Although the taking away of one's life against one's will may be common in both sets of circumstances, the juridical nature of the criminal offence varies. In one situation we may have a case of homicide under municipal (extraterritorial) criminal law, whereas in the other case we may be faced with the question of genocide which is a criminal offence under international law.

The translation of a criminal offence under municipal law into a criminal offence under international law begins where the effects of the crime and its consequences cease to be the sole concern of the lex loci delicti and attract

the reproach of the society of nations. The principal determining factors in this process of transition are the nature and the capability of the act to disrupt international public order and to violate the basic values of humanity.[1]

(d) Judicial Decisions

Judicial decisions rarely focus squarely on the conceptual nature of the criminal offence in international law. Mainly they have contributed to the development of specific practices as criminal offences under international law such as piracy, war crimes, crimes against humanity or hostage taking. They are also useful to the study of the features characteristic of the concept of the criminal offence in international law. Their contribution towards understanding the development of the concept of criminal offence in international law is discussed in Parts II and III of this thesis rather than in this context as a separate source of international law.

(e) The Writings of Publicists

The principle stated in Paragraph D above applies also with regard to the writings of publicists. Their works on the concept of the criminal offence in international law appears throughout this study not only as a source of information but also as evidence of opinion on the development of international law concerning criminal offences.

2. The Concept of "Jus Cogens" and the Criminal offence in International Law

The scope of this section is to address the question whether or not the jus cogens concept has any bearing on

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1. In its Report on the Draft Code the ILC (ILC Yrbk., 1983 v.II, pt.II, p.14 para.48) determines the serious nature of the crimes it seeks to include in its project by the extent of their calamity or by their horrific character, or by both these factors.

the notion of a criminal offence and its development in international law.

The concept of jus cogens[1] has been properly described as "multi-faceted and complex".[2] It consists of a body of rules considered to be essential, fundamental and non-derogable. The presence of these rules has been recognised in the writings of publicists[3] and in international judicial practice[4] but their juridical nature continues to give rise to such questions as: on what basis can we claim to have rules of international law that are indelible?; are they a reflection of a public policy system in international law;[5]

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1. See generally: Sinclair, The Vienna Convention on the Law of Treaties, 1984, p.203 and Brownlie, Principles, p.513. In particular reference should also be made to the 1968 (UN Doc. A/Conf.39/11) and the 1969 (UN Doc.A/Conf.39/11/Add/1) Sessions of the Vienna Conference on the Law of Treaties where the jus cogens concept was greatly debated and widely recognised or accepted.

2. Van Hoof, op.cit., p.151.

3. See, among others, Sinclair, op.cit., p.207; Brownlie, Principles, p.512, Schwarzenberger, 43 Tex.LR (1965) 455 and Macdonald, 25 Can. YIL (1987) 130.

4. The jus cogens concept in international judicial practice has featured in individual opinions (dissentient or otherwise) and much less in collective judgments. See Judge Schucking, Diss. Op., in the Case of the SS "Wimbledon", PCIJ Rep. Ser. A, No.1, 1923, p.47; Judge Anzilotti, Ind. Op., in Customs Regime between Germany and Austria, PCIJ Rep. Ser. A/B, No.41, 1931, pp.58-59; and Judge Moreno Quintana, Sep. Op., in Case Concerning the Application of the Convention of 1902 Governing the Guardianship of Infants. ICJ Rep., 1958, p.106.
While these judicial dicta further the understanding of the concept of jus cogens, they have attracted considerable comment in the writings of jurists. See Sinclair, op.cit., p.210.

5. See Schwarzenberger, op.cit., p.456. See also Judge Moreno Quintana, loc.cit., p.104 et seq.

how do they emerge,[1] and how do they change?[2] Finally, a question with circular overtones: If the jus cogens concept is understood as representing a system of supremacy among rules of international law, is it conceivable to suggest that there may be such a hierarchical system even within the jus cogens concept itself?[3]

There is a considerable degree of debate concerning the origin of jus cogens principles:

> "Some say that such rules are derived from custom, while others say that they can be derived either from custom or from treaties. A few maintain that they are derived from general principles of law, or from either custom or general principles of law, or from either custom, treaties or general principles of law. Judicial dicta speak of rules of jus cogens being derived from treaties or general principles of law, but without apparently implying that they are limited to those sources. Some authorities have argued that treaties or customs which conflict with basic principles of natural law are void; others reject this view."[4]

However, there is a wider consensus on the general proposition that jus cogens rules are those "which derive from principles that the legal conscience of mankind deems absolutely essential to co-existence in the international community; those higher norms which are essential to the life of the international community".[5]

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1. See Van Hoof, op.cit., pp.165-166.

2. See Brownlie, Principles, p.513.

3. Brownlie, Principles, p.515, illustrates this point through a most pertinent question: "If a state uses force to implement the principle of self-determination, is it possible to assume that one aspect of jus cogens is more significant than another?" However, no response is offered to the question.

4. A leading exposition of the various doctrinal viewpoints is furnished by Akehurst, 47 BYIL (1974-75) 282. See also Van Hoof, op.cit., p.156 et seq.

5. Vienna Conference on the Law of Treaties, 1968 Session, see UN Doc A/Conf.39/11, p.294.
Jus cogens rules do not emerge simply because they are

Jus cogens rules operate within spheres of international relations that are of singular importance; spheres which concern some of the most sacred values and interests of mankind. We find recognition of this principle in doctrine[1] and judicial practice[2] where the

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considered as fundamental and necessary by States for the preservation of law and order in the international community. As Article 53 of the Vienna Convention requires, a peremptory norm must be accepted and recognised by all States and can only be modified by a subsequent norm of the same character. Akehurst (op.cit., p.285) interprets this condition as imposing a two-tier test. He claims that "a rule, in order to qualify as jus cogens, must pass two tests - it must be accepted as law by all the States in the world, and an overwhelming majority of States must regard it as jus cogens".
However, Akehurst adds (ibid., p.285 n.4) that in the case of treaties, all States in the world must be parties to the convention for a rule to acquire the jus cogens character. This condition spells bad tidings for the concept of a criminal offence under conventional international law. It would mean that acts may be criminal in international law, but this would not necessarily be considered jus cogens because they are not contained in treaties to which all the States in the world are parties. Thus the rules prohibiting slavery and genocide may be considered as not having the force of jus cogens because not all the States are parties to the relevant treaties concerned with the criminal proscription of these practices. This, especially, would be the case with apartheid where the number of States Parties to the Apartheid Convention hardly reflects an equitable geographical representation of the international community, and even if the position were otherwise, the prospect of S.Africa's accession to the convention is not likely. Nevertheless, the ILC (ILC Yrbk., 1984, v.II, pt.II, p.15 para.53) reports that "the fact that some States had not acceded to the Convention on Apartheid did not deprive it of its force as jus cogens." For this writer's view of the status of apartheid as a criminal offence in international law, see Part III Chapter 6 infra.
Rules of international law, however, do not acquire a jus cogens character exclusively from multipartite treaties, but also from the customary practice of States which includes treaties.

1. See: Sinclair, op.cit., p.207; Rozakis, The Concept of Jus Cogens in the Law of Treaties, 1976, at pp.2, 24-25, 27 and particularly at p.16 where the author

application of jus cogens norms features within regimes such as: the legal limits to the use of force by States, the international protection of human rights, and possibly, the right to self-determination and to permanent sovereignty over natural resources.[1] In its Commentary to the relevant draft article (now Article 53 of the Vienna Convention on the Law of Treaties) the ILC admitted:

> "It is not the form of a general rule of international law but the particular nature of the subject-matter with which it deals that may, in the opinion of the Commission, give it the character of jus cogens."[2]

The relevant question, therefore is: does this principle apply to the concept of a criminal offence in international law? Doctrine, jurisprudence and practice all seem to offer a positive indication in this respect.

Doctrine and State Opinion

With respect to the writings of publicists Brownlie conveniently sets the stage:

> "The least controversial examples of the class (i.e. of jus cogens) are the prohibition of aggressive war,[3] the law of genocide, the principle of racial non-discrimination, crimes against humanity and the rules prohibiting trade

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envisages norms of jus cogens applying within the spheres of international commerce, economics and maritime law; Scheuner, 27 ZAORV (1967) 526; and Van Hoof, op.cit., pp.160-161.

2. See: Ad. Op. on Reservations to the Genocide Convention, ICJ Rep., 1951, p.15; Judge Tanaka, Diss.Op., S.W. Africa Cases, ICJ Rep., 1966, p.298 (Cf. Higgins, Proc.ASIL in 64 AJIL (1970) 47) and Case Concerning US Diplomatic and Consular Staff in Teheran, ICJ Rep., 1980, p.40 para.86 - para.88 and p.42 para.91.

1. Brownlie, Principles, p.513. The concept of the common heritage of mankind has also been cited as a candidate norm. See Sloan, 58 BYIL (1987) 81.

2. ILC Yrbk., 1966, v.II, p.248 para.2. Emphasis added.

3. See Sinclair, op.cit., p.207.

in slaves and piracy."[1]

Among his illustrations of jus cogens rules, Schwarzenberger[2] selects slavery, piracy jure gentium, war crimes and other crimes listed in the Nuremberg Charter.

The significant point is that acts of a criminal nature and indeed, the violation of human rights in international law, are invariably submitted as evidence of the concept of jus cogens.[3] To support this observation, we find that in a list of examples of jus cogens drawn up by Dr. M. Whiteman, several are considered as criminal offences under international law.[4]

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1. Principles, 3rd ed., 1979, p.513. In his fourth edition (1990) p.513, Brownlie drops the reference to "aggresive war" without explanation and substitutes it with "prohibition of the use of force" accompanied by a footnote referring the reader to the ICJ Judgment in the Nicaragua Case.

2. Op.cit., pp.463 and 473.

3. See for e.g. McDonald, 25 Can. YIL (1987) 137-138 and Mann, Further Studies in International Law, 1990, p.96.

4. The following is the list put forward by Whiteman, 7 Ga.JICL (1977) 609 at pp.625-626. Those underlined, though serious in nature and effect, seem questionable as to whether (a) they are either criminal under international law, or (b) whether they may be regarded as jus cogens. In addition the order of the practices listed does not reflect rank or importance of the various practices. 1. Genocide, 2. Slavery and the slave trade, 3. Piracy, 4. Political Terrorism abroad, including terroristic activities. (It is rather peculiar to limit terrorism ratione loci. Terrorist acts are usually considered criminal at home and abroad). 5. Hijacking of air traffic, 6. Recourse to war except in self-defence, 7. Threat or use of force against the territorial integrity or political independence of another State (intervention), 8. Armed aggression, 9. Recognition of situations brought about by force, including fruits of aggression, 10. Treaty provisions imposed by force, 11. War crimes, 12. Crimes against peace and against humanity, 13. Offences against the peace and/or security of Mankind, 14. Dispersion of germs with a view to harming or extinguishing human life, 15. All methods of mass destruction (including nuclear weapons) used for other than peaceful purposes, 16. Contamination of the air,

When drafting articles on the law of treaties, ILC members were much divided on whether the jus cogens provision in a proposed convention on the law of treaties should contain illustrations of the concept. In the end this suggestion was not adopted. However, delegations in favour of illustrating the jus cogens doctrine argued that acts criminal under international law such as genocide and slavery and piracy were excellent examples of the concept.[1] It is worth mentioning that those who opposed an illustrated jus cogens provision did not object to the above as evidence of jus cogens. They were more concerned with the question of limiting the concept ratione materiae.

It seems that jus cogens does operate within the penal and the human rights aspects of international law. Another area in international law where jus cogens has featured, and which is relevant to the concept of a criminal offence in international law, is that of State Responsibility.

The definition of an "international crime", as a breach of an international obligation "so essential for the protection of fundamental interests of the international community", in Draft Article 19 of the ILC Draft Articles on State Responsibility,[2] is responsible for the link

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sea or land with a view to making it harmful or useless to mankind, 17. Hostile modification of weather, 18. Appropriation of outer space and/or celestial bodies, 19. Disruption of international communications with a view to disturbing the peace, 20. Economic warfare with the purpose of upsetting: a. the world's banking systems, b. the world's currencies, and c. the world's supply of energy or d. the world's foodsupply.
The criteria used for the compilation of this list may not have been strictly legal. Political factors are suspected to have had an influential effect in the selection process. Indeed, serious unlawful practices such as torture are noticeably absent.
Similar lists have been submitted by other writers, see Sinclair, op.cit., pp.217-218.

1. ILC Yrbk., 1966, v.II, p.248 (para.3).

2. ILC Yrbk., 1976, v.II, pt.II, p.95.

between the concept of jus cogens and that of the criminal offence in international law. The wording cited from Draft Article 19 above is language borrowed from Article 53 on peremptory norms in the Vienna Convention of the Law of Treaties. Further, Prof. Ago, the principal author of Draft Article 19, pointed out that it is

> "no accident that the (international) obligations whose breach entails .... the personal punishment of the perpetrators correspond largely to those imposed by the rules of jus cogens. The specially important content of certain international obligations and the fact that respect for them in fact determines the conditions of the life of international society are factors which, at least in many cases, have precluded any possibility of derogation from the rules imposing such obligations by virtue of special agreements. These are also the factors which render a breach of these obligations more serious than failure to comply with other obligations."[1]

International Judicial Practice[2]

The International Court has not had many opportunities to address the relationship between acts recognised as criminal offences in international law and the concept of jus cogens. Few as they may be, the judicial pronouncements are most revealing. In the Case Concerning the Barcelona Traction Light & Power Co. Ltd (Second Phase)[3] the International Court distinguished between obligations of a State owed towards the international community as a whole and those arising vis-a-vis another State. The former known as 'erga omnes' are understood to be inalienable, having jus cogens characteristics. To illustrate these kinds of obligations the judgment cites acts of aggression, genocide, and other violations of human rights such as slavery and racial discrimination.

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1. Ibid., v.II, pt.I, p.33 para 101.

2. Generally see Sinclair, op.cit., pp.209-213.

3. ICJ Rep., 1970, p.32.

The Advisory Opinion on the Reservations to the Convention on the Prevention and Punishment of Genocide[1] is another occasion where the International Court addressed the universal character of States' obligations in international law. In brief, the Court opined that the raison d'etre behind the Genocide Convention was the embodiment of a universal assertion against the horror and shock of the crimes which it sought to prevent and supress:

> "States do not have any interests of their own; they merely have, one and all, a common interest, namely, the accomplishment of those high purposes which are the raison d'etre of the convention."

Furthermore, the principles enshrined by the convention "are principles recognised by civilised nations as binding on States, binding, even without any conventional obligation."[2]

In a Separate Opinion in the Case Concerning the Application of the 1902 Convention on the Guardianship of Infants[3] Judge Moreno Quintana spoke of rules within international law "respect for which is indispensable to the legal co-existence of the political units which make up the international community."[4] He recognised the peremptory character and universal scope of principles which were non-derogable even though he did not refer specifically to the jus cogens doctrine. The repression of piracy and the rules governing warfare were among the illustrations used to corroborate the force of those principles in international law.

The notion of jus cogens truly seems to represent the

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1. ICJ Rep., 1951, p.15.

2. Ibid., at p.23. Emphasis added. It has been questioned, however, whether this comment necessarily indicates a reference to jus cogens. See Sinclair, op.cit., p.210.

3. ICJ Rep., 1958, p.55.

4. Ibid., pp.106-107.

embodiment of those rules which regulate some of the most highly sensitive and significant aspects of the conduct of international relations. Criminal offences in international law mark one such aspect. As Schwarzenberger put it, they are examples of "breaches of the standard of civilisation."[1] They are heinous acts beyond the boundaries of toleration. It is the nature of acts such as criminal offences in international law which renders necessary the presence of jus cogens rules.

The concepts of jus cogens and of the criminal offence in international law have much to offer each other. Two points remain unquestionably significant:

(i) Jus cogens contributes to the development of the concept of criminal offence in international law by strengthening the force of its juridical character.

(ii) As rules of international law develop to regulate criminal matters, the jus cogens concept matures.

The development of both concepts is mutually reinforcing.

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1. Op.cit., p.466.

PART II

CHAPTER 2

The Criminal Offence: Problems of Identification and Designation

1. Introduction

The purpose of this chapter is to separate clearly the criminal offence from other unlawful acts in international law. It does not include a discussion of the definition of the concept of criminal offence in international law. The attempts at and the problems involved in defining the concept are tackled in Chapter 3. This chapter examines the difficulties that have arisen as a result of the failure in international practice and especially in the writings of publicists to separate one serious legal wrong, i.e. the criminal offence, in international law from another.

The identification of the criminal offence in international law is marked by the recognition that specific acts create serious cause for concern in the international community because their effects extend beyond the immediate environment of the locus delicti and generate harm which is not sufficiently remedied by the traditional forms of international responsibility.

The reasons for which certain conduct may be proscribed as a criminal offence by the community of nations are varied, but may generally be explained in terms of humanitarian values. For instance, war crimes concern the protection of civilians and prisoners of war in time of armed conflict; slavery concerns the concept of equality; and torture concerns the dignity of mankind. However, the use of force or the pollution of rivers may also be in breach of humanitarian values and though possibly unlawful, do not necessarily constitute criminal offences in international law. It is necessary to separate clearly the criminal offence from other unlawful acts under international law. This question is considered presently.

Further, the criminal offence in international law is

not easily identified by the popular though ambiguous term: 'international crime'. The term has been used by publicists in their writings, by States in diplomatic practice, and in judicial decisions. Sometimes it is used to refer to criminal offences defined under international law. But in other instances it may refer to crimes which, while involving some foreign or transnational element, are not the concern of international law. 'International Crime' will not be used by the present writer in this work to refer to acts recognised as criminal offences under international law.

Finally, this chapter includes a section which reviews the various terms and phrases that have been employed to refer either to specific crimes in international law or to the concept of a crime in international law.

2. The need to distinguish in international law criminal offences from other unlawful acts

The notion of an "unlawful act" is a broad concept. It covers legal wrongs which give rise either to civil liability or criminal punishment. However, in international law the notion of an unlawful act connotes civil rather than criminal implications.

This is the position usually found in doctrine[1] and jurisprudence.[2] But, notwithstanding a general tendency to

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1. See, among others, Cavare, Le Droit International Public Positif, 1969, v.II, p.473 et seq.; Guggenheim, Traite de Droit International Public, 1954, v.II, p.1; Garcia-Mora, International Responsibility for Hostile Acts of Private Persons against Foreign States, 1962, p.15; Brownlie, Principles, Ch. XX, p. 432, and in System of the Law of Nations: State Responsibility (Part I) 1983, p.23. But see, Maryan Green, International Law - Law of Peace, 1987, p.241, who employs the term illegal act in relation to the doctrine of State responsibility in international law. This is curious because the international responsibility of the State is principally delictual but the term "illegal act" traditionally has had criminal overtones.

2. Some of the leading cases include: The Chorzow Factory

equate unlawful acts with civil responsibility, there is no rule which necessarily defines them in a criminal character in international law, nor, for that matter, which excludes the criminal responsibility of States.[1]

Specific unlawful acts such as piracy jure gentium and slavery, violations of the laws and customs of war and, more recently (since the Second World War), violations of certain fundamental human rights have been recognised as criminal offences under international law in the practice of States, in judicial decisions, in international instruments, and in the writings of jurists. However, the theoretical division between criminal offences and other unlawful acts in international law has not received as much exposure as perhaps it deserves, particularly in two significant sources: the practice of the International Court and doctrine.

(a) Practice of the International Court

The approach of the International Court vis-a-vis the criminal character of unlawful acts in international law appears to be somewhat evasive, even when specifically asked to adjudicate upon consequences arising from the alleged breach of international obligations designed to proscribe certain practices as criminal offences.

In Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide the International Court acknowledges that genocide, which represents "a denial of the right of existence of entire human groups, a

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Case (Indemnity) (Merits), PCIJ Rep., Ser. A, No 9, 1928, p. 5; The Corfu Channel Case (Merits), ICJ Rep., 1949, p. 4. See also the distinction between (a) international delinquencies, (b) prejudicial acts and (c) unlawful acts, drawn by Judge Alvarez, Ind. Op., ibid., p.45; and The Reparation Case for Injuries Suffered in the Service of the United Nations, ICJ Rep., 1949, p. 174.

1. See Brownlie, Principles, p.434 n. 8. The concept of State Criminal Responsibility is discussed in Part IV Chapter 10 below.

denial which shocks the conscience of mankind and results in great losses to humanity, and which is contrary to moral law"[1], is a criminal offence in international law. This is perhaps one of the rare occasions where the International Court's position on unlawful acts recognised as criminal offences in international law is unequivocal.

In the Case Concerning the Barcelona Traction, Light and Power Co. Ltd[2] (Second Phase) the Court cited, among other unlawful acts, genocide and slavery as 'outlawed acts'. In the Court's opinion, these acts violate international rights the protection of which rests not with one State but with all States. The Court distinguished between two types of unlawful acts in international law. On the one hand, there are unlawful acts which violate such important rights that "all States can be held to have a legal interest"[3] in protecting them. On the other hand, there are unlawful acts that violate rights but not all States are deemed to have a legal interest in their protection. By citing as examples of the first kind unlawful acts recognised as criminal offences, the Court separates, albeit indirectly, criminal offences in international law from other acts unlawful in international law.

In the Corfu Channel Case[4] Albania was held responsible under international law because it failed to ensure safe passage for vessels passing through an international waterway. The incidents[5] which gave rise to the dispute were the result of conduct described in diplomatic

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1. ICJ Rep., 1951, p.23.
2. ICJ Rep., 1970, p.1.
3. Ibid., p.32.
4. ICJ Rep., 1949, p.4.
5. For a description of the facts see, ibid., p.10.

statements and submissions as an "international crime",[1] a "crime against humanity"[2] and an "offence against humanity".[3] Minelaying in waters used for international navigation was presented in several dissenting opinions[4] as a criminal offence, indeed "as an abominable international crime, very close to an act of terrorism as defined by the (1937 League of Nations) Convention for the Prevention and Punishment of Terrorism".[5] However, the judgment does not indicate that the Respondent (Albania) behaved criminally in international law, and / or that its conduct may have given rise to a form of State responsibility other than that which is civil.[6]

More recently, in the Case Concerning US Diplomatic and Consular Staff in Teheran[7] the International Court did not address the question whether the hostage-takers' acts were criminal or not in international law. The Court did not pronounce itself on all of the United

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1. See statement by H.E. Ambassador Sir Alexander Cadogan, (U.K.), Security Council Meeting 107, Febuary 18th, 1947, ICJ Pleadings, 1949, Vol I, Annexe No. 23, p.211; and H.E. Ambassador Mr. Hasluck (Australia), Security Council Meeting 111, Febuary 24th, 1947, ibid., p.244.

2. Sir Alexander Cadogan, ibid., p.213.

3. Memorial submitted by the United Kingdom, ibid., p.40 para. 72.

4. Judge Winiarski, Diss. Op., ICJ Rep., 1949, p.56; Judge Badawi Pasha, Diss. Op., ibid., p.63, Judge Krylow, Diss. Op., ibid., p.69 and Judge Azevedo, Diss. Op., ibid., p. 85.

5. Dr. Ecer, Judge Ad Hoc, ICJ Rep., 1949, Diss. Op., p. 115.

6. The Applicant did not request a judicial pronouncement on the Respondent's conduct as criminal or as one which constituted a criminal offence in international law. The International Court was asked to adjudge and declare the Respondent to be in breach of its obligations under international law for which reparation is due. ICJ Pleadings, 1949, v.I, p.51.

7. ICJ Rep., 1980, p.3.

States contentions. Of the various international treaty obligations which Iran was alleged to have violated, the Court did not consider Applicants' submission[1] that Iran failed to meet its international obligations under the 1977 Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents.[2]

This case presented the International Court of Justice with an occasion to declare itself on: (a) whether certain unlawful acts were criminal in international law and, if so, (b) on their juridical consequences. The opportunity, not being necesssary for a determination of the issue as fomulated for decision, was not seized.

In the Case Concerning Military and Paramilitary Activities in and against Nicaragua[3] it was claimed that the United States was responsible for, among a number of other violations of international law, unlawful use of force through " recruiting, training, arming, equipping, financing, supplying and otherwise encouraging, supporting, aiding, and directing military and paramilitary actions in and against Nicaragua."[4] In addition, the United States was also charged with the killing, wounding and kidnapping of Nicaraguan citizens.[5] Of the several claims filed against the United States, the above sail closest to the question of the criminal character of unlawful acts in international law; principally for the following reasons:

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1. ICJ Pleadings, 1981, pp.176-178.

2. 1035 UNTS 167. This Convention obliges State Parties to prosecute if they do not extradite criminal offenders for attacks "upon the person or liberty of internationally protected persons". (See Articles 2 and 7. Emphasis added). A full discussion of this convention is found at Part II Chapter 7 below.

3. ICJ Rep., (1986) p.14.

4. Ibid., p.18 para 15(a).

5. Ibid., p.19 para 15(f).

(a) At the time the United Nations was working towards the adoption of a convention intended to render 'mercenarism' a criminal offence. This instrument, recently adopted, is entitled International Convention Against the Recruitment, Use, Financing and Training of Mercenaries.[1] The definition of 'mercenarism'[2] in the text is depicted by language which is almost identical to the wording used by the Applicant in the first of the above two charges.

(b) With respect to the alleged kidnappings and murders committed by US personnel, or other persons in their pay, against Nicaraguans, these acts, per se, are generally acknowledged as criminal offences.

The Court[3] held that it possessed insufficient evidence (perhaps due to the non-participation of the United States in the Merits phase of the proceedings) and thus was not in a position to determine whether the murder and kidnapping allegations were well and truly founded. With respect to the charge of recruiting, training and supporting personnel for the purpose of carrying out military and paramilitary activities within and against Nicaragua, the United States was found:

(i) to have intervened in the domestic affairs of a sovereign State contrary to international law;[4] and,

(ii) to have violated the principle of non-use of force under customary international law.[5]

The question whether 'mercenarism' is a criminal offence under international law remains to be determined. In part, this question may be answered by reference to the existing municipal legislation defining certain practices

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1. Adopted by GA Res. 44/34, 1989. Text at 29 ILM (1990)89.

2. See Article 2.

3. Loc. cit., p.64, para.115 and p.113, para.216.

4. Ibid., p.124, para.242 and p.146, para.292(3).

5. Ibid., pp.118-119, para.228. Cf. Article 2 (4) of the UN Charter.

as constituting 'mercenarism', which when committed result in criminal punishment. Other relevant sources include resolutions adopted by international organisations and international treaties (bilateral and multilateral) denouncing 'mercenarism' as a "universal crime against humanity" and an "international crime".[1]

Though the International Court could have devoted some consideration to these sources and to the nature and character of mercenaries[2] and 'mercenarism' especially in the light of current efforts to regulate this area under treaty law, it chose not to involve itself in the question concerning the status of 'mercenarism' as a crime, and thus in the matter of criminal offences under international law.

(b) Doctrine

Rarely, in the writings of publicists (even in contemporary international law with a substantial number of acts recognised as crimes), is the concept of an unlawful act in international law said to include, other than civil wrongs, criminal offences. Jurists address the concept of an unlawful act in international law either by providing a broad theoretical definition of the concept or by reference to its consequences, i.e. it gives rise to responsibility in international law. Thus Professor Cheng writes:

> "In principle, it may, therefore, be said that an unlawful act in international law engendering responsibility is any act on the part of the State which transgresses a rule of international law".[3]

Even though worded in terms generic enough to include acts

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1. The status of "mercenarism" as a crime in international law is discussed in Part II Chapter 5 below.

2. See Judge Ago, Sep. Op., ICJ Rep., 1986, p.185 para 11, indicating the Court's refusal "to go along with the Applicant's assertions that the contra forces are mere bands of 'mercenaries'".

3. General Principles of Law as applied by International Courts and Tribunals, 1953, p.174.

recognised as criminal offences in international law, this formula does not, in any case, admit criminal offences committed by private individuals, i.e. by persons not acting on "the part of the State".

In a similar generic style Schwarzenberger and Brown[1] define an 'international illegal act'[2] "as an act or omission which is unjustified, uncondoned, attributable to a subject of internationaal law and voluntary". 'Delict' according to Kelsen[3] covers any unlawful conduct including 'crime' and 'tort', and he opined that in international law it is generally accepted that there is such a thing as a delict which consists of State conduct "considered illegal, contrary to international law, and, therefore, a violation of international law".[4] For Professor Tunkin[5] "a violation of either a customary or a treaty norm of international law is an international delict". One writer[6] declared that the distinction between a violation of international obligations and the commission of international crimes is obvious. But he fails to explain why and what is meant by "international crimes".

There is a similar tendency among Continental lawyers to adopt broad generic formulae. According to Professor Guggenheim[7] the unlawful act in international law consists of the violation of an obligation stipulated by a rule of international law. Following a similar approach, Professor

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1. A Manual of International Law, 1976, p.142.

2. 'International Illegal Act', 'International Tort' and the breach of an international obligation are understood by the writers as synonymous. Ibid.

3. Principles of International Law, 1966, p.5.

4. Ibid., p.17.

5. Theory of International Law, 1974, p.383.

6. Lador-Lederer, 4 Is Yrbk HR (1974) 89.

7. Traite de Droit International Public, 1954, v.II,p.1.

Balladore-Pallieri[1] asserts that an unlawful act involves any conduct or practice which violates an international obligation. Inversely, Professor Giuliano[2] submits that a violation of an international obligation results in an unlawful act in international law.

Other writers have adopted a less orthodox approach. Thus, Professor Sereni[3] explains that the unlawful act in international law is a concept having unitary characteristics. It is not a concept to be divided into categories, i.e. a civil wrong and a criminal offence.

At any rate, either approach fails to identify adequately the presence of acts recognised as criminal offences in international law.

The term 'International Delinquency' employed in Oppenheim,[4] which "ranges from ordinary breaches of treaty obligations, involving no more than pecuniary compensation, to violations of International Law amounting to a criminal act in the generally accepted meaning of the term", is equally unhelpful and possibly misleading. It does not assist the identification of the concept of a criminal offence in international law because it can apply both to civil and criminal matters.

The following writers are noteworthy because they clearly specify that in international law the concept of an unlawful act includes criminal offences. As early as 1916, one writer[5] acknowledged that unlawful acts in international law are not solely of a civil nature but possibly also of a "quasi-criminal nature".

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1. Diritto Internazionale Pubblico, 1962, p.245, para. 80.

2. Diritto Internazionale, 1974, v.I, p. 592, para.17.

3. Diritto Internazionale, 1962, v.III, p.1515, para.3.

4. International Law - A Treatise, 8th ed., 1955, v.I, p.339 para 151. Hereafter referred to as Oppenheim, International Law.

5. Peaslee, 10 AJIL (1916) 335.

According to Professor Glaser[1] a violation of international law (termed "infraction internationale") includes wrongs which give rise to civil as well as criminal responsibility.

In his lecture at the Hague Academy of International Law in 1939, Professor Ago[2] noted that in international law it is possible to identify two types of unlawful acts: an "international criminal offence" ("un delit international penal") and an "international civil offence" ("un delit international civil"). They are distinguishable by the character of their legal consequences: that of the latter are reparatory whereas that of the former are punitive. This thesis was subsequently developed by Professor Ago in his capacity as Special Rapporteur to the ILC on State Responsibility.[3] Following the position adopted by his predecessor the former ILC Rapporteur on State Responsibility, Professor Garcia-Amador,[4] Ago recognised that the concept of an unlawful act in international law includes criminal and non-criminal offences. He termed the former "international crimes" and the latter "international delicts".[5] Writers[6] have since reiterated this distinction in their consideration of the concept of an unlawful act in international law.

The need to distinguish clearly in international law

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1. RDPCrim., 1949, p.812.

2. 68 Hague Receuil pp.524-525 para. 6.

3. Fifth Report on State Responsibility, UN Doc. A/CN. 4/291 & /Add.1 & /Add.2, ILC Yrbk., 1976, v.II, pt.I, p.24 para 72.

4. See his work at: 49 AJIL (1955) 345; ILC Yrbk., 1956, v.II, p.183 para 51; and 94 Hague Receuil (1958) 395.

5. See ILC Yrbk., 1976, v.II, pt.I, pp. 53-54 para 153.

6. See, Droit International Public, Nguyen Dinh, (ed.), 1987, p.678 para 483, and Wolfrum writing in 10 Ency. PIL p.272: "The term internationally wrongful act has to be regarded as a generic term which covers both the international crime and the internaitonal delict".

between unlawful acts which are recognised as criminal offences and those which are not, has either been ignored or imprecisely addressed. The evidence reveals two trends of thought concerning this division. First there is a general presumption in judicial and juristic opinion that the concept of an unlawful act in international law includes criminal and non-criminal offences and that it is not invariably necessary to reflect this position. Second, the traditional rule that the responsibility of States is non-criminal, i.e. unlawful acts in international law (criminal and non-criminal) engender 'civil' responsibility, has in the main, neither encouraged nor necessitated the need to specifically identify criminal offences in international law from other unlawful acts under international law.[1]

The concept of a criminal offence in international law is largely discussed outside the broader concept of an unlawful act in international law. It is addressed as a quite separate concept[2] and, unfortunately, very often identified by the label "international crime", which is an ambiguous term. In the two following sections we shall consider the possible meanings of this term and suggest why it does not sufficiently reflect acts recognised under international law as criminal offences.

3. The meaning attributed to "International Crime"

(a) Traditional Meanings

There are at least two instances when an offence may be described as an 'international crime'. The first is the case where the elements of the offence and the participants (offender and victim) involve more than one State either by virtue of the locus delicti or by virtue of the lex

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1 See Brownlie, Principles, p.432; Shaw, International Law, 1986; and Mann, Further Studies in International Law, 1990, Ch.4, p.4.

2. See for example Glaser, Droit International Penal Conventionnel, v.I, p.49, 1970, and Plawski, Etude des Principes Fondamentaux du Droit Internaitonal Penal, 1972, p.142.

patriae. The second instance is that of an act considered to be a criminal offence under the domestic laws of most, if not all, the civilised nations of the world and one also defined as a crime by international law. At the same time, it is possible to have an act deemed criminal under international law but which is not necessarily a criminal offence under domestic law.

The principal factor which distinguishes the latter from the former type of 'international crime' is that certain kinds of behaviour or conduct could very well be criminal in so far as international law is concerned without actually possessing some form of international or transnational ingredient. For instance, genocide practices may be carried out by the nationals of one State (probably, but not necessarily, acting on its behalf) against their fellow citizens. In this case there is no foreign element in a traditional sense. The acts occur in a purely domestic environment. However, the practices and policies in question remain criminal offences as far as international law and the society of nations are concerned.

In contrast, it is also possible to have a situation where the only qualification a criminal offence may have to receive the label of 'international crime' is the presence of some foreign element. This may arise either because of the different nationalities of the offenders and their victims or through the involvement of several States all possibly having an interest to exercise criminal jurisdiciton. A typical example is where homicide is committed by a national of State A against the national of State B in the territory of State C.

Thus the so-called foreign or international element, alone, does not necessarily determine whether the crime in question falls under municipal or international criminal law. It is a universal outrage for specific acts which threaten the foundations of international society and their recognition as criminal offences by the vast majority of civilised nations which begins to identify the line

separating criminal offences under municipal law from criminal offences in international law.

(b) "Sui Generis" Meaning of "International Crime"

The recognition of a specific act as a criminal offence in the municipal laws of a substantial number of States gives the term 'international crime' a new meaning namely, that the criminal offence is international because it is universally proscribed under various national laws and codes. This understanding of the term 'international crime' is promoted by Max Radin:

> "If we were to put (the penal codes of modern civilised countries) side by side, we should see that different as they are in a great many respects, most of the acts which shock moral sensibilities in one country, do so in the others, and these acts are listed as punishable offences, or crimes, in all of them....
>
> It would accordingly not be difficult to prepare a penal code of substance and procedure that would easily find general acceptance among most of the civilised nations of the world because in essence it is already accepted by them. The acts made punishable would be 'international crimes' in a wholly different sense from that which usually attaches to the word. <u>They would not be acts which impair the relations between states, acts like those which instigate war or the violations of treaties. They would be acts which the moral sense of the unorganised but real international community has, independently of formal relations, already condemned and treated as punishable.</u>"[1]

The criminal offences listed in the Nuremberg Charter, especially the category of offences known as "crimes against humanity", have been invoked in support of this theory. Radin notes that 'crimes against humanity' as defined in the Nuremberg Charter essentially amounted to assault, rape, enslavement, robbery and murder. Accordingly, he argues that "not only have these acts been punishable within the borders of the four signatory powers, but they are equally punishable in all the civilised

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[1]. 32 <u>Iowa LR</u> (1945) 40 (emphasis added).

The contribution of this sui generis meaning of 'international crime' in terms of identifying criminal offences in international law is twofold. It identifies municipal legislation as a wealthy source of evidence concerning the criminal character of certain acts in domestic law which may develop as criminal offences in international law. In turn, municipal legislation may embody general principles of law recognised by civilised nations and thus be a source relevant to the formation of criminal offences in international law.

4. The term 'International Crime' in practice and doctrine

The term 'international crime' is seldom employed to reflect specifically the sui generis meaning it is given in this chapter. Often it is used to portray either of the two traditional meanings explained in Section 3(A) supra. However, the distinction between the two traditional meanings is rarely accurately drawn.

The distinction betweeen acts recognised as criminal offences under international law and acts having a foreign element but only recognised as criminal offences under municipal law, is blurred when writers attempt to separate the two types of 'international crimes' by classifying them under a seemingly endless number of categories depicted by fanciful headings. Professor Dautricourt[1] illustrates this experience well. He postulates three principal divisions: (i) "Crimes Against the Domestic or Municipal Public

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those on whose territory the crimes had been committed or whose subjects had been committed or whose subjects had become their victims."

See History of the United Nations War Crimes Commission and the Development of the Law of War, 1948, (hereafter referred to as History UNWCC), p.179 para (iii) (c).

1. Writing in A Treatise on International Criminal Law, Bassiouni, M. Ch., and Nanda, V.P., (eds.), v.I, p. 637, 1975. Hereafter cited as Bassiouni, Treatise.

order"; (ii) "Crimes Against the International Public Order"; and (iii) "Crimes Against the Universal or World Public Order".

The first group is designed to address criminal offences (including those involving some international element) traditionally defined under municipal law. In the second group organised crime is cited as a typical example. But, organised crime, though it often may, does not always affect the public order of more than one State and therefore it is not necessarily a "crime against international public order". Under the same heading Dautricourt provides three further sub-divisions[1] of criminal offences. Slavery and piracy jure gentium, recognised as criminal offences under international law, are included under these three sub-divisions.

The third of Dautricourt's principal groups: "Crimes Against the Unviersal or World Public Order", seems to be home for other criminal offences recognised under international law including genocide, aggressive war, war crimes and the Nuremberg Charter concept of crimes against humanity. But, even this third group contains new sub-divisions. A distinction is drawn between "Major and Minor Crimes Against World Public Order". Genocide and aggressive war are listed as the former type of crimes whereas war crimes and crimes against humanity are listed as the latter, thus begging the question: by what criteria are crimes against humanity considered minor and genocide major crimes against world order?

The purpose of such delicate sub-divisions is questionable. They seem arbitrary ratione materiae, especially where criminal offences such as genocide and the Nuremberg concept of crimes against humanity are so similar

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1. These are: (i) "Crimes against Human Persons and against the Rights of Men"; (ii) "Crimes against Public Morality" and (iii) "Crimes against the international good faith, the international trade and the international means of communication". Op. cit., p.639.

in nature. Organised crime may well be included under the first of Professor Dautricourt's three general headings, whereas slavery and piracy jure gentium belong to the third group along with other recognised criminal offences under international law. The scope for the second group thus becomes unclear. Dautricourt's various categories and divisions do not clearly separate criminal offences in international law from other so-called 'international crimes', and the headings raise issues which require separate attention such as - are there two or more types of non-municipal public order, i.e. an international and a universal public order? If so, are there criminal offences which only affect one system of public order and others which strike at both systems concurrently?

A similar approach to that of Professor Dautricourt was pursued by Mr Thiam,[1] ILC Rapporteur on the Draft Code. In his first report, Mr Thiam submitted three separate meanings of the term 'international crime'. The first meaning refers to criminal offences under international law. He identifies them per natura and by their grave consequences. They are recognised as criminal offences in international law because they "assail sacred values or principles of civilisation - for example human rights or the peaceful coexistence of nations".[2] The second meaning refers to criminal offences which are called 'international crimes' because, for the purposes of punishment, they have been raised from the national to the international level by virtue of an international convention. The difficulty here is that, if given this interpretation, the term 'international crime' would include many practices which may or may not be recognised under international law as criminal offences. The third meaning of 'international crime' is that where criminal offences become the concern of international law because of the involvement of the

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1. ILC Yrbk., 1983, v.II, pt.I, pp.141-143, paras 31-35.

2. ILC Yrbk., 1983, v.II, pt.I, p.142, para 34.

State. Again, State participation in perpetrating criminal offences does not necessarily identify them as ones proscribed under international law.[1]

According to Professor Bassiouni an 'international crime' must possess either an international or a transnational element. The distinction between the two elements is not made clear. But it seems that an 'international crime' is said to have an international element when it refers to acts which are recognised as criminal offences under international law (delicti jure gentium). An 'international crime' is said to have a transnational element where an act "affects the interests of more than one State".[2]

At the International Conference on Military Trials in London in 1945, which was responsible for drafting the Nuremberg Charter, Professor Gros, head of the French delegation, replied in the negative when asked whether there was any distinction between international crimes and criminal violations of international law.[3]

An interim conclusion is that the term 'international crime' is generally defined in terms of the traditional meanings explained in Section 3(A) supra, i.e. it includes acts recognised as criminal offences under national and international law.

Other than the traditional meanings attributed to 'international crime', the term is also used to describe practices and conduct which seriously threaten the stability of international relations[4] and are likely to

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1. Mr Thiam, ILC Yrbk., 1983, v.II, pt. I, p.142, para 34, concedes that the third meaning is a weak interpretation of 'international crime'.

2. 15 Case Western (1983) 28.

3. See report by Mr Justice Robert Jackson to the International Conference on Military Trials, (hereafter referred to as Jackson Report), p.336, 1945.

4. See Trainin, Hitlerite Responsibility under Criminal

become criminal offences in international law.[1]

In re List and Others (Hostages Trial)[2] the United States Military Tribunal at Nuremberg held that an 'international crime' "is such an act universally recognised as criminal, which is considered a grave matter of international concern and for some valid reason cannot be left within the exclusive jurisdiction of the state that would have control over it under ordinary circumstances." Extermination of whole classes of a State's own nationals on the basis of race, religion, or political beliefs was considered "the gravest international crime".[3] The concept of aggressive war has been described as an 'international crime' "because it unjustly contravenes the interest which the international community has in the maintenance of order and tranquility, and in its own integrity."[4] Professor

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Law, 1945, pp.32-33. Elsewhere, (Jackson Report, p.333) Professor Trainin has stated that an act becomes an international crime if it is done in preparation of aggression or domination over other nations.

1. See Roling writing in International Law in the Netherlands, Van Panhuys, H.F., (ed.), 1979, v. II, pp.185-188. In correspondence between H.M. Attorney-General and H.M. Solicitor-General concerning legal justification for the possible use of force by the United Kingdom against Egypt following the Suez Canal crisis in 1956, the Lord Chancellor (then Viscount Kilmuir) opined:

> "I am a great believer in the fact that International Law is dynamic. If I had not been I do not think that aggression would now be generally agreed to be an international crime. I therefore think that one must, in applying the doctrine of self-defence to international entities, make the logical changes."

Cited in Marsten, 37 ICLQ (1988) 773 at 792.

2. WC Law Rep., vol. VIII, p.54.

3. History UNWCC, p.175.

4. Keenan and Brown, op.cit., p.57. Aggressive War - An International Crime, 1957, is the title to a work by Pompe which considers the development and status of

Pella subscribed to this diagnosis of an 'international crime' in a memorandum submitted [1] to the ILC when it was first entrusted[2] with the task of preparing the Draft Code of Offences.

In 1950 the ILC formulated the Nuremberg Principles. In draft form Nuremberg Principle II read as folows:

> "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".[3]

During the ILC debate on this clause it was suggested[4] that the term "international crime" be deleted and substituted by: "an act which constitutes a crime under international law". The amendment was adopted in order that the concept of the criminal offence in international law be described more accurately.[5] Subsequently, however, in a different context[6] the ILC stipulated that an "international crime" may result from "a serious breach of an international obligation of essential importance":

(a) for the maintenance of international peace and security;

(b) for safeguarding the right of self-determination of

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the concept of aggressive war in international law.

1. See UN Doc. A/CN.4/39, 1950, reprinted in ILC Yrbk., 1950, v.II, p.278 at p.295 para 40. Hereafter referred to as Pella's Memorandum.

2. See UN GA Res. 177(II), 21st November, 1947.

3. Report on the Formulation of the Nuremberg Principles by J. Spiropoulos, UN Doc. A/CN.4/22, in ILC Yrbk., 1950, v.II, p.192. Emphasis added.

4. See Hudson, ILC Yrbk., 1950, v.I, p.38 para 43.

5. A full discussion of the implications of the terms "international crime" and "crime under international law" as used by the ILC in the formulation of the Nuremberg Principles is given in Chapter 3 Section 4 below.

6. Draft Articles on State Responsibility. ILC Yrbk., 1976, v.II, pt. II, p.95 et seq.

peoples;
(c) for safeguarding the human being; and,
(d) for safeguarding and preserving the human environment.[1]
When the ILC renewed its interest[2] in the Draft Code, "international crimes" were recognised as "the most serious international offences"[3]

Professor Ago,[4] as Rapporteur to the ILC on State Responsibility, argues that only the breach of an international obligation arising out of a norm "accepted and recognised as essential by the international community of States as a whole", can be considered an 'international crime'. The suggestion being that an 'international crime' can only result from an unlawful act which violates rules protected by jus cogens. Therefore, 'international crime' is identified because it is in breach of a jus cogens rule. Accordingly, if, ex hypotesi, 'international crime' is understood as referring to the concept of a criminal offence in international law, the implication is that it is not possible to commit under international law a criminal offence which does not violate peremptory norms in international law. If so, the issue arises whether criminal offences under international law must constitute violations of norms considered jus cogens.

Others[5] have submitted that the gravity and the threat posed by certain criminal offences allow them to be addressed as 'international crimes'.

True as they all may be, these explanations of the term "international crime" do not justify its application as a term which exclusively identifies acts recognised as

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1. The concept of "international crime" as adopted by the ILC in the Draft Articles on State Responsibility is discussed in Chapter 3 infra.

2. See GA Res. 36/106, 1981 and GA Res. 37/102, 1982.

3. ILC Yrbk., 1983, v.II, pt.II, p.14 para 47.

4. ILC Yrbk., 1976, v.II, pt.II, p.53 para 151.

5. See, for instance, Plawski, op. cit., p.75.

criminal offences under international law.

In diplomatic practice the term 'international crime' has been employed by States in various, contexts reflecting various, sometimes even vague, meanings. It is difficult to trace a consistent pattern in its use by States as indicative of acts recognised under international law as criminal offences.

As cited earlier, the laying of mines in waters used for international navigation was described as an 'international crime' by the United Kingdom in proceedings against Albania before the International Court.[1] In the S.W. Africa Cases applicants Ethiopia and Liberia understood the term 'international crime' to refer to criminal offences in international law, such as piracy, whereby an "extraordinary power of jurisdiction" is conferred by the international community upon individual States. Each State becomes "an agent of the whole (community)" to act upon and suppress crimes in international law.[2]

The term 'international crime' is found in treaties and their travaux preparatoires. It is employed to identify the particularly heinous and serious nature of certain unlawful acts such as aggressive war, and other practices whose status as criminal offences under international law is yet to be determined. For instance, 'mercenarism' is declared an 'international crime'. In the UN Third Committee's debate on a Draft Convention on the Suppression and Punishment of the Crime of Apartheid, it is

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1. See the Corfu Channel Case, Section 2 supra.

2. See ICJ Pleadings, 1966, v.9, pp 354-355. Cf. 'Crimes communis juris' defined by Parry (3 ILQ (1950) 211) as 'international crimes' which upon close examination are actually criminal offences under national law "in relation to which the alleged principle of the territoriality of criminal jurisdiction is recognised not to apply".

reported[1] that a convention is not necessary to establish apartheid an 'international crime'.

'International crime' appears also in General Assembly resolutions. The policies of 'bantustanization',[2] apartheid and racial oppression have been denounced as an 'international crime'.[3]

In diplomatic correspondence an attack upon a country's heritage has also been described as "the most heinous of all international crimes".[4]

The term 'international crime' is not capable of a single definition. As we have seen, it may refer to criminal offences defined under municipal or under international law. It may also be used to describe conduct, which though serious, is neither a criminal offence under municipal law nor under international law. Professor Johnson's assesment in 1957 on "international crime" is still valid today: " in my view the expression is scarcely appropriate for the present stage of international law".[5]

The question whether 'international crime' represents a defined juridical concept or whether it is used as a term of art may not always be answered by reason of the context within which it is used. It is an ambiguous term,[6] and its

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1. Mr Wiggins(USA), UN Doc.A/C3./SR.2003, p. 140 para. 12.

2. G.A.Res.: 36/172(A), 1981; 37/69(A), 1982; and, 38/39(A), 1983.

3. GA Res. 3103, 1973.

4. Reply of Poland concerning the Draft Treaty of Mutual Assistance, 1923, reproduced in Ferencz, Defining International Aggression/The Search for World Peace, 1975, v.1, p.108. Hereafter cited as Ferencz, Aggression.

5. 43 Grotius Trans. p.69. Prof. Johnson conceeded that the term "international crime" may be suitable if and when an international criminal court is established.

6. See Oehler, 52 RIDP (1981) 411-412.

use, particularly to denote criminal offences under international law, should certainly be avoided.

5. The Problem of Designation

In addition to the difficulties generated by the term "international crime", problems of terminology persist because publicists have used one term to designate the concept of criminal offence in international law whereas other writers have employed the same term to refer either to practices which do not constitute criminal offences in international law or to refer to criminal offences under national law. The contributions of various writers are discussed below under the following sub-headings.

(a) International Infraction

The phrase "infraction internationale" is employed by some Continental lawyers to refer to practices which are considered to be criminal offences under international law.[1] But it may also be understood to refer to criminal offences under domestic law containing some foreign element, such as murder committed by a national of State A in the territory of State B.[2]

The term "infraction internationale" is present in the writings of Professor S. Glaser, one of the more prolific Continental writers on international criminal law. The term is said to refer to criminal offences as well as civil wrongs.[3] However, Glaser's own understanding of the term is

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1. See Plawski, op.cit., p.72; Lombois, Droit Penal International, 1979, p.33 para 32.

2. Levasseur and Decocq writing in Repertoire de Droit International, Francescakis, Ph., (ed.), 1969 v.II, p.183.

3. See RDPCrim. (1947-1948) 766, and ibid., (1949) 811.

that which refers to criminal offences in international law.[1]

In the English language the term "infraction of the laws of nations" has been used in respect of practices which are considered criminal offences. In Respublica v De Longchamps,[2] (1784) Chief Justice McKean of Pennsylvania described an attack upon the person of an Ambassador as a "crime against the whole world and an infraction of the law of nations".[3] In the Antelope[4] smuggling was said to be a practice which begins in perjury, may end in murder, and possibly constitutes an offence cognizable by the law of nations, i.e. an infraction of that law. Article 6 of the 1926 Slavery Convention obliges High Contracting Parties to make provision for the punishment of "infractions" of laws which prohibit slavery and slave-trading.

(b) "Delit International"

The traditional meaning of the phrase "delit international" is the breach of a rule of international law which results in international responsibility.[5] It is not generally employed to refer to the concept of criminal offence in international law. However, in his exposition of the concept of international criminality in 1925 Professor Saldana[6] offers no less than six separate types of "delit international", and almost all refer to criminal offences. They are reproduced succinctly below.

(i) Delits Juris Gentium These are so-called "private

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1. See Introduction a l'Etude du Droit International Penal, 1954, p.11 and Droit International Penal, v.I, p.49, 1970.

2. Dallas 1 in 1 US Sup.Ct.Rep.(1784).

3. Ibid., para 116.

4. 23 US Sup.Ct.Rep. 98.

5. See Strupp, 47 Hague Receuil (1934) 557 and Ago, 68 Hague Receuil (1939) 422.

6. 10 Hague Receuil (1925) 227.

international law" crimes committed by nationals of different States. They may also include "delits de droit des gens", i.e. crimes defined under public international law, which may, therefore, be termed "public international law" crimes.[1]

(ii) Crimes Contre Le Droit des Gens Universal. These refer to acts which cause harm or threaten the security of States.

(iii) Delit de Droit International (interetatique): an act or omission by a State to the detriment of another State in breach of international law. Criminal offences are strictly speaking not included in this head.

(iv) Delit Contre le Droit International or Delits Contre le Droit des Gens (antinationaux): acts recognised under international law as criminal offences such as piracy. Other writers[2] also referred to crimes in international law such as the crimes laid down in the Nuremberg Charter as "delits de droit des gens".

(v) Delits Interessant le Droit International (internationaux): acts which are criminal offences under national law but may be of interest to international law by reason of the international rule violated or by reason of the capacity of the offender at the time of the commission. An example would be a crime committed by or to the detriment of an internationally protected person.

(vi) Delits d'apres le Droit International (extranationaux): This group covers acts which are criminal offences under national law but unlike in paragraph (v) above where the capacity of the offender or the rule violated are the determining criteria, violation of "humane interests" is the determining factor. Piracy, damage to

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1. The term "international law crime" appears in the law report of In re List and Others. It is employed specifically to refer to practices recognised as criminal offences in international law. See WC Law Rep., vol.VIII, pp.51-52.

2. Donnedieu de Vabres, 28 RDI Sc.Dip.Pol. (1950) 159.

submarine cables and acts against aerial traffic are cited as examples. Saldana considers these to be largely "private international law crimes". Certainly this group overlaps with "délits juris gentium" in group (i) above as well as groups (iv) and (v).

Valid as the contribution of these several terms may be to a study on international criminal justice, it is safe to conclude that Saldana has succeeded in revealing that the phrase "delit international" hardly begins to identify the concept of criminal offence in international law.

(c) "Offences Against The Law Of Nations" and other Labels

The term "offences against the law of nations" appears in Article 1 Section 8 Clause 10 of the United States Constitution. Writers[1] have applied the term to refer to piracy and war crimes. Professor Bassiouni[2] uses the same term interchangeably with "delicti jus gentium" within the broader heading of "international crimes". Bassiouni does not define the concept of "international crimes" except by way of reference to offensive conduct declared by treaty to be an "international crime". His language is circular. The only clue provided by Bassiouni is a list of a number of practices which he considers to be "international crimes". These include: the crimes defined in the Nuremberg Charter, traffic in narcotic drugs, slavery, the taking of internationally protected persons hostage and counterfeiting. The problem, however, is that not all of these practices are recognised as criminal offences in international law. The following questions are, therefore, left unanswered: does the concept of "international crime" include the concept of "offences against the law of nations"? Are the two concepts synonymous or separate? Furthermore, how do these terms help identify the concept

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1. Lauterpacht, International Law and Human Rights, 1950, p.38 (5).

2. International Extradition and World Public Order, 1974, p.416.

of criminal offence in international law? Matters are made worse when Bassiouni concludes by referring to all of the above practices as "international offences".[1]

Professor Dinstein[2] has also drawn up a list of acts under the heading "international offences - delicta juris gentium". The list is largely similar to that drafted by Bassiouni and includes piracy, genocide, the "grave breaches" provisions under the 1949 Geneva Conventions for the Protection of Victims of War, apartheid, prostitution, obscene publications and breaches of the 1954 Hague Convention for the Protection of Cultural Property. But Dinstein admits that the term "international offence" is controversial, problematic and does not accurately identify the concept of criminal offence in international law.[3]

The term "crimes against the law of nations" appears in Oppenheim[4] and is said to include acts committed against foreign States. The said acts are criminal offences under national law and engender international responsibility for the State on whose territory they are committed. They also include piracy jure gentium; being practices which every State may punish under international law regardless of the nationality of the offender and of the victim. It is valid to say that "crimes against the law of nations" as defined in Oppenheim would include acts recognised as criminal offences under national and international law.

Under the head of "crimes against the law of nations" one writer[5] offers the following sub-divisions: (i) crimes

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1. Op.cit., p.425.

2. 5 Israel YHR (1975) pp.56 & 67-68.

3. "International Offence" is also used to refer to the Nuremberg concept of crimes against humanity. See History UNWCC, p.176. See also Schubber, 52 BYIL (1981) 215 with respect to the practice of hostage-taking.

4. International Law, v.1, p.339, para. 151.

5. Schindler, 8 Ency. PIL, p.109.

punishable under internationally prescribed municipal criminal law. This includes crimes committed against foreign States and their representatives, and crimes defined in international treaties but punished under municipal law. Examples include genocide, apartheid, drug trafficking, and prostitution; (ii) crimes punishable under internationally authorised municipal criminal law. This covers crimes in respect of which customary international law permits States to exercise jurisdiction to punish the persons responsible regardless of nationality and of the locus delicti. Piracy and war crimes are the examples cited here; and (iii) crimes punishable under international law. This category comprises crimes for which there is direct individual responsibility under international law. Only war crimes are cited under this head.

"Crimes against international law" are distinguished from "crimes under international law" by Judge Pal[1]. The latter refers to crimes defined by international law but punishable only under municipal law. Judge Pal referred to them as delicta juris gentium and cited piracy, genocide and slavery as the examples. The former are described as the real crimes in international relations, namely those which deteriorate, hamper and disrupt the social order established by international law. There is a stark and dangerous implication here namely, that genocide and slavery are not "real" criminal offences under international law because they are not classified as "crimes against international law".

Professor Brownlie[2] too employs the term "crimes under international law" and like Judge Pal cites genocide as an example. But Brownlie defines these crimes as acts declared criminal by international law, as opposed to those crimes which international law allows States to punish

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1. Former member of the International Military Tribunal for the Far East. See Crimes in International Relations, 1955, p.1.

2. Principles, pp.305 & 315.

under national law. Brownlie[1] also uses the phrase "international crimes, including genocide". We take this to mean that there is a pre-defined concept of "international crime" and genocide is typical of that concept. But Article 1 of the Genocide Convention confirms that genocide is a "crime under international law"[2].

All of the above terms mentioned in this sub-section continue to be deployed in the writings of publicists.[3] Writers[4] have employed the terms "international crime" and "international criminal acts" interchangeably with the phrases: "internationally prescribed acts" and "international delicts". In particular Rozakis,[5] commenting on a set of draft articles drawn up by the ILC on crimes committed against internationally protected persons and diplomats, explained that the acts proscribed under the

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1. Principles, p.316.

2. This declaration meant, in part, that the rules included in the convention designed to prevent genocidal practices were inserted specifically to define an "international crime". This is reported by M. Ordonneau, French Representative on the UN Ad Hoc Committee established to draft the Genocide Convention (see UN Doc E/AC.25/SR6, p.11). But, see also, the United States Senate Foreign Relations Committee Report on the Genocide Convention (28 ILM 760 at 763). It interprets the term "crime under international law" which appears in article 1 of that convention as combining two elements: "internationally authorised municipal criminal law" and "municipal criminal law common to civilised nations". Neither element endorses the meaning of the term ascribed to it by Brownlie. But the interpretation may endorse the definition provided by Judge Pal.

3. "Crimes against international law", "crimes under international law", "international crimes", "inter-state crimes", "crimes by international law" are some of the phrases used by Professor Green in his various writings. See 3 Dal.LJ (1976-1977) 560, 29 ICLQ (1980) 567, and 11 Israel YHR (1981) at p.24.

4. Friedlander, 52 RIDP (1981)393 and at 15 Case Western (1983)13.

5. 23 ICLQ (1974) 32 at 52.

relevant provisions are punishable by States regardless of the locus delicti. They are thus "international delicts - (delicta juris gentium) and in this sense they are "internationalised crimes" of the kind of piracy, slavery and genocide.

In other contributions[1] the term "international criminal wrongs" appears and it is used to refer to acts deemed punishable under international treaties. Such "international criminal wrongs" also appear as "international crimes" of which, it is suggested there are three possible types namely, crimes defined in the Nuremberg Charter including genocide; terrorism; and, such international practices as illegal exportation of treasures and drug trafficking.

Finally, the concept of criminal offence in international law has been referred to in the writings of some American lawyers by phrases such as "crimes of universal interest" or "universal crime".[2]

(d) Treaty Practice

Attacks by submarines against merchant vessels were considered by the drafters of the 1937 Nyon Agreement[3] as violations of international law and "contrary to the most elementary dictates of humanity which would be justly treated as acts of piracy".

The terms "crime against humanity" and "crimes violating the principles of international law" are both found in the Apartheid Convention [4]; whereas the phrase "crime under international law" is found in the Genocide Convention. The

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1. Hassan, 15 Case Western (1983) 39.

2. See Sweeney, The International Legal System: Cases and Materials, 1981, pp.120-121 and Steiner and Vagts, Transnational Legal Problems - Materials and Texts, 1976, p.903.

3. 181 LNTS 137.

4. Article 1.

term "international crime" appears in the travaux preparatoires of instruments relative to the proscription of torture as a criminal offence. The Inter-American Juridical Committee submitted that it described torture as an "international crime" in order to give effect to the American Declaration of the Rights and Duties of Man and to the American Convention on Human Rights.[1] The phrases: "international crime", "crime against humanity", "criminal offence under international law", "crime of international concern", "crime of international significance" and "crimes against the law of nations" all appear in various draft texts of the UN Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents. But neither term appears in the convention as adopted. The Nuremberg Charter refers to "crimes" for which there is individual responsibility. But "criminal violations of international law" appeared in one draft document at the London Conference on Military Trials.[2]

Current treaty practice refrains from refering to the practices sought to be proscribed by any of the labels discussed in this chapter.[3]

6. Conclusion

The sources reviewed in this chapter reveal that the concept of criminal offence in international law largely

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1. See Statement of Reasons for the Draft Convention Defining Torture as an International Crime. 19 ILM (1980) 628.

2. See, Article 6 in Draft of Agreement and Charter, Reported by Drafting Subcommittee, July 11, 1945, Doc. No XXV, Jackson Report, p.197.

3. See the 1988 IMO Convention on the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, the 1989 UN Convention Against the Recruitment, Use, Financing and Training of Mercenaries, and the 1989 UN Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances. These instruments are discussed in Chapters 7, 5 and 8 respectively below.

fails to be properly identified and is poorly addressed. This occurs in a number of circumstances. First, the concept of criminal offence has received scant attention within the broader concept of unlawful acts in international law. In view of the current trend in international practice to proscribe certain practices as crimes it is necessary that future studies on the concept of unlawful acts in international law include the concept of criminal offence in their considerations. Second, the concept of "international crime" is ambiguous. It has too frequently been used far too inconsistently to be seriously considered as an authoritative statement for the concept of the criminal offence in international law.

In the main hardly any attention has been paid to the general principle so well enunciated by the Inter-American Juridical Committee: " a crime should not only be considered in relation to the circumstances under which it was committed, but it should also be described with prescision in order to avoid connotations different from those anticipated".[1] Criminal offences in international law are often classified under any of the various headings which have been reviewed in this chapter. But few, as defined, describe accurately and exclusively practices recognised under international law as constituting criminal offences. The sources also reveal that the effort to separate such practices from those which are not is conspicuously weak. Further, where this distinction has been drawn successfully and the concept of criminal offence in international law has been defined and identified by a specific term, often other phrases are subsequently brought in without explanation rendering complex matters worse. It is submitted that standard terminology such as "crimes" or "criminal offences" "in" or "under" international law are

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[1] See "Study on Political Offenses" prepared by the Inter-American Juridical Committee cited in its Statement of Reasons for the Draft Convention on Terrorism and Kidnapping, 9 ILM 1250 at 1254.

most appropriate terms. They are succinct and clearly reveal that reference is made to practices which are regulated and defined by international law.

The line of demarcation between the identification, the designation and the definition of the concept of criminal offence in international law is very fine. Though each represents a separate aspect to the study of the concept they are indeed interdependent. Thus, having considered the problems of identification and designation, the question of definition of the criminal offence in international law is discussed in the next chapter.

CHAPTER 3

Defining the Concept of Criminal Offence

1. Introduction

Almost since inception international law has provided for the proscription and punishment of criminal offences. A specific corpus of rules in international law is developing and regulates a number of these practices. It now boasts a broad spectrum of crimes ratione loci and ratione materiae, and addresses, inter alia, crimes committed on the high seas, on board aircraft, in time of war and in time of peace. However, the focus of academic study has been, in the main, on defining specific crimes such as piracy, war crimes, certain violations of individual human rights such as torture and the taking of hostages; the study of each crime being prompted by contemporary developments in the international community. The concept of criminal offence in international law per se has not, by contrast, received the same degree of consideration.

Relevant sources for the definition of the concept of criminal offence are: the writings of learned publicists, a number of judicial decisions and the work of the ILC, in particular, its projects on the Draft Code and on State Responsibility. It is the purpose of this chapter to examine the evidence provided by these sources; to assess the value of their contribution to the question of defining the concept of criminal offence in international law and, to address the validity of the concept of criminal offence defined.

2. Doctrine

Most of the literature concerning criminal offences in international law does not include a definition of the concept of criminal offence in international law but concentrates on specific crimes. Some of the relevant contributions are referred to in the context of the various

crimes discussed infra in Part III. The writers cited in this present section are few in number but it is they who have attempted to formulate a definition of the concept of the criminal offence in international law.

A characteristic common to the contributions made by Continental writers, that the definition of the concept of criminal offence is broadly worded and includes reference to practices that threaten order in the international community. Professor Glaser, whose important work may be cited as typical of the Continental School in this field, submits that the criminal offence in international law is an unlawful act which is so harmful and contrary to the interests of the international community, as protected by international law, that it deserves the reproach of criminal law[1]. In his writings[2] Glaser explained that the scope for a criminal law in a national society is, in principle, identical to that in the international society namely, to protect the members of that society and their material, intellectual and moral development. Glaser distinguished between crimes under international law committed in time of peace and in time of war. He emphasised that in the former case certain practices which violate the concept of humanity especially identify the concept of criminal offence in international law. This observation was not repeated with regards to the latter case, i.e. crimes committed in time of war. This seems strange given that the laws of war are founded on respect for "considerations of humanity" and that grave violations thereof are recognised criminal offences in international law.

Professors Plawski[3] and Lombois[4] have submitted similar

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1. See his works: Droit International Penal Conventionnel, 1970, v.I., p.51, para 32 and Droit International Penal, 1954, p.11.

2. See Infraction Internationale: Ses Elements Constitutifs et Ses Aspects Juridiques, 1957, p.46.

3. Op. cit., pp.74-75.

definitions of the concept of criminal offence in international law, but with Professor Plawski's contribution differing significantly in emphasising the personal criminal responsibility of individual offenders under international law. Others[1], as early as 1932, have submitted their understanding of the concept of criminal offence in international law by focusing on a number of factors. These include: the locus delicti, the status of the victim and the circumstances in which it is committed. Jointly these factors allow the threatened or victim States to denounce the practices as crimes jure gentium, thus rendering such crimes to become justiciable by international rather than exclusively by national tribunals.

It is also interesting to note that the concept of "Crime International" is addressed in more recently published international law textbooks on the Continent. But this concept is defined in terms of Draft Article 19 on State Responsibility as drafted by the ILC.[2]

Lauri Hannikainen writing on jus cogens in international law offers, however, one of the most accurate statements of the concept of criminal offence in international law:

> "An 'international crime' is a grave offence against international law which the international community of States recognizes as a crime and for the committing of which the responsible individuals can be punished under international law even if the domestic law of a particular State does not declare it to be punishable".[3]

In Soviet writings the definition of the concept of criminal offence in international law has been worded in

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4. Op.cit., para 32.

1. Dumas, 59 RDI Leg.Comp. (1932) 737.

2. See Droit International Public, Nguyen Dinh, p.711 para 510. The concept of "international crime" defined by the ILC in Draft Article 19 on State Responsibility is discussed infra in Section 4B.

3 Peremptory Norms (Jus Cogens) in International Law, 1988, p.285 para 3.2.

ideological terms. Thus, its understanding is clouded by political rather than strict juridical thinking. This is evident in Professor Trainin's work,[1] who made substantial contributions on the concept of criminal offence in international law in 1945 and in the immediate post Second World War period. Professor Trainin's premise is that a crime in international law is a punishable act or omission and proclaimed to be such by an alliance of States, rather than by the international community. "International Crime" is "an infringement of the connection between States and peoples, a connection which constitutes the basis of relations between nations and countries. Consequently it must be defined as an infringement of the foundations of international communion".[2] This definition is in line with Western legal thinking, but Trainin attributed the complexity in the development and maintenance of international relations to the "capitalist system".

Professor Trainin remarked, quite properly, that the concept of criminal offence in international law is not limited to specific prcatices defined in international treaty law. One must also look to customary law. In 1945 he identified aggressive war and violations of the laws of war as examples of criminal offences in international law and successfully forecast that other crimes would emerge in international law as the conduct of international affairs increases. Overall, Trainin produced a general but valid account of the concept of criminal offence in international law. However, the ideological framework within which that account is reproduced does detract from its validity and this has become more pronounced in the analysis afforded by more recent contributions from Soviet writers.[3]

A more juridically worded definition is an early

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1. Op. cit., p.26.

2. Ibid., pp.32 - 33.

3. See, for instance, Mochalov and Nadezhdin, 12 Int.Affs. (1983) 43.

contribution by Professor Wright[1]. It echoes, in part, the well endorsed view that such crimes are those which are "committed with intent to violate a fundamental interest protected by international law or with knowledge that the act will probably violate such an interest, (but) which may not be adequately punished by the exercise of the normal criminal jurisdiction of any state". This definition is particular in that it introduces the question that the concept of criminal offence in international law necessitates the exercise of jurisdiction on grounds other than the traditional territorial principle. This observation is endorsed in the more recent writings of publicists[2]. The point is often made that the universality principle of jurisdiction is considered to be one of the most effective forms of exercising jurisdiction in respect of crimes defined under international law. But, along with the concept of individual criminal responsibility, a wide range of jurisdictional bases are usually identified as key juridical features of the concept of criminal offence rather than as a definition of that concept.

Professor Bassiouni, who in the last decade has contributed in no small measure through his writings to the development of rules concerning crimes in international law, has recently (1987) published a tome entitled Draft International Criminal Code and Draft Statute for an International Criminal Tribunal.[3] In the text of the Draft International Criminal Code we find evidence of his understanding the concept of criminal offence in international law but, it contains no succinct defintion. Indeed, as we shall see presently, the evidence resurrects problems of terminology examined in Chapter 2 above, i.e. due to the interchangeable use of phrases such as

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1. 41 AJIL (1947) 56-58 and also at 42 ibid., (1948) 133.

2. See Green, 29 ICLQ (1980) 567 and Kobrick, 87 Col.LR (1987) 1520 et seq.

3. Hereafter referred to as International Criminal Code.

"international crime", "international offence" and "international delict".

In a substantial explanatory introduction to International Criminal Code entitled "A Rationale for International Crimes", Prof. Bassiouni explains the method of inquiry employed to determine what constitutes an "international crime".

Although not specifically stated, it emerges from an overall reading of his introduction that the term "international crime" is used to refer to an act proscribed as a criminal offence under international law and not to an act defined as a crime under national law involving some foreign element. Thus, Bassiouni refers to the concept of a crime under international law as "international crime". It is perfectly legitimate to use this form of terminology to refer to acts defined in international law as criminal offences as long as this is made explicit by the writer concerned. But this is not the case with Bassiouni. There is a weakness in his approach to defining the concept of criminal offence in international law because, as we have seen in Chapter 2, an unqualified use of the term "international crime" may be misleading as it is capable of more than one meaning. It does not refer expressis verbis to the concept of criminal offence in international law.

Bassiouni further explains that he will limit his inquiry on "international crimes" to treaties because they are, par excellence, the primary source of international law. However, while the importance of treaties as a source is undeniable, it is unacceptable to limit a study of the concept of criminal offence in international law to one source alone. Nonetheless, Bassiouni's study of treaties is thorough: he looks at no less than 312 international instruments and identifies 10 penal characteristics common to the crimes defined therein.[1]

The 10 penal characteristics are the following, and

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[1]. Op.cit., p.25 and at pp.28-29.

they are a refined version of a list of 8 characteristics drafted by Bassiouni in earlier contributions[1]:

(1) Explicit recognition of the proscribed conduct as constituting an international crime, or a crime under international law, or a crime;
(2) Implicit recognition of the penal nature of the act by establishing a duty to prohibit, prevent, prosecute, punish, or the like;
(3) Criminalization of the proscribed conduct;
(4) Duty or right to prosecute;
(5) Duty or right to punish the proscribed conduct;
(6) Duty or right to extradite;
(7) Duty or right to cooperate in prosecution, punishment (including judicial assistance in penal proceedings);
(8) Establishment of a criminal jurisdictional basis (or theory of criminal jurisdiction or priority in criminal jurisdiction);
(9) Reference to the establishment of an international criminal court or international tribunal with penal characteristics (or prerogatives);
(10) Elimination of the defense of superior orders."

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[1]. The eight characteristics which appear in "The Penal Characteristics of Conventional International Criminal Law" at 15 Case Western (1983) 30 are:

(i) explicit or implicit declaration that certain conduct is a crime under international law;
(ii) criminalisation of specific conduct under national law;
(iii) provision for prosecution or extradition of alleged perpetrator;
(iv) punishment of the person found guilty;
(v) co-operation through various modalities of judicial assistance in the enforcement of the convention;
(vi) establishment of a priority system in theories of jurisdiction and perhaps recognize the applicability of universal jurisdiction;
(vii) reference to an international criminal jurisdiction;
and,
(viii) exclusion of the defence of superior orders.

Bassiouni submits that the presence of any one of these features in a convention warrants the inclusion of that instrument in international criminal law. This, in part, is a reiteration of a thesis advocated by Bassiouni elsewhere.[1] He explained: "a given act or conduct (is) deemed an international crime by virtue of its inclusion in an international convention containing one or more of the eight penal characteristics"[2] listed. Bassiouni has admitted that the selection of these criteria is arbitrary [3]. However, even if this "penal characteristic" element were to be an acceptable standard by which to arrive at a definition of the concept of a criminal offence in international law, it would be necessary to assume, a priori, that each of the penal characteristics is customary law applicable outside the constraints of particular international treaty law.

On the basis of the ten features listed, Bassiouni attempts a definition of the concept of criminal offence in international law. The formula submitted contains a summary of the characteristics:

> "An **international offence**[4] is conduct internationally proscribed for which there is an international duty for states to criminalize the said conduct, prosecute or extradite and eventually punish the transgressor, and to cooperate internationally for the effective implementation of these purposes and duties".[5]

Certainly the key elements which appear in this definition such as the obligation to proscribe conduct (presumably under national law) as a criminal offence and the aut dedere aut punire principle were taken by its author from the realm of conventional law. But the

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1. 15 Case Western (1983) 30.

2. Ibid., p.37.

3. International Criminal Code, p.26.

4. Emphasis added.

5. Op.cit., p.55 Para 2.A.

authority of this definition would have to be determined against data drawn from an examination of other sources.

Other difficulties which arise with this definition are generated by reason of the terminology used. The "Special Part" of Bassioni's Draft International Criminal Code includes three categories of "International Offences": "International Crimes", "International Delicts" and "International Infractions". This division of crimes is meant to reflect in an international code of crimes the distinction traditionally made in municipal codes between crimes and contraventions, and in this respect the terminology presents little difficulty. However, the concepts of "international crime" and "international delict" which have been promoted and have gained some significance in international law, by the ILC in its Draft Articles on State Responsibility, carry totally different overtones. Without prejudice to the nature and form of international responsibility intended by the drafters of the ILC Draft Articles, the concept of "international delict" contained in Draft Article 19 was certainly not meant to represent criminal offences of a nature less serious than "international crimes" as is the position in Prof Bassiouni's Draft International Criminal Code. The concept of "international delict" in Draft Article 19 is intended to reflect international responsibility engendered by non-criminal offences in international law.

Concluding Note

The generally recognised definition of the concept of criminal offence in international law found in the literature provides that: an act which damages, or threatens to damage, the fundamental interests of, and to disrupt public order within, the international community, may be considered to be punishable as a crime. It is further submitted that such an unlawful act would involve the criminal reponsibility of the individual perpetrator and entail the application of jurisdictional principles of

criminal law that would not normally be applicable in the realm of municipal law.

3. Judicial Decisions

There are few judicial decisions which directly address the concept of criminal offence in international law. In part, we have already seen this in the practice of the International Court reviewed in the preceeding chapter. Fewer still are the decisions which have submitted a definition of the concept per se. Principally, judicial decisions have contributed to the identification of a number of features in various practices considered criminal offences under conventional and customary international law. Collectively these features are telling of the juridical nature of the criminal offence in international law. The next chapter is devoted to the study of these features and relevant judicial pronouncements are considered in that context.

The definition of the concept of criminal offence in international law is inferred rather than stated in the majority of judgments. This is noticeable in the early decisions concerning crimes such as piracy, slavery, even attacks upon diplomats. In Respublica v De Longchamps[1] (1784), assault upon the physical person of an ambassador was deemed an "infraction" of the law of nations and, in turn, this was held to hurt "the common safety and well-being of nations" rendering the offender "guilty of a crime against the whole world."

This pronouncement reiterates the general principle that the concept of a crime in international law inherently involves the notion of harm or threat thereof to the international order. But, in another early judgment, The Antelope[2] (1825), the United States Supreme Court, defines "a crime against all nations" as an offence which engenders

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1. Dallas 1 Para 110, in 1 US Sup.Ct.Rep. (1784).

2. Wheaton 10 in 23 US Sup.Ct.Rep.

"the duty of all (States) to seek out and punish offenders, as in the case of piracy". Thus begins a pattern, ratio decidendi, where the concept of criminal offence in international law is defined not in theoretical terms but with reference to the legal consequences engendered by it. This trend in judicial reasoning is also evident in post Second World War military trials.[1]

It is significant to note that in none of the following sources can a definition of the concept of criminal offence in international law be found: (i) the Nuremberg and Tokyo Charters; (ii) the Indictment for the Major German War Criminals and for Japanese War criminals before the International Military Tribunals at Nuremberg and Tokyo; and (iii) the Nuremberg and Tokyo Judgments. The question of defining crimes in international law was discussed at the London Conference on Military Trials by the drafters of the Nuremberg Charter. The discussions were devoted to the formulation of acceptable definitions (in juridical and political terms) of the crimes that emerged as "crimes against peace", "war crimes" and "crimes against humanity". However, a record of the deliberations of the drafters of the Nuremberg Charter, reveal that theoretical discussions of the concept of criminal offence in international law took place. It is reported[2] that the view on which general agreement was reached, was that which defined a crime in international law as an act which cannot be circumscribed either ratione loci or ratione personae. It is justiciable regardless of the place where it is committed, of the nationality of the victim and of the offender, and, of the status of the perpetrator.

The Nuremberg and Tokyo Judgments, including the greater part of decisions delivered by military tribunals in the period following cessation of hostilities in 1945, focus on the nature and definition of specific crimes

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1. See WC Law Rep., 15 vols., 1947-1949.

2. Jackson Report, pp.vii - viii.

presented for judicial determination. However, In re List and Others[1] provides an exceptional exposition of the definition of the criminal offence in international law formulated in a judicial decision. The two principal elements which feature prominently in the various definitions above, namely: (i) the question of harming the international order, and (ii) the exercise of extraterritorial jurisdiction, are reiterated in this decision by the United States Military Tribunal in Nuremberg. It held:

> "An international crime is such an act universally recognised as criminal, which is considered a grave matter of international concern and for some valid reason cannot be left within the exclusive jurisdiction of the state that would have control over it under ordinary circumstances."

The key words "for some valid reason" have attracted juristic comment and the following explanation has been offered. States may not be prepared perhaps for ideological reasons, to prosecute and punish the alleged offender. Therefore, the State in whose territory the offender is present would be able to prosecute or to extradite him to a State which has expressed an intention to do so. A "valid reason" may also be construed in terms of the nature of a particular crime, i.e. it constitutes such a breach of the rule that either by treaty or custom it is accepted that any State may exercise jurisdiction over the offender in respect of that offence[2].

The decisions of the Israeli Courts in Attorney-General for the Government of Israel v Eichmann[3] addressed the nature of the crimes with which Adolf Eichmann was charged under the Nazi and Nazi Collaborators (Punishment)

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1. WC Law Rep., Vol. VIII, p.54.

2. See Green, 29 ICLQ p.568.

3. 36 ILR 1.

Law of 1950 [1]. The crimes defined in that law are an almost verbatim exposition of the crimes that are defined as "war crimes" and "crimes against humanity" under the Nuremberg Charter, and as "genocide" under the Genocide Convention. The District Court of Jerusalem held:

> "The abhorrent crimes defined in this Law are not crimes under Israel law alone. These crimes, which struck at the whole of mankind and shocked the conscience of nations, are grave offences against the law of nations itself (delicta juris gentium). Therefore, so far from international law negating or limiting the jurisdiction of countries with respect to such crimes, international law is, in the absence of an International Court, in need of the judicial and legislative organs of every country to give effect to its criminal interdictions and to bring the criminals to trial. The jurisdiction to try crimes under international law is universal".[2]

The Supreme Court of Israel reiterated the position taken by the District Court. The Supreme Court also pointed to individual responsibility under international law: "the underlying principle in international law regarding such crimes is that the individual who has committed any of them .... must account for his conduct."[3] With regards to the juridical character of the crimes under the 1950 Law, the Supreme Court concluded:

> "(T)heir harmful and murderous effects were so embracing and widespread as to shake the international community to its very foundations. The State of Israel therefore was entitled, pursuant to the principle of universal jurisdiction and in the capacity of a guardian of international law and an agent for its enforcement, to try the appellant."[4]

These dicta in Eichmann constitute one of the most authoritative declarations of the meaning of the concept of criminal offence in international law. The reservation may

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1. 4 LOSI 154.

2. 36 ILR 26 para 12. Emphasis added.

3. 36 ILR 291-292 para 11(b).

4. Op.cit., p.304 para 12(f).

be made, however, that the Courts expressed opinions on crimes defined under Israeli law and not of the concept of criminal offence under international law. In other words, is it proper to apply mutatis mutandis the assessment made of the crimes discussed in Eichmann to the broader concept of criminal offence in international law? A string of recent judgments delivered by United States courts concerning crimes proscribed under international law may help us to address this issue.

The actions cover a broad spectrum ratione materiae and include the following crimes: war crimes, crimes against humanity, torture, hostage-taking, unlawful seizure of aircraft and acts of terrorism in general. Some of the crimes came to be justiciable in United States courts by virtue of legislation enacted in view of international treaty obligations and others by virtue of Chapter 28 US Code Paragraph 1350 [1] which permits tort actions to be brought, even by non United States nationals, for a violation of the law of nations or a breach of a treaty to which the United States is party.

In United States v Layton[2], defendant, a United States national, was charged with conspiring to murder and with aiding and abetting in the attempted murder of an American diplomat attached to the US mission in the Republic of Guyana. Defendant sought to dismiss the charge, inter alia, on the ground that US courts lacked subject-matter jurisdiction over offences occurring outside US territory. The court found that national law permits jurisdiction to be exercised over persons, solely by virtue of their presence in US territory, who murder or attempt to murder internationally protected persons and diplomats. This provision was enacted as a result of US treaty obligations under the 1974 UN Convention on the Prevention and Punishment of Crimes Against Internationally Protected

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1. Hereafter referred to as 28 USC 1350.

2. 509 F.Supp. 212 (1981).

Persons Including Diplomats[1], which incorporates, inter alia, exercise of jurisdiction by States Parties on the basis of presence of the offender in their territory (universality principle). In its application of this basis of jurisdiction to the defendent as charged, the Court held[2]:

> "This type of jurisdiction had its origins in the special problems and characteristics of piracy. It is only in recent times that nations have begun to extend this type of jurisdiction to other crimes, crimes considered in the modern era to be as great a threat to the well-being of the international community as piracy was in an earlier time and therefore properly included within this type of jurisdiction".

In Tel-Oren v Libyan Arab Republic[3] an action for damages was brought in the Federal District Court of Columbia by the heirs of victims and survivors of a terrorist attack by Palestinian forces on a civilian transport vehicle in Israel.

It was claimed, inter alia, that as a result of the incident the victims had been subjected to torture and acts of terrorism; that their attackers violated obligations imposed by the 1949 Geneva Conventions for the Protection of Victims of War and by the 1977 Additional Protocols thereto, relevant treaties proscribing acts of terrorism and the Genocide Convention; and that these constituted violations of the law of nations for which there is tortious liability under 28 USC 1350.

The District Court dismissed plaintiffs' motion on the basis that they failed to show that either federal criminal law statutes or the international treaties cited in their application provided them with a private cause of action thus enabling the court to grant relief for the damage and suffering caused. The court held that it was necessary for

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1. 1035 UNTS 168. Article 3.2. See further Part III Chapter 7.B infra.

2. 509 F.Supp.223.

3. 517 F.Supp. 542 (1981) and 726 F.2d. 774 (1984).

the plaintiffs to show private cause of action, otherwise:

> "Federal Courts would clutch power over cases, under the guise of the law of nations, undoubtedly casting effect on international relations and foreign policy when no country, freiend or foe, has consented to an American Court opening its door to one alleging violations of international legal principles."[1]

Accordingly, the District Court did not address the substantive issue of whether particular practices, alleged to have been committed during the course of the incident, constituted violations of the law of nations. In view of the criminal nature of the practices involved namely, torture, genocide and acts of terrorism, a judicial assessment of their status as particularly serious violations of the law of nations could well have resulted in a much desired contribution which furthers understanding of the concept of criminal offence in international law.

The Court of Appeals[2] upheld the decision of the District Court but separate and differing reasons for the decision were submitted by each of the three members of that Court.[3]

The contribution made to the question of defining the criminal offence in international law by the Court of Appeal in Tel-Oren is, however,only marginally greater than that found in the District Court, and it is provided by Judge Edwards[4]. He acknowledged that there are certain unlawful acts in international law considered as criminal offences for which there is personal responsibility. The learned Judge also addressed the question whether

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1. 517 F.Supp. at 550.

2. 726 F.2d. 774 (1984).

3. The view that there is insufficient evidence in international law of a generally acceptable definition of terrorism to be considered a violation of the law of nations was, however, shared by all three judges. See, especially Judge Edwards op.cit., pp.795-796; and Judges Bork, pp.806-807, and Robb p.823 et seq.

4. Op.cit., p.781.

international law provides personal responsibility for violations of the law of nations (including crimes) committed by persons acting in a non-public capacity. Following the decision in Filartiga v Pena-Irala[1], where defendant had committed torture when holding the Office of Chief of Police in Paraguay, Judge Edwards held that the view that there is personal responsibility in international law for private wrongs "is not widely accepted doctrinally or practically as to represent consensus among nations".[2]

Given that the acts in Tel-Oren were committed by Palestinian and other non-State actors, Judge Edwards accordingly followed preceedent and denied motion for Appellants.

A more explicit recognition of acts as crimes in international law was made by the United States District Court of Ohio in the matter concerning the extradition of Demjanjuk[3]. John Demjanjuk, a naturalised US citizen of Ukrainian origin, was alleged to have committed war crimes and crimes against humanity while serving at Treblinka Concentration Camp during the Second World War. A request for his extradition was submitted to the United States by Israel. The matter came before the District Court in Ohio. It held, inter alia, that Israel could properly assert jurisdiction on the basis of universality because these crimes fell under that category of unlawful acts in international law where the perpetrator is considered an enemy of mankind and in whom all nations have an interest in apprehending and punishing.

Finally, in United States v Yunis[4], we find one of the most recent decisions affirming the universally punishable nature of crimes proscribed by international law. Yunis,

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1. 630 F.2d. 876. A fuller discussion of this decision is found in Part III Chapter 6.D infra.

2. Op.cit., pp.792-795 at p.793.

3. 612 F.Supp. 544 at pp.555 - 556.

4. 681 F.Supp. 896 (1988).

a Lebanese national, unlawfully seized a non-US registered civilian aircraft and took the passengers hostage. Some of the passengers were US nationals but the offences took place outside US territory. The defendant, subsequently present in the United States, was charged with crimes against aircraft and with hostage-taking. The crimes are proscribed under relevant international conventions which contemplate universal jurisdiction and which are ratified by the United States. The court dismissed motion challenging exercise of subject-matter jurisdiction on the basis that such jurisdiction was in accordance with relevant municipal statutes. It held that in having enacted such enabling legislation, "the United States (is) acting on behalf of the world community to punish alleged offenders of crimes that threaten the very foundations of world order."[1]

4. The Work of the International Law Commission

A. The Nuremberg Principles, the 1950-1954 Draft Code of Offences and the Draft Code of Crimes Against the Peace and Security of Mankind: 1984-1991

The concept of criminal offence in international law has been a principal topic of consideration for the ILC since it adopted the Nuremberg Principles at its second session in 1950,[2] which provide, inter alia, that a "crime under international law" engenders individual criminal responsibility for the perpetrator even when it is committed by a Head of State or Government; that it is justiciable regardless of whether or not it is considered a criminal offence under internal law; and that all those who commit such a crime have the right to a fair trial.

The key phrase "crime under international law" above is most relevant to the question of defining the concept in international law of criminal offence. In draft form the

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1. Ibid., p.903.

2. ILC Yrbk., 1950, v.II, p.374.

Nuremberg Principles contained the phrase "international crime" later to be substituted by "crime under international law" because it was suggested[1] that though the two phrases had the same meaning (and there is some evidence that the Rapporteur used them interchangeably in his drafting of the Principles[2]) the phrase "crime under international law" is more accurate to depict the concept of criminal offence in international law.

There is no definition of the concept of "crime under international law" as debated by the ILC in the context of the Nuremberg Principles[3], but it is clear that it refers to conduct proscribed as criminal under international law which is quite distinct from criminal conduct proscribed under domestic law.

The wording "crime under international law" was retained by the ILC Rapporteur in the formulation of articles submitted in three reports on a Draft Code of Offences between 1950 and 1954.[4]

The ILC first adopted the Draft Code of Offences at

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1. See Mr. Hudson, ILC Yrbk., 1950, v.I, p.33 para 55 and at p.38 para 43.

2. See Commentaries to the Draft Principles ILC Yrbk., 1950, v.II, pp.191-193.

3. See comment by Peru in the Sixth Committee, reproduced in ILC Yrbk., 1951, v.II, p.49 para 59:

> "(Nuremberg) Principle I, as formulated by the Commission, (is) not a definition of an international crime .... What constituted a crime under international law should have been specified before anything else. Crimes were clearly defined in national law and the same should be true in international law".

4. See First Report, UN Doc. A/CN.4/25 ILC Yrbk., 1950, v.II, p.253; Second Report, UN Doc. A/CN.4/44, ibid., 1951, v.II, p.43 and Third Report, UN Doc. A/CN.4/85, ibid., 1954, v.II, p.112.

its third session[1] and the final version at its sixth session in 1954. Though the phrase "crime under international law" was retained there was no discussion of the definition of the concept of criminal offence in international law. Indeed, there was no provision for a definition of the concept of crime against the peace and security of mankind. But Draft Article 1 contained a declaration to the following effect:

> "Offences against the peace and security of mankind, as defined in this Code, are crimes under international law, for which the responsible individuals shall be punished".[2]

This declaration attracted a number of comments from Governments which are telling of the juridical character of the concept of crimes against the peace and security of mankind, and thus also of the concept of criminal offence under international law. It was submitted by the representative of Bolivia that it would be desirable to emphasise that the crimes included in the Draft Code of Offences may not be considered political crimes under international law. The representative of Yugoslavia, in turn, wished to reiterate that the crimes would remain punishable as such, independently of whether they were proscribed as crimes under municipal law.[3]

Accordingly, in and up to, 1954 the ILC did not formulate a definition of the concept of crime against the peace and security of mankind, not did it define the broader concept of criminal offence in international law. However, Professor Pella, in his Memorandum[4] to the ILC included a number of definitions of the concept of criminal offence in international law. In this context, i.e. with respect to the ILC effort to draft an international code of

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1. See ILC Yrbk., 1951, v.II, p.133 at pp.134-137.

2. See ILC Yrbk., 1954, v.II, p.151.

3. See UN Doc. A/CN.4/85, 1954, p.11-12. Also in French at ILC Yrbk., 1954, v.II, p.112.

4. UN Doc. A/CN.4/39, in ILC Yrbk., 1950, v.II, p.278.

crimes, Pella's contribution is singular.

In the Memorandum Pella cites three separate definitions of the concept of criminal offence in international law which were drafted in some of his earlier writings. Of the three, two have a common standard, namely, an "international crime" is an act or omission which violates the fundamental interests of international order.[1]

This approach to defining the concept of criminal offence in international law falls squarely within the general pattern of definitions identified in the writings of publicists above in Section 2. But, Prof. Pella also submitted a third and more juridically tailored formula of a crime in international law:

> "an act or omission sanctioned by punishment established and enforced for and on behalf of the community of States".[2]

At any rate, the drafts produced by the ILC in the 1950s concerning criminal offences in international law failed to take on board a conceptual definition of the criminal offence in international law.

In 1981 the ILC was re-instructed by General Assembly Resolution 36/106 of that year to recommence work on the Draft Code. The position was improved since the 1954 Draft Code of Offences because the new ILC Rapporteur, Professor Thiam, elected to consider the question of defining the concept of a crime against the peace and security of mankind.[3] It is discussed here in so far as it is relevant to the definition of the concept of criminal offence in international law.

In the First Report submitted by Prof. Thiam, the concept of criminal offence under international law was identified as a concept in its own right quite separate

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1. Op.cit., p.295 para 40 and also at p.296.

2. Memorandum, op.cit., p.296 n.77.

3. See ILC Yrbk., 1985, v.II, pt.I, pp.66-71 paras 18-67.

from crimes which are defined under municipal law.[1] In the Sixth Committee[2], it was suggested that "the gravity or heinousness or horrific nature of a particular offence" were to be the general criteria by which certain crimes in international law would be included in the proposed code. Thus, the principal distinguishing element of the concept of crimes against the peace and security of mankind was to be that of "extreme seriousness" and this was reiterated in the Rapporteur's Second Report. There it was also stated that "today, the concept of international crime has acquired a greater degree of autonomy and covers all offences which seriously disturb international public order"[3]. This statement follows (a) the general view expressed with respect to the broader concept of crime under international law in the writings of publcists in Section 2 above and, (b) is in keeping with the principle adopted by the ILC[4] that all crimes against the peace and security of mankind are crimes under international law. Thus, the ILC criterion of "extreme seriousness" was seen to be common to crimes under international law generally, and to crimes against the peace and security of mankind specifically.

However, the Rapporteur indicated that the work on the definition of the concept of crimes against the peace and security of mankind should not be limited to the element of seriousness. His remarks were endorsed in the Sixth Committee[5] and representatives suggested other criteria, such as the doctrine of jus cogens, by virtue of which the concept of crime against the peace and security of mankind is to be identified. During deliberations of the ILC's

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1. See ILC Yrbk., 1983, v.II, pt.I, p.141 para 31.

2. UN Doc. A/CN.4/L.369, 1984, p.21 para 57.

3. ILC Yrbk., 1984, v.II, pt.I, p.90 para 10.

4. ILC Yrbk., 1984, v.II, pt.I, p.90 para 7.

5. UN Doc. A/CN.4/L.382, 1985 p.17 para 29.

thirty-sixth session, most members[1] stressed that the concept of crime against the peace and security of mankind needs to be defined in precise terms and that the element of seriousness was too vague, subjective and volatile to satisfy the maxim nullum crimen sine lege. A valid contribution to defining the concept of crimes against the peace and security of mankind, which is also of relevance to the concept of criminal offence in international law, was submitted by the United Kingdom member, Sir Ian Sinclair[2]. He recommended that "it was necessary to find the equivalent of the concept of hostis humani generis which had, in classical international law, justified the exercise of universal jurisdiction in relation to piracy under the law of nations." This clearly reveals an understanding of the concept of criminal offence in international law as a universally punishable act.

A draft provision defining the concept of crime against the peace and security of mankind was included in a set of Draft Articles submitted in the Rapporteur's Third Report at the ILC's thirty-seventh session.[3] The definition was drafted in terms almost identical to that which defines the concept of "international crime" in Draft Article 19 of the ILC's set of Draft Articles on State Responsibility. Draft Article 19 will be discussed presently, but its election by the Rapporteur as a definition of the concept

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1. ILC Yrbk., 1984, v.I, see, inter alia,: Thiam, p.5 para 5; Calero-Rodrigues, p.14 para 13; NI, p.15, para 23; Al-Qaysi, p.18 para 4; Mahiou, p.21 para 20; Lacleta-Munoz, p.25 para 22; Ogiso, p.33 para 36; Jagota, p.39 para 25; and Koroma, p.42 para 18. In particular see McCaffrey's criticism who depicted the "serious crimes" factor as sloganistic (p.17 para 37). McCaffrey submitted seven additional criteria necessary for the determination of crimes against the peace and security of mankind (pp.46-47 paras 3-11). But these too met with criticism from other members of the Commission. See Balanda, p.48 para 22.

2. Ibid., p.29 para 3.

3. See Draft Article 3 in UN Doc. A/CN.4/387, 1985, ILC Yrbk., 1985, v.II, pt.I, p.81.

of crime against the peace and security of mankind received little support by the ILC membership[1] and there was much division of opinion in the Sixth Committee's[2] consideration of that provision.

Accordingly, the matter of definition was re-drafted and reappeared as article 1 in the Rapporteur's Fourth Report.[3] The previous draft provision was deleted in toto and has now been replaced by the following:

"Article 1 Definition"

> "the crimes [under international[4]] law defined in this draft Code constitute crimes[5] against peace and security of mankind".[6]

The ILC did not consider this provision properly at the thirty-eight session. Only a handful of the membership

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1. See, ILC Yrbk., 1985, v.I, inter alia: Calero-Rodriguez, p.16 para 29; Lacleta-Munoz, p.28 para 44; Razafindralambo, p.44 para 34; Njenga, p.48 para 3-4; McCaffrey, p.53 para 40-41; Yankov, p.56 paras 8-10; Diaz-Gonzalez, p.54 para 24-25; and Tomuschat, p.71 para 11. Some members offered their own proposals for defining the concept of crime against the peace and security of mankind, see, ibid., Malek, p.18 paras 47-48, Sir Ian Sinclair, p.23 paras 13-15 and Uschakov, p.28 para 44.

2. See UN Doc. A/CN.4/L.398, 1986, p.29 paras 131-144.

3. See ILC Yrbk., 1986, v.II, pt.I, p.53.

4. This wording has been placed in parenthesis because the ILC is yet to take a decision as to whether to adopt them or not. See ILC Yrbk., 1987, v.II, pt.II, p.13 para 5. See also GAOR, Supp. No 10, (A/45/10) p.55.

5. The term "offences" first appeared when this draft provision was formulated by the Rapporteur in his fourth report.

6. This is the text as provisionally adopted by the ILC. It has not altered substantially since it was first drafted. See ILC Report to the General Assembly on its work at its forty-second session (1990), GAOR, Supp. No 10, (A/45/10) p.55.

offered comments on the new "definitional" draft article.[1] It was decided to defer the matter to the next session.[2]

The majority view on article 1 at the ILC's thirty-ninth session preferred to see the element of "seriousness" specifically included in the wording.[3] Some members[4] would have endorsed an "open-ended" definition, preferably followed by an enumeration of the offences including a phrase to the effect that new offences may be included by virtue of general rules recognised by the international community to be of a peremptory nature. But, it is imperative to affirm that such formulae for definition violate the maxim nullum crime sine lege. Typical of these definitions is a proposal by one member to have the concept of crimes against the peace and security of mankind defined by a formula having the following concluding phrase: ".... as well as any other such crime as may be adopted by the General Assembly from time to time."[5]

However, the difficulties with draft article 1 cited above arise at a more fundamental level than concern for specificity in the wording of definitions in international law. The question is that this provision is not a definition but a statement concerning crimes against the

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1. See, ILC Yrbk., 1986, v.I: Calero-Rodrigues, p.154, para 46; Sucharitkul, p.158, para 12 and Barboza, p.163, para 65 who all felt that article 1 was a far better effort than either of the two alternatives of the article as previously drafted. Sixth Committee views were very similar, see UN Doc. A/CN.4/L.410, 1987, p.114 para 586.

2. See ILC Yrbk., 1986, v.II, pt.II, p.54 para 185.

3. See ILC Yrbk., 1987, v.I: Koroma, p.19 para 43; Graefrath, p.20 para 5; Jacovides, p.21 para 13; Hayes, p.23 para 29; Njenga, p.24 para 40; and Yankov, p.26 para 65.

4. Ibid., Tomuschat, p.8 para 5; Mahiou, p.24 para 25; and especially Bennouna, p.12 para 37 and 38.

5. See Prince Ajibola, ibid., p.36 para 2.

peace and security of mankind.[1] The issue was discussed in the ILC's Drafting Committee and its Chairman (Razafindalambo)[2] explained that the meaning of the term "defined" in article 1 is "intended" or "determined". In addition, the question of sepcifically including the criterion of "seriousness" in article 1 re-surfaced in the Drafting Committee and proposals to take this element into account resulted in the following wording being submitted for consideration:

> "Crimes against the peace and security of mankind are the acts which jeopardize the most vital interests and the very existence of mankind, violate the fundamental principles of international law, and threaten civilization and the basic human right to life."[3]

The distinction between the previous format, i.e. defining the concept of crime against the peace and security of mankind on the basis of Draft Article 19 on State Responsibility and the present draft article 1 is evident. The relevance of the current formulation to the general concept of criminal offence in international law is significant because, although the latest statement is not a definition it is an improvement, it suggests that whichever crimes are included under the Draft Code they are not only crimes against the peace and security of mankind but first and foremost criminal offences under international law. The words in parenthesis: "under international law" are responsible for this interpretation. Their inclusion would be consistent with the position under the Nuremberg Principles, the 1954 Draft Code of Offences and the Genocide Convention. The ILC's majority view endorses this understanding.[4]

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1. See Calero Rodrigues, ibid., p.15, para 3 and Shi, p.32 para 32.

2. Ibid., p.227 para 15.

3. Razafindralambo, ILC Yrbk., 1987, v.I, p.227 para 16. Also see, ibid., Jacovides, p.228 para 31.

4. ILC Yrbk., 1987, v.I, pp.227-232.

Again, Sixth Committee views on the definitional article were divided[1]: some favoured an enumerative type of definition whereas others insisted on having a conceptual definition of the concept of crimes against the peace and security of mankind. The inherent problem in the first option, however, is the question of legality. This is evident prima facie. But the second type of definition generated comments relevant beyond the concept of a crime against the peace and security of mankind to the concept of criminal offence in international law. Thus, those who expressed support for a conceptual definition identified the following elements: (a) seriousness of the crime, (b) its massive and systematic nature, (c) acts which threaten survival of mankind including certain violations of human rights such as the right to life (for example, crimes against humanity, genocide, apartheid, torture) and (d) violations of the fundamental principles of international law (jus cogens).

These elements have not been adopted, despite Sixth Committee recommendations, as criteria in draft article 1 of the Draft Code. However, their identification, is evidence of a consensus, which emerges clearly in the sources reviewed so far in this chapter, on certain indicia which do not define but characterise the concept of criminal offence in international law.

Should draft article 1 be included in the Draft Code as provisionally adopted by the ILC then the contribution of that to the definition of the criminal offence in international law would take the following form. The question would arise whether the principles of criminal law applicable under the Draft Code to the concept of crimes against the peace and security of mankind are also applicable to the broader concept of criminal offence under international law which, as purported under draft article 1, includes crimes against the peace and security of

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1. See UN Doc. A/CN.4/L.420, 1988, p.12 para 25 - p.14 para 29.

mankind.

In addition to article 1, the general principles provisionally adopted so far by the ILC include: (i) the personal responsibility of the individual offender for these crimes under international law; (ii) the aut dedere aut punire principle; (iii) non-applicability of the principle of statutory limitation; (iv) the protection of judicial guarantees for individuals charged with crimes under the code; (v) non bis in idem rule; (vi) the principles: nullum crimen sine lege and nulla poena sine lege; (vii) responsibility of superiors; and (viii) the official position of the offender is not a ground which excuses responsibility.[1]

If these general principles are applicable to all crimes proscribed under international law and have not been selected from general principles of criminal law by the ILC drafters solely for the purposes of the Draft Code, then they are telling of the nature of crimes in international law, but they do not, as such, provide a definition of the concept of criminal offence in international law. The following chapter contains a systematic examination of a number of criminal offences in international law in order to determine whether the applicability of certain legal principles appear as juridical features of the concept of criminal offence in international law. In its turn, that exercise will go some way in determining whether the principles that are to be incorporated in the Draft Code are merely de lege feranda or whether their selection by the ILC is, in part, an exercise in the codification of customary rules applicable to crimes in international law.

B Draft Articles on State Responsibility

The principle of responsibility in international law is generally understood as liability incurred by a State for

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1. See GAOR, Supp No 10, (A/45/10) pp.55-58. See also draft articles 6-13 inclusive adopted by the ILC Drafting Committee at its forty-third session (1991). See UN Doc. A/CN.4/L.459, 1991.

a wrongful act committed in breach of international obligations. Traditionally the responsibility incurred is of a civil nature. However, Professor Garcia-Amador, the first Rapporteur since the ILC was requested by General Assembly Resolution 799 (VIII)[1] to undertake the codification of the principles of State responsibility, argued that codification of the concept should not be limited to civil responsibility:

> "Contemporary international law .... considers that the notion of responsibility covers not only the duty to make reparation for damage or injury, but also the other possible legal consequences of the breach of non-performance of certain international obligations; the obligations in question are those the breach of which is punishable."[2]

Thus, Prof. Garcia-Amador clarified the position namely, that international responsibility may be civil and/or criminal depending on the character of the international obligation breached.[3] This thesis was based on the principle that "since the Second World War, the idea of international criminal responsibility has become so well defined and so widely acknowledged that it must be admitted as one of the consequences of the breach or non-observance of certain international obligations".[4] In support of this position Garcia-Amador submitted that certain violations of fundamental human rights are so serious in nature as to have come to be considered as crimes against humanity; and that as early as 1948 the UN Secretary-General in a Memorandum on the Survey of International Law in Relation to the Work of Codification of the International Law Commission recommended that the ILC

> "must take into account the problems which have arisen in connection with recent developments

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1. Adopted on the 7th December 1953.

2. ILC Yrbk., 1956, v.II, p.180 para 35.

3. ILC Yrbk., 1956, v.II, p.183 para 52.

4. ILC Yrbk., 1956, v.II, p.175 para 4.

> such as the question of the criminal responsibility of States as well as that of individuals acting on behalf of the State."[1]

Accordingly, since the beginning of its consideration of the topic, the ILC membership was not unappreciative of the distinction between unlawful acts in international law which give rise to civil and criminal responsibility. But it was felt that a codification of the rules of international law governing State responsibility should be restricted to its traditional understanding i.e. State "civil" and not "criminal" responsibility.[2] However, Professor Ago (later to succeed Garcia-Amador as Rapporteur on State Responsibility[3] and who in 1976 advanced the theory that international responsibility varied in form according to the nature of the international obligation breached) endorsed, as early as 1957, an inquiry by the Commission into whether an unlawful act in international law produced legal consequences for the responsible State other than the duty to make reparation, such as whether a State may be the addressee of reprisals by a wronged State.[4]

The relevance of Prof. Ago's contributions to the definition of the concept of criminal offence in international law within the context of State Responsibility is discussed presently. However, the issue here is that in the initial period (1956-1961) of the ILC's discussion of the topic of State Responsibility, notwithstanding a recognition in the ILC that civil wrongs and criminal offences are both unlawful acts in international law which may give rise to different forms and degrees of international responsibility, there appears no definition or discussion of the concept of criminal

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1. Ibid., p.175 para 4.

2. Generally see ILC Yrbk., 1956, v.I Meetings 370-373.

3. See ILC Yrbk., 1963, v.I, Meeting 686, p.86 para 76.

4. See Ago, ILC Yrbk., v.I, 1957, at Meetings 413 and 415.

offence in international law.

In the Fifth Report on State Responsibility[1] presented by Prof. Ago the following issue was submitted for consideration: whether it is possible to distinguish between different types of unlawful acts in international law on the basis of the content of the international obligation breached.[2] The Rapporteur examined judicial decisions, State practice and doctrine in order to determine this matter and found the following. Especially since the end of the Second World War, which represents an era in history notorious for systematic and mass violations of human rights on an unprecedented scale, and in view of the difficulties experienced by the movement for decolonialisation over the past three decades, there are present in international law rules which appear as evidence of the conviction that certain types of unlawful acts engender a more serious regime of responsibility necessary to remedy the harm generated by these same acts. The pertinent rules identified by Ago are:
(i) peremptory rules of international law (jus cogens);
(ii) the principle that individuals are personally responsible in international law for the commission of certain acts even if at time of commission the offender acted on behalf of the State; and (iii) rules defined in the UN Charter for the determination of legal consequences flowing from, the exercise of unlawful use of force, threats to and breaches of the peace, and, acts of aggression.

Prof. Ago's analysis of these three classes of rules is considered with a view to determine their relevance to the question of defining the concept of criminal offence in international law.

(i) & (ii). Prof. Ago identified a class of acts

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1. UN Doc. A/CN.4/291, 1976, see ILC Yrbk., 1976, v.II, pt.I, p.3.

2. Ibid., p.24 para 72.

prohibited under international law known as "crimes under international law". Two features are submitted as typical of this class: (a) the individual perpetrators are personally responsible for the crimes committed regardless of whether they acted in a public or private capacity and (b) these crimes are justiciable by the tribunals of States other than that of the nationality of the offender. Prof. Ago also submitted that there are rules of international law which deny perpetrators of "crimes under international law" territorial asylum, the principle of the political offence exception to extradition and that of statutory limitation.[1]

(iii). Ago also focused on the regime existing under Chapter VII of the UN Charter[2]. On the basis of relevant international declarations, General Assembly resolutions, international conventions, and statements by government representatives in UN bodies, the Rapporteur proceeded to show how the concept of aggression and practices such as apartheid, genocide and colonial domination, though not being strictly speaking the traditional practices that would trigger mechanisms operative under Chapter VII of the Charter, are considered to be among the most serious internationally wrongful acts. In his examination of these sources of evidence, the Rapporteur submitted that UN practice frequently refers to "systematic", "constant" or "persistent" practices involving "massive", "gross" or "flagrant" violations of rights or freedoms. Thus the ILC reported[3]:

> "this, then, is the kind of offence which the General Assembly appears to distinguish from other, less serious, possible violations of obligations existing in the same sphere, and this is the kind of breach which is viewed as an 'international crime'".

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1. See ILC Yrbk., 1976, v.II, pt.I, p.32 para 100.

2. See ILC Yrbk., 1976, v.II, pt.I, pp.33-40 paras 102-119.

3. ILC Yrbk., 1976, v.II, pt.II, p.110 para 34.

Finally, Ago examined writings of publicists in three separate periods: (a) from the mid-19th century to the First World War; (b) the period between the two World Wars, and (c) from the end of the Second World War to present times[1]. It was revealed that since the isolated views of progressive thinkers such as Bluntschili, the notion that the nature of unlawful acts in international law is determined by the content of the international obligation breached, gained increasing support among publicists.

The considerations relevant to the definition of the concept of criminal offence in international law as identified by Ago may be stated succinctly as follows:

(i) There are serious and less serious internationally wrongful acts in international law.

(ii) Internationally wrongful acts of a serious character are deemed crimes in international law.

(iii) There is a class of acts in international law considered as criminal offences which entail personal responsibility and broad jurisdictional reach.

(iv) Criminal offences in international law generally violate prereremptory norms of international law.

(v) Certain practices such as, aggression, racial discrimination, colonial domination, apartheid and genocide, which have been referred to or designated as "crimes", "crimes against humanity" or "criminal policies", and may constitute a threat to or a breach of peace and international security, are internationally wrongful acts of a serious character.

(vi) They thus engender a specific regime of international responsibility other than that operative under traditional international law.

All of these elements can be seen directly or indirectly, in Ago's first attempt at defining

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1. ILC Yrbk., 1976, v.II, pt.I, p.40 para 120 - p.52 para 145.

"international crime". Draft Article 18 [1] read as:

> "1. The breach by a State of an existing international obligation incumbent upon it is an internationally wrongful act, regardless of the content of the obligation breached.
> 2. The breach by a State of an international obligation established for the purpose of maintaining international peace and security, and in particular the breach by a State of the prohibition of any resort to the threat or use of force against the territorial integrity or political independence of another State, is an "international crime".
>
> 3. The serious breach by a State of an international obligation established by a norm of general international law accepted and recognized to be essential by the international community as a whole and having as its purpose:
>
> (a) respect for the principle of the equal rights of all peoples and of their right of self-determination; or
>
> (b) respect for human rights and fundamental freedoms for all, without distinction based on race, sex language or religion; or
>
> (c) The conservation and the free enjoyment for everyone of a resource common to all mankind. It is also an "international crime".
>
> 4. The breach by a State of any other international obligation is an "international delict."

This draft provision was discussed by the ILC at its twenty-eight session where it experienced substantial drafting amendments.[2] There was general agreement on the basic principle namely that international responsibility varied according to the content of the international obligation breached[3]. Some of the observations made by members are telling of the meaning of the concept of

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1. ILC Yrbk., 1976, v.II, pt.I, p.54 para 155.

2. See ILC Yrbk., 1976, v.I, Meetings 1371 - 1376 and 1402 - 1403.

3. Ibid., Meetings 1361 - 1363.

criminal offence in international law. Some[1] argued that a single distinction be drawn between "international delicts" and "international crimes", rather than as in Draft Article 18 between "international delicts" and "international crimes" and "international crimes par excellance" in paragraph 2 thereof. It was also suggested that the definition of "international crime" would be worded as much as possible on the meaning ascribed to peremptory norms in the Vienna Convention on the Law of Treaties. This would be in line with the general principle that crimes in international law are practices which strike directly at the fundamental interests of States recognised as such by the international community as a whole. Mr. Rossides remarked that the distinction between "international delicts" and "international crimes":

> ".... represented an advance in the progressive development of the law of international responsibility in the vitally important field of the maintenance of peace and security. (The distinction) was not only in keeping with the Commission's mandate but would also bring international law into harmony with the present day international legal conscience."[2]

Some of the suggestions made by the members were taken on board when the Drafting Committee re-drafted article 18 which now appears as Draft Article 19 and, provisionally adopted by the ILC, reads as follows:

> "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 recognized as a crime by that community as a whole, constitutes an international crime.
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> 3. Subject to paragraph 2, and on the basis of

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1. See, ILC Yrbk., 1976, v.I: Tammes, p.64 para 24; Sir Francis Vallat, p.68 para 12 - p.69 para 14; and Uschakov, p.71, para 37 - p.73 para 5.

2. ILC Yrbk., 1976, v.I, p.82 para 28.

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."[1]

Draft Article 19 was adopted unanimously by the Commission.[2] It retained all the elements identified above in Ago's thesis on the legal consequences of international crimes as serious unlawful acts in breach of international obligations. But, certain weaknesses in the drafting are evident.[3]

Paragraph 2, which attempts a conceptual definition of "international crime", has been said to be in breach of the

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1. ILC Yrbk., 1976, v.I, p.239.

2. Ibid., p.253 para 55.

3. For a critical review of Draft Article 19 see, among others, Marek, 14 RBDI (1978-79) 460, Stein writing in International Crimes of State, Weiler, J., (ed.), 1989, at p.222; Gounelle writing in Melanges Offerts a Paul Reuter. Le Droit International: Unite' et Diversite', 1981, p.315, and Mohr writing in United Nations Codification of State Responsibility, Spinedi, M., (ed.), 1987, p.115.

general principle of criminal law - nullum crimen sine lege. Professor Marek[1], for instance, submits that the two criteria contained in paragraph 2 are vague and subjective: the first i.e., that the obligation breached is to be essential for the protection of fundamental interests of the international community is "qualitative"; and the second, that the act in question must be recognised as a criminal offence by the international community as a whole, is "conditional". Prof. Marek points out that there are no definite criteria by which it is possible to determine the "fundamental interests" of the international community and the concept of "international community" itself is questionable. Furthermore, the "inter alia" qualification in paragraph 3, which purports to reflect the substantive part of a Penal Code, is severely criticised by Marek:

> "The general extensibility announced at the outset by the 'inter alia' clause is thus made operative in every particular case. There is no limit to further criminalization and advance knowledge of what may or may not be recognised as criminal is withheld from the future 'accused' State."[2]

Marek also finds that there is great uncertainty with regards to the status as crimes in international law of some of the practices cited in paragraph 3 namely, aggression, maintenance by force of colonial domination, and pollution of the seas.[3]

In the light of these observations the value of the contribution of Draft Article 19 to the definition of the concept of criminal offence in international law is considerably diminished. Even if a solution to the difficulties identified above were to be found, the following issue would still need to be addressed: a joint

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1. Op.cit., p.472.

2. Op.cit., pp.474-475.

3. The status of most of the examples cited in Draft Article 19 (3) is considered in relevant chapters in Part III infra.

reading of paragraphs 2 and 3 suggests that only a breach of a non-derogable international obligation may constitute a criminal offence under international law. This criticism finds some support in the four sub-paragraphs of paragraph 3 which have been selected as areas of peremptory regulation in international law. Each one is considered "essential" for the protection of specific regimes operative in the international community.

Mr. Reuter[1], (former) ILC Member, reveals that sub-paragraph 3 was never intended to be a complete list of crimes and admits that the examples cited was a political choice. But, they were the most important "international crimes". Further, Mr. Quentin-Baxter[2] indicated, quite clearly, that the concept of "international crime" in Draft Article 19 had nothing to do with the principle of individual criminal responsibility but with State responsibility. This view is reiterated by the ILC in its report to the General Assembly on the work of its twenty-eight session.[3] It confirms that the special regime of responsibility intended by Draft Article 19 within the context of the Draft Articles on State Responsibility is separate from the remedy provided by the principle of individual criminal responsibility in international law.

Draft Article 19 was only well received by some Governments[4] and there was much division of opinion in the

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1. ILC Yrbk., 1976, v.I, p.245 para 62.

2. ILC Yrbk., 1976, v.I, p.79 para 6.

3. ILC Yrbk., 1976, v.II, pt.II, p.119 para 59.

4. At the time of its drafting, Draft Article 19 represented a doctrinal devide that may well not obtain in the next decade. Evidence of this divide can be seen, to some extent, by the particular States which then endorsed Draft Article 19. See, inter alia, ILC Yrbk., 1980, v.II, pt.I: Mali, p.101 para 2; Byelorussia SSR, p.93 paras 3-4; Ukrainian SSR, p.103 paras 2-3; USSR, p.104; Yugoslavia, p.106 para 19; Canada, p.94 para 5 and the Netherlands, p.103 para 10; ILC Yrbk., 1981, v.II, pt.I: Bulgaria, p.72; and Czechoslovakia, p.73 para 7; and ILC Yrbk., 1982,

Sixth Committee.[1] Nevertheless its wording remains capable of far too many interpretations to be seriously considered candidate for an authoritative definition of the concept of criminal offence in international law. It does represent, however, an admirable effort to define a concept which largely escapes definition.

5. Conclusion

The sources reviewed in the present chapter reveal that the concept of criminal offence in international law can only be defined by general formulae, more often than not, incorporating subjective criteria. Common to the various draft definitions is the general consideration that a crime in international law is an act (or ommission) which violates interests fundamental to the orderly conduct of international relations. Also in municipal law, a criminal offence is defined as

> "a wrong which affects the security or well being of the public generally so that the public has an interest in its suppression, (and) a crime is frequently a moral wrong in that it amounts to conduct which is inimical to the general moral sense of the community".[2]

These statements are equally valid explanations of the ratio behind the proscription of certain acts as criminal offences in international law. Thus, the recognition that certain violations of the international law of armed conflict constitute criminal offences is due to the moral concept of "considerations of humanity". This is true also of the proscription of the crime of slavery under conventional international law. The crimes of genocide, torture and hostage-taking (these especially when committed in time of peace), unlawful acts against the safety of civil aviation and 'mercenarism', are all illustrations of

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v.II, pt.I: Spain, p.17. For further State Comment see Spinedi, op.cit., pp.78-79 para 8.

1. See, UN Doc. A/31/370, 1976, p.44 et seq.

2. Halsbury's Laws of England, 4th ed., v.11, para 1.

the response of the international community to practices which place in manifest jeopardy its security and well-being. But, is it enough to state that the concept of criminal offence in international law is an act which ruptures international order?

We have seen in doctrine and judicial practice as well as in the ILC and Sixth Committee debates on the Draft Code that the concept of criminal offence in international law is often defined by reference to its legal consequences namely, that it gives rise, inter alia, to individual responsibility, to the application of extraterritorial jurisdiction and to the non-applicability of specific grounds of defence that may otherwise be invoked by the accused.[1] We have also seen drafts de lege feranda which have tried to define the concept by combining two principal elements i.e.: (i) actual threat to international interests and public order and (ii) legal consequences of the offence.

Notwithstanding these efforts, we are aware of the difficulties generated by a definition such as that in ILC Draft Article 19 on State Responsibility which qualifies the first element by virtue of subjective criteria, stating that only "serious" breaches of international obligations" essential for the protection of fundamental interests of the international community" constitute an international crime. It is not improper, faced with such a definition, to question which breach of international obligation is

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1. A recent illustration of such a definition is provided by Spinedi writing in International Crimes of State, op.cit., p.138:

> "The expression "crimes under international law" is generally taken to mean individual actions, committed by private individuals or State organs considered to be so serious that the States are authorized, and often even obliged, to judge and punish them, on the basis of their internal law, waiving the ordinary rules of jurisdiction, extradition, etc."

"serious" to be able to be considered a crime and which are the fundamental interests of international society?

If no satisfactory answer can be provided for these questions save that no definition of the concept of criminal offence can escape formulation on the basis of subjective crieria, the need for a definition of the concept becomes questionable. What is the value of a definition which is either circular or rife with subjective criteria or both? Alternatively, if the concept of criminal offence in international law is defined solely by reference to the legal consequences which it engenders it would be prudent to attempt to identify those features which are telling of (and thus "define") the concept. This is the purpose of Part III.

PART III

Introduction

Part III consists of five chapters which collectively classify ratione materiae a number of practices that are well accepted as constituting criminal offences in international law. A number of practices whose status as such, is more debatable are also included. The task here is to identify and examine in each of the practices classified the principal juridical indicia which contribute to their status as criminal offences in international law and thus give substance to the concept of criminal offence in international law.

The various practices are considered in the following groups:

(1) acts which are considered to be the classical examples of criminal offences in international law (Chapter 4);

(2) criminal offences and other practices which usually occur in armed conflict (Chapter 5);

(3) certain violations of human rights which have come to be considered in international law as criminal offences (Chapter 6);

(4) acts which have been deemed criminal offences because of their effect on the political and economic interests of the international community (Chapter 7);

and,

(5) other practices (Chapter 8).

Other classifications of crimes in international law have been submitted.[1] They are wider in scope than the present one and more specific in their classification ratione materiae, although they have not been entirely

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1. See the following works by Bassiouni, International Criminal Law: A Draft International Criminal Code, 1980; International Criminal Code, 1987; and, International Crimes: Digest/Index of International Instruments 1815-1985, 1986, v.I, p.lvi (hereafter referred to as Digest). See also Convention on International Crimes prepared by the Foundation for the Establishment of an International Criminal Court.

immune from critical comment.[2] It is true that some of the crimes listed could easily be included under either one of two different headings. For instance, piracy jure gentium is placed in the first group because of its traditional status as the classical criminal offence in international law. But it may also come under the fourth group because the origins of its criminal proscription under the law of nations are not totally unconnected with the strain which piracy jure gentium has placed upon international trade. At the same time, terrorist practices committed on the high seas also affect the traditional concept of piracy jure gentium in a way as to make it a matter of international political concern. Similarly, the taking of hostages (considered in Chapter 7), which is generally committed for political purposes, could well be classified along with practices found in the third group because it inherently involves the violation of a number of fundamental freedoms.

The present scheme has been adopted because it is convenient for purposes of exposition.

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2. See Blishchenko and Shdanov, 14 Can. YIL (1976) 288-290; and Carnahan, 80 AJIL (1986) 998.

CHAPTER 4

Classical Crimes

A. Piracy

Piracy jure gentium is acknowledged as a crime in international law in the writings of publicists,[1] in judicial decisions[2] and in international practice by States.[3] Its juridical status as such has long been recognised,[4] but the fact that piracy may also be defined as a criminal offence under municipal law has not always helped its status as a crime under international law. In

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1. Generally see: Brownlie, Principles, pp.233-237; O'Connell, International Law of the Sea, 1984, v.2, p.966 et seq.; E. du Pontavice & P. Cardier, La Mer et le Droit, 1984, v.1, p.49; Rousseau, Droit International Public, 1980, v.IV, p.330 para. 266; Report of the International Law Association (hereafter referred to as ILA) Committee on Piracy: Sea and Air, ILA (1970), p.706 et seq; Goldie writing in International Law at a Time of Perplexity - Essays in honour of Shabtai Rosenne, 1989, p.225; and Green, also at ibid., p.249.

2. Some of the earlier and leading cases include: US v Palmer, 16 US Sup.Ct.Rep., 610, 1818; and US v Smith, 18 US Sup.Ct.Rep., 513, 1820. See also the Opinion of the Privy Council, In re Piracy Jure Gentium, 1934, 7 Ann.Dig. (1933-34) 213.

3. See replies of States to Questionnaire No. 6 in the League of Nations Report on Questions Which Appear Ripe For International Regulation, submitted by The Committee Of Experts For The Progressive Codification Of International Law, (LN Doc. C.196. M.70.1927 V). Hereafter cited as LN Report on Progressive Codification of International Law. Also refer to replies of governments to the ILC Questionnaire on the Regime of the High Seas, ILC Yrbk., 1950, v.II, p.52 et seq. Hereafter referred to as ILC Questionnaire on the High Seas. Furthermore, see Moore, A Digest of International Law, v.II, p.263, 1906; Hackworth, Digest of International Law, 1941, v.II, p.681 and Whiteman, Digest of International Law, 1964, v.IV, pp.663-665. Hereafter cited as Digest.

4. See Blackstone, Commentaries on the Laws of England, 1800, vol.IV, p.68. See also ILC's Report to the GA on the work of its thirty-sixth session, ILC Yrbk., 1984, v.II, pt.II, p.17 para 65(c)(vi).

the past there has been debate on whether piracy is really a crime in international law[1] and some[2] rejected this proposition on the basis that there is no "international agency to capture (pirates) and no international tribunal to punish them". They preferred to think of the practice in terms of "a special ground of State jurisdiction - of jurisdiction in every State." The prevailing view, however, is that piracy is a crime under customary and conventional international law.[3]

Much of the discussion concerning piracy has focused on the question of its definition.[4] The general opinion is that piracy as defined by Article 15 [5] of the 1958 Geneva

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1. See Harvard Research Draft Convention on Piracy (hereafter referred to as Harvard Draft), 26 AJIL (Supp.) (1932) 756, and the discussions in the ILC on the preparation of a Draft Code of Offences, ILC Yrbk., 1950, v.I, p.317 paras 48-58. Also cf. reply of the US Government to the ILC Questionnaire on the High Seas, op. cit., v.II, p.63 section VII.

2. See Harvard Draft, op. cit., pp.759-760. Acknowledgment of the view that piracy constitutes an exception to the exercise of territorial criminal jurisdiction by States and to the principle of the freedom of the high seas, continues to be found in more recent contributions, see ILC Memorandum, ILC Yrbk., 1950, v.II, p.70; ibid., 1955, v.II, p.1 para 4. Also see Lauterpacht, International Law and Human Rights, 1950, at pp.9 & 38, Brownlie, Principles, p.233, and Professor Valladao, ILA (1970) p.737 para.5.

3. Cf. Articles 13-19 of the 1958 Geneva Convention on the High Seas and Articles 100-105 of the 1982 Law of the Sea Convention. See also Draft Statute of an International Criminal Code submitted by the International Association of Penal Law (hereafter cited as IAPL) where piracy is listed in Article X as a crime in international law. Op.cit., 52 RIDP (1981) 144. See also Bassiouni, International Criminal Code, Articles X, p.156.

4. See especially the literature cited so far. Also see, ILC Yrbk., 1955, v.I, pp.38-45 and pp. 52-57, and ibid., 1956, v.II, pp.18-19.

5. The relevant text reads as follows:

Convention on the High Seas[1] does not adequately cater for current international criminal activities and terror-violence on the high seas. The adoption of the unamended 1958 definition by the 1982 Law of the Sea Convention[2] is perhaps one of its lesser achievements in the progressive codification of international law. Since the Santa Maria incident in 1961, a re-assessment of the traditional definition of the crime of piracy jure gentium has been demanded.[3] The Achille Lauro affair in October 1985 refuelled outcries for changes (long overdue) to be made to the definition of piracy.[4] Two principal amendments have

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"Piracy consists of any of the following acts:
(1) Any illegal acts of violence, detention or any act of depredation, committed for private ends by the crew or the passengers of a private ship or a private aircraft, and directed:
  (a) On the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft;
  (b) Against a ship, aircraft, persons, or property in a place outside the jurisdiction of any State;
(2) Any act of voluntary participation in the operation of a ship or of an aircraft with knowledge of facts making it a pirate ship or aircraft;
(3) Any act of inciting or of intentionally facilitating an act described in sub-paragraph 1 or sub-paragraph 2 of this article."

1. 450 UNTS 82. Hereafter referred to as 1958 High Seas Convention.

2. UN Doc. A/Conf.62/122, October 10th, 1982. Text also at 21 ILM 1261. Hereafter cited as LOS Convention 1982.

3. See Franck, 36 NYULR (1961) 839 and Professor A. Evans, ILA (1970) pp.717-718.

4. See McGinley, 52 Tenn.LR (1985) 691; McCredie, 16 Ga.JICL (1986) 435; Joyner and Francioni at 31 GYIL (1988) at p.230 and p.263 respectively, and Green writing in International Law at a Time of Perplexity Essays in honour of Shabtai Rosenne, at p.271.

been suggested.[1] The first is the elimination of the requirement that more than one vessel should be involved in the course of the perpetration of the crime.[2] An internal uprising on a ship would then perhaps be able to qualify as piracy jure gentium. The second proposition is that acts committed for "public ends" rather than solely for "private ends" may, in certain circumstances, also be considered piratical. A third suggestion is that if the definition of piracy jure gentium under contemporary international treaty law were ever to be revised, the wording ought clearly to state that piracy as defined is a crime in international law.

The single most telling consequence of the crime of piracy jure gentium is that it places its perpetrators, irrespective of their nationality, ipso facto outside the protection of the law of nations and allows any State to capture and to try them.[3] In his Dissenting Opinion in the Lotus Case Judge Moore stated: "in the case of what is known as piracy by the law of nations, there has been conceded a universal jurisdiction, under which the person charged with the offence may be tried and punished by any nation into whose jurisdiction he may come".[4] Pirates are known as the enemies of all mankind, but as it has been rightly pointed out, their designation as hostis humani generis "is neither a definition, nor as much a description

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1. See Constantinople, 26 Va.JIL (1986) 723 at 748-751, and McCredie, op.cit., p.446 para.4. Also see the reply of Greece in LN Report on Progressive Codification of International Law, p.168. Further, see Poland, ILC Yrbk., 1955, v.II, p.2 para 17; and Czechoslovakia, in Official Records of the 1958 UN Law of the Sea Conference on the High Seas, v.IV, p.78 para 33.

2. See, Professor Johnson, Rapporteur, ILA (1970) p.709 and at p.732 et seq.

3. Cf. Article 19 of the 1958 High Seas Convention.

4. PCIJ Rep. Ser. A., No. 10 (1927) 70. See also People v Lol-Lo and Saraw, US Supreme Court of the Phillipine Islands, 1 Ann. Dig. 165.

of a pirate, but a rhetorical invective to show the odiousness of that crime."[1] Historically, the principal reason attributed to the universal repugnance of the crime of piracy jure gentium was its inherent attack on international trade and commerce[2], but more significantly piracy jure gentium strikes directly at the concept of the freedom of the high seas.

> "Piracy has as its field of operation that vast domain which is termed "the high seas". It constitutes a crime against the security of commerce on the high seas, where alone it can be committed. The same acts committed in territorial waters of a State do not come within the scope of international law, but fall within the competence of the local sovereign power.
>
> When pirates choose as the scene of their acts of sea-robbery a place common to all men and when they attack all nations indiscriminately, their practices become harmful to the international community of all States. They become the enemies of the human race and place themselves outside the law of peaceful people."[3]

The locus delicti of the crime of piracy jure gentium - the high seas - is central to the character of this criminal offence in international law. Indeed it is one of the most significant contributing factors to its status as such. But, piracy is not a criminal offence in international law because it is committed on the high seas. It is a criminal offence in international law also because of its effect upon world public order, in particular it disrupts international navigation by rendering unsafe and

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1. See Sundberg writing in Bassiouni, Treatise, 1972, v.I, p.455.

2. See LN Report on Progressive Codification of International Law, op. cit., p.117, and Harvard Draft op. cit., p.757.

3. See LN Report on Progressive Codification of International Law, op.cit. p.117. Emphasis added.

thus detracting from States the freedom of the high seas.

The principal "trade-mark" of piracy as a crime in international law is the permissability of States to capture and to prosecute pirates and to exercise criminal jurisdiction on the basis of the universality principle [1]. Roumania, in its reply[2] to the Questionnaire attached to the LN Report on Progressive Codification of International Law,[3] highlights in piracy jure gentium the principle of "universality" and projects it as a standard feature of criminal offences in international law:

> "We already see here (with piracy) in embryo the principle which, in future social relations will become the practice - of penalising throughout the world violations of law which are common to every country."

Our outlook on piracy jure gentium should be in consonance with contemporary international life. The society of nations continues to experience an unprecedented surge in its history of movements seeking national identity, territorial sovereignty and political independence. Political goals and values remain noble but it is a common occurrence that the need is now taken to justify the means by which they are fulfilled. Criminal practices within and against the international community have become more frequent, organised, sophisticated and indiscriminate. Accordingly the notion of piracy jure gentium can no longer be viewed in terms of classical sea-brigands. The motives behind current international criminal practices have changed dramatically. Present-day

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1. Professor Johnson, as Rapporteur of the ILA Committee on Piracy: Sea and Air, reported, "the basic approach of the Committee has been that Piracy, whether committed at sea or in the air, is a crime that merits the application of the universal principle of jurisdiction". ILA (1970), p.709.

2. Drafted by Prof. Pella, who later was to advise the ILC on the preparation of the Draft Code of Offences. See Memorandum, UN Doc. A/CN.4/39, in ILC Yrbk., 1950, v.II, p.278.

3. Op.cit., p.202.

criminal activities occuring in regimes such as that of the high seas address a larger State audience than in the 18th and 19th centuries. They seriously challenge international order, yet due to technical reasons do not qualify as piratical. Change in the meaning, scope and definition of piracy jure gentium, is therefore, necessary. However, the value of its most important feature as a criminal offence in international law: the exercise by any State of criminal jurisdiction on the universality basis, is timeless. It is a feature which should not be restricted to piracy jure gentium, as much as the "enemies of mankind" should not be an "exclusive club" for pirates but for all perpetrators of criminal offences in international law.[1]

B. Slavery

This practice formed part of Roman law. It was accepted as lawful among many early civilisations and up to the mid-19th century it was still legal within certain parts of the United States.[2] It does not, therefore, have the same history as piracy jure gentium i.e. as being since time immemorial, 'delicto jure gentium'. Indeed it is not unreasonable to question the status of slavery as a criminal offence in international law. The available evidence: early international declarations, agreements, national legislation, judicial practice, including the most recent multilateral instruments and their travaux preparatoires, clearly suggests that, initially, the raison d'etre behind the legal proscription of slavery (at both

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1. Constantinople, op. cit., p.727, argues that a contemporary definition of piracy ought not to cater only for "traditional pirates who were hostis humani generis to the commercial interests of States, but also (for) 'modern' pirates, the terrorists who are 'hostis humani generis' to the humanitarian interests of the world community." (Emphasis added). See also Rovine, 3 Israel YHR (1973) 34 and Friedlander, 52 RIDP (1981) 400 n.43.

2. Cf. 13th Amendment to the US Constitution abolishing slavery in 1865.

the national and international level) was to outlaw it i.e. to make it an unlawful (and a criminal) offence under the national laws of all States, but not to render it a crime under international law.

At the Congress of Vienna in 1815 the Great Powers of Europe signed a declaration[1] deeming slave-trading a practice "repugnant to the principles of humanity and universal morality." They also called for its immediate and complete abolition in all parts of the world. In 1841 they signed an international agreement concerning the suppression of slavery.[2] That treaty is particularly significant because the Contracting Parties declared slave-trading to be piracy and established that rights of visit and search may be exercised by properly authorised warships against merchant vessels[3] reasonably suspected of engaging or having been engaged in slave-trafficking.

A number of other bilateral and multilateral treaties continued to mushroom throughout the 19th century reaffirming the general principle that slavery, like piracy jure gentium, is repugnant to justice and humanity, and that an effective way towards achieving its total suppression was through exercising rights of visit and search on suspect vessels by warships.[4]

Legislative action was undertaken along similar lines

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1. Declaration Relative to the Universal Abolition of the Slave-Trade. Text at 63 CTS 473.

2. Treaty between Austria, Great Britain, Prussia and Russia for the Suppression of the African Slave Trade. Text at 92 CTS 437.

3. There is nothing in the treaty text to indicate that ships of war may not be searched but, at any rate, those flying the flag of the High Contracting Parties are specifically excluded from the exercise of such rights. (Article IV).

4. Generally see UN Doc. E/AC.33/3, 1950; Fischer, 3 ILQ (1950) pp.46-47 and Fischer 61 RGDIP (1957) 69 at p.73 para.5 (hereafter cited as Fischer, RGDIP).

at the national level[1] and other declarations and proposals were made at international fora.[2]

The international denunciation of slavery did not subside at the turn of the century even though early treaties such as the 1904 International Agreement for the Suppression of the White Slave Traffic[3] and the 1910 Convention for the Suppression of the "White Slave Traffic"[4] refrain from expressly declaring the character of slavery to be criminal.[5]

A pattern, therefore, begins to develop where slavery is assimilated to the crime of piracy jure gentium. Initially this trend unfolds in two ways: the first is the quest to suppress universally (as is the case with piracy jure gentium) practices and institutions of slavery; and the second is to achieve this objective through the visit and search of 'slave vessels' on the high seas as if they were piractical. However, in early 19th century judicial

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1. See the 1824 British Slave Trade Act and Title 18 USC Section 421. Later the American provision was amended whereby the word 'pirate' was deleted as a description of the slave-trader, see Title 18 USC, Ch. 77, para. 1585. See also Moore, op.cit., v.2, p.6 and at p.946 re: 1862 Treaty on the Suppression of the Slave Trade between the United Kingdom and the United States.

2. See replies of governments to Letter sent by the League of Nations Temporary Slavery Commission, 1924, nos: 1-5, 7, 11, 14, 15, 17, 19, 30, 37, 39, 40, 52-55. But see especially nos: 18, 36 (para. 8 a & c p.10), 42 (para. 52 p. 23), 42(1) & (2 para. 44 p.16 & para. 50 p.18) where reference to piracy jure gentium is found. See also UN Docs. E/AC.33/10 Add.1-99 and E/AC.33/L29.

3. 1 LNTS 83. Text also at 195 CTS 326.

4. Text at 211 CTS 45.

5. In the 1910 convention the word 'infraction' is used which does not really help in determining whether the parties considered slavery as a criminal offence or simply a legal wrong. The convention, however, provides for extradition proceedings and this throws some light on the juridical character of slavery in international law at the time.

practice[1] we find that the criminal character of slavery is acknowledged in principio, but the notion that it is piracy jure gentium, and therefore criminal under international law, is dismissed. In the Antelope[2] we find that slavery is declared unlawful, criminal, contrary to the law of nature but not to the law of nations. The position at that stage in the history of the international legal status of slavery is summed up as follows:

> ".... the Court will show the present state of the world's opinion and practice upon this subject, and will prove that the time is at hand, if it has not already arrived, when the slave-trade is not only forbidden by the concurrent voice of most nations, but is denounced and punished as a crime of the deepest die. This is shown by the declarations contained in the treaties of Paris and Ghent; by the acts and conferences at the Congresses of Vienna, London, and Aix la Chappelle; by the treaties between Great Britain; and by the reports of the Committees of the House of Commons, and the House of Representatives in Congress. We contend, then, that whatever was once the fact, this trade is now condemned by the general consent of nations, who have publicly and solemnly declared it to be unjust, inhuman and illegal. We insist, that absolute unanimity on this subject is unnecessary; that, as it was introduced, so it may be abolished by general concurrence. This general concurrence may not authorise a Court of Justice to pronounce it a crime against all nations, so as to make it the duty of all to seek out and punish offenders as in the case of piracy ....
> (T)he slave trade is not contrary to the natural law of nations because until recently, it was universally tolerated and encouraged. It is not contrary to the positive law of nations, because there is no general compact inhibiting it..."[3]

The court then proceeds to examine relevant State and judicial practice, concluding that slavery and the slave-trade could not possibly qualify as crimes in international law simply on the basis that they were proscribed as criminal offences under several municipal laws and associated with piracy jure gentium under certain

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1. See generally Fischer, ILQ, p.30 et seq.

2. 10 Wheaton, in 23 US Sup.Ct.Rep. (1825).

3. Op. cit., paras. 76-77 & 90. Emphasis added.

international instruments. This view, expressed more than a century ago, is still present in recent doctrine.[1]

This perception of the juridical character of slavery persisted and is evident in the two leading instruments on the subject: the 1926 Slavery Convention[2] and the 1956 UN Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices similar to Slavery.[3]

The 1926 convention neither declares nor implies that slavery is a crime under international law. It calls for the co-operation of the Contracting Parties to prevent, suppress and punish the practice but this hardly identifies it as criminal; it only establishes that it is illegal. At the drafting stage of the convention, the United Kingdom delegation had submitted a proposal where slave-trading on the high seas would be treated like piracy jure gentium and "the public ships of the signatory States should have the same rights in relation to vessels and persons engaged in such act as over vessels and persons engaged in piracy". The British draft article also stipulated that the captured vessel and the offenders would be brought before the court of the flag State of the capturing vessel to be handed over to their own authorities. The slaves, in all cases, would be set free. However, opposition within the League of Nations Temporary Slavery Commission[4] was such that, despite the support of the LN's Sixth Committee and a recommendation previously adopted by same Commission suggesting the assimilation of slavery to piracy [5], the

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1. See Fischer, ILQ, p.45 and Fischer, RGDIP, p.74.

2. 60 LNTS 255.

3. 266 UNTS 3. Hereafter cited as the 1956 Supplementary Convention.

4. LNOJ, 1924, p.909. Hereafter cited as TSC.

5. See Minutes of Second Session TSC, LN Doc. C426.M. 157 (1925.VI) pp.34-35 & 52-53; LN Doc. A.19.1925 VI pp.6-7, and also Hackworth, Digest, v.II, Ch.8, p.669.

British proposal was withdrawn.[1]

The 1926 convention marks the first concrete effort made by States, under the auspices of a truly international organisation, to proscribe slavery as a criminal offence. Also, "its importance lies in the fact that for the first time in international law slavery and the trade in slaves were defined."[2] It does not, however, render them criminal offences in international law, either by express declaration or implicitly by assimilating them to piracy jure gentium. The overall value of the convention is that it partakes in the formulation of the status of slavery as a crime under customary law.

This development process is traceable in the declarations of States[3] before the League of Nations Committee of Experts on Slavery.[4] In a statement[5] by the Anti-Slavery and Aborigines Protection Society(London), the sale and purchase of human beings was described as a crime against humanity. In addition, the CES reiterated the necessity to study the question of assimilating slavery on the high seas to piracy jure gentium.[6] This "assimilation pattern" is also present in the reports of the UN Ad Hoc

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1. See UN Doc. E/AC.33/3, pp.23-25 paras.89-91. Also see Gutteridge, 6 ICLQ (1957) 449 at 455-456.

2. Fischer, ILQ, p.511.

3. Generally see the proces-verbaux of the Committee of Experts on Slavery, 1932, Minutes of Meeting VI. Mexico (op. cit., p.29) cited national legislation which declared all slaves brought into its territory to be free ipso facto and any vessel caught carrying slaves shall be confiscated and the responsible persons prosecuted and punished as criminals.

4. This later came to be known as the Advisory Committee of Experts on Slavery. Hereafter cited as CES. See LNOJ, 1932, pp.428-484.

5. CES Doc.1(c) 1932, VI pp.7-8.

6. Minutes of IVth Meeting, First Session 5th May, 1932, pp.8-9.

Committee on Slavery[1] which paved the way for the 1956 Supplementary Convention. On several occasions, suggestions were made that if an instrument were to be formulated as a sequel to the 1926 instrument, the notion of placing slavery on equal footing with piracy jure gentium deserved serious consideration.[2]

However, objection to such proposals was made in the Ad Hoc Committee's debates, even though the juridical character of slavery as a crime in international law was acknowledged and some of the members strongly urged that a future international convention ought to reflect that position unreservedly.[3]

These recommendations were short-lived. The 1956 Supplementary Convention does not assimilate slavery to the crime of piracy jure gentium. However, in so far as the legal character of slavery is concerned, the convention clearly acknowledges it and other similar practices as being criminally unlawful even though the criminalisation process takes place under municipal and not under international law: "the act of conveying or attempting to convey slaves from one country to another .... shall be a criminal offence under the laws of the States Parties to this Convention ...."[4] In this respect[5] the 1956 treaty has improved and clarified the position as it existed under the LN Convention, but the status of slavery as a crime in international law remained in the balance. The travaux preparatoires and the debates which led to the 1956

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1. ESC Res. 238, UN Doc. E/1553, 1949.

2. See UN Docs: E/AC.33/4, p.6 para. 19(c); ibid. /9, p.12 para. 29; ibid. /13, p.20 no.2, and Doc. E/AC.33/L 17, p.13 para. 32.

3. UN Doc. E/AC. 33 /SR27, pp. 8-10 paras. 39-52. See also UN Doc. E/AC.33/R3, p. 2 para 2, ibid., /R4, pp.2-4; ibid., /R6, p.11 and ibid., /R14, p.106.

4. Article 3(1). Emphasis added.

5. Other aspects of the 1956 Supplementary Convention are discussed by Gutteridge, op. cit., p.449.

instrument reveal a conflict of opinion on this issue.

The United Kingdom delegation tried, as it had thirty years earlier, to equate the conveyance of slaves on the high seas to piracy jure gentium and to make it punishable as such.[1] Its efforts met with as much success as they did in 1926.[2] Some delegations felt that there was no real cause why slavery should be assimilated with piracy on the high seas.

> "Piracy was held to be a danger to international navigation and trade and should accordingly be dealt with through international co-operation. The slave trade, on the other hand, was a violation of the inherent right of every individual to freedom, but it had no international significance except in relation to the conscience of mankind."[3]

Others[4] based their reservations on the basis that piracy jure gentium "implied violence on the high seas and should therefore be suppressed by force, but similar action could not be taken in regard to the slave trade". Given this argument, protests were also launched against proposals whereby government ships would have the power to visit and search vessels suspected of slave-trading as is the practice with pirate ships on the high seas.

The UK Anti-Slavery Society presented a very interesting approach. Initially, they felt "glad that slave trading at sea would be declared to be an act similar to piracy in international law."[5] They did not consider it appropriate, however, for 'slave trading' to be equated with piracy jure gentium as that practice usually occurred

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1. See UN Doc. E/2824, p.27 paras. 97-100.

2. See UN Doc. E/AC.43/SR.14, p. 3 and E/Conf. 24/SR.17, pp.2-5.

3. Egypt, UN Doc. E/Conf.24/SR 7, p.2.

4. Portugal, UN Doc. E/Conf. 241/SR8, p.2.

5. UN Doc. E/AC.43/SR4, p.4. Also see, UN Doc. E/AC.43/L1 p.27, para. 62.

on land and not at sea. Later,[1] the Society argued that slaves were only carried "...on the seas around Arabia, ... and it is not necessary to make conveying of slaves on the high seas throughout the world an offence similar to piracy."[2]

These views opposing the treatment of slavery as piracy jure gentium are not easily reconciled. First there is an assumption that the former unlike the latter is not a crime of international significance except in so far as the conscience of mankind is concerned. If this were true does it therefore mean that slavery is less criminal than piracy jure gentium? Is the violation of humanitarian values inherent in slavery not sufficient to render it a crime in international law? Are such values only significant in so far as they ensure that a multilateral instrument dealing with slavery ought not to have the standard treaty provision for reservations?[3]

Second, slavery was not thought fit to be in the same class of crimes as piracy jure gentium for the latter involved violence whereas slavery did not. Suffice it to describe such an approach as naive given that violence is not restricted to one form be it physical, moral or social.

Third, the assimilation of slavery or any similar practice (including 'slave raiding') to piracy jure gentium cannot be dismissed simply because the locus delicti of the offence differs. As we have seen, the qualities of piracy jure gentium as a crime in international law do not derive force solely from the fact that it is committed on the high seas but also from the unaffordable dangers with which it presents the international community. This is the real significance that lies behind any attempt to place slavery "on par" with piracy jure gentium. Acts come to be

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1. UN Doc. E/Conf.24/NG01, 1956.

2. Ibid., p.2.

3. Article 9 of the 1956 Supplementary Convention. See also Peru, UN Doc. E/Conf. 24/SR 24, p.7.

considered as crimes in international law because of their nature and not by virtue of the locus delicti alone. Unfortunately the prevailing view among the drafters of the 1956 instrument overlooked these significant points and subscribed to the narrower line of approach namely, slavery and other related activities were affirmed as criminal practices which ought to be made punishable as crimes under national law.[1] At any rate, whilst criminal proscription at the municipal level does not render acts crimes in international law it does not detract from but contributes to their development as such.

Thus, the general position under treaty-law up to 1956 testifies that slavery is illegal, criminal and possibly in the process of developing as a crime in international law.[2] However, there remains further significant evidence to be weighed before a reasonable assessment of slavery and its qualities as a crime in international law can be made.

Reporting to the ILC on The Regime of the High Seas, M. Francois [3] did not advocate assimilation of slavery to

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1. See the position taken by Monaco, UN Doc.E/AC.43/L1, p.32 para. 69; and see also UN Docs: E/Conf.24./SR11, p.5 and E/AC43/L41, para. 3.

2. Gutteridge (op.cit., p.471) who, as member of the UK delegation, participated in the drafting of the 1956 Supplementary Convention, only cares to admit that "....slavery may come to be regarded as not merely illegal under municipal law, but as illegal under international law." Emphasis added. In Oppenheim, International Law, v.I, p.733 para 340 it is conceeded that "it is difficult to say that customary International Law condemns two of the greatest curses which man has ever imposed upon his fellow-man, the institution of slavery and the traffic in slaves." Cf. Rejoinder of South Africa in the S.W. Africa Cases, 1966, ICJ Pleadings, v. 10, p.20.

3. Second Report on the Regime of the High Seas, UN Doc. A/CN.4/42, ILC Yrbk., 1951, v.II, p.75. The question of assimilating slavery to piracy jure gentium did not arise in Francois's first report to the ILC, UN Doc. A/CN.4/17, ibid., 1950, v.II, p.36, and slave-trading per se is dealt with in a most succinct manner, ibid., p.41 para 14.

piracy jure gentium, because the slave-trade usually only concerns two particular States at any one time and, therefore, it should not be 'internationalised' giving powers of search and seizure to all government ships over 'suspected' merchant vessels sailing the high seas. This line of thought is conditioned by the Rapporteur's personal view of slavery namely, that, unlike piracy jure gentium, it was not universally recognised as a crime.[1] However the majority opinion within the ILC differed and felt that slavery ought to be treated as piracy jure gentium.[2] This was due to the ILC's interest in the concept of the right of approach on the high seas;[3] an interest which crystallised in the 'right of visit' provisions of the 1958 High Seas Convention[4] and the 1982 LOS Convention.[5]

To this extent, therefore, slavery came to be considered in the same light as piracy jure gentium.[6] The ILC also considered a recommendation made by the UN Ad Hoc Committee on Slavery where slave-raiding and slave-trading would be declared crimes similar to piracy jure gentium, but in the end it opted to concentrate on obliging States to implement effective measures designed to punish and prevent the conveyance of slaves on ships flying their flag.

The ILC's work on the Regime of the High Seas proceeded concurrently with its preparation of the Draft Code of Offences. In the period 1950-1954, slavery, as contemplated under the 1926 Convention, was not among the

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1. ILC Yrbk., 1951, v.I, p.350 para 79.

2. See ILC Yrbk., 1951, v.1, pp.350-354 paras 61-132; pp.359-361 paras 73-94; and ILC Report, ibid., 1952, v.II, p.46 para 4.

3. ILC Yrbk., 1951, v.I, pp.353-354 paras 114-132.

4. Article 22.

5. Article 110.

6. See ILC Yrbk., 1951, v.I, p.360 para 79. Cf. Article 13, 1958 High Seas Convention.

list of crimes considered candidate by the ILC for the formulation of the Draft Code of Offences.[1] However, 'enslavement' as expressed in the Nuremberg Charter (Article 6c) definition of the concept of crimes against humanity[2], appears in the Draft Code of Offences as part and parcel of a broader category of crime known as "inhuman acts".[3] This is an important clue for an investigation of the international legal status of slavery. It shows the concept of slavery and its related practices, committed either in time of war or peace, to have been considered criminal under international law by the draftsmen of the Nuremberg Charter whose provisions are now accepted rules indispensternational law. Jurists who consider slavery to be a crime in international law[4] have found this evidence indispendable for the presentation of their argument.[5]

Since 1982 when the ILC returned to the consideration of the topic of the Draft Code, the 1956 Supplementary Convention was included in a list[6] of acts considered to be

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1. Some ILC members expressed doubts whether slavery, like piracy jure gentium, could be considered a crime in international law. See ILC Yrbk., 1950, v.I, p.317 paras 48-58. It should also be pointed out that the ILC had decided not to include such practices as piracy, slavery, traffic in dangerous drugs and damage to submarine cables because they did not fall within the scope of the Draft Code of Offences. Ibid., 1950, v.II, p.380 para 149.

2. Cf "Slave-labour" in Article 6(b) (which defines "war crimes") of the Nuremberg Charter.

3. See Article 2(11) of the 1954 Draft Code of Offences. ILC Yrbk., 1954, v.II, p.151.

4. Generally see, Whiteman, Digest, v.11, pp.866-867.

5. See Fischer, ILQ, pp.517-518 and Trebilcock, 8 Ency. PIL op. cit., pp.483-484.

6. Slavery is also included in a Draft International Criminal Code prepared by the IAPL, Article VII, 52 RIDP (1981) 134-138. See also Baussioni, International Criminal Code, p.146.

crimes under conventional international law[1]. Initially, the position taken by the ILC Rapporteur, had been that the absence of slavery from the Draft Code was explained by the fact that it was covered by "inhuman acts" as defined in the 1954 Draft Code of Offences.[2] However, during the course of the ILC's consideration of the topic at its thirty-sixth session (1984) some members recommended inclusion of slavery, per se, in the Draft Code.[3]

The matter concerning slavery arose again at the ILC's thirty-eight session (1986) when the Rapporteur presented a draft article on the concept of crimes against humanity for consideration. Again slavery did not feature as a crime per se, but appeared in the form of "enslavement" as an "inhuman act" and recommended for consideration as part and parcel of the concept of crimes against humanity.[4] In the debate on slavery, though revealing a certain division, opinion was for rather than against including it as a criminal offence in its own right.[5] Accordingly, at the ILC's forty-first session (1989) a draft article 14 on crimes against humanity appears as having a sub-clause on slavery and all other forms of bondage including forced

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1. See ILC Yrbk., 1984, v.II, pt.I, p.95 para 44 No.(14).

2. See ILC Yrbk., 1984, v.I, p.53 para 56.

3. See, ILC Yrbk., 1984, v.I: Sir Ian Sinclair, p.30 para 17; Calero Rodrigues, p.33 para 33 and Njenga, p.45 para 42. Sixth Committee's views on slavery were scant. See UN Doc. A/CN.4/L.382, 1985, p.25 para 70.

4. See draft article 12 (3), ILC Yrbk., 1986, v.II, pt.I p.86.

5. See ILC Yrbk., 1986, v.I: Balanda, p.107 para 34; Jacovides, p.121 para 27; Arangio-Ruiz, p.123 para 59; Koroma, p.135 para 84 and Rapporteur Thiam, p.179 para 59 who admitted planning to include a separate provision for slavery. Contra, see Razafindralambo, p.129 para 28. For Sixth Committee views see UN Doc. A/CN.4./L.410, 1987, p.105 para 530.

labour.[1] The ILC (and the Sixth Committee) expressed favourable views on retaining this provision but has yet to study a better formulation of the provision.[2] As at its forty-third session, the ILC's Drafting Committee adopted a draft provision (article 21) on systematic violations of human rights and has thus provided for the punishment of the crime of "establishing or maintaining over persons a status of slavery, servitude and forced labour".[3]

Slavery is also included as one of the so-called "international crimes" in ILC Draft Article 19 (3c) on State Responsibility.[4] It is clearly stated there that an international crime may result from ".... a serious breach on a widespread scale of an international obligation of essential importance for safeguarding the human being, such as those prohibiting slavery...." In the course of the ILC debates on State Responsibility there was no doubt that slavery was considered criminal in international law.[5] Some[6] stressed that the quality of slavery as a crime in international law derived from "the systematization of a policy contrary to human dignity."

Slavery also marks the threshold for the proscription of human rights violations as criminal offences in international law. Together with its related practices, it

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1. See Rapporteur's Seventh Report to the ILC on the Draft Code. UN Doc. A/CN.4/419, 24th February 1989, p.11.

2. See ILC Report to the General Assembly on the work at its forty-first session, GAOR, Supp.No.10 (A/44/10) pp.158 - 160 paras 169-174. Summary Records of the ILC's debates at its forty-first session are not in print at time of writing. See also UN Doc. A/CN.4/L.443, 1990, p.33 paras 92-95.

3. See UN Doc. A/CN.4/L.459/Add.1, 1991, p.6.

4. ILC Yrbk., 1976, v.II, pt.II, p.75.

5. Ibid., v.I, pp.239-253.

6. Ramagasoavina, ibid., p.247 para. 5.

is condemned and outlawed by important instruments concerned with the international protection of human rights. These include: the Universal Declaration of Human Rights,[1] the European Convention on Human Rights,[2] the International Covenant on Civil and Political Rights,[3] the American Convention on Human Rights[4] and the African Charter on Human and Peoples' Rights.[5] The freedom from slavery provision also occupies a prominent place in the 'non-derogable' clauses of some of these instruments[6] and enjoys the force of jus cogens in international law.[7]

Slavery constitutes a fine illustration of a practice which was once an accepted institution in the history of civilisation, but later came to be regarded as morally reprehensible; as an illegal practice; as a criminal offence under the municipal laws of States; a violation of internationally protected fundamental freedoms; and, indeed, a criminal offence in international law.

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1. Article 4. UN. Doc. A/811, 1948.

2. Article 4(1), 1950 ETS No. 5. Hereafter referred to as ECHR.

3. Article 8, 1966, GA Res. 2200 (XXI). Hereafter cited as International Covenant.

4. Article 6. Text also at 9 ILM 673. Hereafter cited as AmCHR.

5. Article 5. Text at 21 ILM 59. Also known as the Banjul Charter. Hereafter cited as African Charter on Human Rights.

6. See: ECHR, Article 15(2), International Covenant, Article 4(2), and AmCHR, Article 27(2).

7. See Chapter 1 supra, generally, Trebilcock, op. cit., p.484 and Hannikainen, op. cit., p.444 et seq.

CHAPTER 5

Conflict Related Crimes and Practices

A. Aggressive War

Until the beginning of the present century several international instruments and declarations accelerated the movement towards outlawing war.[1] But, the Treaty of Versailles and the findings of the 1919 Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties [2] are, initially, the most revealing sources in

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1. The legal status of war during the 19th Century is meticulously expounded by Brownlie, Use of Force, pp.18-50, and is recorded by: Rifaat, International Aggression, p. 19 et seq., and by Roberts and Guelff in Documents on the Laws of War, 1989, p.2. But the following instruments may be cited among the principal participants in the formation of its status at that time: Secret Treaty of Defensive Alliance, 1815. For juristic comment see Pompe, Aggressive War an International Crime, 1953, p.47 and Brownlie, Use of Force, p.351 n.3. The Hague Conventions of 1899 and 1907, texts in Scott, The Hague Conventions and Declarations of 1899 and 1907, 1918 (hereafter referred to as Hague Conventions: Texts). See also Scott, The Hague Peace Conferences 1899 and 1907, 2 vols., 1909. The World Peace Conference of 1878 adopted a resolution describing aggressive war as"brigandage international". See Wehberg, The Outlawry of War, 1931, p.6. See also Treaties For The Advancement of Peace (also known as the Bryan Peace Treaties) concluded by the United States in 1913-1914. Text in Scott, Treaties for the Advancement of Peace, 1920. For juristic comment see Brownlie, Use of Force, p.23 and Rifaat, op.cit., pp.30-31. In addition, note should be made of the following instruments namely, Declaration Respecting Maritime Law, 1856, (also known as the Declaration of Paris) 115 CTS 1 and at 1 AJIL (1907) 89; Geneva Convention for the Amelioration of the Condition of the Wounded Armies in the Field 1864, 129 CTS 361 and at 1 AJIL 90; Additional Articles Relating to the Condition of the Wounded in War, 1868, 138 CTS 189; and the Project of an International Declaration Concerning the Laws and Customs of War, 1874, (also known as the Brussels Declaration).

2. See Majority and Dissenting Reports of the American and Japanese Members at 14 AJIL (1920) 95. Hereafter referred to as the 1919 Commission on the Authors of

the formation of the concept of aggressive war and subsequently of its character as a criminal offence in international law. [1]

The 1919 Commission on the Authors of War was instructed, inter alia, to inquire and to report on the responsibility of those persons (regardless of rank or office) who committed offences against the laws and customs of war and to advise on the question of establishing tribunals empowered to hear cases concerning the perpetration of these offences.[2]

The Commission identified the Central Powers - Germany and Austria and their allies, Turkey and Bulgaria, as the principal authors responsible for waging a "deliberate" and premeditated war.[3] They were also held responsible for violating the neutrality of Belgium and Luxembourg.[4] The Commission further concluded that the Central Powers and their Allies, "by barbarous or illegitimate methods (violated) the established laws and customs of war and the elementary laws of humanity."[5] In addition, it recognised that the sponsors of such violations were deserving of nothing less than to be held personally liable for their actions. Indeed, given the following extract from a letter sent by German Kaiser Wilhelm II to the Austrian Kaiser Franz Josef, little can be said in opposition to such a recommendation:

> "....everything must be put to fire and sword; men, women and children and old men must be slaughtered and not a tree or house be left

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War.

1. Generally see: Gleuck, 59 HLR (1946) 396 at p.401; History UNWCC, pp. 32-52; Brownlie, Use of Force, p.52 et seq., and Rifaat, op.cit., 1979, p.34.

2. See Report, op.cit., p.95.

3. Ibid., p.107.

4. Ibid., p.112.

5. Ibid., p.115.

> standing. With these methods of terrorism, which are alone capable of affecting a people as degenerate as the French, the war will be over in two months, whereas if I admit consideration of humanity it will be prolonged for years....."[1]

Thus, the traditional position when Heads of States or of Governments and their "entourage" were totally immune from civil or criminal prosecution and where the only form of redress open to the wronged State was either the demand for reparation or the termination of diplomatic relations, inevitably began to alter. The 1919 Commission on the Authors of War felt that "the conscience of mankind" would be shocked if it was upheld that the immunity of the Sovereign applies even when it is proven that he has committed the "gravest outrages against the laws and customs of war and the laws of humanity".[2]

The Commission recommended that individuals alleged to have committed violations of the laws of war should be tried by a specialised independent tribunal. It did not feel, however, that a similar proceedure should be extended to those whose acts provoked war. The reason was that in this case the evidence raised complex proceedural issues thought to be "more fit for investigation by historians and statesmen than by a tribunal appropriate for the trial of offenders against the laws and customs of war".[3] Thus, it implied that the act of provoking war had not yet reached the stage where it could be considered a criminal offence.[4] Notwithstanding, the Commission did suggest, however, that penal sanctions should in future be provided for such grave outrages against the elementary principles of international

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1. Cited in Adams, "The American Peace Commission and the Punishment of Crimes Committed During the War" 39 LQR (1923) 245 at 248.

2. Report, op.cit., p.116.

3. Report, op.cit., pp.118-119.

4. See reservations of the American and Japanese members of the Commission, op.cit., pp.127-152.

law.[1]

Be this as it may, by virtue of Article 227 of the Treaty of Versailles the Allied and Associated Powers proceeded to "publicly arraign William II of Hohenzollern, formerly German Emperor, for a supreme offence against international morality [2] and the sanctity of treaties". This charge attracted much debate and criticism,[3] largely because of its unhappy wording.

Some of the architects of the Treaty of Versailles may have intended to assert personal criminal liability not only in respect of those who actually violated the laws of war, but also for those who waged war. When introducing the Treaty of Versailles to the House of Commons, Prime Minister Lloyd George spoke of the War:

> "There were three alternative methods of dealing with Germany bearing in mind her crime. What was that crime? Germany not merely provoked, but she planned the most devastating war the earth has ever seen. I think it is essential, if wars of this kind are to be prevented in future, that those who are personally responsible for them, and have taken part in plotting and planning them, should be held personally responsible".[4]

It is reported that Prime Minister Lloyd George "wanted to establish a new precedent in international law. He wanted to establish the principle that national leaders might be held criminally responsible for their actions, especially for waging a war of aggression" [5]. However, the wording in Article 227 of the Treaty of Versailles implies otherwise, namely the criminalisation of international

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1. See Report, op.cit., p.120.

2. Emphasis added.

3. See Brownlie, Use of Force, pp. 53-54.

4. See, Temperley, A History of the Peace Conference, 1920, v.III, p.83.

5. See Willis, Prologue To Nuremberg, 1982, p.73 and p.80.

morality.[1]

The American members of the 1919 Commission on the Authors of War stressed in their reservations to the Report that moral offences, unlike legal offences, however "iniquitous and infamous" they may be, "were beyond the reach of judicial procedure and subject only to moral sanctions".[2] Germany did not consider "the criminal prosecution (of the former Emperor) to be founded upon any legal basis. No law of any of the interested Powers threatens with punishment the violation of international law of morality or the breach of treaties".[3] Brownlie[4] also tells us that "in so far as it (the Treaty of Versailles) attempted to introduce morality into a new sphere it was courageous but not in harmony with the spirit of the time". At any rate, the former German Emperor escaped to the Netherlands where he sought and received refuge from the Dutch authorities. The Allied governments requested his extradition but this was refused on the grounds that the Kaiser's acts were political and thus did not qualify for extradition.[5]

The Treaty of Versailles (Articles 228-229) established military tribunals empowered to try and to

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1. See Scott, writing in What Really Happened at Paris, House, E.M., and Seymour, C., (eds.), 1921, p.237.

2. Report, op.cit., p.128.

3. See Temperley, op.cit., v.II, p.304. But see also Allies' rejoinder, ibid., p.307 :

> "The public arraignment against the German Emperor under article 227 has not a juridical character as regards its substance but only in its form. The ex-Emperor is arraigned as a matter of high international policy, as the minimum of what is demanded for a supreme offence against international morality, the sanctity of treaties, and the essential rules of justice".

See also Garner, 14 AJIL (1920) 91.

4. Use of Force, p.53.

5. See Brownlie, Use of Force, p.54 ns. 2 & 3.

sentence war criminals. The trials were meant to be conducted by Allied tribunals but it was agreed to have the accused tried by German courts[1]. It is reported that out of forty-five cases listed for trial only twelve took place, six of which resulted in acquittals whereas the other six convicted offenders "found it curiously easy to escape".[2]

The two leading First World War trials held at Leipsig are that of the Dover Castle and of the Llandovery Castle.[3] As with other 1918-1919 trials, both cases are concerned with the prosecution of German officers for war crimes and not for waging aggressive war. Accordingly, they are discussed under the relevant section on war crimes. However, their relevance to the criminality of aggresive war is outlined below.

In practice, First World War trials were limited in their impact. In theory, however, they were significant. There was a clear understanding that violations of the laws and customs of war were criminal at international law engendering criminal responsibility for the individual perpetrators. This doctrine of responsibility included the act of waging war. More significantly the trial and prosecution for war crimes was initiated at the international level. Thus, we see that some of the principles of law applicable to the crimes discussed in Chapter 4 begin to extend to the sphere of armed conflict. The principle of individual responsibility for criminal actions in international law is constant and the exercise of criminal jurisdiction by States begins to modify whereby it is accepted that the trial of offenders takes place

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1. See Protocols and Correspondence of the Supreme Council and Conference of Ambassadors and Germany at Versailles, 1919, paras 20 and 40. Hereafter referred to as Protocols and Correspondence.

2. See Waldock, 106 Hague Receuil (1962) 215.

3. Decided on 4th June 1922 and 16th July 1921 respectively. 2 Ann.Dig. (1923-24) at 429 and 436 respectively.

before domestic courts as well as international tribunals. A further interesting factor highlighted by the Treaty of Versailles is that persons charged with crimes in international law will be prosecuted irrespective of the capacity they occupy at the time of committing the offence.

Thus, it can be seen that up until the end of the First World War the question of the criminality of aggressive war was introduced almost by "slate of hand", not on the basis of a firm text (the Treaty of Versailles - not really declaring aggressive war a criminal offence) but on practice built on that text.

The Inter-War period is pregnant with treaties, declarations and resolutions indicating that resort to war (and later, the unlawful use of force by States) was to be deemed a criminal offence. The 1923 Draft Treaty of Mutual Assistance[1] declared aggressive war an international crime.[2] Lord Cecil[3] speaking at the British (later Royal) Institute of International Affairs on the scope and meaning of the treaty explained that such a description of aggressive war had been the result of demands made during the negotiating stages of the draft by "a very large and a very honest body of opinion in America requesting the condemnation of war". A reasonable number of States[4] including Germany, Italy and Japan[5] endorsed the view that war was not only illegal but

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1. See generally: Brownlie, Use of Force, pp.68-69 and Rifaat, op. cit., p.50.

2. Article 1. Text at Ferencz, Aggression, v.I, p.77.

3. Jnl. BIIA (1924) 51-52.

4. See replies of governments on the Draft Treaty of Mutual Assistance, at Ferencz, Aggression, v.I: Finland, p.84; Belgium, p.90; Latvia, p.94; Bulgaria, p.95; China and Portugal, p.105; Spain, p.106; and France p.114. See also Ago, ILC Yrbk., 1976, v.II pt.I, p.31 ns.142 & 143.

5. For replies of these States, see Ferencz, ibid., at pp.102, 117, and 123 respectively.

criminal [1]. The 1924 Geneva Protocol for the Pacific Settlement of International Disputes[2] reiterated the declaration made by the 1923 Draft Treaty of Mutual Assistance.

These two instruments are an integral part of a process by which the Nuremberg Tribunal found aggressive war to be a crime in international law. However, they were never ratified, thus allowing jurists to question the findings of the Nuremberg Tribunal. Some[3] have said that "no customary rule can be deduced from resolutions and unratified treaties".

A number of significant resolutions were adopted by the League of Nations[4] and by other regional bodies[5] denouncing aggressive war as an international crime. In 1928 the General Treaty for the Renunciation of War as an Instrument of National Policy[6] was concluded. Though concise in its

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1. See Draft Treaty of Disarmament and Security proposed by an American Group reiterating the criminality of aggressive war: text at Ferencz, Aggression, v.I, p.124. Cf. Wheberg, op.cit., pp.17-25. Also see LN Res. 24th Sept., 1927 adopted by roll call expressing the conviction of the Assembly that aggressive war can never serve as a means of settling disputes and is in consequence an international crime.

2. 1008 LNOJ (1925) 1521, LN Doc.C.606.M.211., 1924.IX. Text also reprinted in Ferencz, Aggression, v.I, p.132 and in 19 AJIL (1925) 9. See Brownlie, Use of Force, pp.69-70 and Rifaat, op. cit., pp.54-56.

3. Pompe, op. cit., p.246 n.2.

4. See Brownlie, Use of Force, pp.71-73.

5. See Resolution of the VI International Conference of American States, Final Act, Havana. 1928. Text at 22 AJIL (1928) 356-7 or at 34 AJIL (Supp.) p.200.

6. 94 LNTS 57. The treaty came to be known as the Pact of Paris or the Kellog-Briand Pact named after the American and French statesmen who sponsored it. See Brownlie, Use of Force, pp.74-92 for a full discussion of the Pact of Paris. Also see Wright, 23 AJIL (1929) 96, 27 ibid., (1933) 39; Borchard, 23 AJIL 116; Gonsiorowski, 30 Am.Pol.Sc.Rev. (1936) 653; Rifaat, op. cit., pp.64-79 and Wallace, 3 Ency. PIL, p.236.

provisions[1] and originally signed only by a relatively small number of States[2], it had one principal purpose: to renounce war and its use as a means by which States executed their international policies. Jurists have described its legal value as epoch-making: "for the first time in the history of mankind, almost the entire civilised world has condemned any war waged by a State in order to promote its selfish interests."[3] Its contribution, on the one hand, to the law of war and general international law, and to the conduct of international relations on the other, continues to be the subject of approbative comment.[4]

It has been said that the Pact of Paris only contributed to the formation of a customary norm establishing the illegality and not the criminality of war. The absence of terms such as "crime", "international crime" and "offence" or "criminal offence", and of provision for the prosecution of individuals responsible for waging a war before international or national tribunals[5] from the treaty text, are partly the reason for this assessment. There is, however, evidence, even in diplomatic correspondence, suggesting that its sponsors considered war to be a criminal offence as much as an illegal concept.

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1. It consists of a preamble, two operative provisions and a ratification clause.

2. Initially they totalled 15 including Germany, Italy and Japan. For the Japanese interpretation of the Pact see: Marshall-Brown 27 AJIL (1933) 100. 63 States subsequently adhered to it. See Bassiouni, Digest, v.I, p.50. Cf. Brownlie, Use of Force, p.75 n.2.

3. Gonsiorowski, op. cit., p.680. Also see Waldock, 81 Hague Receuil (1952) 451 at 471-472 and the ILA Report of the Committee on Conciliation Between Nations, ILA (1934), p.4.

4. Wallace, op. cit., pp.238-239 and Brownlie, Use of Force, p.91.

5. See Glueck, 59 HLR (1946) 396 at pp.403 - 406, and Kelsen, 1 ILQ (1947) 156.

In a note[1] addressed to the United States Secretary of State, the French Ambassador in Washington expressed the views of his government when he said that France "has always under all circumstances, very clearly and without mental reservation declared its readiness to join in any declaration tending to denounce war as a crime..." In his reply to the French Ambassador, the Secretary of State stressed the significance of the resolution adopted at the Sixth International Conference of American States which condemned and described war as an international crime against the human species. Further, the ILA in one of the reports at its Thirty-Eight Conference, described the State violating provisions of the Pact of Paris as "an offender against the law of nations - a criminal against humanity".[2] Professor (later Sir) Hersch Lauterpacht[3] spoke of extradition in respect of the crime of initiating the war in violation of the General Treaty for the Renunciation of War and Verzijl[4] stated that "without losing its character of an international delinquency in the traditional sense it assumed the additional and much graver nature of an international crime, exposing the State concerned to counter-measures by the community which bore in embryo a distinctly penal character".

In 1933 a number of Latin American countries concluded a treaty which is considered as the counterpart to the Pact of Paris. The 1933 Anti-War Treaty of Non-Aggression and Conciliation[5] was initiated by the Argentine Minister for

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1. See Shotwell, "The Pact of Paris with Historical Commentary", International Conciliation, 1928, p.447.

2. ILA (1934), p.23. Emphasis added.

3. 21 BYIL (1944) 91.

4. International Law in Historical Perspective, 1968, v.I, p.224.

5. Signed at Rio de Janiero, 10th October, 1933. Text at 163 LNTS 393.

Foreign Affairs, Mr Saavedra Lamas.[1] Again the State Parties undertook to resolve their disputes by peaceful means, while wars of aggression were condemned.

If the Hague Peace Conferences and the Pact of Paris were epoch-making at the turn of the century, the establishment of the Nuremberg and Tokyo Tribunals in 1945-1946 are epoch-markers. The Charters of these tribunals, their judgments and the several decisions delivered under Allied Control Council Law No.10, 1945,[2] are signposts for the developing corpus of criminal law rules in international law.[3]

Article 6 of the Nuremberg Charter establishes jurisdiction of the Nuremberg Tribunal ratione materiae, i.e. it specifies the "crimes coming within the jurisdiction of the Tribunal". Sub-paragraph (a) of the same article defines "crimes against peace" as :

> "namely, the planning, preparation, initiation or waging of a (declared or undeclared)[4] war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing".

Article 6 also provides that there shall be individual criminal responsibility for whomsoever commits the crimes therein defined.

The majority of publicists have endorsed the criminality of aggressive war in their writings.[5] However,

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1. The treaty later came to be known as the Saavedra - Lamas Pact.

2. Hereafter referred to as CCL No.10.

3. See Pompe, op. cit., p.297.

4. The words in parenthesis are additional in Article 5(a) of the Tokyo Charter, which is the corresponding provision to Article 6(a) of the Nuremberg Charter.

5. See, among others, Manner, 37 AJIL (1943) 407; Pompe, op.cit., at pp. 259, 271, 285, 304, and 318; Keenan and Brown, op.cit., at pp.7, 75-82 and 83-85; Gros, 41 Am.Pol.Sc.Rev. (1947) 205; Glueck, op. cit., p.396 et seq.; Appleman, op.cit., p.22 & p.264; Yokota writing

Article 6 (a) has generated one principal doctrinal argument: were the practices designated as "crimes against peace" actually proscribed as criminal offences at the time of their commission or was Article 6(a) in violation of the general principle of criminal law nullum crimen sine lege? The Nuremberg Tribunal was satisfied that aggressive war was a criminal offence in international law in 1945 for which there was individual responsibility. Its judgment was founded on evidence consisting, inter alia, of the instruments adopted in the inter-war period.[1] Jurists, however, are divided on this question. Some feel that its inclusion in the Nuremberg (and Tokyo) Charter represented "an exercise of political power by the victorious nations under the cloak of legal proceedings".[2] Others [3] felt that by 1939 aggressive war was only morally announced as a crime, it lacked legal basis in theory and practice. Other views are less categoric but equally effective in their reservations.[4] A number of writers preferred to concentrate

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in Festschrift fur J. Spiropoulos, 1957, p.453; Roling at: 7 Ind. LR (1953) 11-12; writing in, International Law in the Netherlands, v.II, p.188, 1972; 3 Ency. PIL p. 136 and 4 ibid., pp.244-245 and, in The Current Legal Regulation of the Use of Force, Cassese, A., (ed.), 1986, p.385; Starace 153 Hague Receuil (1976) 283 and De Stoop writing in International Law in Australia, 1984, p.159.

1. See Nuremberg Judgment, Cmd. 6964, pp.38-41.

2. See Pompe, op.cit., p.237 and especially at n.2 for his references to other writings rejecting the justiciability of aggressive war before the Nuremberg Tribunal. Also see Schick, 41 AJIL (1947) 770 and Borchard, op.cit., p.107.

3. See Rifaat, op.cit., p.132 n.23 and at pp.164-180. Cf. Brownlie, Use of Force, p.110 and pp.156-157 who opines that by 1939 a customary rule had developed establishing use of force to be illegal but not a criminal offence.

4. Kelsen, 1 ILQ 165, submits that the Nuremberg Charter constitutes retrospective legislation only in so far as it attached individual criminal responsibility where only collective responsibility existed. See also

on the disadvantaged position suffered by counsels for defence at Nuremberg[1] and Tokyo.[2] Dissent was also expressed in judicial opinion. At Tokyo, Judges Pal and Roling challenged the illegality of aggressive war.

The Sub-Committee[3] of the Legal Committee of the United Nations War Crimes Commission[4] was instructed in 1944 to reconsider the question of the criminality of aggressive war because when that subject had been discussed by its Legal Committee it was only found to be criminal in the wider notion of "war crimes". Sir Arnold McNair,[5] the United Kingdom representative, spoke for the majority of the Sub-Committee when he said that as at 1945 acts committed in preparation of launching and conducting a war of aggression were not criminal offences, i.e. as a war crime, in international law [because of the lack of judicial or arbitral practice recognising the penal liability of States].[6] The Czechoslovak representative on the Sub-Committee, Dr. Ecer, disagreed with McNair's conclusions on the legal status of aggressive war as an

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his views at 31 Cal.LR (1943) 530.

1. See Jescheck, 4 Ency. PIL pp.53-54; Brownlie, Use of Force, p.169; Kraus, 13 De Paul LR (1963-64) 248; and Rie, 48 AJIL (1954) 470.

2. Appleman, op.cit., p.237.

3. This was composed of representatives from the United Kingdom, Czechoslavakia, Netherlands and the United States. See History, UNWCC, p.180 et seq.

4. Hereafter referred to as UNWCC.

5. See Majority Report of the Sub-Committee Appointed to Consider Whether the Preparation and Launching of the Present War should be considered "War Crimes". Text in Ferencz, International Criminal Court, 1980, v.I, p.425. Hereafter cited as Ferencz, ICCt.

6. See also Brownlie, Use of Force, p.69, who indicates, inter alia, that the term 'international crime' as used for instance in the Draft Treaty of Mutual Assistance, 1923, "could at the time only comprehend the delictual rather than the criminal liability of States".

unlawful but not as a criminal offence in international law. He submitted a dissenting opinion.[1] Dr. Ecer referred to excerpts from relevant writings of publicists including the classical works of De Vattel; international instruments relevant ratione temporis such as the 1924 Geneva Protocol; the Pact of Paris including a discussion of the ILA on same Pact and diplomatic statements issued by Allied Leaders in 1942, as authoritative sources of evidence endorsing the principle that initiating and conducting an aggressive war is a criminal offence in international law. For instance, of the 1924 Geneval Protocol, Dr. Ecer wrote:

> "The importance of the Geneva Protocol lies in the fact that it expressed clearly, without reservations and without clauses confusing the sense of the words, the legal conviction of the League of Nations - which was the legal conviction of the whole civilised humanity - that a war of aggression is an international crime".[2]

Despite his endorsement of the criminality of aggressive war, Dr Ecer, did not lose sight of the following irredeemable factors: (a) the 1924 Geneva Protocol had no binding effect because it was never ratified, (b) the Pact of Paris did not declare the concept of war a criminal offence as such, and (c) the Covenant of the League of Nations indeed failed to outlaw war much less declare it a criminal offence.

Nonetheless, Dr. Ecer concluded, inter alia, that: (i) the preparation and launching of the 1939-1945 war constitute crimes against the criminal laws of the invaded countries and crimes against the whole of mankind according to the general principles of international law and (ii) perpetrators of these crimes including Heads of State or Government may be tried by tribunals of the States where

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1. See Minority Report on the question whether the preparation and launching of the present war should be considered as crimes being within the scope of the United Nations War Crimes Commission. Reproduced in Ferencz, ICCt, v.I, p.414.

2. Ferencz, ICCt, v.I, p.417. Emphasis has not been added by the present writer.

the crimes were committed, alternatively by an inter-allied tribunal distributing international justice over "hostis humani generis".[1] Dr. Ecer's support for the thesis of the criminality of war as and up to 1945 is substantiated by properly researched documents and evidence. However, his conclusions cannot be accepted as final of the status of aggressive war as a crime in international law.[2] But, in so far as they refer to the doctrine of individual responsibility and to the universal justiciability of crimes jure gentium, they are certainly indicative of juridical indicia which characterise the concept of the criminal offence in international law.

Relevant minutes of sessions of the International Conference on Military Trials in London in 1945 reveal that there was a general understanding among the drafters of the Nuremberg Charter that aggressive war was a crime in international law prior to the Second World War.[3] However, due to some reservations on the part of the French delegation[4] Article 6 of the Nuremberg Charter introduces three categories of offences "as crimes....for which there shall be individual responsibility" which is a diluted version of the original (and more categoric) wording: "the following acts shall be considered criminal violations of international law".[5]

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1. Ferencz, ICCt, v.I, p.424.

2. Members of the UNWCC subsequently received instructions from their governments to endorse the criminality of aggressive war. The UNWCC was authorised to place on its list of "war criminals" those responsible for launching the war. See History UNWCC, pp.184-185.

3. See Jackson Report, p.299.

4. This was composed of Mr Justice Falco and Professor A. Gros who rejected the notion of aggressive war as a criminal offence. Ibid., p.295 and p.335.

5. See minutes of session, 19th July, 1945 and minutes of session, 23rd July, 1945, Jackson Report, pp.295-297 and p.328 respectively.

The discussions at the London Conference focused on a number of points which too are telling of the features of the crime of aggressive war and, indirectly, perhaps also of the concept of criminal offence in international law. First, aggressive war was seen to be an unlawful practice as piracy jure gentium and brigandage,[1] i.e. it deserved proscription as a criminal offence irrespective of the locus delicti.[2] Second, a draft list of practices (later to be included in the Nuremberg Charter) submitted by the United States, consisted of acts which were considered criminal offences irrespective of whether they violated the lex loci commissi, thus underlining their universally illegal character. A third factor emerges from a French amendment to a United States draft proposal stating that the projected tribunal shall have jurisdiction to try any person regardless of his office or rank.[3]

The transformation of the concept of war from an acceptable method of settling international disputes to a prohibited practice, indeed a crime, reveals the following elements indicative of the nature of the concept of criminal offence in international law. The principle of individual criminal responsibility in international law extends to persons who occupy public office at the time of the commission of the offence. As a result of events in World War I and especially in World War II, individual responsibility is incurred not only by high ranking officers and members of government (which is an innovative rule in international law by any standard) but includes Heads of State and of Government, thus delivering a severe blow to the doctrine of "Act of State" in international law

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1. On the relationship between piracy and brigandage, see Cowles, 33 Cal. LR (1945) 177.

2. See Jackson Report, p.48 para 5 et seq. Cf.Shawcross, Speeches of the Chief Prosecutors at the Close of the Case Against the Individual Defendants, (hereafter referred to as Closing Speeches), 1946, pp.57-58.

3. See Jackson Report, p.293.

and its implications of immunity from criminal prosecution for the holders of public office. Accordingly, criminal responsibility for individuals in international law has changed radically since earlier times where its application was limited to pirates as common enemies of mankind. Further, the establishment of international tribunals by the Allies in 1945 (an unsuccessful exercise at the end of the 1914-1918 War) to try persons charged, inter alia, with preparing, launching and carrying out a war of aggression, indicates the passage of yet another criminal practice in international law so deserving of universal proscription that its justiciability exceeds even the application of the universal principle of criminal jurisdiction and is elevated to trial by international judicial fora.

B. War Crimes

The concept of war crimes reflects lato sensu a number of crimes traditionally proscribed under national criminal codes. It is reported by the drafters of the Nuremberg Charter that the practices which constitute war crimes have been considered criminal offences "since the time of Cain".[1] However, it is not before 1945 that the first authoritative definition (Article 6.b of the Nuremberg Charter) is found of war crimes in international law.

A discussion on the definition of war crimes is beyond the scope of this work. But, the sub-headings of this section on war crimes are examined and considered, as aspects most relevant to the task of determining the juridical features of the concept of criminal offence in international law.

I. Jurisdiction and Individual Criminal Responsibility

Relevant source material is considered under this sub-heading in order to trace the development of the law on individual responsibility and on the bases of jurisdiction

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1. See Jackson Report, p.50.

as applied in war crimes trials. It will be considered in stages covering the events generated by three periods in time: 1914 - 1919, 1939 - 1945 and current practice.

(a) The First World War

Enemy nationals are subject to the jurisdiction of the State in whose hands they fall. This is the principle on which jurisdiction was exercised in respect of early war crimes prosecutions. It is enunciated in the classical work of Sir Thomas Holland on the laws of war.[1] Article 59 of Instructions for the Government of Armies of the United States in the Field, issued in 1863 provides that "a prisoner of war remains answerable for his crimes against the captor's army or people, committed before he was captured, and for which he has not been punished by his own authorities."[2] This principle came to be regarded as the cardinal rule in instruments relevant to war crimes trials following cessation of hostilities in 1918. But, even at this early stage of the development of the concept of violations of the laws and customs of war as war crimes in international law, there is evidence that the bases of jurisdiction known as the principles of passive personality, protectivity and universality were promoted as acceptable grounds on which proceedings against war criminals may be instituted. Professor Bellot[3] cited the penal codes of Mexico, Russia and Greece as evidence of the applicability of the passive personality principle of criminal jurisdiction. Professor Merignhac[4] cites a law of 23rd July, 1913 amending Articles 249 and 266 of the French Code of Military Justice providing that all persons

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1. The Laws of War on Land (Written and Unwritten), 1908, pp.59-60.

2. General Order No 100. See Manner, 37 AJIL (1943) 407 at 420.

3. 2 Grotius Trans. (1917) 31 at 44-45.

4. 24 RGDIP (1917) 1 at pp.40-45.

(nationals and foreigners) are liable to prosecution under French law for acts in breach of the 1906 Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field.[1] Merignhac also refers to clause 7 of the French Code d'Instruction Criminelle as providing French courts with jurisdiction over war criminals regardless of their nationality for breaches committed in foreign territory on the basis of the protective principle. "No quarter" policies, for instance, were considered to be acts against the security of the State.

(a.i) The 1919 Paris Peace Conference, the Treaty of Versailles and the 1920 Peace Treaties: Individual Responsibility

The 1919 Commission on the Authors of War, reporting on the responsibility of persons guilty of violations of the laws and customs of war, held that all persons regardless of rank or authority are personally answerable for such violations. This broad sweeping statement was also deemed to be applicable to Heads of State. It was held that to allow the classical principles of international law concerning the immunity of Heads of State to apply in the tragic circumstances of the First World War would be tantamount to a great injustice. In the words of the Commission:

> "It would involve laying down the principle that the greatest outrages against the laws and customs of war and the laws of humanity, if proved against him [William II of Hohenzollern formerly German Emperor] could in no circumstances be punished. Such a conclusion would shock the conscience of civilized mankind."[2]

The American members of the Commission disagreed. But, their interpretation of the principle of sovereign immunity and its application to cases involving crimes committed by Heads of State are unconvincing and the reasons submitted in dissent are superficial. They held that a Head of State

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1. 1 AJIL (1907) 201.

2. Report, op.cit., pp.116-117.

is only politically not legally answerable; that he is responsible only to his country - to hold otherwise would mean subjecting him and his country to foreign jurisdictions to which he owes no allegiance; that he can only be answerable to the law of his country and consequently answerable before a tribunal of his country not before foreign tribunals; that he is not subject to punishment affixed after the commission of the alleged crime - nulla poena sine lege; and finally, that these principles apply to persons occupying the office of Head of State/Government and not to persons who have been deposed from such office. The stongest argument submitted by the Americans against the Commission's recommendation to hold Heads of States/Government personally responsible was that the charge of so-called "violations of the laws of humanity" may have been in breach of the nullum crimen sine lege principle.[1]

None of the penal clauses found in the Treaty of Versailles and in the 1920 Peace Treaties contain any reference to or include any wording concerning individual criminal responsibility for violations of the laws and customs of war or of humanity. The principle of personal responsibility for such breaches is implied in common wording whereby the government of the vanquished nation recognises the right of the Victors to bring criminal proceedings against responsible persons. The following clause appears as standard:

> "The (national) Government (of the vanquished State) recognises the right of the Allied and Associated Powers to bring before military tribunals persons accused of having committed acts in violation of the laws and customs of war. Such persons shall, if found guilty, be sentenced to punishments laid down by law. This provision will apply notwithstanding any proceedings or prosecution before a tribunal in Germany or in the territory of her allies".[2]

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1. Report, op.cit., pp.135-136.

2. Article 228, Treaty of Versailles, 13 AJIL(Supp.)

(a.ii.) Jurisdiction Ratione Personae

The 1919 Commission on the Authors of War adopted the rule that Allied States are entitled under international law to try captured enemy nationals for violations of the laws and customs of war and of the laws of humanity before national military or civil tribunals, purposely constituted, for the trial of such cases. This rule came to be accepted as standard-setting. It was followed later in 1944-1949 war crimes trials. The Commission, however, listed four exceptions to the above general rule which were regarded as being candidate for trial by an international criminal tribunal.[1] They are:

(i) outrages and violations of the laws and customs of war committed against victims of different nationalities;

(ii) enemy nationals of authority giving or executing orders permitting violations of the laws and customs of war to be committed in more than one zone of operations;

(iii) all ranking personnel, civil or military, including Heads of State who ordered or, with authority to intervene, failed to prevent the commission of violations of the laws and customs of war;

and

(iv) all other cases which, having regard to the character of the crime committed or to the law of any belligerent country, it is best to have tried before an international criminal tribunal.

The Commission also outlined a draft skeleton of relevant clauses regulating the establishment of the

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(1919) p.250; Article 173, Treaty of St Germain-en-Laye with Austria, September 10, 1919, 14 AJIL (1920) p.55; Article 118, Treaty of Neuilly-Sur-Seine with Bulgaria, November 27, 1919, 14 AJIL (1920) 185 at p.221; Article 157, Treaty of Trianon with Hungary, June 4, 1920, 15 AJIL (1921) 1 at p.48; and Article 226, Treaty of Sevres with Turkey, August 10, 1920, 15 AJIL (1921) 179 at 234.

1. Report, op.cit., pp.121-122.

proposed international criminal tribunal. The clauses relevant to the sacrosant principles nullum crimen sine lege and nullum poena sine lege were designed as follows:

(a) Applicable law: "principles of the law of nations, as they result from the usages established among civilised peoples, from the laws of humanity, and the dictates of the public conscience." This wording is taken from preambular paragraph 8 common to Hague Conventions (II) 1899 and (IV) 1907.

and

(b) Punishment: such penalties as are imposed by the law of the country whose representative sits on the international criminal tribunal in respect of same or similar offences.

The Commission proposed that the jurisdiction of the international criminal tribunal, should be supported by obliging Allied and Associated governments to adopt legislation to ensure the enforcement of the international tribunal's decisions.

The dissenting report[1] submitted by the American representatives on the Commission endorses the basic rule that Allied governments are entitled under international law to try enemy nationals for war crimes. It also endorsed the proposition that an international judicial forum takes cogniscance of cases falling, under exceptions (i) and (ii) above. The American representatives' view differed, in this respect, only in so far as they preferred to see a mixed military tribunal/commission established rather than an international criminal tribunal.

The American delegation, however, had serious reservations with regard to the Commission's proposal to bring charges for violations of the laws of humanity because it felt they would be in breach of the principle nullum crimen sine lege. Indeed the wording cited from common preambular paragraph 8 of Hague Conventions (II) 1899 and (IV) 1907 on the law to be applied by the proposed international criminal tribunal allows such charges of

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1. Op.cit., Annex II, p.127.

retrospectivity to be made. That preambular language was drafted to serve as an all embracing provision for unlawful practices that were not provided for in the so-called Reglements annexed to Hague Convention (IV) of 1907. Its significance is such that one finds it also in Article 1(2) of Additional Protocol I of 1977 to the 1949 Geneva Conventions. It is ironic that the representatives of a State so instrumental in the drafting of the provisions of the Hague Conventions on the laws of war, were to cite its language as being in breach of the nullum crimen sine lege rule. Notwithstanding, it is quite proper to question, especially in 1918-1919 when the concept of war crimes was in its embryonic stages, as to what is the definition of the laws of humanity. The American representatives cited thinkers of philosophy pointing out the indeterminable nature of such concepts, thus emphasising their inadequacy to meet the degree of specificity required by criminal law for the definition of criminal offences.

The American delegation also objected to (i) the fact that there was no precedent for the establishment of an international criminal tribunal; and, to a lesser degree, (ii) for having persons, especially Heads of State and high ranking authorities, tried for omissions, i.e. failure to prevent the commission of violations of the laws and customs of war.

However, there was consensus in the 1919 Commission on the Authors of War and, in particular, within the American delegation on the following principles of law:

(a) That Allied and Associated governments are entitled under international law to try enemy nationals for violations of the laws and customs of war.

(b) That these States may establish military tribunals for this purpose and may exercise jurisdiction where the crimes were committed in their territory or against their nationals and property, i.e. application of the territorial and passive personality principles of criminal jurisdiction.

and

(c) That an international criminal tribunal be established

for crimes committed in several areas by and against nationals of several States.

The Treaty of Versailles reflected a compromise settlement between American and Commission proposals. Thus Article 227 of the Treaty of Versailles provided for the establishment of a "special tribunal" with representatives of the United States, Great Britain, France, Italy and Japan sitting on it to try the former German Emperor for a "supreme offence against international morality and the sanctity of treaties"; wording which again invited charges of retrospective legislation. The crimes identified by the Commission as having been committed in circumstances warranting trial by an international military tribunal were excluded. The passive personality principle proposed by the American delegation in a separate memorandum[1] to the Commission features in all of the 1919-1920 instruments by virtue of a standard clause which reads:

> "Persons guilty of criminal acts against the nationals of one of the Allied and Associated Powers will be brought before the military tribunals of that Power."

Further, the idea of establishing an international criminal tribunal for crimes committed by persons of different nationalities against persons of several nationalities in more than one area was abandoned to be replaced by separate proceedures sponsored by the American delegation namely, to have them brought before a mixed military tribunal. The following clause is also standard in the penal provisions of the Treaty of Versailles and the Peace Treaties:

> "Persons guilty of criminal acts against the nationals of more than one of the Allied and Associated Powers will be brought before military tribunals composed of members of the military

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1. Report, op.cit., p.141.

tribunals of the Powers concerned."

However, the de facto situation which resulted in 1919-1920 was totally divers to that envisaged by the Allies and the Treaty of Versailles. Arguing that execution of the penal clauses in the peace treaty would, politically and economically, have catastrophic effects in Germany, the Germans succeeded in persuading the Allied Powers to have alleged war criminals charged before German national courts. They offered: (a) enactment of specific war crimes legislation; (b) repeal of all national laws that could prevent enforcement of war crimes legislation; (c) trials to be held before the highest court of the land in Leipsig; (d) direct Allied participation in the proceedings; (e) Allied collaboration in the collection of evidence; and (f) guarantees of fair and impartial proceedings. A law entitled "Law as to Prosecution for War Crimes and War Offences" was passed on the 18th December, 1919.[1] It provided the German National Tribunal with jurisdiction to try nationals for having committed "war crimes"[2] against foreign nationals at home and on foreign territory. The jurisdictional base of this law, though extraterritorial, did not extend beyond a wider reach of the application of the traditional principles of criminal jurisdiction namely, territoriality and active personality.

The Allied Powers, partly satisfied with German guarantees, accepted their plan of action but reserved "the right to use, in the degree and in the form they consider suitable, the rights which the treaty (of Versailles)

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1. See TS File 26/2, 1919-1920. See also Additional Law to the law of 18th December, 1919 in Enclosure No.61, Protocols and Correspondence.

2. The term "war crimes" as opposed to the term "violations of the laws and customs of war" is used and thus it is conspicuously different to the wording in the Treaty of Versailles and the Peace Treaties of 1920. The same phrase "war crimes" or "war offences" also appears in diplomatic correspondence between German authorities and the Allied Powers. See Protocols and Correspondence, Enclosure No.20, p.19.

confers on them in this event".[1] The Allies followed, but did not participate in, the trials held at Leipsig.[2]

The merits and de-merits of the Leipsig trials are several and varied but for the purposes of the present study the practice at that time clearly reveals opinions favouring the application of the territorial, active and passive personality principles of criminal jurisdiction (in this order) for practices considered to be more than merely unlawful in international law but criminal offences.[3] There is no concrete evidence showing the universality principle of jurisdiction being applied at this early stage in the development of war crimes, although the movement in favour of establishing an international criminal tribunal for war crimes having no particular location committed against persons of varied nationalities represents a scenario similar to that traditionally associated with piracy committed on the high seas.

(b) The Second World War

(b.i.) Diplomatic Statements

As early as 1940-1941 the Allies and governments of occupied countries issued declarations that the punishment of persons guilty of war crimes would be foremost amongst the war aims. The most significant document is the text of a Declaration[4] adopted in January 1942 by nine governments

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1. Protocols and Correspondence, Enclosure No 40, p.32.

2. Reports by representatives of HM Government at Leipsig on the German War Crimes trials may be found at TS Files 15, 16 and 17, 1921.

3. Doctrinal authority on this point is offered by Professor Garner in his leading work on the events of this period - International Law and the World War, 1920, v.II, Ch.XXXVIII, Section 584.

4. Hereafter referred to as the Inter-Allied Declaration.

paragraph five recalls that international law and in particular Hague Convention (IV) 1907 prohibit the commission of violent acts by belligerent forces in occupied territories. Operative paragraphs three and four provide that individual responsibility attaches to all persons irrespective of whether they merely ordered or actively participated in the commission of war crimes. All of the heads of governments in exile or their representatives made statements at the London Conference adopting the Inter-Allied Declaration. Those of Prime Minister Sikorski (Poland), of Prime Minister Sramek (Czechoslovakia), Foreign Minister Bech (Luxembourg) and Minister Wold (Norway)[1] identified, in particular, the universally unlawful character of war crimes and the common policy of nations to punish the perpetrators regardless of their nationality and of the locus delicti.

In August, September and October of the same year, statements made by Prime Minister Churchill, President Roosevelt and Soviet People's Commissar for Foreign Affairs, Molotov, reiterated the Allies' intention to proceed against war criminals. Prime Minister Churchill made the following declaration in the House of Commons:

> ".....those who are guilty of the Nazi Crimes will have to stand up before tribunals in every land where their atrocities have been committed in order that an indelible warning may be given to future ages and that successive generations of men may say 'So perish all who do the like again'."[2]

The Soviet Foreign Minister referred to the trial of war

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part document entitled Punishment For War Crimes, 1942.

1. Ibid., Part I, pp. 7, 9 and 11 respectively.

2. Punishment For War Crimes, Part II, p.3. See also pp. 9-10 for declarations by President Roosevelt.

criminals by a "special international tribunal".[1]

In November 1943 the Moscow Declaration[2] represents perhaps the most authoritative diplomatic statement of the Allies' intentions and opinions on the legal position concerning war criminals. The Allies declared that war crimes trials will be held in States whose territories were the scenes of horrific crimes.[3] Major war criminals, i.e. those whose crimes had no particular geographical location, would be punished by a joint decision of the Allies. This resulted in the establishment of the Nuremberg and Tokyo International Military Tribunals.

These statements reflect consistency in legal opinion concerning the trial by belligerents of enemy nationals for war crimes on the basis of the territoriality and passive personality principles of jurisdiction. In addition to World War I practice, this source material reveals tacit readiness by Allied Leaders in 1945 to apply also the active and universality principles of jurisdiction in respect of war crimes. War criminals whose crimes

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1. Ibid., p.7.

2. The text is reproduced in, History UNWCC, op.cit., pp.107-108.

3. HMG Inter-Departmental Correspondence reveals that the Foreign Office adopted the view that the Moscow Declaration implies more than the application of the territorial principle of jurisdiction. The following interpretation has been recorded:

> "Although it does not say so in so many words, we have always interpreted the Moscow Declaration on War Crimes as meaning that war criminals will be tried and punished by the United Nation of which the victim is, or was, a national".

This extract is found in correspondence between the Treasury Solicitor's Department and the Judge Advocate General's Office. See letter dated 13th December 1945 in TS File 26/128 sent by the War Crimes Branch at the Treasury Solicitor's Office to Brigadier Shapcott of the Judge Advocate General's Office.

transcended national boundaries were considered liable for trial before purposely established international criminal tribunals.

(b.ii.) Jurisdictional Principles Applied In Immediate Post War National Legislation

The jurisdictional principle common to post war legislation is the passive personality principle, i.e. war crimes were deemed justiciable regardless of the nationality of the accused and of the locus delicti as long as one significant criterion had been met: the victims were either nationals of or (in some cases) foreigners resident in the prosecuting State.

The legislation adopted in Yugoslavia[1], Czeckoslovakia[2] and Poland[3] included provision for the protective principle of jurisdiction. Great emphasis was placed by these (would be totalitarian) States on making certain that persons who had collaborated with the enemy and thus threatened the security and national insterests of the State would be brought to trial. This factor conditioned war crimes legislation to such an extent that provision was made for the application of the active personality principle, thus nationals who may have collaborated with the enemy could be tried for war crimes. In this context, the presence of the protective and of the active principles of jurisdiction seems a natural combination.

Certainly, the territorial principle is applied across the board, even though it was not always specifically identified in the legislation adopted. For instance, the

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1. Law of 25th August, 1945. See WC Law Rep., vol. XV, p.207.

2. Decree No. 16 of 1945 as amended by Law No. 22 of 24th January, 1946. See WC Law Rep., vol. XV, p.205.

3. Decree of 31st August, 1944 Concerning the Punishment of Fascist-Hitlerite Criminals Guilty of Murder and Ill-Treatment of the Civilian Population and of Prisoners of War, and the Punishment of Traitors to the Polish Nation. See WC Law Rep., vol. VII, p.82.

law adopted by China in 1946 did not specify whether it applied only in so far as war crimes committed in its territory or in territory subject to its de facto control.

Finally, the British experience merits separate comment for the following reasons. First, unlike all other samples of national legislation provision for war crimes trials is made by Royal Warrant rather than by Act of Parliament.[1] Second, it contains no provision concerning jurisdiction ratione personae. Third, its legal imperfections have generated effects that currently continue to be felt as shown in recent (1990) endeavours to introduce new war crimes legislation in the United Kingdom. The jurisdictional issues involved in this new initiative are discussed below under the following section on Current Practice.

Any person could be tried for war crimes committed against British and allied nationals in foreign territory under the Royal Warrant. A total of 500 war crimes trials is reported to have taken place under the authority of the Royal Warrant for the period 1945 - 1949.[2] But, far from being taken as approval of the application of the universal principle of jurisdiction by Great Britain, the Royal Warrant was enforced by military courts within spheres/zones subject to British authority. In a sense, this represented a particular mode of giving effect to the territorial principle of jurisdiction.

Evidence of great relevance to legal thought in 1943-1944 on the principles of jurisdiction applicable in war crimes trials is found in HMG Inter-Departmental correspondence. A memorandum was submitted concerning the proposal to draft a War Crimes Bill.[3] The Bill included a

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1. The status of the Royal Warrant is well considered in a recent contribution by Col. Rogers in 39 ICLQ (1990) 780.

2. See Rogers, op.cit., p.795 n.86.

3. See TS 26/64, 1943. The memorandum is not signed. The letter "S" appears at the end. This could well be

preambular paragraph telling of individual criminal responsibility for war crimes under international law:

> "... whareas there is an undoubted right under the law of nations for HM Government and her allies to bring to trial and to punish those responsible for violations of the laws and usages of war."

Provision was also made for the application of the universal and passive personality principles: principles of jurisdiction not traditionally applicable under the common law system. Moreover, legal advice had it that enactment of such legislation was not retrospective but in conformity with international law. During the debate on war crimes, the Lord Chancellor in 1942 made the following statement in the House of Lords:

> "I take it to be perfectly well-established International Law that the laws of war permit a belligerent commander to punish by means of his Military Courts any hostile offender against the law and customs of war who may fall into his hands wherever be the place where the crime was committed.
>
> National Courts, in my view, are equally entitled to exercise whatever criminal jurisdiction would be conceded to them by International Law. The real question, in relation to National Courts, is not so much whether the domestic law of a particular nation has already conferred upon the particular National Courts concerned a particular jurisdiction. It may not have gone to the full length which International Law would recognize and permit. The important question is this: what is the ambit of the jurisdiction which might by International Law be conferred upon them, as for example, in the present case, by Parliament here actually legislating to enlarge, within permissible limits, the jurisdiction of our Courts to deal with crimes committed abroad?"[1]

On the basis of the evidence provided by the experiences respecting war crimes trials in the First World War, the Lord Chancellor's interrogatories would have been answered at the time, in part, by providing for the application of

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Brigadier H. Shapcott who at the time was assigned to the Judge Advocate General's Office.

1. See Punishment for War Crimes, Part II, 1942, p.11.

the passive personality principle of jurisdiction. The application of this principle by belligerents in cases of war crimes is understandable where nationals are prime victims of warfare.

(b.iii.) The 1949 Geneva Conventions and Israel's 1950 Nazis and Nazi Collaborators (Punishment) Law

The provisions concerning repression of "grave breaches" of the 1949 Geneva Conventions mark one of the major post Second World War developments in multilateral treaty practice concerning principles of jurisdiction applicable in respect of war criminals in international law. The following clause is common to the four conventions and is also applicable (by virtue of Article 85.1) to the 1977 Additional Protocols.

> "Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts. It may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a prima facie case."

The option available to High Contracting Parties introduces the essence of the principle aut dedere aut punire, so prominent in subsequent instruments proscribing criminal offences. The obligation is to bring persons to trial for war crimes ("grave breaches") and not to extradite them. This rule, as we shall see in the crimes yet to be discussed in Part III, is inversely stated in international instruments.

The fact that High Contracting Parties are obliged to search for and to institute criminal proceedings against persons regardless of their nationality, and given that it is quite possible for "grave breaches" to have been committed outside the territory of the prosecuting High Contracting Party by non-nationals against non-nationals, the Geneva Conventions allow for the exercise of the

universality principle of jurisdiction in respect of war crimes.

100[1] States have ratified the 1949 Geneva Conventions and several have adopted specific legislation to give effect to obligations arising under the repression of "grave breaches" provisions in the conventions. The status of these conventions is authoritative and law-making in international law. The substance of the common clause cited above has had a pionneering effect in the field of international law where justiciability of internationally proscribed criminal offences is concerned. But, its development and status as a juridical characteristic of the concept of criminal offence in international law depends upon a fuller assessment of its application vis-a-vis other criminal practices. That assessment is determined by the discussion of crimes in the following chapters.

The Nazis and Nazi Collaborators (Punishment) Law adopted by the Israeli Parliament (Knesset) in 1950 is singular in its content ratione materiae and ratione personae. Its evidential value as one of the first peace-time war crimes legislation following the Second World War cannot be overstated. The law defines three types of crimes: (i) "crime against the Jewish people" - this is largely based on the definition of genocide in the Genocide Convention but tailored to apply specifically to persons of the Jewish faith; (ii) crimes against humanity - this largely reproduces the definition found in the Nuremberg Charter but excludes the restrictions ratione materiae found therein; and (iii) war crimes - the definition is again based on that found in the Nuremberg Charter but includes minor amendments which suited the Israeli legislator.

Any person, national or non-national, may be tried under the law for the crimes defined therein as long as

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1. Data as at January, 1990. See Bowman, and Harris, Multilateral Treaties, Index and Current Status, 7th Cumulative Supplement, 1990.

they were committed within an enemy country, i.e. Germany or in any of its Allied States or in any territory, in whole or in part, under the de facto rule of Germany or any of its Allied States. The law is operative ratione temporis as follows: crimes committed in the Nazi regime, i.e. between 30th January, 1933 and 8th May, 1945 and in the Second World War, i.e. between 1st September, 1939 and 14th August, 1945.

The law received full judicial appreciation in the leading case Attorney-General of the Government of Israel v Adolph Eichmann.[1] Aspects of the Judgment relevant to the principles of individual responsibility and jurisdiction in international law are enunciated below.

Counsel for defendant Eichmann submitted that it was contrary to international law for a State to exercise criminal jurisdiction against a person alleged to have committed crimes against non-nationals in foreign territory prior to the very establishment in international law of the State prosecuting the defendant.[2] It is unclear whether objection to extraterritorial application of jurisdiction by Israel was a temporal matter for defence counsel or whether the principle per se was objectionable. The Court dismissed counsel's plea for lack of jurisdiction by declaring that it is bound to give full effect to the 1950 Law as the law of the land in Israel which has precedence over international law even it may be in conflict with it.[3]

The District Court of Jerusalem further held that the crimes defined in the law were crimes under international law in addition to being crimes proscribed under Israel law. "The jurisdiction to try crimes under international law is universal".[4] The Court cited classical doctrine

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1. 36 ILR 1.

2. Ibid., p.23 at para 8.a.

3. Ibid., pp.24-25.

4. Ibid., p.26 para 12.

(Grotius and Vattel), contemporary literature, the crime of piracy jure gentium and international instruments including the Nuremberg and Tokyo Charters, CCL No.10, and the Genocide Convention as evidence that the crimes defined in the law constitute delicti jure gentium.[1]

In addition, to the universality principle, the District Court also held that it could exercise jurisdiction on the basis of passive personality and protective interests. The Court traced the historical development of the State of Israel, recorded the fact that the accused was charged with mass murder simply because the victims were Jews, and on that basis found support for invoking the two principles of jurisdiction.[2] Again, in answer to defence counsel's argument that these principles could not be invoked because the State of Israel had not yet been recognised as a sovereign entity in international law at the time of the commission of the offences, the District Court argued [already in 1961 citing Israeli judicial practice as precedent] that the interests of the State of Israel already existed under Mandatory Palestine "and that 'in spite of the changes in sovreignty there subsists a continuity of law'."[3]

The Supreme Court of Israel upheld the Judgment delivered by the District Court and its dicta are even more lucid affirmations of the relevant principles of international law on individual criminal responsibility and jurisdiction as juridical features of war crimes in international law.

The Supreme Court considered two basic premises (a) the crimes defined in the Nazis and Nazi Collaborators (Punishment) Law are crimes in international law entailing individual responsibility and (b) every State is therefore

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1. Op.cit., p.26 para 13 - p.32 para 16.

2. Ibid., p.49 para 30 - p.55 para 35.

3. Katz-Cohen v Attorney General, cited by the District Court at 36 ILR 55 para 38.

entitled to try and to punish those who commit such crimes.[1]

The Supreme Court endorsed the District Court's dismissal of the plea raised by the defence for lack of jurisdiction. The Supreme Court, relying on the Judgment of the Permanent International Court of Justice in the Lotus Case[2] and on the opinions of publicists of international repute, held that there is insufficient evidence in international law to support the theory advanced by defence counsel. Moreover, the Supreme Court added that even if defence counsel's argument correctly reflected international law, the proceedings against the defendant by Israel constituted violation of rights pertaining to his national State (Germany) and not to the defendant personally. It would be for the national State to seek remedy for breach of international law and not for the individual defendant.[3]

To support its thesis that the crimes defined in the 1950 law are crimes under international law the Court examined the concept of criminal offence in international law. Of the juridical features of this concept it declared:

> "these crimes constitute acts which damage vital international interests; they impair the foundations and security of the international community; they violate the universal moral values and humanitarian principles that lie hidden in the criminal law systems adopted by civilized nations. The underlying principle in international law regarding such crimes is that the individual who has committed any of them and who, when doing so, may be presumed to have fully comprehended the heinous nature of his act, must account for his conduct."[4]

It arrived at these conclusions on the basis of an assessment of piracy jure gentium, the development of the

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1. 36 ILR 287 para 10.

2. PCIJ Rep. Ser.A., No.10, 1927.

3. 36 ILR at p.286 para 9.

4. Op.cit., p.291 para 11.(b).

concept of violations of the laws of war and an early case involving an attack upon the person of an ambassador - all cited as evidence of the presence of the concept of criminal offence in international law.[1]

There are two key elements to be identified in the above passage. The first, is the description of the concept of criminal offence in international law as a universally reprehensible practice contrary to humanitarian and moral standards. This element has already been referred to supra in Part II Chapter 3 in the writings of certain publicists concerned with the definition of the concept of criminal offence in international law. The second key factor is reference to the principle of individual accountability. This principle of international law already emerges from the crimes considered so far as a salient juridical charateristic of the concept of criminal offence in international law.

A third key element, considered separately from the other two factors by the Supreme Court, is the applicability of the principle of universal jurisdiction where international law crimes have been committed. The Court reported four schools of thought expressing separate and differing views on the applicability of the universality principle in respect of crimes in international law.[2] They are, (i) that which believes that the principle applies only where piracy jure gentium has been committed; (ii) that which believes that the universality principle should be applied within the framework of the aut dedere aut punire formula; (iii) that which believes that the principle of universal jurisdiction applies to all crimes under international law; and, (iv) that which believes that "common crimes", in the absence of an effective international extradition system, would be justiciable before national tribunals regardless of the

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1. Ibid., pp.292-294.

2. Op.cit., pp.298-299 para 12(a).

locus delicti and the nationality of the offender and victim.

The agrument that whereas in international law the principle of universal jurisdiction applies in respect of the crime of piracy jure gentium then it certainly applies in respect of the concept of crimes against humanity and the other crimes defined under the 1950 law, was accepted by the Supreme Court as being beyond reproach. Accordingly, the Supreme Court subscribed to the third school of thought listed above.

Defence counsel submitted two grounds on which the accused ought to have been tried in the locus delicti. The first is that there is an international obligation to invoke the aut dedere aut punire rule. In other words Israel ought to have offered Eichmann to be extradited to Germany. This submission was denied because the Federal Republic of Germany had already made it clear that it would not be prepared to try Eichmann. Further, the greater part of the evidence including witnesses and documents were to be found in Israel. That was the forum conveniens. The Court did not pronounce itself on the implied suggestion made by the defence that there is a customary law obligation to invoke the aut dedere aut punire rule. It simply stated that it was not applicable in the circumstances of the case.[1]

Article VI of the Genocide Convention provides that the competent tribunal to hear genocide trials is that of the State in whose territory the crimes were committed. This was the second submission of defence counsel to have Eichmann's trial in Israel declared null on the basis of lack of jurisdiction. The Supreme Court interpreted Article VI of the Genocide Convention as a conventional obligation binding between the States Parties to the Convention without derogating from the customary law rule which permits any State to exercise universal jurisdiction

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[1]. Op.cit., pp.302-303 para 12(d).

in respect of delicti jure gentium including genocide.[1] The implications of this legal reasoning are discussed in Chapter 6 below where "Genocide" is considered.

Accordingly, war crimes committed by Eichmann in foreign territory against aliens including Jews, but non-Israeli nationals at the time of the commission, were deemed justiciable in Israel because:

> "their harmful and murderous effects were so embracing and widespread as to shake the international community to its very foundations. The State of Israel therefore was entitled, pursuant to the principle of universal jurisdiction and in the capacity of a guardian of international law and an agent for its enforcement, to try the appellant."[2]

(c) Current Practice

Most recent State practice in the field of war crimes legislation is provided by initiatives taken in Canada, Australia and the United Kingdom. In each case the legislator's brief was to focus, inter alia, on the following set of circumstances: is legislation required, and if so what form should it take, to bring criminal proceedings against nationals, suspected of having committed war crimes in 1940-1945 but who, at the time of commission, were themselves aliens, in foreign territory against foreign nationals? In other words, was it permissible for States to exercise universal jurisdiction for war crimes committed between 1940-1945? These circumstances are almost wholly responsible for drafting war crimes legislation close to fifty years after the events occurred. The law is intended to serve more retrospective rather than, as with normal criminal legislation, prospective ends.

In 1987 and 1988 Canada[3] and Australia[4] respectively

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1. See op.cit., p.303 para 12(e).

2. 36 ILR p.305 para 12 (f).

3. Criminal Code Amendment Act, 16th September,

enacted war crimes legislation as recommended by reports of government appointed Inquiries.[1] In the United Kingdom no legislation has been enacted, although a War Crimes Inquiry was appointed in 1988 [2] and submitted its Report in 1989.[3]

(c.i.) Canada[4]

The ad hoc Canadian Commission on War Crimes adopted a schematic approach by first looking at relevant sources of existing Canadian and international law and then by recommending amendments to be made to its law in order that criminal proceedings may be instituted.

As far as national law is concerned the Commission identified certain provisions of its Criminal Code, the 1945 War Crimes Act and the 1965 Geneva Conventions Act.[5] Each source was deemed inapplicable on the basis of the following respective grounds: (i) criminal law in Canada

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1987. Generally, see Green, 58 BYIL (1988) 217.

4. War Crimes Amendment Act 1988.

1. In Canada, see Report of the Commission of Inquiry on War Criminals, 1986. Hereafter referred to as Canada War Crimes Report. In Australia, see Review of Material Relating to the Entry of Suspected War Criminals into Australia, 1986. Parliamentary Paper 90/87. Hereafter referred to as Australia War Crimes Report.

2. Established by Letter of Appointment of the 15th Febuary, 1988. The present writer was asked by Sir Thomas Hetherington and Mr. William Chalmers, Members of the Inquiry, to prepare and to submit papers advising the Inquiry on: the status of war crimes, crimes against humanity and genocide under international law; on the question of retrospective criminal legislation and other related matters concerning deprivation of citizenship and deportation of war criminals.

3. See Cm.744, hereafter referred to as United Kingdom War Crimes Report.

4. Studies of the Canadian legislation are provided by: Fenrick, 12 Dal. LJ (1989-90) 256 and Wagner, 29 Va. JIL (1988-89) 887.

5. See Canada War Crimes Report, pp.113-116, 117-122 and 123-126.

is territorial. Canadian courts are permitted to exercise jurisdiction extraterritorially only in exceptional cases which do not include the present circumstances; (ii) 1945 war crimes legislation is considered out-of-date, inapplicable in peace time, and would be in breach of the Canadian Bill of Rights and Charter of Rights and Freedoms; finally, (iii) the 1965 Geneva Conventions Act applies only prospectively, excluding, a priori, the exigencies demanded by the terms of reference of the Commission.

The Commission also looked at the position under conventional and customary international law.[1] The 1949 Geneva Conventions and the 1948 Genocide Convention were the only two sources identified by the Commission under conventional international law and both were dismissed as being inapplicable for the purposes of its brief because of the prospective application of the instruments. The Genocide Convention was further deemed inapplicable to war crimes trials ratione materiae. In so far as the customary law position was concerned, the Commission opined that the universality principle of jurisdiction was not a well supported principle in war crimes trials in 1949:

> "universal jurisdiction is far from being generally recognized and that the practice of states is rather lacking in eloquence when one embarks upon an attempt at examining the various forms which, according to the International Law Commission, (ILC Yrbk., 1950, v.II, pp.368-372) state practice can take, namely: treaties, decisions of international and national courts, national legislation, diplomatic correspondence, opinions of national legal advisors, and practice of international organizations. The poverty of those sources is blatant and obviously does not meet the standard necessary for the establishment of a customary rule at international law."[2]

However, the Commission's conclusions on the status of the universality principle in 1945 as customary law, are much defused, because the Commission stated that a

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[1]. Op.cit., pp.127-132.

[2]. Op.cit., pp.129-130.

customary rule of international law is only applicable under Canadian law if ratified by statute.

Article 11(g) of the Canadian Charter of Rights and Freedoms, which reads as follows:

> "Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations"

would permit, nonetheless, in the Commision's view, war crimes trials to be held in Canada because war crimes and crimes against humanity are criminal offences according to general principles of law recognised by civilised nations and as such, therefore, are crimes under international law.

Article 11(g) of the Canadian Charter of Rights and Freedoms clearly reproduces the essence of Article 7(2) of the European Convention on Human Rights and Article 15(2) of the International Covenant on Civil and Political Rights. The Commission examined the travaux preparatoires of both of these provisions in some detail including relevant judicial practice under the European Convention.[1] It traced the history of the adoption of both clauses and neatly summarised the arguments submitted for their adoption. Those submitted during the UN Third Committee's debate on Article 15(2) of the International Covenant merit reproduction because they are wholly relevant to the present discussion. The Commission reports that some Member States submitted, inter alia, that Article 15(2) is necessary because:

a) The provision is designed to avoid doubts about the Nuremberg and Tokyo trials;
b) There are still many war criminals to be punished;
c) The provision would prevent war criminals from escaping justice because their offences were not provided for under domestic or international law;
d) Deleting it would absolve persons guilty under international law.

The Yugoslav delegate is specifically quoted by the

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[1]. See Canada War Crimes Report, pp.137-143.

Commission as having said:

> "The question the (Third) Committee should ask itself was whether it wished war criminals to be punished. If as he was sure it did, there could be no objection to inserting in the draft Covenants a provision which would ensure that that would be done." [1]

Armed with this source material and supported by national parliamentary debates interpreting Article 11(g) of the Canadian Charter on Rights and Freedoms as permitting war crimes trials in Canada, the Commission concluded - erroneously - that this sub-clause

> "stands as an exception[2] to the principle of non-retroactivity of penal laws .... and opens the way to the prosecution and punishment of those guilty of crimes committed during World War II."[3]

Of all the admirable research and deductive arguments presented by the Commission it erred at its most delicate point, namely the basis on which it was to build its recommendations for legislation to the Canadian Government. This is evident in the recommendations submitted. The basic flaw in the Commission's conclusion is that it failed to appreciate "general principles of law recognised by civilised nations" as a source of international law. The dicates of the maxims "nullum crimen sine lege / nulla poena sine lege", these too being general principles of law, are just as applicable where the legal source is unwritten as when it is written. Far from being exceptions to these maxims, Article 7(2) of the European Convention on Human Rights and Article 15(2) of the International Covenant represent their very affirmation. They were not drafted to permit legislation to be enacted retrospectively

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1. Ibid., pp.142-143. The Commission also reproduces Canada's explanation of its vote on Article 15(2) in the Third Committee which, in the Commission's words, was "not glorious". Canada had abstained on the motion to delete 15(2) simply "because the majority of the (Third) Committee members seemed to wish to retain the paragraph".

2. Emphasis added.

3. Op.cit., p.141.

allowing persons to be tried for wrongs which were not criminal offences at the time of their commission.

The portrayal of Articles 7(2) and 15(2) as "an exception" to retrospective criminal legislation, allowed the Commission to recommend to the Canadian government to consider legislating retroactively in the sense that Canada would be able to exercise jurisdiction in respect of war crimes by virtue of jurisdictional bases when, at the time of the commission of the offences, it was not permitted under international law to invoke those same bases of jurisdiction.[1] The Commission recommended that Canada adopts legislation to take jurisdiction over persons who, as aliens in 1940, either committed or were victims of war crimes and subsequently became Canadian citizens or came to be present in Canadian territory. If adopted as such, legislation would be tantamount to applying the active and the passive personality principles, and the universality principle of jurisdiction, to a period in time when Canada was not permitted to apply them.

The Commission's recommendations were thus retrospective ratione temporis, which is a less acceptable but equally disagreeable proposition than retrospective legislation ratione materiae.

The following is the relevant section on jurisdiction as adopted in the 1987 war crimes legislative amendments to the Canadian Criminal Code:

> "(1.91) Notwithstanding anything in this Act or any other Act, every person who, either before or after the coming into force of this subsection, commits an act or omission outside Canada that constitutes a war crime or a crime against humanity and that, if committed in Canada, would constitute an offence against the laws of Canada in force at the time of the act or omission shall be deemed to commit that act or omission in Canada at that time if,
>
> (a) at the time of the act or omission,
>
> (i) that person is a Canadian citizen or is

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[1]. See Canada War Crimes Report, p.168.

employed by Canada in a civilian or military capacity,

(ii) that person is a citizen of, or is employed in a civilian or military capacity by, a state that is engaged in an armed conflict against Canada, or

(iii) the victim of the act or omission is a Canadian citizen or a citizen of a state that is allied with Canada in an armed conflict; or

(b) at the time of the act or omission, Canada could, in conformity with international law, exercise jurisdiction over the person with respect to the act or omission on the basis of the person's presence in Canada, and subsequent to the time of the act or omission the person is present in Canada."[1]

The 1987 Amendment to the Criminal Code also contained a definition, ratione temporis, of war crimes which must be read jointly with section 1.91 above:

" 'war crime' means an act or omission that is committed during an international armed conflict, whether or not it constitutes a contravention of the law in force at the time and in the place of its commission, and that, at that time and in that place, constitutes a contravention of the customary international law or conventional international law applicable in international armed conflicts."

As amended the Criminal Code provides Canadian courts with the competence to exercise jurisdiction on the basis of the active and passive personality principles (just as recommended by the Commission) over enemy nationals and in cases where the victims were allied nationals. In Parliament the Canadian Government declared that these bases of jurisdiction are fair because they attach jurisdiction due to the persons's status at the time of the commission of the offence. They are fairer than the Commission's recommendation because they reflect the practice as applied by States in 1939-1945. Unlike the Commission's proposal the law does not permit jurisdiction to be exercised on the basis of the person's subsequent

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[1]. Section 1 Criminal Code Amendment Act 1987.

acquisition of Canadian nationality. An additional safeguard against retrospectivity in the law is the requirement that the act constituted a war crime under international law and a criminal offence under Canadian law at the time of commission.

Finally, the new law also provides for the universality principle. The same degree of attention against elements of retrospectivity in the application of this ground of jurisdiction was given by the legislator as to the personality principles. The presence of the qualifying words: "in conformity with international law" in section 1.91(b) of the Amendment Act is intended specifically to ensure that Canada will only exercise universal jurisdiction in respect of war crimes or crimes against humanity if it was permissible for States to exercise such jurisdiction under international law at the time of commission. The Government's position is summarised as follows: depending on the time period in history, universal jurisdiction may or may not, exist; this will have to be established under paragraph 1.91.b, and it is prepared to do so in court where necessary.

The Canadian legislator's efforts to respect the jurisdictional principles applicable to war crimes under customary law are manifest. The Criminal Code Amemdment Act of 1987 on war crimes constitutes a rare sample of legislation because, without violating the legality principle, it is as retrospective as it is prospective. It has withstood its first test in Reg. v Finta.[1] It was held that the crimes defined in the Amendment Act were not in violation of the nullum crimen sine lege principle. The court also made an interesting distinction between "retroactive" and "retrospective" legislation. The former is interpreted in the traditional meaning i.e., a law which defines an act as a crime when at the time of commission it was not an offence. The latter is interpreted as

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1. 82 ILR (1989) 425.

referring to laws which regulate circumstances which have already occured but, without creating new criminal offences. Accordingly, the court held the provisions on jurisdiction in the Amendment Act to be "retrospective". But, notwithstanding this curious distinction, the weaknessess in the interpretation of the Canadian Commission on War Crimes with respect to the principle laid down in Article 7(2) and 15(2) of the European Convention on Human Rights and the International Covenant respectively, remain, and as such are, a warning sign for other States that wish to draft similar legislation.

(c.ii.) Australia

The foregoing remarks are not as deserving by the Australia War Crimes Amendment Act 1988, as its Canadian counterpart. Unlike Canada, Australia opted to introduce fresh war crimes legislation into the statute book by amending its 1945 War Crimes Act rather than fashioning separate legislation. Although this approach was possibly chosen in order to avoid confusion by having two sets of war crimes legislation, Australia has repealed, save for its title, the entire content of the 1945 War Crimes Act. Accordingly, it has deleted from its statute book the generally accepted definition of war crimes in international law, previously contained in the original 1945 Act, and replaced it by the concept of "serious crime".

Further, the statutory vehicle chosen by Australia has removed altogether the competence of military tribunals to try war crimes trials "prodiving instead for their trial by civil courts."[1]

Only Australian citizens and residents are liable to be prosecuted under the new law (section 11 of the

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1. See Explanatory Memorandum of the War Crimes Amendment Bill 1987, Parliament of the Commonwealth of Australia, House of Representatives, 1988, No.16024/88, Cat. No. 8868660.

Amendment Act). Unlike the methodology adopted in the Canadian Criminal Code there is no list of bases on which jurisdiction ratione personae is to be exercised. There is no mention of the application of the active and passive personality principles and the universality principle. These are to be deduced only by implication. The law has introduced the following changes.

First, the accused will now be an Australian national or a resident whereas under the 1945 Act "any person" could be tried for war crimes. This was the practice in 1939-1949 and Canadian legislation followed that practice.

Second, the term "person" under the new law means: a national and a resident of Australia, a British subject and an allied national. The term is only limited in so far as it applies to the accused. This broadly covers the passive personality principle and thus follows the Canadian law.

Third, there is no provision concerning the universality principle of jurisdiction. But this does not mean that it is irrelevant to war crimes trials under the 1988 Amendment Act.

There is no evidence either in the travaux preparatoires, including the relevant Bills in Parliament, or indeed in the law itself which suggests that henceforth Australian courts will not be competent to hear trials for crimes committed in foreign territory in 1939-1945 by non-nationals against non-nationals. The question arises whether Australian courts enjoyed such jurisdiction in 1939-1945. The response would probably have been in the affirmative had the Australian legislator, like his Canadian counterpart, taken the necessary precautions by adopting definitions of crimes and bases of jurisdiction operative under international law in 1939-1945. However, given the content ratione materiae and ratione personae of the new law, Australian courts will now exercise jurisdiction on the basis of the active and passive personality principles and on the basis of the universality principle in respect of crimes committed forty/fifty years

ago by or against persons who were aliens at the time of the commission and have since acquired Australian citizenship or residency. Thus Australia will exercise jurisdiction when it may not have been permissible, at the time of the commission of the offences, for it to take that jurisdiction under international law.

The Australian Amendment War Crimes Act 1988, as its Canadian parallel, does incorporate the redeeming safeguard namely that the crimes proscribed become justiciable only on condition that, if at the time of commission, they would have been punishable as criminal offences under Australian criminal law.

Overall, however, Australia has failed where Canada has succeeded namely, not to allow itself to be exposed to the comments so well phrased by the Attorney General in Canada:

> "We don't care what international law states. We don't care whether or not international law will permit the prosecution of this person under the traditional international bases or under the internationally recognised universal jurisdiction principle. But if you are a Canadian (Australian) citizen/resident today you must be held accountable for all your past sins committed outside Canada (Australia) merely because you are a Canadian (Australian) citizen today."[1]

(c.iii.) The United Kingdom

In comparison to Canada and Australia, initiatives in the United Kingdom to legislate for war crimes between 1988-1990 [2] are almost unique.

In its terms of reference, the War Crimes Inquiry was provided with a most peculiar definition of war crimes. It included the crime of genocide, and thus the Inquiry felt

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1. Minutes of Proceedings on Debate in House - "Comparison between Bill 1-71 and the Deschenes Commission Report", pp.5-6.

2. These dates mark the period since the War Crimes Inquiry was appointed (15th February 1988) by the Home Secretary to report on whether legislation ought to be introduced in Parliament and that in which the War Crimes Bill was voted down in the House of Lords.

obliged to consider it at some length. But, quite properly, the Inquiry devoted attention to the concept of violations of the laws of customs of war/war crimes which is to be found in the, still operative, Royal Warrant of 1945. The Inquiry studied the historical development of war crimes from times preceding the Second World War up to the adoption of the 1949 Geneva Conventions and the 1977 Additional Protocols. It found substantial evidence suggesting that a generally recognised definition of the concept of war crimes had been established in 1945 and that, at that time, Great Britain and international practice generally endorsed various bases of jurisdiction on which war crimes became justiciable before national and international tribunals, including the right of a belligerent to try captured enemy nationals for war crimes.[1]

Aware of the Canadian and Australian experiences in providing for the question of retrospectivity, the Inquiry clearly separated between legislation which would be in breach of the nullum crimen sine lege principle, from legislation which would enable the United Kingdom to take jurisdiction over persons who committed crimes almost half a century ago, as long as it was entitled to take that jurisdiction under international law but, for separate reasons, had failed to do so by Parliamentary Statute. The only element of retrospectivity in such form of legislation would be that it is operative vis-a-vis events which have already occured.

> "(The) enactment of legislation in this country to allow the prosecution of 'war crimes' in British courts would not be retrospective: it would merely empower British courts to utilise a jurisdiction already available to them under international law since before 1939, over crimes which had been internationally recognised as such since before 1939 by nations including both the United Kingdom and Germany".[2]

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1. United Kingdom War Crimes Report, para 5.42 p.54 and para 6.44 p.63.

2. See United Kingdom War Crimes Report, pp.63-64

Accordingly, jurisdiction ratione materiae and ratione personae must both meet the test of non-retrospectivity in any legislation purporting to render 1939-1945 war crimes justiciable before national courts in 1990 and thereafter. Regrettably, the UK 1990 War Crimes Bill fails this test.

The scope of the Bill ratione materiae provides that murder, manslaughter or culpable homicide are justiciable if committed between 1st September 1939 and 5th June 1945 in Germany or in German occupied territory and constitute violations of the laws and customs of war. The following points are significant.

(a) The War Crimes Bill burdened the Prosecution with the onus of proving that the offences constitute, in the circumstances of each case, violations of the laws and customs of war. In this respect serious difficulties are likely to be experienced especially vis-a-vis the offence of culpable homicide.

(b) Unlike the Nuremberg Charter, certain 1944-1945 national war crimes legislation and more recent judicial and legislative practice, the War Crimes Bill did not define, in any form whatsoever, violations of the laws and customs of war.

(c) Again unlike the sources stated above, there is no reference in the Bill to the status of violations of the laws and customs of war in international law. Indeed, there is no reference to "war crimes".

Within this background and given that the scope of the Bill ratione personae was to prosecute crimes committed only by persons who, on the 8th March 1990 or thereafter, have or will have acquired British nationality, the following factors must be noted.

(a) Contrary to legislative practice the War Crimes Bill hardly gives proper consideration to the traditional bases of jurisdiction including the active and passive personality principles and their proper application in

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para 6.44.

respect of war crimes under international law by national tribunals in 1939-1945.

(b) The broad statement of the active personality principle proposed in the Bill necessarily applies retrospectively, i.e., not in the sense that it will apply in proceedings concerning crimes committed before the adoption of the legislation, which is inevitable; but that if it were not for the application of this principle criminal proceedings would not be possible at all. This procedure ignores the issue of whether or not Britain was permitted under international law to institute same proceedings for same offences on the basis of the nationality of the offender at the time of the commission of the offences and not at the time of legislative enactment.

The drafter of the War Crimes Bill failed to appreciate the concern expressed by his Canadian counterpart for this form of retrospective application of the active personality principle. Furthermore, the legislator, conditioned presumably by tradition and desire to restrict as far as possible extraterritorial application of criminal law in the United Kingdom, underestimated the customary law status of the various bases of jurisdiction applied throughout the course of the twentieth century in war crimes trials.

II. Superior Orders

1914-1918 source material relevant to the applicability of the defence of "superior orders" to war crimes in international law is scant. The Report of the 1919 Commission on the Authors of War, the Treaty of Versailles and the 1919-1920 Peace Treaties are all silent on the matter. The question did arise, however, in two cause celebres before the Leipsig Supreme Court namely, the Dover Castle and the Llandovery Castle trials.[1]

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[1]. Judgments of both cases are reported in 2 Ann.Dig. (1923-24) at pp.429 and 436 respectively. Important background information on these and other British

In the first case the accused, a German naval officer (Karl Neumann) was charged with committing a violation of the law of war as a result of torpoeding a British hospital ship. The accused admitted [as] having been instructed in the laws of sea warfare and declared that the explosion of the hospital vessel was such that confirmed German suspicions of the unlawful use of such ships for the transportation of arsenal and explosives. In the circumstances he did not think the order to be unlawful.

The Supreme Court accepted the plea of "superior orders" because the two criteria identified by the Court under German (and not under international) law were not applicable. The plea of "superior orders" would be inadmissable if: (a) the accused exceeded his order and (b) if both he and his superior were aware that the order constituted a crime at military and civil law.

The facts in the Llandovery Castle case were almost identical to that in the Dover Castle except that the accused fired upon the sick and wounded immediately after the hospital ship was torpoedoed and two of three lifeboats carrying survivors were destroyed. The Supreme Court considered this action to be an offence against the law of nations engendering individual criminal responsibility.[1] It denied the plea of "superior orders" and sentenced the accused to four years imprisonment.

Other than this judicial practice, qualified as it is, the notion that "superior orders" was considered inadmissable in 1914-1918 as a defence to war crimes in international law is hardly sustained. The position under the then operative British and American military manuals did not uphold the view that "superior orders" ought not to be accepted as a basis of defence. On the contrary Paragraph 443, Chapter XIV Paragraph 443, of the British

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Trials at Leipsig are found in HM Treasury Solicitor's Files. TS26/16 & 17, 1921.

1. 2 Ann.Dig. 436-437. See also Oppenheim, International Law, v.II, p.569 n.2.

Manual, 1914, read as follows:

> "Members of the armed forces who commit such violations of the recognised rules of warfare as are ordered by their Government, or their commander, are not war criminals and cannot therefore be punished by the enemy".

This paragraph was amended in 1944 and the background to that amendment is described presently. However, the position in 1914-1918 on "superior orders" and war crimes in international law was very much embryonic. The Supreme Court of Israel confirmed this in the Eichmann Case.[1] The opinion of publicists expressed after the First World War is divided on the application or otherwise of "superior orders" to war crimes.[2]

The position in Paragraph 443 of the British Manual was drafted by the eminent authority on international law, the late Professor Oppenheim. This results from 1943-1944 correspondence between the Judge Advocate General's Office and that of the Solicitor-General. The British Manual was in line with Oppenheim's fifth edition of his treatise on international law. However, during the course of the war British, American and French practice reveals how State opinion towards the question of "superior orders" altered.

The correspondence cited above reveals quite clearly the movement towards prohibiting the plea of "superior orders" raised in defence. In a letter sent to the Solicitor-General from the Judge Advocate General's Office in July 1943 the following view was expressed:

> " 'Superior orders' (is) no defence, except possibly where an accused was a mere automation such as a member of a firing squad who really had no discretion and would himself probably be shot if he disobeyed the order."[3]

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1. 36 ILR p.315 para 15.C.1.

2. See Garner 14 AJIL (1920) 70 at 83-94 and in International Law and the World War, 1920, v.2, p.588. See also Oppenheim, International Law, v.II, para 253, p.568 n.2.

3. See TS File 26/64, 1943-1944.

It is also understood from the same letter that the Americans took the same position as Britain.

The Solicitor-General's reply came in early 1944 and indicates that after holding conference with the Advocate-General Paragraph 443 of the British Manual was to be amended to reflect the position advanced by the Judge Advocate General. The following points are specifically identified in the Solicitor General's reply:

(a) The new version of Paragraph 443 should be fashioned along the lines of the opinion (then) offered in Oppenheim's sixth edition (v.II p.453).

(b) A footnote ought to accompany Paragraph 443 as amended indicating that the text was altered in accordance with Oppenheim's sixth edition.

(c) The footnote is also to mention that Oppenheim had drafted Paragraph 443 prior to its amendment. It is also to be stated that the position in practice had been reversed, that this change was expressed by publicists in their writings and, significantly, that Paragraph 443 as previously stated was inconsistent with the Llandovery Castle decision.

These suggestions were taken on board by the Judge Advocate General's Office which drafted an amendment to Paragraph 443 reproducing almost verbatim Oppenheim's view on "superior orders" as expressed in the sixth edition of his treatise and now found in volume II paragraph 253 of the last edition.[1]

> "The fact that a rule of warfare has been violated in pursuance of an order of the belligerent Government or of an individual belligerent commander does not deprive the act in question of its character as a war crime; neither does it, in principle, confer upon the perpetrator immunity from punishment by the injured belligerent..... Undoubtedly, a Court confronted with the plea of superior orders adduced in justification of a war crime is bound to take into consideration the fact that obedience to military orders, not obviously unlawful, is the duty of every member of the

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1. Oppenheim, op.cit., pp.568-569.

> armed forces and that the latter cannot, in conditions of war discipline, be expected to weigh scrupulously the legal merits of the order received; ..... the question is governed by the major principle that members of the armed forces are bound to obey lawful orders only and that they cannot therefore escape liability if, in obedience to a command, they commit acts which both violate unchallenged rules of warfare and outrage the general sentiment of humanity."[1]

War crimes legislation adopted in 1944 by the governments in exile of France and Poland both contain provision for the non-applicability of the defence of "superior orders". Article 3 of the French Ordonnance of 28th August, 1944 Concerning the Repression of War Crimes, following the view stated in Oppenheim, denies the plea to be made in respect of crimes committed on orders issued by a belligerent commander. Article 5 of the Polish Decree makes no mention of orders issued by commanders but simply states that crimes committed upon issue of orders do not relieve the accused from responsibility.

The standard set out in Article 8 of the Nuremberg Charter and in Articles 6 and II.4.b. of the Tokyo Charter and CCL No.10 respectively, was endorsed in post-war legislation[2] and judicial practice,[3] and it was also

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1. Ch. XIV, Para. 627 of The Law of War on Land reads:
> "Obedience to the order of a Government or of a superior, whether military or civil, or to a national law or regulation, affords no defence to a charge of committing a war crime but may be considered in mitigation of punishment."

Part III of the British Manual of Military Law, HMSO, 1958.

2. See Regulation 15 attached to the 1946 Canada War Crimes Act, Article 5 of the Norwegian law of 13th December, 1946; and Regulation 9 of the US Mediterranean Regulations, in WC Law Rep.: vol.IV, p.129; vol.III, p.85; and vol.I, p.120 respectively. See also Netherlands' Decree No.45 of 1946 applicable to its territories in the East Indies, ibid., vol. XI, pp.98-99. China's law of 1946 is silent on the question of "superior orders", ibid., vol. XIV, p.157.

formulated as a principle of international law by the United Nations General Assembly.[1] Article 8 of the Nuremberg Charter provides:

> "The fact that the Defendant acted pursuant to order of his Government or of a superior shall not free him from responsibility, but may be considered in mitigation of punishment, if the Tribunal determines that justice so requires."

The Nuremberg Judgment held this provision to be in conformity with international law and that the true test of mitigating punishment for war crimes committed in pursuance of "superior orders" is whether moral choice is possible to the offender at time of commission.[2]

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3. Generally see the decisions reported in WC Law Rep., 15 vols. 1947-1949. However, the decisions delivered in: the Trial of Sawada & Three Others, U.S. Military Commission, Shanghai, 1946, (ibid., v.V); In re List and Others (Hostages Trial), U.S. Military Tribunal, Nuremberg, 1948, (ibid., v.VIII); The Trial of Von Falkenhorst, British Military Court, Brunswick, 1946, (ibid., v.XI); The Peleus Trial, British Military Court, Hamburg, 1945, (ibid., v.I) and the Dostler Case, U.S. Military Commission, Rome, 1945 (ibid.). The last two decisions are cited as leading authorities on the defence of "superior orders" in post-World War II trials. They have identified a number of elements in applying the principle as stated in Article 8 of the Nuremberg Charter. In effect the elements constitute a resume' of Oppenheim's consideration of "superior orders" and they are: (a) officers are only bound to follow lawful orders, (b) violations of the laws of warfare including general sentiments of humanity committed in pursuance of orders consitute war crimes and (c) the order does not confer immunity from criminal prosecution.

1. See Nuremberg Principle IV, ILC Yrbk., 1950, v.II, p.375. A discussion of Nuremberg Principle IV is at Chapter 9 infra under the appropriate heading on Superior Orders.

2. Cmnd. 6964, p.42. See also the travaux preparatories relevant to Article 8 of the Nuremberg Charter, Jackson Report, pp. 367-368 where it emerges clearly that the intention of the drafters was to adhere to the international law position on the matter namely, to allow the defence of "superior orders" to be considered for purposes of mitigation of punishment.

In United States v Ohlendorf,[1] the United States Military Tribunal upheld the position enunciated in the First World War period, namely that subordinates are only bound to follow lawful orders and added that "superior orders" may not be pleaded where the order is manifestly unlawful. However, the Tribunal introduced, as mitigating factors, the elements of imminent, real and inevitable harm to which the accused would have exposed himself had he refused the order if the circumstances were such that the resultant harm to the subordinate would be disproportionately greater than that which would have resulted from executing the illegal order.

Neither the 1949 Geneva Conventions nor their Additional Protocols of 1977 contain provisions concerning the question of "superior orders". Article 75 of Additional Protocol I is an impressive provision which establishes a minimum standard of fundamental guarantees for the protection of prisoners of war. Some of its sub-clauses are indirectly relevant to the issue of "superior orders" as a defence to war crimes.

Sub-clause 4(b) guarantees that a person tried for committing a "penal offence (war crimes included) related to the armed conflict" should not be convicted except on the basis of individual penal responsibility. Sub-clause 7 adds that in war crimes trials the following two principles are applicable: (i) the accused is entitled to be tried in accordance with the applicable rules of international law and (ii) if the accused does not benefit, in his trial, from more favourable treatment under the 1949 Conventions or Additional Protocol I, the provisions of Article 75 remain operative even where the charge is for the commission of "grave breaches".

Article 87 of the same Protocol defines duties of military commanders and is included in SECTION II of the Protocol which provides for States Parties to repress

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1. 15 Ann.Dig. (1948) 656 at 665-668.

breaches (including grave breaches/war crimes) of the 1949 Conventions and Additional Protocol I. Commanders are required to prevent all officers and persons under their control from committing breaches of the Conventions and of the Additional Protocol. They are also required to suppress and to report such breaches to competent authorities. Further, Commanders are required to ensure that such persons under their control are, as commensurate with their level of responsibility, aware of their obligations under the Conventions and Additional Protocols.

Article 86 of same Protocol I, also coming within the parameter of SECTION II of the Protocol, provides for what is known as the responsibility of superior officers ("respondeat superior"). Article 86.2 reads as follows:

> "The fact that a breach of the Conventions or of this Protocol was committed by a subordinate does not absolve his superiors from penal or disciplinary responsibility, as the case may be, if they knew, or had information which should have enabled them to conclude in the circumstances at the time, that he was committing or was going to commit such a breach and if they did not take all feasible measures within their power to prevent or repress the breach."

Jointly read, the following points emerge from the above provisions:

(1) Military officers including Commanders are duty bound to be learned in the rules regulating armed conflict. They ought to know, therefore, what constitutes a violation of the laws of war which engenders individual criminal responsibility.

(2) The principle of individual criminal responsibility is the basis of any war crimes trial.

(3) The criminal responsibility, if any, of the superior is, subject to the provisions of Article 86.(2) of Additional Protocol I, always incurred and cannot be waived on the basis that the crime is committed by a subordinate officer or private soldier. Thus, arguing <u>a contrario sensu</u> and on the basis of the elements in (1) and (2) above, it is reasonable to assume that the inverse of the <u>respondent superior</u> rule may equally be applied in trials for "grave breaches" under the 1949 Conventions and the 1977 Additional

> Protocols. The question whether or not "superior orders" will be accepted as a mitigating factor and, if so, in what manner, is to be decided by the forum having due regard to the development of "superior orders" as a defence in war crimes proceedings. This approach would be in consonance with the scope of Article 75.7.a of Additional Protocol I which seeks to ensure that all relevant rules of international law are applied in such trials.

A final observation on the defence of "superior orders" is the position adopted in recent Australian and Canadian legislation. The Australian War Crimes Act 1988 (Article 14) follows the rules laid down in Article 8 of the Nuremberg Charter. Regulation (15) annexed to the Canada War Crimes Act of 1946 which reproduces the Nuremberg position continues to be operative under Canadian law. The Canadian amendment to the Criminal Code does not address "superior orders" specifically but it contains a general provision which provides that any grounds of defence available under Canadian or international law either at the time of the commission of the offence or at the time of the proceedings may be invoked in a war crimes trial.

III. The Political Offence Exception Principle

Defining the concept of a political offence is problematic and it escapes formulation by means of a standard definition. The conceptual meaning of a political offence has developed from an act committed by one party against another in the course of and in furtherance of a political struggle as defined in the leading 19th century decisions In re Castioni[1] and In re Meunier[2], to criminal offences ordinarily punishable under municipal law but deemed not to be extraditable because they are committed for political

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[1]. [1891], 1 Q.B. 149.

[2]. [1894], 2 Q.B. 415.

purposes.[1] This is the political offence exception rule.[2]

In this chapter the question arises whether the political offence exception rule is applicable where aggressive war (more often than not waged for political purposes) and war crimes have been committed. The present writer believes that they should not. They ought to qualify as exceptions to the political offence exception rule.[3] The reason is that if crimes in international law, like municipal law crimes, are recognised as political offences, the perpetrators of the most heinous form of criminal activity - a crime against the international community - would avoid extradition and possibly prosecution by successfully invoking the political offence exception rule.[4] An early example is that of Emperor Willhem II of Hohenzollern who after the First World War escaped prosecution for waging a war of aggression by seeking political refuge in the Netherlands. Where a requested State is of the opinion that an extradition request should be refused,[5] it ought to institute criminal

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1. R v Governor of Brixton Prison ex parte Kolcynski, 1 All E.R. (1955) 31.

2. Generally see, Van den Wijngaert, The Political Offence Exception to Extradition, 1980, p.95.

3. In support of this view, see Wijngaert, op. cit., p.133 et seq.

4. See Fawcett, 34 BYIL (1958) 391 and Green, 11 ICLQ (1962) 354.

5. In re Kahrs, Supreme Court, Brazil, 15 Ann.Dig. 1948, 301, and in Karadzole v Artukovic, 247 F.2d.(1954) 205 it was held that an extradition request for alleged war criminals will be denied where it seems evident that the requested person is either unlikely to receive a fair trial in the requesting State or is likely to be prosecuted for his political opinions. See Wijngaert, op.cit., pp.144-145 and Green, 11 ICLQ 346-349. Requests made by the USSR to the Federal Republic of Germany for the extradition of persons alleged to have committed war crimes on Russian territory were refused on the ground that the Basic Law of the Federal Republic of Germany prohibits the extradition of its own nationals. See, The Times,

proceedings under its own national law.[1]

The 1949 Geneva Conventions are silent on the applicability or otherwise of the political offence exception rule in respect of proceedings for grave breaches commissions, but it does provide for the aut dedere aut punire principle.[2] Additional Protocol I [3] of 1977 slightly improves that position whereby the High Contracting Parties, subject to certain conditions, are obliged to co-operate in matters of extradition and to give due consideration to the request of the State in whose territory the alleged offence occurred.

It has been argued by some[4]: (a) that there is no rule in international law which prohibits aggressive war and war crimes committed for political motives from coming within the general notion of a political offence and (b) that in such cases the perpetrators are not necessarily liable to

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11th July, 1987, p.5. Cf. U.K. amendment (UN Doc. E/CN4/L.1250) to draft resolution submitted by Byelorussian SSR (UN Doc. E/CN.4/L. 1248 - 21st March, 1973) on "The Question of the Punishment of War Criminals and Persons Who Have Committed Crimes Against Humanity".

1. At the drafting stages of the UN Convention on Torture, the USSR submitted an amendment (UN Doc. E/1979/36 - E/CN.4/1347) stipulating that where a person charged with the offence of torture, as provided under the proposed convention, is not extradited because of fear of being subjected to torture practices in the requesting State, he shall be prosecuted by the State in whose territory he is present if he had committed "crimes against peace or mankind", or war crimes. The proposal was not adopted. UN Doc. E/CN.4/1367, 1980, p.6 para 32.

2. See Convention I: Article 49, Convention II: Article 50, Convention III: Article 129 and Convention IV: Article 146.

3. Article 88. (2).

4. Lauterpacht, 21 BYIL (1944) 91 and Garcia-Mora, 53 KLR (1964) 52. See also Wijngaert writing in Bassiouni, International Criminal Law Volume III Enforcement, 1987, p.89.

extradition[1] as long as their actions were not contrary to the laws and customs of warfare. This statement, especially in view of the declaration made at Nuremberg[2] that aggressive war "is the supreme international crime differing only from other war crimes in that it contains within itself the accumulated evil of the whole", is very curious. It seems contradictory to say that war crimes and aggressive war may be accepted as legitimate political offences as long as they are not in violation of the laws of war when they inherently constitute such violations.

There is a substantial body of evidence which refutes the view that war crimes committed under international law for political motives should not be comparable to political crimes committed under municipal law. Dr. Lachs[3] (later President of the International Court) provides a succinct but most penetrating analysis of the relationship between war crimes and the concept of political offences: "the political offence enjoys three privileges....the privilege that the deed is not dishonourable, the punishment is not dishonourable and that extradition is not granted.... on the other hand we have war crimes". This viewpoint is endorsed by other publicists[4] and by both international and academic bodies.[5]

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1. Cf. Wijngaert, op.cit., p.140, para 3.2.3.

2. Nuremberg Judgment, Cmnd. 6964, p.13.

3. 56 Jurid. Rev. (1944) 27 at 39.

4. See among others: Morgenstern, 25 BYIL (1948) 382, Green, 11 ICLQ (1962) 329, Glaser, RDPCrim. (1948) 766 and Garcia Mora, 9 Wayne LR (1963) 269.

5. A resolution on Extradition adopted by the Institute of International Law at its Oxford Session in 1880 provides guidelines for States in determining whether acts for which extradition is demanded are of a political character. The resolution implies that certain acts are not to be considered political offences if they run counter to customs of war. See Scott, Resolutions of the Institute of International Law, 1916, p.44.

In the Asylum Case[1] Judge Alvarez[2] opined that crimes such as genocide, crimes against humanity and the waging of war "cannot be qaulified as political offences". It has

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The Cambridge Commission on Penal Reconstruction and Development recommended that war criminals should not be treated as political offenders and that neutral States should not grant them asylum. See also draft article 5 para.1. of the IAPL Draft International Criminal Code, 52 RIDP (1981) 172.

The second report submitted by J. Spiropoulos, ILC Rapporteur on the Draft Code of Offences between 1950-1954, contained a draft text of articles which included a provision (Draft Article IV, ILC Yrbk., 1951, v.II, p.60), rendering inapplicable the poltical offence exception rule vis-a-vis the crimes defined therein which included war crimes. Draft article IV read:

> "Crimes defined in this Code shall not be considered as political crimes for the purpose of extradition.
>
> The States adopting the Code undertake to grant extradition in accordance with their laws and treaties in force."

The draft article was supported in principle, although there was some debate concerning the wording (ibid., v.I, p.82 para. 25 - p.86 para. 69 and p.86 para. 73 p.87 para 91, and p.244 para 112 - p.245 para 134). However, the draft article was not adopted (ibid., p.247 para 1 - p.248 para. 18) because it was felt that it gave rise to procedural issues better dealt with in discussions concerning the establishment of an International Criminal Court. The ILC has not, so far, adopted in its current work on the Draft Code (as at its Forty-First Session [1989]) a provision similar in scope to the draft provision quoted above.

A Draft Convention on Extradition drafted by a team of Harvard University Research Scholars (29 AJIL (1935) p.15) neither admits exceptions to the political offence exception rule nor restricts States from determining the political character of the offences. But the drafters stated that violations of the laws of war are recognised as exceptions to the political offence question (op. cit., p.115).

1. ICJ Rep., 1950.

2. Diss. Op., ibid., p.298.

also been held in municipal decisions[1] that war crimes do not qualify as political offences.

Since the 1942 Inter-Allied Declaration which affirmed that acts of violence inflicted upon civilian populations have nothing in common with acts of war and political offences as understood by civilised nations,[2] there has been a steady growing movement in treaty law to ensure that the political offence exception rule does not apply to war crimes.

In the 1975 Additional Protocol to the European Convention on Extradition[3] we find that violations of the laws of war and the 'grave breaches' specified in the 1949 Geneva Conventions form part of the exceptions to the political offence exception rule. Similar provisions are found in other regional instruments. For instance 'acts of terrorism' are excluded from the application of the political offence exception rule in an Extradition Agreement concluded between member States of the Arab League.[4] The phrase "acts of terrorism" is controversial. It gives rise to many problems of definition and for that reason ought to have been avoided, but certainly war crimes and aggressive war may take on the guise of acts of terrorism. The 1981 Inter-American Convention on

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1. Re Extradition Act 1870, 1 WLR (1962) 12 and at 55 ILR (1979) 550; R v Wilson ex parte Witness T, 135 CLR (1976) 179, see especially, Murphy J. at p.189 et seq.; In re Coleman, 14 Ann. Dig (1947) 139 and In re Spiessens, 16 Ann. Dig. (1949) 275, where persons charged with spying and collaborating with the enemy during the war could not plead the political offence exception rule.

2. Operative Paragraph 1, Punishment For War Crimes, Part I. See also History UNWCC, pp.89-90.

3. ETS No.86: Article 1(b) and (c).

4. Article 4, LASTS p.27. Also at 159 BFSP 606 and in Khalil, The Arab States and the Arab League, v.2, p.106, 1962. See reservation made by Egypt.

Extradition[1] does not specifically exclude acts from the applicability of the political offence exception rule, but in Article 5 we find a blanket provision broad enough to cover crimes in international law. It stipulates that extradition proceedings may be carried out where extradition is regulated by a treaty or convention in force between the requesting and the requested State and "whose purpose is to prevent or repress a specific category of offences and which imposes on such States an obligation to either prosecute or extradite (aut dedere aut punire) the person sought". Such a provision is also included in bilateral extradition agreements.[2]

Further, we find that the 1951 UN Convention Relating to the Status of Refugees[3] denies persons seriously believed to have committed crimes against the peace, war crimes and crimes against humanity[4] any rights or benefits which accompany refugee-status and may also be liable to "refoulement".[5] The purpose of these provisions is to prevent perpetrators of the most heinious crimes against the international community from taking advantage of rules designed to protect those persecuted for their political beliefs.[6]

IV. The Principle of Statutory Limitation

Another factor which concerns war crimes prosecutions

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1. 20 ILM 723. Not yet in force.

2. See Article V para 2 in Extradition Treaty between the United States and Italy. See 24 ILM (1985) 1529.

3. 189 UNTS 137. Generally see Goodwin Gill, The Refugee in International Law, 1983.

4. See Article 1(F) of the 1951 Refugee Convention.

5. Article 33(2).

6. Article 42, ibid., and Article VII of the 1967 UN Protocol Relating to the Status of Refugees, 606 UNTS 267. State Parties are prohibited from making reservations to the relevant provisions.

and which is telling of the nature of such crimes in international law, is the question of the application of statutes of limitation.[1] The relevant principal instruments are: the 1968 UN Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity[2] and the 1974 European Convention on the Non-Applicability of Statutory Limitation to Crimes Against Humanity and War Crimes.[3] The casus foederis in both treaties is that persons charged with war crimes (and crimes against humanity) should be prosecuted regardless of the lapse of time between the commission of the crime and the institution of proceedings against the perpetrator. The basis for this principle is that war crimes and crimes against humanity are among the gravest crimes in international law. They are not to be treated like ordinary municipal law crimes and benefit from the rule of statutory limitation. Indeed both instruments[4] oblige States Parties to adopt all measures, legislative or otherwise, in order to ensure that municipal statutes of limitation do not apply to these crimes.

Article 6 of the European Convention on Statutory Limitation allows States Parties to extend the reach of the treaty's provisions ratione materiae. The European instrument is thus wider than its UN counterpart, although in the fourth preambular paragraph the UN Convention on Statutes of Limitation considers war crimes and crimes against humanity to be "among" the gravest crimes in

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1. Generally see Fawcett, 14 ICLQ (1965) 627 and Weiss, 54 BYIL (1983) 163.

2. 754 UNTS 74. Hereafter cited as UN Convention on Statutes of Limitation. For further reading see, Lerner, 4 Israel LR (1969) 512; Note, in 9 IJIL (1969) 221 and Drabowa, 4 Pol.YIL (1971) 171.

3. ETS No.82. Hereafter cited as European Convention on Statutory Limitation.

4. See Article 4 and Article 1 of the UN and of the European Convention on Statutes of Limitation respectively.

international law, thus implying that the principle of the non-applicability of statutes of limitation is applicable in respect of other crimes in international law. These treaties have also improved on the position ratione temporis and ratione materiae found in Article II.5 of CCL No. 10 which suspends applicability of the principle of statutory limitation for crimes against peace, war crimes and crimes against humanity committed between 30th January 1933 and 1st July, 1945. There are no reservation clauses in either the European or the UN instruments, but the former convention is not yet in force and the geographical representation of States party to the latter is conspicuously biased.[1]

The reluctance of some States to subscribe to these instruments, especially that adopted under the auspices of the UN, does not necessarily constitute an implied protest to the principle of the non-applicability of statutes of limitation to criminal offences in international law. But, the hesitancy may be explained as a result of other factors such as unsatisfactory wording used in the treaty text.[2]

The principle of the non-applicability of statutes of limitation has been adopted by the ILC in its current work on the Draft Code. A draft article 5 has been inserted in the "General Principles" section of the Draft Code where it is stipulated that "no statutory limitation shall apply to offences against the peace and security of mankind, because of their nature".[3] This provision attracted almost unanimous support from the Commission's members,[4] although

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1. See Bowman & Harris, op.cit.

2. See the explanation offered by Lerner, op. cit., pp.529 - 531, on the refusal of Israel to ratify the UN Convention.

3. Italics Added. See ILC Yrbk., 1987, v.I, pt.I, p.4. Also see Malek, ILC Yrbk., 1985, v.I, pp.74-75 paras. 34-38.

4. See, ILC Yrbk., 1987, v.I: Calero-Rodrigues, p.15 para 11; Sreenivasa Rao, p.18 para 27; Graefrath, p.21 para

a number of them feel that the qualifying words "because of their nature" are redundant and have been deleted.[1] The qualifying language, however, underlines the very reason why crimes in international law deserve to be outside the application of statutory limitations. Thus in its own way draft article 5 has made its contribution to the development of the concept of the criminal offence in international law.

The exclusion of the application of statutes of limitation to war crimes appears in other proposals de lege ferenda. These include a Draft Convention on the Non-Applicability of Statutes of Limitation to War Crimes and Crimes Against Humanity prepared by the IAPL.[2] This body also prepared a Draft International Criminal Code,[3] but provided that statutes of limitation would run for a period not longer than the maximum penalty attached to a particular crime as defined in the code. There would be no statutes of limitation where the punishment was life imprisonment or death. An almost identical provision appears in a similar Draft International Criminal Code

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9; Jacovides, p.22 para 19; Hayes, p.24 para 33; Njenga, p.25 para 46; Yankov, p.27 para 70; Illueca, p.32 para 25; Shi, p.33 para 37; Eiriksson, p.34 para 53; Prince Ajibola, p.37 para 8; Sepulveda Gutierrez, p.37 para 19; Ogiso, p.38 para 30; Razafindralambo, p.45 para 7; Roucounas, p.50 para 40; Al-Khasawneh, p.54 para 27; Diaz-Gonzalez, p.56 para 45 and Koroma, p.58 para 66. Draft Article 5 was provisionally adopted by the ILC at its thirty-ninth session, ILC Yrbk., 1987, v.I, p.234 paras 30-32.

1. See draft article 7 adopted by the ILC Drafting Committee at its forty-third session, UN Doc. A/CN.4/L.459, p.3, 1991. The wording was deleted on the basis of suggestions made during the debate by the membership at the ILC's thirty-ninth session. Further, see Sixth Committee Reports: UN Doc. A/CN4/L.410, 1987, p.117 paras 603-605 and at UN Doc. A/CN.4/L.420, 1988, p.20 paras 51-57. Also see Levasseur, 93 JDI (1966) 276.

2. 37 RIDP (1966) 375.

3. 52 RIDP (1981) 230.

prepared by Professor Bassiouni[1]. Professor Bassiouni's work specifically excludes the applicability of statutes of limitation to war crimes and crimes against humanity.

In Eichmann, accused pleaded that he could not be tried for war crimes between 1939-1945 because during his residence in Argentina after the War, Argentine law provided for a statutory period of 15 years within which criminal proceedings are to be instituted. The defence argued that 15 years had elapsed and therefore the case against Eichmann must be quashed.

The District Court rejected this plea on two grounds. First, it held that the application of Argentine law on prescription in Israel was an "untenable contention". Second, Article 12(a) of the Nazis and Nazi Collaborators (Punishment) Law,[2] under which Eichmann was charged, excluded war crimes (and crimes against humanity) from Israeli statutes of limitation otherwise applicable to ordinary criminal offences. The Court explained that "because of the extreme gravity of the crime against the Jewish people, the crime against humanity and the war crime, the Israel legislator has provided that such crimes shall never be subject to prescription."[3]

The question of statutes of limitation and war crimes has also arisen in the context of the international protection of human rights. It has been argued before the European Commission of Human Rights that failure to try a person for a criminal offence within a reasonable period of

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1. Bassiouni, International Criminal Code, 1987, p.11.

2. See generally: Attorney-General v Tarrek, Tel Aviv District Court, 14th December, 1951; Attorney-General v Enigster, ibid., 4th January, 1952 and Honigman v Attorney-General, ibid., 23rd March, 1953 all at: 18 ILR 538 et seq.

3. 36 ILR pp.78-79. Emphasis added. See also UN Secretary General's Report on the Question of the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, UN Doc.E/CN4/906, 1966, p.117 para. 157.

time constitutes a violation of one's right to a fair trial,[1] even where the offence in question is a war crime or a crime against humanity. The Commission disagreed in that it found that what was a "reasonable time" with respect to war trials might well be considerably longer than in other trials. The Commission further held that trials involving such crimes were inherently complex and time consuming because of the difficulties in locating witnesses and other sources of evidence.[2] Thus, "the rules of prescription do not apply to war crimes" and, furthermore, "the international community requires the competent (State) authorities to investigate and prosecute these crimes despite the difficulties encountered by reason of the long time that has elapsed since the commission of the acts concerned".[3]

C. Aggression

In its conceptual development, aggression has been plagued more by problems of definition than by the question of its status, i.e. whether or not it is a criminal offence under international law. Historically, the term "aggression" emerged as a substitute for the term "war". It appeared in diplomatic correspondence and treaties in the inter-war period where State practice sought to outlaw war and the use of force.[4]

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1. Cf. Article 6, ECHR.

2. See Application No. 9433/81, Applicant X v Netherlands, 27 ECHR Rep., p.237.

3. Application No.6946/75, Applicant X v Federal Republic of Germany, 6 ECHR Rep., p.116.

4. See: Convention for the Definition of Aggression, 1933, 147 LNTS 69. A sister convention was also signed in London in 1933 between Romania, Czechoslovakia, Yugoslavia, USSR and Turkey, 148 LNTS 213. In 1937, a Treaty of Non-Aggression was signed in Teheran between the Kingdoms of Afghanistan and Iraq, the Empire of Iran, and the Republic of Turkey, 190

Deliberations at the Paris Peace Conference in 1919 offer early evidence of the concept of aggression considered as a criminal offence. Prime Minister Lloyd George described Germany's invasion of (neutral) Belgian territory as a crime. Such action was "aggression without provocation, without any greviance against the country attacked, because it was convenient to cross her territory and in spite of a solemn engagement treated like a scrap of paper, is an indisputable crime".[1] President Wilson endorsed this assessment but added that there was no legal precedent for it. He envisaged, however, the founding of the League of Nations as a regime from which rules and formulae of international law would emerge and make provision for its (aggression) punishment.

The notion of aggressive war also came to form part of the concept of aggression. At the 1945 London Conference on Military Trials, a US draft definition of aggression[2] reveals that aggression meant aggressive war and more.[3] It came to imply as Brownlie[4] puts it, any "military attack not justified by law". Indeed, this is the casus foederis of the definition of aggression in the Annex to General Assembly Resolution 3314 (XXIX) 1974.[5] Gradually a trend of thought began to emerge whereby aggression meant unlawful

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LNTS 21. The development of the concept of aggression under treaty law during the League of Nations period is well outlined by Ferencz, Aggression, v.I, pp.6-36, and, generally, by Brownlie, Use of Force, pp. 351-352.

1. See Willis, Prologue To Nuremberg, pp.79-80.

2. See Jackson Report, p.294.

3. Ibid., at p.273 and at Conference Sessions of July 19, 1945, at p.298.

4. Use of Force, p.352.

5. Adopted without a vote on December 14, 1974. Hereafter referred to as Resolution 3314(XXIX). Text also at UN Yrbk. 1974, pp.846-848 and in Rifaat, op. cit., p.321 and Ferencz, Aggression, v. II, p. 14.

use of force and in turn use of force by States was seen as a criminal offence under international law.[1]

When the ILC had originally been instructed to prepare a Draft Code of Offences [2], the text of an initial draft of Crime No. 1 prohibited "... the use of armed force in violation of international law..."[3] and not aggression. This draft had a mixed reception in the ILC. Some members[4] supported it but felt that the wording could be improved because it left courts with the task of determining what constituted a "violation of international law". Two other formulae were submitted as alternatives: one was qualificatory - use of force is a criminal offence except where it occurs in self-defence or in accordance with a UN mandate. The other suggestion associated the use of force with the violation of territorial integrity and the political independence of States. Both formulae were found to be inadequate. The first raised questions concerning the concept of self-defence in international law. The second was narrow in scope and limited to non-legal concepts. A further suggestion,[5] also rejected when submitted to the vote, proposed that: "resort to violence in any form in violation of international law, and in particular, the waging of aggressive war", be considered a criminal offence.

The final text of the Draft Code of Offences adopted by the ILC in 1954 presents aggression and unlawful use of force almost as synonymous concepts, namely:

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1. See History UNWCC, pp.185-186.

2. See GA Res. 177(1), 1947.

3. See Report (UN Doc.A/CN.4/25, 1950) by J. Spiropoulos, ILC Yrbk., 1950, v.II, p.261 para 57. Pella (ibid., v.I, p.165 paras 120-127) also included 'use, threat and preparation of use of force' in his proposed list of offences to the ILC.

4. See ILC Yrbk., v.I, pp.108-110.

5. See ILC member Yepes (Colombia) ibid., p.116 para. 2.

> "Any act of aggression, including[1] the employment by the authorities of the State of armed force against another State for any purpose other than national or collective self-defence or in pursuance of a decision or recommendation of a competent organ of the United Nations."[2]

In its observations, the United Kingdom government[3] was not in favour of such a lengthy provision, but preferred simply:

> "The following acts are offences against the peace and security of mankind: (i) any act of aggression".

In explanation it was submitted that "a satisfactory definition of aggression is extremely hard to find".[4] Along with its work on the Draft Code of Offences, the ILC was entrusted[5] with the specific task of defining aggression. In the course of this work a number of proposals and memoranda again assimilated the notion of aggression with use of force,[6] whereas others[7] maintained that aggression was beyond legal definition.

Thus began to surface the real issue which prevented the codification of rules relating to the concept of aggression; i.e. whether aggression ought to be defined or whether it is indeed capable of definition. At any rate, it is not proper to portray aggression and the concept of use of force as twin rather than as related concepts. Not

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1. See objection for the use of this word by the Government of Bolivia, UN Doc.A/CN4./85, 1954, p.13 para(b).

2. ILC Yrbk., 1954, v. II, p.151. Also see, ibid., v.I, pp.125-126 paras 33-45 and p.127 paras 51-52.

3. UN Doc. A/CN.4/85, p.13 para. (b).

4. This was the view also taken by ILC Rapporteur Spiropoulos, op.cit., ibid., p.13 paras. c and d.

5. By virtue of GA Res. 378 B(V), 1950.

6. See ILC Yrbk., 1951, v.II, pp.28-42.

7. Spiropoulos, ibid., p.60 and at p.69 paras 165-170.

every action involving use of force amounts to aggression and acts of aggression may very well occur without involving use of force. Professor Higgins explains:

> "low level coercion is an illegality rather than an aggression: it is not an international crime, but an international tort (and) certainly it is arguable that aggression can take place without any use of force, and must be considered, even where the methods are solely economic by nature, as too major to be a mere illegality - that is to say a tort."[1]

The difficulties encountered by the ILC in defining aggression were such that it was eventually decided to postpone consideration of the matter including the preparation of the Draft Code of Offences.[2] In 1952 a UN Special Committee[3] had been established to deal with the question of aggression. Thereafter the concept was to be studied by a series of UN General Assembly appointed Special Committees.[4] Only three decades later, when a formal definition of aggression had been fashioned, would the ILC resume its work on the Draft Code.[5]

The architects of the definition of aggression had three formulae to choose from, each had its own difficulties:[6]

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1. The Development of International Law Through the Political Organs of the United Nations, 1963, pp.175-176 (emphasis added).

2. ILC Yrbk., 1951, v.I, pp. 120-121 paras 74-86. Also see GA Res. 897 (IX) 1954.

3. Established by GA Res. 688 (VII). Cf. Sixth Committee Report UN Doc. A/2322, 1952.

4. A summary of the work carried out by these committees is outlined by Ferencz, Aggression, v. II, pp. 4-13. Also see Rifaat, op. cit., p.222 et seq.

5. See GA Res. 36/106, 1981.

6. See generally: Waldock, 81 Hague Receuil (1952) 508-510, Pal, 3 Ind. YIA. (1954) 348 et seq., Roling, NILR (1955) 171-172, Higgins, op. cit., p.171 n. 19; and Brownlie, Use of Force, p.355. Also see ILC Rapporteur Thiam, Third Report on the Draft Code, ILC

(i) The enumerative approach, i.e. the listing of certain acts deemed to constitute aggression. This approach immediately lends itself to the charge: enumerations are inherently either restrictive or inexhaustive and thus inconclusive.

(ii) The general formula approach. This can be ambiguous and open to various interpretations as much as it appears "safe" and all-embracing.

(iii) The mixed approach is a compromise between the above possibilities and it now appears in Resolution 3314(XXIX).

Some officials and government representatives[1] felt that there was no particular need to define aggression; whereas a considerable number of States and non-governmental bodies[2] continued to believe in aggression defined. Professor (later Sir) Humphrey Waldock's assessment of the matter is as valid today as when it was written in 1952:

> "although an unsatisfactory definition would be worse than none at all, there is a case for continuing the attempt to clarify, if not define, the crime of aggression. Otherwise we may end up by blurring completely the line between international wrongs and international crimes."[3]

Yrbk., 1985, v.II, pt I, p.72 paras 82-87.

1. Fitzmaurice, 1 ICLQ (1952) 137, Roling, op. cit. p.167, and at 7 Ind.LR (1953)8, and Spiropoulos, ILC Yrbk., 1951, v.I, p.89 para 121.

2. A number of draft resolutions have been submitted by States emphasising the positive contribution which a definition of aggression would give to the development of international criminal law: Syria, (UN Doc. A/C6/L215); Afghanistan, Iran, Chile, Bolivia, Cuba, Dominican Republic, El Salvador, Netherlands, Peru and Yugoslavia (UN Docs: A/C6/265 & Rev.1, A/C6/L268, A/C6/L269/Rev.1, A/C6/L270); Iran & Panama (UN Doc. A/C6/L335, 336 and 334/Rev 1); and the replies of USSR, Sweden and France (UN Doc. A/2689), 6th August 1954 and 18th October 1954 respectively. Aggression appears as the first criminal offence in the Draft International Criminal Code prepared by the IAPL. See also Bassiouni, International Criminal Code, p. 121.

3. 81 Hague Receuil (1952) 514.

In a period spanning almost over two and half decades when the concept of aggression was being studied by the various UN Special Committees the number of draft proposals, resolutions, memoranda, and diplomatic statements (a) recognising the criminal character of aggression and (b) designating it by labels such as "an offence against the peace and security of mankind" and a "crime against humanity", is impressive.[1]

In the 1972 Special Committee[2] three drafts, thought fit to describe aggression and its legal consequences, were put forward for consideration:

(i) "Aggression, as defined herein, constitutes a crime against international peace giving rise to responsibility under international law."

(ii) "A war of aggression constitutes a crime against peace, for which there is responsibility under international law."

(iii) It was suggested that the provision defining aggression would in its initial wording introduce the concept as a crime against peace.

It was also reported[3] that States agreed in principio

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1. See, inter alia, statements made by the following States: Colombia, UN Doc. A/C6/L210, 11th January, 1952; Egypt, UN Doc. A/C6/L213, 17th January, 1952; Mexico cited in the Sixth Committee Report, UN Doc. A/2087, 29th January, 1952; USSR Draft Resolution, op. para. 5, GAOR, 24th Session, Supp. No. 20, UN Doc. A/7620; Working Papers submitted by China, UN Doc. A/AC.66/L4/Rev.3 and UN Doc. A/AC.66/L7/Rev.2; Uruguay, GAOR, 28th Session, Supp. No. 19, UN Doc. A/9019, 1973. Further see: Siage (Syrian Arab Republic) and Kolenski (USSR) GAOR, 29th Session, Supp. No. 19, UN Doc. A/9619, Members 1974 Special Committee; Sixth Committee Report 1973, UN Doc. A/9411, p.13; and thirteen nation draft resolution (UN Doc. A/AC134/L16 and Corr1.) concerning designation of aggression.

2. See Report, GAOR, 27th Session, Supp. No. 19, UN Doc. A/8719, p.17.

3. See Sixth Committee Report, UN. Doc. A/8929, 1972, p. 8 para 36.

on the criminality of aggression and on establishing individual responsibility for acts of aggression. However, these factors are certainly not evident in the final text adopted. Thus Article 5 paragraph 2 of Resolution 3314(XXIX) reads as follows:

> "A war of aggression[1] (as opposed to aggression) is a crime against international peace. Aggression gives rise to international responsibility."[2]

This wording, with its reference to a war of aggression, is a clear departure from the notion of declaring aggression simpliciter, criminal. Some members of the final (1974) UN Special Committee[3] objected and were generally discontent with the final outcome. As the Yugoslav representative[4] put it:

> "The provision, as now formulated, would permit the absurd interpretation that aggression might not be a crime against international peace and that a war of aggression might not give rise to international responsibility".

The views of representatives who supported the final wording are significant because though few in number they reflect legal thought in the principal political systems of the world. The United Kingdom representative[5] was only prepared to conceed to that recognised by international law, namely, the criminality of aggressive war and not of aggression. Sir Lawrence McIntyre (Australia)[6] categorically stated that international responsibility for acts of aggression should not be construed as implying

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1. Italics added.

2. For an analysis of this section, generally see Ferencz, Aggression, v. II, pp. 43-45 and Rifaat, op. cit., pp. 275-276.

3. GAOR, Supp. No. 19, UN Doc. A/9619, Annex I.

4. Ibid., p.26.

5. Mr Steel, ibid., p.31.

6. Ibid., p.33.

individual responsibility.[1] Moreover, the Mexican member[2] explained that "the fact that the text did not expressly say that aggression was a crime against the peace could not be construed as authorising a contrario interpretation".[3]

In practice States have been denounced as aggressors in inummerable resolutions, diplomatic statements and other official declarations.[4] However, the occasions in which State conduct, that qualifies as aggression, has been referred to as criminal, are exceptional[5].

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1. It is interesting to note that although reference to State delictual responsibility is clearly intended by the Australian representative, he does not rule out the concept of State criminal responsibility. In its report to the Sixth Committee, the 1974 UN Special Committee explained that its use of the term "international responsibility" was without prejudice to the scope of that concept. See also Oehler, 52 RIDP (1981) 416.

2. UN Doc.A/9619, p.38.

3. Similar remarks were made by: Spain, ibid., p.18; France, p.22; US, p.24; and Bulgaria, p.29.

4. See diplomatic correspondence between the US and USSR in Whiteman, Digest, v. 5, pp. 795-808, 816-819 and 838-843. Also see Rifaat, op. cit., pp. 96-99 and 208-216 and Higgins, op. cit., pp. 222-224, who all provide succinct but rich expositions of LN and UN practice concerning the question of aggression. Generally, see Whiteman, ibid., v. 12, pp.141-142, 814-816, and 817-820. More recent citations include: GA Res. 38/10, 1983 on the situation in Central America; SC Res. 573, 1985 on the Israeli attack against Tunisian territory; and see the response of the Islamic Republic of Iran to SC Res. 598, 1987 concerning immediate termination of hostilities between Iran and Iraq. Text also at 26 ILM (1987) 1481.

5. See: 1939 diplomatic correspondence between Finland and USSR, in Ferencz, Aggression, v. I, pp. 275-284; Colombia, Statement at the League of Nations on the proposed expulsion of the USSR, LN Doc. A.48., 1939, VIII 13th December 1939; Statement by Prime Minister Macmillan concerning British troops sent to Jordan in 1958, see Whiteman, Digest, v.12, pp.221-225. Generally, also see White, 21 Jnl. Int. Affs. (1967) 123, and Falk, The Vietnam War and International Law, 1968, p.523.

The general trend in State practice is confirmed by the invasion of Kuwait by Iraq on August 2nd, 1990. The resolutions adopted by the Security Council in the period August - December 1990 do not include wording which: (a) specifically denounces the invasion, occupation and subsequent annexation of Kuwait territory as acts of aggression and, much less, (b) that unlawful conduct of that degree by Iraq engenders implications of the criminal law for the individuals responsible.

From the resolutions adopted during the period stated above, the following points emerge as relevant to the status of the concepts of aggression and of the criminal offence in international law:

(i) The annexation of Kuwait by Iraq is without legal validity.[1]

(ii) Acts of violence and other unlawlful conduct directed against foreign diplomats and internationally protected persons in Kuwait by Iraq:

> "constitute aggressive acts and a flagrant violation of (Iraq's) international obligations which strike at the root of the conduct of international relations in accordance with the Charter of the United Nations."[2]

(iii) Iraq's treatment of civilians in Kuwait as well as in its own territory may constitute "grave breaches" under 1949 Geneva Convention IV on the Protection of Civilians in Time of War and thus engender individual criminal responsibility for whomsoever is responsible for that treatment.[3]

(iv) Iraq incurs international responsibility and becomes liable to pay compensation for all damages caused to property and in lieu of personal harm suffered by non-nationals as a result of its unlawful conduct directed against

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1. See SC Res. 662 adopted on 9th August 1990.

2. See SC Res. 667 adopted on 16th September, 1990.

3. See SC Res. 674 adopted on 29th October, 1990.

Kuwait.[1]

Accordingly, despite an ever-developing commitment by States to define by way of international agreement a number of practices as criminal offences triggering the application of a specific regime of criminal law rules and principles in international law, State practice reveals that aggression continues to fall short of this category of particularly heinous, but internationally proscribed, unlawful practices.[2]

Sources de lege ferenda concerning the status of aggression as a criminal offence are found in the context of the ILC's current projects on State Responsibility and the Draft Code. In the Commission's Draft Article 19 on State Responsibility, we find that an international crime may result from "a serious breach of an international obligation of essential importance for the maintenance of international peace and security, such as that prohibiting aggression".[3] During the debate[4] on the draft article (numbering 18 at the time) aggression was unmistakably identified as one of the gravest crimes in international law.[5] This was also the view taken in the Sixth Committee.[6]

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1. See SC Res. 674A adopted on 29th October, 1990.

2. Statements by President Bush and Prime Minister Thatcher to the effect that Iraqi President, Saddam Hussein, and other persons under his command, could be dealt with in the same manner as the Major German War Criminals at Nuremberg, in 1945 were made with reference to the ill-treatment of civilians and the practice of hostage-taking by Iraq and not with reference to the actual invasion and occupation of Kuwait.

3. ILC Yrbk., 1976, v.II, pt.II, p.95.

4. Ibid., v.I, p.239 et seq.

5. ILC Yrbk., 1976, v.II, pt.II: Castenada, p. 242 para 31; Yasseen, p.243 para 38; Tabibi, p. 244 para 52; Reuter, p. 245 para 62; Njenga, p.246 para 78; Ramangasoavina, p.247 para 3; Sir Francis Vallat, p.

Aggression is found in the forefront of a number of acts considered candidate by the ILC for inclusion in the Draft Code.[1] At the ILC's thirty-seventh session (1985) some members supported the adoption of aggression as defined in Resolution 3314 (XXIX) either in a verbatim form or by reference to that instrument.[2] A few were either indifferent or expressed no definite opinion on the methodology to be adopted.[3] Others[4] could not subscribe to the adoption of Resolution 3314 (XXIX) in toto and some[5] even opposed the inclusion of aggression in the Draft Code, principally for the following reasons:

(i) no international criminal code could function properly where the UN Security Council had overriding discretionary powers in determining aggression. The presence of the Veto-Powers[6] in that organ would indirectly weaken the

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248 para 12; Calle y Calle, p.250 para 30; and Ago, (Rapporteur) p.252 para 42.

6. UN Doc. A/31/370, 1976, pp.44-46 paras 130-132 and pp. 58-59 paras 165-166, and p.61 para 171.

1. See Third and Sixth Reports on the Draft Code presented by Rapporteur Thiam, ILC Yrbk., 1985, v.II, pt.II, p. . and UN Doc.A/CN.4/411, 19th February, 1988, respectively.

2. ILC Yrbk., 1985, v.I: Jacovides, p.14 para 14, Malek, p.19 para 49, Njenga, p. 48 para. 5, Ogiso, p. 44 para 22, Calero Rodrigues, p.16 para 33 and Yankov, p. 58 para 12.

3. Ibid., Diaz-Gonzalez, p. 59 para 26; Roukounas, p. 69 para 57 and Sucharitkul, p.38 para 29.

4. Ibid., Arangio-Ruiz, p.66 para 33; Balanda, p. 34 para 29; Barboza, p. 51 para 26; Huang, p. 64 para 12; Lacleta Munoz, p. 73 para 25; Mahiou, p. 31 para 13; Tomuschat, p. 71 para 12 and Razafindralambo, p. 46 para 38.

5. Ibid., Sir Ian Sinclair, p. 24 paras 17-18.

6. It is interesting to note that amendments to the crime of aggression suggested by ILC members McCaffrey (USA) and Ushakov (USSR) did not seem to address the Security Council issue but rather were phrased in a way as to allow the Security Council a "say" in

independence of the proposed code.

(ii) A list of acts constituting aggression, always open to further supplement, as that found in Resolution 3314(XXIX), would expose the code to the charge that it violates the nullum crimen sine lege principle.

This state of opinion remained unchanged in the Sixth Committee.[1]

Common to the various formulae discussed by the ILC for a definition of aggression as a crime, are the following introductory words:

> "The commission by the authorities of a State of an act of aggression".

This wording clearly indicates the intention to classify aggression as a crime that can only be committed by States, i.e. by individuals acting on its behalf.

At its forthiet session (1988), however, the ILC provisionally adopted a differently worded provision on aggression, one which clearly reflects its intention to attach individual criminal responsibility to all acts proscribed under the Draft Code irrespective of the offender's capacity.[2] Thus the introductory paragraph of the relevant provision on aggression read:

> " Any individual to whom responsibility for acts constituting aggression is attributed under this Code shall be liable to be tried and punished for a crime against peace".[3]

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determining whether aggression had been committed or not. See, ibid., p.54 para 48 and p.61 para 44 respectively.

1. UN Doc. A/CN.4/L.398, 1986, p.21.

2. A full discussion of the concept of individual criminal responsibility under the Draft Code is found in Part IV Chapter 9 infra.

3. The full text of the article is reproduced in the ILC's Report to the General Assembly on its work at

The evidence in support of the concept of aggression as a criminal offence in international law is substantial. It is a developing corpus but as yet it is premature to certify that there is sufficient State practice and "opinio juris" which accepts aggression as a crime jure gentium. Indeed the debate within the ILC[1] and the Sixth Committee[2] remains very much divided on a number of issues of which finding an acceptable definition of the concept is foremost.

Of the various international texts and documents adopted, Resolution 3314 (XXIX) will undoubtedly continue to feature as a prominent contribution to the development of aggression. The attention which this concept receives especially in the context of the ILC's Draft Code is an equally important factor in the formation of its juridical character as a criminal offence. However, its status as a crime in international law will be determined by considerations other than its inclusion in an international code of crimes. Unlike some other offences such as genocide and war crimes (also to be included in the Draft Code) the status of aggression would in part depend on the reception given to the Code by States.

Aggression will always be "quasi" political in nature and accordingly continue to be a source of concern for the architects of an effective international prosecuting system. It is essentially a "State-Crime", i.e. committed largely by persons acting in a public capacity. However, much as the present writer appreciates a form of individual

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its fortieth session, (see GAOR, Supp. No.10, A/43/10, p.186 and pp.187-190 for ILC Commentary.). See also draft article 15, which is the latest version adopted by the ILC's Drafting Committee, UN Doc. A/CN.4/L 459, 1991.

1. See summary records of the ILC Debates at Meetings 2053 - 2061 and at Meeting 2085 (p.291 para 23), ILC Yrbk., 1988, v.I.

2. See UN Doc. A/CN.4/L.443, 1990, p.17.

criminal responsibility in international law which does not discriminate between the capacity of one offender and that of another, it is unlikely that the forseeable future will offer successful convictions for aggression[1] outside the aftermath of armed conflict and without the rhetorical invective: "the punishment of the vanquished by the victors".

D. The Recruitment, Use, Financing and Training of Mercenaries

The principal texts relevant to the status of mercenary activities as criminal offences in international law may be divided as follows: on the one hand we have the Organisation of African Unity[2] Convention for the Elimination of Mercenarism in Africa [3], UN General Assembly Resolution 3314 (XXIX) on Aggression and the recently adopted International Convention Against the Recruitment, Use, Financing and Training of Mercenaries[4]. On the other hand, we have proposals de lege feranda which include a provision on mercenarism in the ILC's Draft Code[5].

The sources also include a substantial body of municipal legislation[6] which consider the recruitment, use,

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1. Cf. Waldock, 81 Hague Receuil 506.

2. Hereafter referred to as OAU.

3. Hereafter referred to as the OAU Convention on Mercenaries.

4. Adopted by GA Res. 44/34, 4th December 1989. Text also at 29 ILM (1990) 89. Hereafter referred to as UN Convention on Mercenaries.

5. Draft article 23 adopted by the ILC Drafting Committee at the forty-third session, UN Doc. A/CN.4/L.459, 1991, which is based largely on the definition of "mercenary" in the UN Convention on Mercenaries.

6. A detailed and thorough examination of national legislation concerning mercenary activities is found in a thesis submitted for the degree of Doctor of Philosophy in the University of London by A. Layeb entitled The Development of International Law in

financing and training of mercenaries as criminal offences. The prevention of these mercenary practices is also contained in bilateral agreements.[1] In addition a number of UN General Assembly resolutions,[2] some not directly concerned with the question of mercenary activities[3], have declared the use of mercenaries a criminal act, described them as outlaws deserving only of criminal punishment and called upon States to enact legislation proscribing their recruitment as punishable offences. In particular, General Assembly Resolution 34/140, 1979, which initiated the drafting of the UN Convention on Mercenaries, recognised in the second preambular paragraph that "mercenarism is a threat to international peace and security and, like murder, piracy and genocide, is a universal crime against

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relation to the Legal Status of Mercenaries, 1986.

1. See Agreement on Non-Aggression and Good Neighbourliness (known as the Nkomati Accord), signed between Mozambique and the Republic of South Africa, March 16th, 1984. Text at 23 ILM (1984) 282. Generally see Stein, 10 S. African YIL (1984) 1.

2. See: Res. 2465 (XXIII), 20th December 1968, op. para. 8, p.5; Res. 2548 (XXIV), 11th December 1969, op. para. 7, p.6; Res. 2708 (XXV), 14th December 1970, op. para. 8, p.8. The voting pattern for these resolutions is telling. Most Western States including China and Japan abstained. Great Britain, US, Australia, South Africa and Portugal voted against, whereas a large number of African States voted in favour. Records of votes are at UNPV 4355, 17th December 1970 and ibid., at 4940, 19th December 1973 at p.308. The same voting pattern is also found with regards to GA Res. 3103 (XXVIII), 12th December 1973 concerning "Basic Principles of the Legal Status of the Combatants Struggling Against Colonial and Alien Domination and Racist Regimes", op. para. 5. Also, cf. Razafindralambo, ILC Yrbk., 1984, v.1., p.12 para 43.

3. Some resolutions address the question of granting independence to colonial peoples, and others, address the policies of apartheid in Southern Africa. As examples see, GA Resolutions: 31/6(I), 1976; 31/34, 1976; 32/14, 1977; 33/24, 1978; 35/35, 1980; 36/9, 1981; 37/43, 1982; 38/17, 1983; 39/17, 1984; 40/25, 1985; 41/101, 1986.

humanity." And, preambular paragraph three of the UN convention now reiterates this thinking and declares that the States Parties affirm that the practices proscribed by the convention are "considered as offences of grave concern to all States and that any person committing any of the offences should either be prosecuted or extradited."

Other international bodies[1] have made similar statements and passed resolutions condemning mercenaries and their practices. The mercenary has also been described as an enemy of all mankind.[2]

Preambular paragraph four of the OAU Convention on Mercenarism refers to the various UN resolutions where mercenary practices are condemned and to "statements of attitude and the practice of a great number of States indicative of the development of new rules of international law making mercenarism an international crime." Article 3 of the same convention adds that any person, natural or juridical, who commits the crime of "mercenarism" has committed a crime against peace and security in Africa. These provisions are evidence of regional thinking on the character and status of "mercenarism" developing as a criminal offence in international law.

In response to General Assembly Resolution 34/140, 1979, a substantial number of States[3] representing various

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1. World Conference for Action Against Apartheid, Nigeria, 1977, see UN Doc. A/Conf. 91/9, v.I, p. 33, para. 15. See also Political Declaration of the VI Conference of Heads of State and Governments of Non-Aligned Countries, Havana, 1979; Second World Conference to Combat Racism and Racial Discrimination, Geneva, 1983; and Res. AHG/112 (XIX) adopted at the 19th Ordinary Session, OAU, Addis Ababa, 1983.

2. Chief Akinjide, ILC Member, speaking to postgraduate students at the Palais des Nations, Geneva, June 1986.

3. See, among others, Argentina, Austria, Barbados, Belgium, Bolivia, Chile, Cuba, Nicaragua, Roumania, Suriname, Sweden, Great Britain, German Democratic Republic, Nigeria, Ukrainian SSR, USSR and Byelorussion SSR, Finland and Hungary. UN Doc. A/35/366/Add.2.

political and legal systems expressed, (a) support for a multilateral instrument outlawing mercenaries and proscribing their activities and (b) the view that these practices are criminal in character, describing them as forms of "international terrorism", "crimes against humanity" (GDR) and "grave international crimes" (Ukrainain SSR). Other governmental replies[1] acknowledged the unlawful character of mercenaries and their activities but made no reference to their criminal nature; whereas other governments[2] had greater difficulties with General Assembly Resolution 34/140, even though it was adopted without a vote.

The US delegate expressed objection to some of the expressions contained in the resolution and in particular the French and Italian delegates categorically rejected the terms used to describe mercenarism. Furthermore, even though mercenary activities continued to be indentified in the various meetings[3] of the UN Ad Hoc Committee established[4] to draft the UN Convention on Mercenaries and in the UN General Assembly's Sixth Committee[5] as a "crime against the peace and security of states and of mankind", States such as Japan believed no such crime existed. Brazil felt that since no international criminal code was

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1. See ibid., Costa Rica, Czechoslavakia, India, Liberia, Libyan Arab Republic, Mexico, Venezuela and the Philippines.

2. See UN Doc. A/34/PV. 104, p.188.

3. Ad Hoc Committee Report, 1984, GAOR, Supp. No. 43 (A/39/43) pp.7-8 paras. 21-23; and ibid., 1985 Report, GAOR, Supp. No. 43.(A/40/43) p.22 para. 105.

4. By GA Res. 35/48, 1980.

5. See UN Docs.: A/C.6/35/SR20: Clark (Nigeria), p.8 para. 28; ibid., SR/21: Sallam (Yemen), p.2 para. 2, Clark (Canada), p.7 para. 30 and 31, Economides (Greece), p.14 para. 53, Ordzkonikidze (USSR), p.16 para. 61; and ibid., SR/22: Mussa (Somalia), p.9 para. 32, Sincar (Bangladesch) p.11 para.42, El-Banhawi (Egypt), p.13 para. 52, Dramou (Guinea), p.15 para. 65 and Quentin-Baxter (New Zealand), p.16 para. 68.

in force these labels have very little meaning, and Ireland, speaking on behalf of the member States of the European Community, considered them to be controversial.[1] Notwithstanding such reservations, a draft article 7 appeared in a set of draft articles entitled Third Revised Consolidated Negotiating Basis[2] offered in 1988 by the Ad Hoc Committee designating the use, recruitment, and financing of mercenaries as a "crime against the peace and security of mankind".[3] In addition, Cuba submitted a set

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1. UN Doc. A/AC.207/L.23, pp.27-30 paras. 90-104. Also see Ad Hoc Committee Report 1984, op.cit., para. 22 and, Ad Hoc Committee Report for 1985, paras. 103-104. Cf. Ad Hoc Committee Report for 1988, GAOR, Supp. No.43, (A/43/43), pp. 6-7 paras. 27-29.

2. GAOR, Supp. No.43, (A/43/43), 1988, p.29.

3. Draft article 7 was initially placed in parenthesis indicating that the Ad Hoc Committee had not yet taken a decision whether to adopt it or not.
And although the Ad Hoc Committee decided in 1989 to delete it, some members plainly indicated that a clause worded as follows ought to be included in the convention:

> "Nothing in this Convention shall be construed in any way as derogating from the principles relating to the criminal responsibility of individuals under international law."

See Ad Hoc Committee's Report, GAOR, Supp. 43. (A/44/43) p.9 paras 48-50.No.offences.

The text of the convention is equally silent. It contains no descriptive labels of the practices it seeks to proscribe other than that already cited above in its preambular provisions. However, the operative clauses of the convention make it perfectly clear that the proscribed practices are considered as criminal offences. Cf. draft preambular paragraph 4 of the draft text of the convention drafted by the Ad Hoc Committee and reproduced in its Report for 1989 (GAOR, Supp. No. 43 (A/44/43), p.10). The preambular provision read as follows:

> "Considering that the resolutions of the Security Council and General Assembly of the United Nations are indicative of the development of new rules of international law making mercenary activities international

of draft articles[1] of which article 1 declared mercenarism to be a "crime against international law".[2]

The significance of these characterisations may be more than stylistic. The labelling of offences are indications of State opinion especially when coupled with statements such as:

> "It (the proposed UN Convention) should embody the principles of international criminal law discussed during the Nuremberg Tribunals, namely the need for offenders to be prosecuted and judged by any State where they were captured. Such a provision is necessary because mercenarism is a crime against humanity."[3]

Other statements[4] recommended that an international convention on mercenary activities ought not to rest with "criminalising" such activities at the international level but ought also to oblige State Parties to enact criminal legislation under their respective municipal laws. This recommendation is now binding upon State Parties in Article 5 (3) of the UN Convention on Mercenaries. In addition, it has been suggested that mercenarism has the force of jus cogens in international law: the use of mercenaries is "a criminal act and a serious violation of fundamental norms of contemporary international law".[5]

The question of political offences has also been

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offences".

1. The articles were entitled "Convention Against The Recruitment, Use, Financing and Training Of Mercenaries". Hereafter referred to as the Cuba Draft. See Annex in GAOR, Supp. No.43, (A/40/43).

2. Of the various descriptive tags, the proposal in the Cuba Draft is the most neutral - based on article 1 of the Genocide Convention.

3. Balanda (Zaire), UN Doc. A/C6/35/SR22, p.4 para. 9.

4. Adjoyi (Togo), UN Doc.A/C.6/35/SR21, p.6 para.22; ibid./SR22, Makarevich (Ukrainian SSR), p.7 para.22 and Dramou (Guinea), p.16 para.67.

5. See Mickiewicz (Poland), UN Doc. A/C6/35/SR22 p.14, para.58 (italics added), and at p.7 para. 21 in the Ad Hoc Committee Report for 1984.

raised during the drafting stages of the convention.[1] It was suggested that mercenary activities should not in principle be considered political crimes. The relevant draft provision (Article 18) on extradition in the proposed text of the convention contained a separate sub-clause (5) fashioned along the lines of Article VII of the Genocide Convention [2], i.e. designed to render inapplicable the political offence exception rule in the matter of extraditing mercenaries. This read as follows:

> "For the purpose of extradition between States Parties, the offences .... shall not be regarded as political offences."[3]

The view had also been submitted that the non-applicability of the political offence exception rule ought to extend to cover circumstances where the offender had received some form of material compensation for his 'services'.[4] However, the Ad Hoc Committee opted, as is the case with several other multilateral instruments covering a number of practices such as unlawful seizure of civilian aircraft, hostage-taking, torture and crimes committed against internationally protected persons, to delete sub-clause 5.

The jurisdictional provisions (Articles 9 and 12) contained in the UN Convention on Mercenaries are modelled along the lines of parallel clauses contained in treaties, contemporaries of this most recent of instruments, concerned with the international proscription of unlawful practices as criminal offences. These treaties are discussed under the appropriate sections in the following chapters of Part III. Some of them have emerged as standard-setting in the international effort to define criminal offences. The adoption by the drafters of the UN

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1. See Makarevich (Ukrainian SSR), UN Doc. A/C6/35/SR22, p.7, para. 23.

2. The Genocide Convention is discussed infra in Chapter 6.

3. See GAOR, Supp. No.43, (A/43/43), p.32.

4. Ad Hoc Committee Report 1984, p.20 para. 87.

Convention on Mercenaries of some of the rules found in these treaties, such as those which render the particular crimes justiciable before national courts by virtue of a number of jurisdictional bases, constitutes a reaffirmation of a developing treaty practice that is telling of the juridical nature of the concept of criminal offence in international law.

The salient elements in the jurisdictional clauses of the UN Convention on Mercenaries are the following:

(a) States Parties are obliged to take all necessary measures to establish jurisdiction over the offences defined in the convention.

(b) States Parties will take jurisdiction over the offences that are committed on their territory (territorial principle) and where the offender is a national of the State Party (active personality principle). Jurisdiction taken over stateless persons on the basis of their habitual residence in the territory of a State Party is increasingly becoming popular among drafters of such international instruments.[1] Such a base of jurisdiction is included in the mercenaries convention.

(c) Finally, jurisdiction on the basis of universality may be exercised by States Parties. However, the application of this principle is dependent upon the either extradite or prosecute (aut dedere aut punire) formula (Article 12), now also featuring as a standard provision in treaties the casus foederis of which is to render certain acts criminal offences.[2] In other words, a State Party will try a person solely on the basis of his presence in its territory if it decides not to extradite him to another State Party which may have been entitled to exercise jurisdiction on the principles indicated in (a) and (b) above.

With regard to the question of individual responsibility the UN Convention on Mercenaries is

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1. See Article 6.2.a. of the IMO Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation.

2. The Report of the Ad Hoc Committee for 1989, GAOR, Supp. No. 43, (A/44/43) p.6 para 30 confirms that Article 12 of the convention was based on the corresponding provision of the UN Convention Against the Taking of Hostages. A discussion of this convention is found below in Chapter 7.

dissimilar to some of the "law making" treaties which feature in the crimes discussed in this chapter such as the Nuremberg and Tokyo Charters, including other authoritative instruments yet to be addressed in Part III such as the Genocide Convention. These instruments all precede the UN Convention on Mercenaries, and yet it contains no provision which enunciates in crisp and categoric terms the principle of individual criminal responsibility. The concept of individual responsibility under the UN Convention on Mercenaries is implied; in almost all of its substantive provisions.

However, the Cuba Draft contained provisions (Articles II, III and V) which, read jointly, provided for both individual and State responsibility. The Cuba Draft distinguished between individual responsibility incurred by persons acting in a private capacity and individuals acting on behalf of a State. Notwithstanding this two-tier form of individual criminal responsibility, the Cuba Draft also provided that certain State conduct such as, permitting the use of territory for mercenary activities and providing facilities to carry out same activities, engenders criminal responsibility for the State representatives / agents involved.

At the drafting stages it was suggested[1] that a provision on State criminal responsibility, i.e. a form of penal liability other than the penal responsibility of individual offenders acting in a public capacity, ought to be included in the convention. It was also considered to be beneficial to general international law. However, this

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1. See, Correia (Angola), UN Doc. A/C6/35/SR21, p.5 para. 14. Cf. article 2 of a draft text of an International Convention Against the Activities of Mercenaries submitted by Nigeria, UN Doc.A/25/366/Add.1. Hereafter referred to as the Nigeria Draft. Also see Clark (Canada), UN Doc. A/C.6/35/SR21, p.8 para.33 and Wentzel (Federal Republic of Germany), p.12 para.50 at UN Doc. A/55/35/SR22.

suggestion was rejected by the Ad Hoc Committee.[1] The drafters of the convention finally opted to avoid any form of provision on criminal responsibility. They chose, however, to include a clause (Article 16) which, in part, states the obvious:

> "The present Convention shall be applied without prejudice to:
> (a) The rules relating to the international responsibility of States".

The ILC has devoted some attention to the question of mercenary activities. In the context of the 1954 Draft Code of Offences we find proscribed as criminal offence:

> "The organisation, or the encouragement of the organisation, by the authorities of a State, of armed bands within its territory or any other territory for incursions into the territory of another State, or the toleration of the organisation of such bands in its own territory, or the toleration of the use by such armed bands of its territory as a base of operations or as a point of departure for incursions into the territory of another State, as well as direct participation in or support of such incursions."[2]

There was some doubt as to whether "armed bands" included mercenaries, but the position has now been clarified by virtue of Article 3(g) [3] of Resolution 3314 (XXIX) which in its definition of aggression includes:

> "the sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein."[4]

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1. See its Report for 1985, para. 103.

2. Draft Article 2 (4). See ILC Yrbk., 1954, v. II, p. 150. For further reference, ibid., 1950, v.II, p.262 Crime No. II; ibid., v.I, pp.117-122; ibid., 1951, v. II, p.135, article 2.4., and ibid., 1954, v.II, p.117 para VII.

3. For commentary on the specific sub-clause, see Ferencz, Aggression, v. II, pp.39-41.

4. See Nicaragua Case, ICJ Rep., 1986, p.103 para.195. Cf. Judge Schwelb, Diss. Op., ICJ Rep., p.345 paras

In the course of the ILC's current work on the Draft Code, mercenarism was discussed as its thirty-seventh (1985) and fortieth (1988) sessions.[1] The practice was considered at both sessions within the context of the concept of aggression as defined in Resolution 3314 (XXIX). That definition of aggression stood to be adopted in toto by the ILC and its relevant sub-clause 3(g) on mercenaries was considered sufficient by the ILC Rapporteur to cover the crime of mercenarism in the Draft Code. ILC opinion on this aspect was much divided at the thirty-seventh session,[2] but it has been provisionally adopted as such by the Commission.[3] In addition, the ILC is in the process of drafting a separate provision on the recruitment, use, financing and training of mercenaries.[4] At its forthy-third session (1991) the ILC's Drafting Committee presented for consideration a draft provision which contemplates, on the one hand, the crime of recruiting, using, financing and

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169-171.

1. See ILC Yrbk., 1985, v.II, pt.I, p.80 and UN Doc. A/CN.4/411, 19th February, 1988.

2. See relevant contributions made during the debate by the following members (ILC Yrbk., 1985, v.I.): Mahiou, p.32, para 18; Balanda, p.34, para 36; Sucharitkul, p.38, para 30; Flitan, p.42, para 9; Razafindralambo, p.48, para 40; Njenga, p.48, para 9; Barboza, p.52, para 30; McCaffrey, p.55, para 56; Yankov, p.58, para 18; Diaz Gonzalez, p.60, para 31; Ushakov, p.62 para 49; Huang, p.64, para 19; Lacleta Munoz, p.74, para 30; Jagota, p.77, para 57. See also Sixth Committee Report, UN Doc.A/CN.4/L.398, 1986, p.25 paras 98-101.

3. See ILC Yrbk., 1988, v.I, p.291 et seq., and ibid., v.II, pt.II, pp.71-73.

4. See draft article 23 presented by the Drafting Committee at the ILC's forty-third session, UN Doc. A/CN.4/L.459, 1991, p.6. This is a refined version of an earlier attempt at drafting a provision at the forty-second session. See GAOR, Supp. No. 10 (A/45/10) pp.64-67. See also Sixth Committee views in UN Doc. A/CN.4/L.456, 1991, p. 19.

training mercenaries. This, according to the ILC Drafting Committee can only be committed by persons acting on behalf of a State. On the other hand, it is also proposed to have individuals punished for acting as mercenaries. The definition of mercenary is taken from the relevant provision (Article 1) in the UN Convention on Mercenaries and thus individuals who have no connection whatsoever with the parties to an armed conflict, i.e. who are neither nationals nor residents nor members of the armed forces of either the State sending them or the State in whose territory the conflict occurs, will be punished. It is here where the presence of the universality element is felt in this particular practice and which thus may permit it to be considered candidate for the delicti jure gentium class.

CHAPTER 6

Human Rights Violations as Crimes

A. Crimes Against Humanity[1]

The concept of crimes against humanity was designed to reach crimes committed, principally, in the course of the Second World War, but which fell outside the customary law definition of war crimes and which were directed against non-Allied nationals in occupied territory.[2] Certainly, there is a degree of overlap between the concepts of war crimes and crimes against humanity. The latter unlike the former may be committed in time of peace as well as in time of war.

I. Juridical Nature of the Concept

Were it not for the impact which the Nuremberg and Tokyo Charters have had in international law,[3] the term "crimes against humanity" would reflect a vague notion rather than a developed legal concept of international significance. The reason is that, per se, this phrase may embrace a wide variety of activities: legal and non-legal.

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1. See generally: Pella, Memorandum, UN Doc. A/CN4/39, 1950, ILC Yrbk., 1950, v.II, pp.346-348. See also History UNWCC, op. cit., pp.188-220; Schwelb 23 BYIL (1946) 178; Glaser, Droit International Penal Conventionnel, 1970, v.I, paras. 76-79, and Bassioni writing in International Crimeimal Law Volume III Enforcement, 1987, p.51. A German perception of the concept of crimes against humanity is found in: Statement of Dr. Jahreiss, Trial of German Major War Criminals, HMSO, v.18, pp. 80-120 and in Kraus, 13 De Paul LR (1964) 233 at 241.

2. See Schwelb, op.cit., pp.183-187 and Cassese, International Law in a Divided World, 1986, p.290 para.169.

3. GA Res. 95(I), 11th December 1946, Affirming Principles of International Law Recognised by the Charter of the Nuremberg Tribunal. See also Brownlie, Use of Force, p.185 et seq., and at, Principles, p.562.

In re Altstotter & Others[4] genocide was cited by the US Military Tribunal at Nuremberg as the "prime illustration of a crime against humanity under CCL No.10, which by reason of its magnitude and international repurcussions has been recognised as a violation of common international law". In the Asylum Case[5] Judge Alvarez interpreted the concept of "crimes against humanity" lato sensu, i.e. broad enough to include the act of waging war. At one stage during its work on the preparation of a Draft Code, the ILC adopted "Crimes Against Humanity" as a very broad heading comprising such practices as "apartheid" and damage to the environment, practices whose status as criminal offences in international law is hardly established.[6] Unlawful seizure of aircraft too has been described as a "crime against humanity".[7] Accordingly the phrase may be used indiscriminately. It lends itself to various, and possibly conflicting, interpretations.[8] It must be employed with caution and qualification if it is to reflect practices recognised as criminal offences in international law.

The authoritative definition of the concept of crimes against humanity in international law is contained in Article 6 of the Nuremberg Charter. Sub-clause (c) thereof reads as follows:

> "**CRIMES AGAINST HUMANITY:** namely, murder, extermination, enslavement, deportation, and

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4. 14 Ann.Dig. 279 at p. 285.

5. ICJ Rep., 1950, p.298.

6. See draft article 14 proposed by Rapporteur Thiam in his Seventh Report, UN Doc.A/CN.4/419, 1989, p.9 para 30. See also ILC Report to the GA on its work at its forty-first session, GAOR, Supp. No. 10 (A/44/10) p. 147 et seq.

7. See Plawski, p.139 n.78.

8. See: Schwelb, op.cit., p.195; Roling, 100 Hague Receuil (1960) 346 and Thiam, Fourth Report on the Draft Code, ILC Yrbk., 1986, v.II, pt.I, p.56 paras 12-15 and p.57 paras 20-27. Cf. ILC Member Balanda, ILC Yrbk., 1986, v.I, p.107 para 30.

other inhumane acts committed against any civilian population, before or during the war;[1] or persecutions on political, racial or religious[2] grounds [**in execution of or in connection with any crime within the jurisdiction of the Tribunal**[3]] whether or not in violation of the domestic law of the country where perpetrated".

This definition includes practices which for long have been recognised as criminal offences, under municipal law. They were new in 1945 not in the sense that they were not formerly considered criminal offences, but rather for the first time the international community considered itself authorised to concern itself with criminal acts committed against a State's own nationals "because the crimes

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1. This semi-colon was replaced by a comma. See Berlin Protocol, 6th October, 1945. See also Schwelb, op.cit., pp.187-188.

2. Reference to persecutions on religious grounds is not included in the parallel provision (Article 5.c.) of the Tokyo Charter. See Schwelb, op.cit., p.214 et seq.

3. The words placed in parenthesis restrict, ratione materiae, the justiciability of the crimes before the Nuremberg and Tokyo Tribunals. But that limitation does not apply in Article (II.1.c.) of CCL No.10. This change in the definition of the concept of crimes against humanity has been interpreted by Schwelb (op.cit., p.218 para.4) as an indication to allow persons to be tried for these crimes committed after formal termination of hostilities in June 1945. Schwelb's assessment (ibid., p.206) of crimes against humanity as "the cornerstone of a system of international criminal law equally applicable in times of war and of peace, protecting the human rights of inhabitants of all countries, against anybody, including their own States and governments", inapplicable in the context of the Nuremberg and Tokyo Charters, is certainly valid under CCL No.10.

   Recent State legislative practice follows the CCL No.10 type of definition, i.e. it excludes restrictions of any form on the justiciability of the concept of crimes against humanity before national tribunals. See for example, Article 1.96 of the Canada Criminal Code Amendment Act 1987.

surpassed in magnitude and savagery any limits of what was tolerable".[1] This is endorsed by a proposal made by the US Representative on the Legal Committee of the UNWCC. The US representative[2] explained that the concept was designated as "crimes against humanity" because they were crimes against the foundation of civilisation, irrespective of the place and the time of commission, and irrespective of the question as to whether or not they constitute violations of the laws of war.

From 1939 to 1945 the concept of crimes against humanity was the result of a callous policy which took the form of a "systematic, wholesale, consistent action, taken as a matter of deliberate calculation."[3]

The elements of organisation and premeditation in mass murder, "extermination"[4] in the words of Article 6(c) of the Nuremberg Charter, are the features which distinguish most the concept of crimes against humanity and the class of crimes discussed in this chapter in general. These elements have been emphasised in the writings of publicists[5]

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1. Roling, 100 Hague Receuil, pp.345-346 (italics added), and also writing in International Law in the Netherlands, v.II, p.191. Cf. Bassiouni, writing in International Criminal Law Volume III Enforcement, op.cit., p.61.

2. See History UNWCC, p.175.

3. Sir Hartley Shawcross, Closing Speeches, p.60. See also Nuremberg Judgment, Cmd. 6964, p.65. Cf. Lemkin, Axis Rule in Occupied Europe, 1944, p.90.

4. See generally Schwelb, op. cit., p.192 para.(g).

5. M. Champetier de Ribes, Closing Speeches p.140; Nuremberg Judgment, pp.44-45; cf. IXth common preambular paragraph of Hague Conventions (II) 1899 and (IV) 1907 respectively. Also see: Doc. XXXIX, Jackson Report, p.312 entitled: "Proposed Revision of Definition of 'Crimes'" - later to emerge as Article 6 of the Nuremberg Charter, submitted by the British Delegation, July 20th, 1945, where Article 6(c) in embryonic form read as : "systematic atrocities against or systematic terrorism or ill-treatment or murder of civilians"; Keenan and Brown, op. cit., pp.117-118; Roling, 100 Hague Receuil, p.347; History

and in the decisions of post-1945 military tribunals.[1]

The concept of crimes against humanity is recognised in international law as illustrating norms considered to be peremptory. The status of the practices as delicti jure gentium is accepted[2] and endorsed, in part, by virtue of the following words common in the relevant provisions of the Nuremberg, Tokyo Charters and CCL No.10: "whether or not (committed) in violation of the domestic law of the country where perpetrated". Accordingly, the locus delicti as well as the nationality of the offender and the capacity in which he acted at the time of the commission are irrelevant in so far as the status of crimes against humanity in international law is concerned. Crimes against humanity are crimes whose proscription and prevention are of universal concern.[3] Indeed, four decades on they remain one of the most serious and grave crimes in international

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UNWCC, op. cit., p.179, para. (iii) c; Ferencz, 8 Ency.PIL, 107; and ILC Members: Yrbk., 1986, v.I, Ogiso, p.113 para 24; McCaffrey, p.119 para 7; Mahoiu, p.127 para 9; Riphagen, p.131 para 43, and Koroma, p.134 para 77. Contra : Balanda, p.107 para 31. See also Seventh Report on the Draft Code, UN Doc. A/CN.4/419, pp.16-18. See also ILC Report to GA on the work of its forty-first session (1989), GAOR, Supp No.10 (A/44/10) p.151 para 150 - p.153 para 158, and draft article 21 entitled "Systematic or mass violations of human rights" adopted by the ILC Drafting Committee at the ILC's forty-third session (1991). See UN Doc. A/CN4/L.459/Add.1, p.5.

1. See In re Altstotter and Others (The Justice Trial), 1947, 14 Ann.Dig. 285 and In re Ahlbrecht as cited in Roling 100 Hague Receuil, p.348.

2. See Lauterpacht, International Law and Human Rights, p.35.

3. See History UNWCC, op. cit., pp.178-179 and Prof. Gros, Jackson Report, p.360. At the time of drafting the Apartheid Convention, the Director of the United Nations Human Rights Division expressed the view that once "apartheid" was to be designated a crime against humanity under international law, the perpetrator may be punished by any future State Party independently of his nationality. See UN Doc. A/C3/SR2004, p.145 para.26.

law [1] and continue to be a focus for drafters of national legislation and ad hoc government appointed inquiries.[2]

II. Individual Responsibility, Justiciability and the defences of: "Superior Orders", the Political Offence Exception and Statutory-Limitation

As has been stated, the 1945 concept of crimes against humanity supplemented the war crimes category defined under the Nuremberg Charter and, given the limitations placed upon the Nuremberg Tribunal in its consideration of the concept, much of the rules and principles of law identified under the relevant headings of Individual Responsibility, Jurisdiction, "Superior Orders", the Political Offence Exception and Statutory-Limitation in the War Crimes section of Chapter 5 apply mutatis mutandis to the present category of crimes. With regards to the various bases of jurisdiction applied in 1945-1949 war crimes trials, these too are identifiable in trials involving charges for crimes against humanity. However, the removal of restrictions ratione materiae on the justiciability of the concept under CCL No.10 permitted the application of the universality principle of jurisdiction in trials where charges of crimes against humanity were considered. But, notwithstanding that improvement in the definition of the concept, decisions delivered by US Military Tribunals in pursuit of CCL No.10, reveal a degree of inconsistency in judicial

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1. Other than in the context of the ILC's project on the Draft Code the concept of crimes against humanity is found in the following projects de lege ferenda: Draft Article V of the Draft International Penal Code prepared by the IAPL, 52 RIDP (1981) 130 and Draft Article IV of the Draft International Criminal Code, prepared by Bassiouni, op.cit., 1987, p.141.

2. See Canada War Crimes Report, pp.167. The United Kingdom War Crimes Inquiry was not instructed by H.M. Government to consider the concept of crimes against humanity, but decided nevertheless to have the present writer submit considerations on the concept and included in its report. See United Kingdom War Crimes Report, pp. 48 and 52.

interpretation. In re Flick and Others[1] the requirement to have the concept of crimes against humanity linked with the Nuremberg Charter definition of either war crimes or crimes against peace, was held to be equally applicable under CCL No.10. Subsequently, however, the same tribunal, In re Ohlendorf and Others (Einsatzgruppen Trial) [2] declared that under CCL No.10 crimes against humanity were justiciable regardless of the nationality of the accused and of the victim, or the locus delicti, or of any limitation ratione temporis. In 1961, the Jerusalem District Court in Eichmann endorsed the Einsatsgruppen Trial interpretation, but it was admitted that in the circumstances of the case most of the practices with which Eichmann was charged were all committed during the Second World War or in connection with it.[3]

During the course of the Second World War, allied governments in exile had resolved that the criminal practices committed by Germany against civilian populations in the course of its conduct of an aggressive war, which include mass deportations, executions and massacres of hostages, are not considered as political crimes.[4] Publicists,[5] have put forward the view that the concept of crimes against humanity as defined at Nuremberg should not be recognised as political crimes even if committed for political motives.

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1. Decided December 22, 1947. 14 Ann.Dig. 266 at p.272.

2. Decided April 10, 1948. 15 Ann.Dig. 656 at p.664.

3. See 36 ILR p.49 para.29.

4. Operative Paragraph 1, International-Allied Declaration, 1942.

5. For views endorsing the non-applicability of the political offence exception vis-a-vis crimes against humanity see, among others, Garcia-Mora, 62 Mich. LR (1964) 927; Bassiouni, International Extradition and World Public Order, 1974, p.420 and Reiss, 20 Cor. ILJ (1987) 281 at 308 et seq. See, however, Wijngaert, writing in Bassiouni International Criminal Law Volume III Enforcement, 1987, p.91 et seq.

Further there is some evidence which indicates that States consider the prosecution of offenders for crimes against humanity as not being subject to statutes of limitation. France[1] and Israel[2] have passed legislation specifically to this effect. The principle has been upheld in recent judicial decisions delivered by tribunals in both countries.[3] In Handel v Artukovic[4] the District Court of California has held that the United States "appears to recognise the principle that a statute of no limitation should be applied to the criminal prosecution of war crimes and crimes against humanity".

B. Genocide

Genocide has been declared to be the "crime of crimes" and "older that civilisation itself".[5] But notwithstanding these approbative descriptions genocide is generally recognised as a category of criminal practices whose origin lies in the Nuremberg Charter concept of crimes against humanity. There is substantial source material which endorses this view,[6] although some writers are of the

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1. Law No. 64-1326, December 12th, 1964.

2. 20 LOSI (1966) 8.

3. See Federation Nationale des Deportes et Internes Resistants et Patriotes and Others v Barbie, 78 ILR (1985) 125 and Eichmann, 36 ILR 79.

4. 601 F.Supp. 1421 (1985) 1430.

5. See Drost in the Introduction to his work, The Crime of State, v.II, 1959. See also Statement of US Secretary of State, Dean Rusk, before the United States Senate Sub-committee of the Committee on Foreign Relations. Whiteman, Digest, v.11, p.858.

6. See Preamble to a set of draft articles submitted by the UN Ad Hoc Committee (hereafter referred to as Ad Hoc Committee) established by ECOSOC Res. 117(IV), 3rd March, 1948, to formulate an international instrument defining and proscribing genocide as a criminal offence. In particular, see French proposal to include reference to the Nuremberg Judgment in the Ad Hoc Committee's Preamble, UN Doc. E/AC.25/SR23, p.5

opinion that genocide existed as a criminal offence in international law quite separately from the concept of crimes against humanity prior to World War II [1], indeed prior to the adoption of the Genocide Convention.[2]

Certainly, genocide and crimes against humanity, though related, are separate criminal offences in international law. The status of genocide as a crime in international law is beyond reproach. The declaration to this effect in Article 1 of the Genocide Convention reflects customary law. Considerable evidence in support of this view is to be found in the travaux preparatoires of the convention,[3] in General Assembly resolutions[4], in doctrine and in ILC debates.[5] Like crimes against humanity,

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and statement by French Representative Ordonneau on the Ad Hoc Committee confirming the work of the committee as the second stage in the development of the concept of crimes against humanity. UN Doc.E/AC.25/SR 7, pp.7-8. See also Memorandum entitled: "The Basic Principles of a Convention on Genocide" submitted by the USSR to ECOSOC, UN Doc.E/AC.25/7, 7th April, 1948.

1. See Bryant, 16 HILJ (1975) 687 n.12 and Weiss, 54 BYIL (1983) 195. Cf. Handel v. Artukovic, 601 F. Supp. 1421 (1985) at 1428-1429.

2. See Mr Gross, Statement for Applicants, S.W. Africa Cases, ICJ Pleadings, v.9, pp.355-356, 1966; Lador-Lederer, 4 Israel YHR (1974)101; Plawski, op.cit., p.74 and Eichmann, 36 ILR p.35 para.21.

3. See summary records of the Ad Hoc Committee, UN Docs. E/AC.25/SR1-28; draft articles submitted by UN Secretariat, UN Doc.E/447; draft articles submitted by China, (Ad Hoc Committee member), UN Doc. E/AC.25/9, 16th April, 1948; and GA Res. 180(II) entitled "Draft Convention on Genocide" adopted 21st November 1947.

4. GA Res. 96(1) adopted unanimously 11th December, 1946 recommending the drafting of a convention on the crime of genocide. Also see more recent resolutions such as GA Res. 40/142, 13th December, 1985 and Res.42/133, 7th December 1987.

5. Generally see summary records of ILC debates at its thirty-eight session, ILC Yrbk., 1986, v.I, Meetings 1958-1963. The following ILC Members, in particular, emphasised the distinction between the concepts of

genocide may be committed in time of peace as well as in time of war and the policy of mass-murder, a characteristic common to both crimes, places it squarely within the concern of the international community and international law. Roling has written:

> "In essence they (genocide and crimes against humanity) form one concept of internationally recognised criminality: systematically encroaching upon vital rights of groups, threatening the existence of one of the groups of which mankind is composed. They constitute as such an unbearable mass violation of human rights. That is the title of the right which mankind has to be entitled to intervene."[1]

The principles of individual responsibility, criminal jurisdiction, justiciability and "superior orders" in international law as they apply to genocide are discussed below within the framework of the Genocide Convention which was adopted, in the words of the French Representative on the Ad Hoc Committee, to state precisely what constitutes an international crime.[2]

In Article IV we find one of the Nuremberg Charter's legacies - the non-acceptance of the plea of 'Act of State' as a defence. It provides that constitutionally responsible rulers, public officials or private individuals are personally responsible for acts of genocide including those who conspire, incite, attempt and participate in its commission. Thus Article IV reaffirms the principle of individual responsibility for crimes committed under international law. Support for this principle was constant throughout all the stages of the treaty's drafting history.[3]

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crimes against humanity and the crime of genocide, ibid., Sir Ian Sinclair, pp.104-105; Mr.Balanda, p.107 para 34; and McCaffrey, p.119 paras 6-8.

1. Roling, 100 Hague Receuil, p.350.

2. See UN Doc.E/AC.25/SR6, p.11.

3. The principle was put forward in a Draft Convention by the UN Secretariat (see Drost, op. cit., p.12 para. 15). It was endorsed by governments in their replies to the UN Secretariat's draft articles (ECOSOC Res.

However, the division in Article IV between 'constitutionally responsible rulers' and 'public officials' may allow States to contract out of their obligations under this provision by pursuing academic arguments in order to establish, for instance, that a Head of State is neither a 'public official' nor a 'constitutionally responsible ruler."[1] Wording to the effect that all physical persons[2] may incur responsibility for the commission of genocide is a more suitable arrangement: it enunciates clearly the principle of individual rsponsibility, it is less prone to misinterpretation and thus becomes more effective.[3]

The Genocide Convention contains no provision which declares that acting in pursuit of "superior orders" is not an admissible ground of defence for the commission of genocide. The UN Secretariat's set of draft articles contained such a clause in draft article V,[4] but the Ad Hoc Committee[5] resisted suggestions to include the provision on

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77(V), August 6th 1947. See also Drost, op. cit., pp.22-23). It was also included in various drafts and memoranda submitted by government delegations, e.g. : USSR, UN Doc.E/AC.25/7 and China, UN Doc.E/AC.25/9. The principle was also adopted by the Ad Hoc Committee, UN Docs. E/AC.25/SR4 p.3-5, E/AC.25/W1 Add.1, p.4 draft article 4, and E/AC.25/W4, p.14, draft article 5.

1. E.g. see Paragraph 1 of the declaration made by the Phillippines. See UN Multilateral Treaties Deposited with the Secretary General. Status as at 31st December, 1989, 1990, p.100.

2. Some governments, influenced by the Nuremberg Judgment, expressed the view that organisations should also be deemed criminally responsible, Drost, op.cit., p.24.

3. See UN Doc. E/AC.25/SR18, cf. Drost, op.cit., pp.92-94.

4. See Drost, op.cit., pp.12-26 and 97-99.

5. See UN Docs. E/AC.25/W1/Add.1, p.4 para.2 - p.5, and E/AC.25/W4, pp.14-15.

the basis that such a principle ran counter to the cardinal rule of complete obedience expected from members of armed forces and the civil services. The Russian and Polish delegations on the Ad Hoc Committee[1] found its exclusion to be one of the Committee's most regressive steps. Drost[2] acknowledged it as "a serious failure of the Convention".

Furthermore, the Genocide Convention does not regulate instances where genocide is committed in a State whose law does not provide for its punishment. Thus perpetrators captured outside the locus delicti could plead "command of the law" in their defence. The UN Secretariat's Draft Articles contained a provision denying offenders the possibility of invoking this defence. The Draft Articles had been influenced by the Nuremberg Charter definition of crimes against humanity which were deemed justiciable irrespective of whether or not they violated the lex loci delicti commisi. The principle that "command of the law" is no justification for the perpetration of criminal practices under international law has been affirmed by the UN General Assembly[3] and formulated by the ILC.[4] Further, Article 1(b) of the UN Convention on Statutes of Limitation stipulates that genocide shall not be subject to the principle of statutory limitation even if it "does not constitute a violation of the domestic law of the country in which it was committed". Genocide, for instance, is considered to be an extraditable crime under Article 3(2) of the Ireland Genocide Act and Article 2(1) of the UK Genocide Act even if it was not considered as a criminal offence under the law of the lex loci delicti commisi.

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1. UN Doc. E/AC.25/SR26, p.15.

2. Op. cit., p.26. See also Shaw, writing in Essays in Honour of Shabtai Rosenne, p. 813.

3. Res. 95(I), 11th December, 1946.

4. See Nuremberg Principle II, ILC Yrbk., 1950, v.II p.192. Discussion of Principle II by the ILC, ibid., v.I, pp.37-39.

The Genocide Convention's silence on the question of "command of the law" can perhaps be explained for the following reason. The drafters of the convention attributed a great deal of importance to the obligation committing High Contracting Parties to enact legislation[1] implementing the convention's provisions and making them part of domestic law.[2] It may have seemed redundant, therefore, to include a statement similar to that contained in the definition of crimes against humanity in the Nuremberg Charter[3] or to Article 1(b) of the UN Convention on Statutes of Limitation.

The Genocide Convention has been ratified by 100 States.[4] The rules proscribing genocide practices as criminal offences are customary law,[5] and recognised as

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1. Some examples of national legislation include, the UK Genocide Act 1969; the Australia Genocide Convention Act 1949; US, Genocide Convention Implementation Act of 1987; Spain, Article 137b of the Penal Code 1971; Federal Republic of Germany, Article 220A of the Penal Code; Netherlands, The Implementation of the Genocide Act, 1964, Stb No.243; Monaco, Ord. No.351 Implementing the 1948 Genocide Convention, Laws of the Principality of Monaco 093- f.22; Ireland, The Genocide Act 1973; and Israel, The Crime of Genocide (Prevention and Punishment) Law, 1950.

2. Article V of the Genocide Convention. See UN Docs. E/AC.25/W1 Add.2 and E/AC.25/ W4, p.16, and Principle VIII (b), USSR Memorandum, UN Doc.E/AC.25/7, p.3.

3. See Drost, op. cit., pp.95-97.

4. Data as at January, 1990. See, Bowman and Harris, op.cit. The United States Senate has only recently given its advice and consent to ratify the Genocide Convention. 86 US Dept. Bull., pp.89-91. See Statement of Elliott Abrams, Assistant Secretary for Human Rights and Humanitarian Affairs, US Dept. Bull., Nov. 1984, p.66.

5. See Reservations to the Genocide Convention, Ad. Op., ICJ Rep., 1951, p.23. Also see, Rosenne, ILC Yrbk., 1963, v.I, p.74 para 9; Hannikainen, op. cit., p. 456 et seq., and Shaw, op.cit., p.800.

peremptory norms in international law.[1] Genocide is a criminal offence of the same calibre as war crimes and piracy jure gentium. It is a crime which transcends national boundaries. It deserves punishment whenever and wherever it is committed. For this reason Article VI of the Genocide Convention is disappointing because it provides that:

> "persons charged with genocide 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".

In one clause the Genocide Convention establishes the exercise of criminal jurisdiction at two levels: national and international. The significance of this two-tier system vis-a-vis the crime of genocide and the concept of a criminal offence in international law is discussed below.

I. Jurisdiction

(a) Municipal Level

States ought to ensure that perpetrators of criminal practices under international law are prosecuted and to this end provision ought to be made to ensure that prosecution of the offender takes place even on the basis of his presence alone in State territory. Accordingly, the absence of the active and passive personality principles and particularly that of the universality principle of jurisdiction from Article VI of the Genocide Convention is conspicuous.

M. Akoul, Lebanon's representative on the Ad Hoc

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1. The Barcelona Traction, Light and Power Co. Ltd Case (Second Phase). ICJ Rep., 1970, p.32, paras. 33 & 34. Brownlie, Principles, p.513; Sinclair, op.cit., p.217; Roling writing in International Law in the Netherlands, v.II, p.192; Beres writing in Bassiouni, International Criminal Law Volume 1 Crimes, p.279. Cf. Oppenheim, International Law, 1954, v.I, p.740 n.3, and Article 6.3 of the International Covenant. But contra see: Friedlander, 15 Case Western (1983) 22.

Committee, stated that once universal punishment for 'international infringements' such as piracy is accepted as a common law principle, then it must equally apply to genocide.[1] Other writers[2] have opined that failure to include the universality principle in the Genocide Convention has undermined its scope, purpose and object, i.e. to effectively prevent and to punish authors and sponsors of these type of discriminatory practices. This is especially true in view of the absence from the convention's text of a provision catering for the obligation of States Parties either to extradite or to prosecute perpetrators.[3]

The territorial principle in Article VI is cause for concern because the perpetrators of genocide may remain unprosecuted, unpunished or both. The fact that genocide practices are in most cases likely to be committed or abetted by individuals holding public office,[4] the more it seems unlikely that criminal proceedings would be instituted against the perpetrators by the authorities responsible for the administration of justice in the locus delicti.

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1. UN Doc. E/AC.25/SR8, p.10. Contra, see USSR delegate, ibid., p.9.

2. Jescheck, 8 Ency.PIL 256.

3. The aut dedere aut punire principle featured in a Memorandum (UN Doc. E/AC.25/8, 14th April, 1948) submitted to the Ad Hoc Committee on Genocide.

4. State participation in the commission of genocide is not an absolute requirement. This was the final position taken by the drafters of the Genocide Convention, see Drost, op.cit., p.66 para. 78. There was some division of opinion, however, in the Ad Hoc Committee. The Chinese representative (UN Doc.E/AC.25/SR4, p.5) opined that "a crime need not be committed with the complicity of a government in order to fall within the presence of international law". The French delegate disagreed. Genocide was only an international crime if committed by the authorities of the State, otherwise it could only be considered a municipal crime. (UN Doc.E/AC.25/SR7, pp.7-8).

In the Preamble and in Draft Article VII of the UN Secretariat's Draft[1], in the debates of the Ad Hoc Committee[2] and in the discussions of the UN Sixth Committee[3], we find support for adopting the universality principle in the Genocide Convention. Judicial decisions and the writings of publicists[4] endorse the view that the crime of genocide demands the application of a universal principle of jurisdiction. Samples of municipal legislation illustrate that States, including States Parties to the Genocide Convention, are not prepared to be restricted by the territorial principle contained in Article VI of the Convention, and are prepared to exercise jurisdiction on other bases, including the universality principle. Thus, Article 5 of the Israel Crime of Genocide (Prevention and Punishment) Law[5] establishes that any person who committed genocide outside Israel will be prosecuted as if the crime was committed in its territory. A similar provision applies to perpetrators of genocide under Article 6(1) of the German Penal Code.[6] On the basis of the travaux preparatoires of the Convention, the US Senate Foreign Relations Committee considers the active and passive principles of jurisdiction to be applicable under Article VI. In recommending ratification of the Genocide Convention the Foreign Relations Committee reported:

> "The negotiating history makes it clear, however, that this is not the only place (locus delicti)

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1. See Drost, op. cit., pp.9-13.

2. See Rudinski (Poland), Lin (China), UN Doc. E/AC25/SR3 p.4; and Perez-Perozo (Venezuela), Azkoul (Lebanon) ibid., /SR8, p.2 and p.8 respectively. Also see Drost op. cit., p.34 para. 48 and p.46 para. 63.

3. See Drost, op.cit., p.100 paras. 100-101.

4. See among others: Drost, op. cit., p.13; Lemkin, op. cit., p.90; Jescheck, op. cit.; Beres op. cit., p.279, and Wagner, op.cit., p.908 n.106.

5. 4 LOSI 101.

6. STGB, 1987.

where trial may be had. The state of which is the individual is a national or the state against whose nationals the act was committed may also exercise jurisdiction."[1]

In its Advisory Opinion on the Genocide Convention[2] the International Court recognised but stressed the "universal character both of the condemnation of genocide and of the co-operation required" to suppress it.

In Eichmann[3] defendant was charged, inter alia, with so-called "Crimes against the Jewish People" under the 1950 Nazis and Nazi Collaborators (Punishment) Law. This class of crimes is defined in terms almost identical to the definition of genocide under the Genocide Convention. Thus the District Court of Jerusalem discussed the concept of the crime of genocide in international law.[4]

The Court noted[5] General Assembly Resolution 96 (I) of 1946 which stated that "punishment of the crime of genocide is a matter of international concern" and "affirmed that genocide is a crime under international law". The Court further considered the International Court's Advisory Opinion on the Genocide Convention paying due regard, in particular, to the International Court's reference to the universal scope of the convention and its underlying principles "which are recognised by civilised nations as binding on States even without any conventional obligation".[6]

On the basis of this evidence the District Court held: (a) the crimes of genocide committed against Jewish people and other peoples during the Nazi regime were crimes under international law, therefore, (b) "in accordance with

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1. 28 ILM (1989) 765.

2. ICJ Rep., 1951, p.23.

3. 36 ILR 5 at p.8.

4. 36 ILR p.32 para.17 - p.39 para.25.

5. Ibid., pp.32-33.

6. ICJ Rep., 1951, p.23.

accepted principles of international law the jurisdiction to try such crimes is universal".[1] The Court also proceeds to explain how this assessment of the status of the crime of genocide and the application of the universal principle of jurisdiction are tenable in view of Article VI of the Genocide Convention.

The Court submits the following thesis.[2] On the one hand, the Genocide Convention codifies customary law by virtue of Article I which provides: "the Contracting Parties confirm[3] that genocide, whether committed in time of peace or in time of war, is a crime under international law". The District Court noted once again the International Court's statement that the underlying principles of the Genocide Convention (namely the criminal character of the practices which constitute genocide; the criminal responsibility of rulers and public officials and the absence of any "political" character of the crime for the purposes of extradition) are recognised [4] by civilised nations as binding on States without any conventional obligation.[5] The Court[6] concluded that the words "confirm" (in Article I of the Convention) and "recognised" (present in the International Court's Advisory Opinion) "indicate confirmation and recognition ex tunc; that is, the said principles were already part of customary international law" before the adoption of the Genocide Convention.[7]

On the other hand, the Genocide Convention has created, prospectively, international obligations for the

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1. Op.cit., p.34 para.19.

2. Op.cit., p.34 para.21 et seq.

3. Emphasis added.

4. Ibid.,

5. Ibid.,

6. Op.cit., p.35 para.21.

7. Ibid., p.35 para.21.

Contracting Parties. Inter alia, States Parties are required (Article V) to enact legislation "in particular to provide effective penalties for persons guilty of genocide". The Court noted that an "invitation" to this extent had already been made to all Member States of the United Nations by General Assembly Resolution 96 (I). It was held that Article V gave substance to an undertaking made in the latter part of Article I where States Parties commit themselves to prevent and to punish the crime of genocide. Thus, in the Court's opinion Article VI constitutes yet another obligation for States Parties in a chain of obligatory provisions intended to secure punishment of the crime of genocide. The best assessment of Article VI, however, is found in the Judgment and deserves to be reproduced:

> "It is clear that Article 6 ..... is intended for cases of genocide which will occur in the future after the ratification of the treaty or the adherence thereto by the State or States concerned. It cannot be assumed, in the abscence of an express provision in the Convention itself, that any of the conventional obligations, including Article 6, will apply to crimes which had been perpetrated in the past.... Article 6 .... is a purely purposive provision, and does not presume to affirm a subsisting principle. [It is] a special provision undertaken by the contracting parties with regard to the trial of crimes that may be committed in the future.... It constitutes no part of the principles of customary international law, which are also binding outside the conventional application of the Convention."[1]

The Court further declared:

> "Moreover, even with regard to the conventional application of the Convention, it is not to be assumed that Article 6 is designed to limit the jurisdiction of countries to try crimes of genocide by the principle of territoriality."[2]

In support of this interpretation of Article VI, the

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1. 36 ILR p.36 para.22.

2. Ibid., para.23.

Court[1] submits, as corroborating evidence, the Report sent by the UN Sixth Committee to the General Assembly prior to the adoption of the Convention stating, inter alia, that Article VI does not prejudice the right of any State to bring to trial its nationals for acts committed outside the State. The Court also cited the writings of learned publicists reporting that there was no settled opinion in the Sixth Committee on the interpretation of Article VI. Other writers stated by the District Court opined that Article VI did not exclude application of principles of jurisdiction permitted under international law, including, and especially in the case of genocide, the principle of universality.[2]

The District Court admitted that the absence of the universality principle in Article VI is a "grave defect". But the territorial principle contained therein is only a "compulsory minimum". There is no rule against the principle of universality of jurisdiction with respect to the crime in question. Article VI is not exhaustive.[3]

The District Court of Jerusalem thus held, that genocide was a crime under customary international law prior to the adoption of the Genocide Convention and the jurisdictional bases for crimes under international law certainly include the universality principle. Israel was not therefore impeded from exercising either "legislative authority" or "judicial jurisdiction".[4] The Supreme Court (sitting as

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1. Ibid., p.37 para. 23 et seq.

2. Op.cit., p.37.

3. Op.cit., p.39 para.25.

4. The District Court Judgment makes it perfectly clear that the universality prinicple applied in Eichmann was neither based on Article 5 of the 1950 Crime of Genocide (Prevention and Punishment) Law, because that law "does not apply with retroactive effect", nor on the basis of its interpretation that reference to the territorial principle in Article VI of the Genocide Convention does not exclude other principles of jurisdiction for State Parties. The application of

Court of Criminal Appeal)[1] endorsed the District Court ruling:

> "Not only do all the crimes attributed to the appellant bear an international character, but their harmful and murderous effects were so embracing and widespread as to shake the international community to its very foundations. The State of Israel therefore was entitled, pursuant to the principle of universal jurisdiction and in the capacity of a guardian of international law and an agent for its enforcement, to try the appellant".

The exercise of the universality principle by national courts in respect of crimes in international law was also recognised by the United States Court of Appeals in the more recent case Demjanjuk v. Petrovsky.[2] The Foreign Relations Law of the United States - Third Restatement[3] reports that while the Genocide Convention "provides for trial by the territorial State .... universal jurisdiction to punish genocide is widely accepted as a principle of customary law". But more than a re-affirmation of the view held by the Courts in the Eichmann case, i.e. that genocide was a crime even prior to the drafting of the convention, the Third Restatement may suggest that genocide has passed into customary international law since the adoption of the Genocide Convention and is recognised as such.

At any rate, the more frequent the application of the universality jurisdiction principle to criminal offences under international law the greater is its promotion as one of the features characteristic of the concept of criminal offence in international law.

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the universality principle by the Court was based on the "basic nature of the crime of genocide as a crime of the utmost gravity under international law." Op.cit., p.39 para.25.

1. 36 ILR 277 at p.304.

2. 776 F.2d. 571 (1985).

3. Edited by the American Law Institute, 1987, v.I, p.256.

(b) International Level

The question whether the position concerning territorial jurisdiction in Article VI is satisfactory and the reference to an "international penal tribunal" in the same clause are singly and jointly relevant to the understanding of the concept of a criminal offence in international law. The travaux preparatoires of the Genocide Convention reveal that the question whether jurisdiction was to be restricted to the territorial principle or whether it was to have been broader and include, for example, the universality principle, depended very much on what shape and form would the international criminal jurisdiction formula take if indeed it were to be included.[1]

Some of the members[2] of the Ad Hoc Committee were in favour of accepting the universality principle per principio, but opposed it on the grounds that they could not allow their nationals to be tried by foreign courts because they may not benefit from the same constitutional guarantees as they would under the lex patriae.[3]

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1. Several drafts of the international criminal jurisdiction clause were submitted: See China, Memorandum, draft article III, UN Doc.E/AC.25/9; Ad Hoc Committee's draft article VII, UN Doc. E/794 and amendments submitted by Uruguay, UN Doc. A/C.6/209, United States, UN Doc. A/C6/235 and France UN Doc. A/C6/211. Also see Sohn, Cases and Other Materials on World Law, 1950, p.1024.

2. France, UN Doc. E/AC25/SR8, p.10; Venezuela, ibid. p.3, Lebanon, ibid., p.3; USA, ibid., p.11 and China, UN Doc. E/AC25/SR7, p.17.

3. In their comments on the UN Secretariat's set of draft articles which included the exercise of jurisdiction on the universality principle, some governments felt that the principle could be "abused by claiming jurisdiction over aliens on the grounds of genocide whilst the real purpose would be nothing but political retribution". See Drost, op. cit., p.26. Cf. amendments submitted by the United Kingdom, UN Doc. E/CN.4/L.1250, 23rd March, 1973 to the Draft Resolution of the Byelorussian SSR (UN Doc.E/CN.4/L.1248, 21st March, 1973) on the "Question of the Punishment of War Criminals and of Persons Who Have Committed Crimes against Humanity".

Unfortunately Article VI of the Genocide Convention does not diminish this cause of concern for governments because it does not prevent national courts from trying non-nationals. At any rate, the drafters preferred to include a reference to some form of an international criminal forum which represents independence and impartiality rather than admit a wide form of territorial jurisdiction. M. Ordonneau[1] declared: "France might be prepared to forego the right which she derived from the principle of national sovereignty in favour of an international jurisdiciton, but she could not do so in favour of a foreign jurisdiction." Other States[2], however, claimed that the setting up of an international criminal court was not in conformity with reality and violated the most basic principle of international law, i.e. State sovereignty.

The reference to an international penal tribunal in the Genocide Convention is certainly foward looking and de lege ferenda. But, it is also more than that. Draft article IX of the UN Secretariat's Draft and Governments' views expressed in the UN Sixth Committee reveal a very purposeful and practical meaning behind the two-tier system of criminal jurisdiction found in the Genocide Convention. States may, for a variety of reasons (political or non-political), find it more convenient to have offenders tried by an international tribunal than by their own national courts. The Netherlands[3] argued that individuals ought to be tried at the national level and States should be held responsible at the international level. It was also suggested that those offenders who held public office or acted in a public capacity at the time of the commission of

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1. UN Doc. E/AC.25/SR8, p.10.

2. See Venezuela, Poland and USSR, UN Doc. E/AC.25/SR7, p.4; and USSR Declaration, UN Doc. E/AC.25/W5, p.13. Also see views of these States in the Sixth Committee: UN Docs. A/C.6/SR97-99. Reproduced in Sohn, op.cit., pp.1026-1034.

3. A/C.6/SR97-99, loc. cit., pp.1027-1028.

the offence should be tried before an international rather than a national court.[1] For this reason the Czechoslovak Representative[2] too supported the establishment of an international criminal court. The French Representative[3] in the Sixth Committee stressed the need for a competent international criminal court: once the criminal responsibility of public officials had been accepted, law enforcement could not be expected to remain at the national level.

The notion of an international criminal tribunal is more relevant in the overall context of crime prevention and punishment in international law than it is to a discussion of the features typical of the concept of a criminal offence in international law. However, the need felt by treaty drafters to include a reference to an international penal tribunal in an international instrument such as the Genocide Convention, indicates that crimes in international law cannot, per principio, be totally separated from some form of international criminal jurisdiction.[4]

II. The Political Offence Exception Question

There was general agreement at the various drafting levels of the convention that under no circumstances would genocide be sanctioned on political grounds. The proposal[5] to stipulate that genocide "shall not be considered a political offence for the purposes of extradition" was adopted unanimously[6] in the Ad Hoc Committee[7] and now

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1. Drost, op. cit., p.14.

2. See Sohn, op. cit., p.1031.

3. M. Spanieu, ibid., p.1029.

4. Cf. ILC discussion on the Draft Code of Offences, ILC Yrbk., 1951, v.1. p.82 para 25 - p.86 para 68.

5. Submitted by Poland in UN Doc. E/AC.25/W5, p.20.

6. The USSR was in favour of the non-applicability of the

appears in Article VII of the Convention. It also appears in municipal legislation[1] and in other texts de lege feranda.[2]

Article VII of the Genocide Convention in original form read as follows:

> "Genocide and the other acts in Article IV[3] shall not be considered as political crimes and therefore shall be grounds for extradition".[4]

The Convention contains a similar provision except that it reads as:

> "Genocide and the other acts enumerated in Article III shall not be considered as political crimes for the purpose of extradition."[5]

The Ad Hoc Committee's Draft Articles, unlike the Convention, contained two separate statements :(i) a declaration that genocide is not and may not be considered a political crime, and (ii) that it is an extraditable offence. In turn the Genocide Convention embodies one principle, namely that in so far as extradition

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political offence exception with respect to genocide. See UN Doc. E/AC.25/SR7, p.15. However, see the United States reservation (ibid.) declaring that an extradition request for genocide could only be entertained once genocide was a criminal offence under domestic law as requried by Article V of the Convention.

7. UN Doc. E/AC.25/SR23, p.12.

1. See: Ireland, Genocide Act 1973 Article 3(1); UK, Genocide Act 1969 Article 2(2) and Israel, Crime of Genocide Law 1950 Article 8.

2. See Draft Article IV(1) of the International Criminal Code drafted by IAPL, 52 RIDP (1981) 172. Cf. Bassiouni, International Criminal Code, p.190.

3. This article referred to 'attempt', 'complicity', 'conspiracy' and 'incitement'.

4. See UN Doc. E/AC.25/W5, p.20.

5. The position is similar under the 1957 European Convention on Extradition (ETS No.24) as supplemented by virtue of Article 1a of Additional Protocol 1975 (ETS No.86) to the convention.

proceeedings are concerned the political offence exception rule shall not apply. The Ad Hoc Committee's version, unlike the Convention, underlines the fact that regardless of the question of extradition proceedings or the motives for which it was committed, genocide will under no circumstances whatsoever be considered a political offence. In some cases municipal legislation reflects the Convention's text and not the position in the Ad Hoc Committee's draft article IX. It may well be argued that the political offence exception to extradition ought not to apply to genocide. But it cannot be said that this is a generally accepted principle in practice. States may accept a political offence exception plea in extradition proceedings where genocide is concerned, or they may not, but still fail to prosecute especially in the absence of the aut dedere aut punire principle in the convention. For instance the Philippines continue to reserve[1] their position on the question of the political character of genocide until domestic legislation is enacted in accordance with their constitutional procedure.

III. Applicability of the Rule of Statutory Limitation

With regard to the question of statutory limitation the Genocide Convention is silent but there are two other sources on the subject: international treaties and State practice. The principle of statutory limitation does not apply to genocide according to Article 1(b) of the UN Convention on Statutes of Limitations. An identical reference is found in Article 1(1) of the European Convention on Statutory Limitation. In a list of criminal practices including, inter alia, hostage-taking, apartheid, unlawful seizure of aircraft and the "grave breaches" provisions under the 1949 Geneva Conventions, genocide is singled out as the crime in respect of which statutes of limitation will not apply. This proposal de lege ferenda is

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[1]. See Paragraph 2 of Philippines Reservation, op.cit., p.100.

found in a Draft Protocol I to the Statute for an International Criminal Court and to the Statute for an International Commission of Criminal Inquiry drawn up by the ILA.[1]

States have enacted legislation implementing the principle of the non-applicability of statutes of limitation to genocide.[2] Israel is not a party to the UN Convention on Statutes of Limitation but it recognises the non-applicability of the principle in respect of crimes in international law.[3] In 1966 Israel passed a law entitled "Crimes against Humanity (Abolition of Prescription) Law"[4] providing that there shall be no time-limits for the prosecution of offences coming within the Crime of Genocide (Prevention and Punishment) Law and the 1950 Nazis and Nazi Collaborators (Punishment) Law.

In the Federal Repbulic of Germany a curious series of events has occurred. In 1979, the Bundestag amended the Penal Code to ensure that murder, genocide and war crimes as laid down under the 1949 Geneva Conventions are exempt from the application of statutes of limitation.[5] However, the amendment applies only to genocide acts committed since the entry into force of the Genocide Convention (12th January, 1961). Any such crime committed during Hitler's regime, for instance, falls outside the amendment. Two significant implications have been drawn from this: (i) the Federal Republic of Germany does not recognise the existence of genocide prior to the Genocide Convention. The crimes committed within that time-frame will have to be

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1. ILA (1984), p.298.

2. See UN Doc. E/CN4/906, 1966.

3. Possible reasons for Israel's non-accession to the UN Convention on Statutes of Limitation are given by Lerner, 4 Israel LR (1969) 533.

4. 20 LOSI (1966) 8.

5. A thorough review of the relevant legislation is given by Weiss, 54 BYIL (1983) 163.

considered as ordinary murder rather than as criminal offences under international law. (ii) The Federal Republic of Germany felt it had no obligation under customary international law to prosecute war crimes and crimes against humanity ('lato sensu'), regardless of any time-limits, when it was not a party to the Genocide Convention.

The principle of the non-applicability of statutes of limitation with regard to crimes such as genocide continues to be applied. States seem to show no indiciation which suggests any hesitation on their part to invoke the application of this principle especially where fugitive offenders, alleged to have committed offences such as war crimes and crimes against humanity during the Second World War, remain unapprehended. The value of this principle as a feature characteristic of the nature of crimes in international law will certainly increase through its continued application in respect of various criminal practices in international law.

C. "Apartheid"

Prima facie, apartheid, which means "separation of the races" in the Afrikaans language,[1] does not a fortiori carry unlawful connotations as does for instance the crime of genocide[2], i.e. the concept of the killing of races. In principle, there is nothing illegal or criminal about peoples living and developing, perhaps with the assistance of, but separate from, others.[3] The non-coercive separate

1. In Webster's Third New International Dictionary, apartheid is defined as "separateness: separation of the races: racial segragation." In practice, the term has also been used interchangeably with the concept of 'separate development'. See E. Gros, Agent for Applicants, S.W. Africa Cases, 1966, ICJ Pleadings, v.8, p.113.

2. The term, which is a combination of the Greek for race or tribe ('genos') and the Latin for killing 'cide', was coined by Prof. Lemkin, op.cit., p.79.

3. Cf. the principle of self-determination, UN Charter, Article 1, para. 2, and Article 55; Declaration on the Granting of Independence to Colonial Countries and

development of a group of people is not, per se, an illegal policy much less subject to criminal sanction.[1] If, however, separate development is imposed[2] upon a group or groups of peoples by another group, implemented by racial domination and discrimination, and supervised by virtue of a constant, systematic policy of human rights violations, then apartheid (the separation of the races) immediately begins to assume a different juridical nature. It may then be considered unlawful,[3] and in certain circumstances may be viewed as a criminal practice.

The evidence that is submitted for consideration below including an analytical consideration of relevant provisions of, the Apartheid Convention reveals that apartheid is an unlawful act under international law, but

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Peoples, 1960, preambular para. 2 (for background comment on the Declaration see Brownlie, Basic Documents on Human Rights, p.28); and Declaration of Punta del Este, 1961, (also see Brownlie, ibid., p.388). The right to self-determination is provided for in: Article 1 of the International Covenant on Economic, Social, And Cultural Rights, 1966; in article 1 of the International Covenant on Civil and Political Rights, 1966; and in Article 20 of the African Charter on Human Rights, 1981. Generally see, Brownlie, Principles, Chapter XXIV, 9, pp.595-598.

1. Cf. Judge Van Wyk, Sep. Op., S.W. Africa Cases, 1966, ICJ Rep., pp.173-193, especially at p.188 para. 35.

2 "'Separate but equal'(development) is possible so long as it is a matter of choice by both parties; legally imposed by one, it must be regarded by the other as a humiliation....."

The Director, Institute of Racial Relations, London, cited by the President of the International Court in Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276(1970), Ad. Op., ICJ Rep., 1971, p.63. Also see McKean, Equality and Discrimination under International Law, 1983, pp.260-263.

3. Cf. Brown v Board of Education of Topeka, US Supreme Court, May 17th, 1954, 98 L.Ed. 873.

that its status is increasingly looked upon as a criminal offence.

In the S.W. Africa Cases[1], Ethiopia and Liberia claimed that the Union of South Africa practised apartheid in the form of practices having defined legal consequences[2] namely, where individuals' rights, duties and opportunities were determined and distributed "on the basis of race, colour and tribe, in a pattern which ignores the needs and capacities of the groups and individuals affected, and subordinates the interests and rights of the great majority of the people to the preferences of a minority."[3]

By the President's casting vote, the International Court found that the applicants had failed to establish "any legal right or interest appertaining to them in the subject-matter of the present claims". Accordingly, the Court did not address the legal status of apartheid. However, some of its members found little difficulty in this regard. Judge Tanaka,[4] whose dissenting opinion has been described as "probably the best exposition of the concept of equality in existing literature",[5] stated:

> "The policy of apartheid or separate development which allots status, rights, duties, privileges or burdens on the basis of membership in a group,class or race rather than on the basis of individual merit, capacity or potential is illegal whether the motive be bona fide or mala fide, oppressive or benevolent."

Judge Padilla Nervo[6] echoed Tanaka's support for the

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1. See Submission 2 and 4, ICJ Rep., 1966, p.15.

2. ICJ Pleadings, 1966, v.8, p.113.

3. Ibid., v.1, p.108 para.2, and also at p.161 para 189. See also Application by the Government of Ethiopia, ibid., p.6, para.4(b).

4. ICJ Rep., 1966, p.309.

5. Brownlie, Basic Documents on Human Rights, p.440. See also McKean, op. cit., p.263.

6. ICJ Rep., 1966, p.457. See also Judge Wellington Koo, Diss. Op., ibid., p.235, Judge Forester, Diss. Op.,

general principle that "all men are by nature equally free and independent", and that this principle "has conquered solemn recognition in the basic law of many nations and is today in one form or another - customary declaration, norm and standard in the constitutional practice of States."

Less than a decade later the International Court was faced once more with issues concerning South Africa and its presence in Namibia. In its Advisory Opinion,[1] the Court concluded that apartheid as employed by South Africa in Namibia represented a governmental policy intended to achieve:

> "a complete physical separation of races and ethnic groups in separate areas within the territory, [by means of] limitations, exclusions or restrictions for the members of the indigenous population groups in respect of their participation in certain types of activities, fields of study or of training, labour or employment and also submit them to restrictions or exclusions of residence and movement in large parts of the Territory. [Such measures were held to be inconsistent with South Africa's obligations under the UN Charter, and to] constitute a denial of fundamental human rights ...a flagrant violation of the purposes and principles of the UN Charter".[2]

In a Separate Opinion, Judge Ammoun,[3] Vice-President of the International Court, opined that "one right which must certainly be considered a pre-existing binding customary norm which the Universal Declaration of Human Rights codified is the right to equality". This right "naturally rules out racial discrimination and apartheid". Judge Padilla Nervo[4] reiterated the position he took in the S.W. Africa Cases.

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ibid., p.483, and Judge Mbanefo, Diss. Op., ibid., pp.489-490 para. (c).

1. ICJ Rep., 1971.

2. ICJ Rep., ibid., p.57 paras 130-131.

3. ICJ Rep., ibid., p.76.

4. Ibid., p.108 and p.123.

After the Nambia Case it is clear that the International Court found apartheid to be unlawful in international law. But, it has never had occasion to address the question of the criminality of such unlawfulness. The following source material is relevant to its status as a crime.

Before the Universal Declaration of Human Rights was adopted in 1948, the UN General Assembly had already passed resolutions[1] declaring that matters of racial persecution and discrimination do not conform to the letter and spirit of the UN Charter. For a period of over four decades (1946-1990) the General Assembly has almost annually[2] adopted a resolution which, in one form or another, 'noted', 'considered', 'affirmed', and 'reiterated' this principle.[3] The General Assembly[4] has also called upon governments to enact legislation rendering racial discrimination and segregation punishable as criminal offences under domestic law.

Since 1965 [5] a significant change occurred in the wording of relevant General Assembly resolutions. For more than twenty years (1965-1990) two resolutions, on average,

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1. GA Res. 44(I), December 8th, 1946 and GA Res. 103(I), November 11th, 1946.

2. It seems that between 1947 and 1949 and in 1956 and 1964 there were no resolutions adopted denouncing (directly or indirectly) racial discrimination and/or apartheid.

3. See, among others, GA Res: 616(VII)(B), December 5th, 1952; Res. 1016(XI), 30th January, 1957; Res. 1883(XVIII), 14th October, 1963; Res. 2054(XX)(A), December 15th, 1965; Res. 2646(XXV) November 30th, 1970; Res. 34/175, December 17th, 1979; and Res. 39/17, November 23rd., 1984.

4. GA Res. 1698(XVI) December 19th, 1961; and GA Res. 1850(XVII) December 19th, 1962.

5. GA Res. 2022(XX) November 5th, 1965; and GA Res. 2074 (XX) December 17th, 1965.

were adopted every session[1] (even after the General Assembly adopted the International Convention on the Suppression and Punishment of the Crime of Apartheid in 1973 [2]) designating racial discrimination, segregation and apartheid as one of the following: "a crime against humanity"[3]; "an offence against human dignity"[4]; "a crime against the conscience and dignity of mankind"[5] and "a criminal affront to the conscience and dignity of mankind."[6] However, the value of these resolutions as indicative of international law is conditioned by the General Assembly's voting pattern, which is telling of State opinion. 'Western' and other States including Australia, New Zealand and Japan have generally abstained or voted against the resolutions; whereas a large number of African Republics, certain Latin American States, some Arab countries and East European nations including the Soviet Republics, have been responsible for the overwhelming support which these resolutions attracted in the General Assembly.[7]

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1. There were four resolutions (Numbers: 2145, 2202, 2142 and 2144) adopted at the twenty-first session, 1966; and five resolutions (Numbers: 39/72(a), 39/15, 39/17, 39/19 and 39/21) adopted at the thirty-ninth session, 1984.

2. GA Res. 3068(XXVIII) November 30th, 1973.

3. This phrase appears in no less than 36 resolutions from GA Res. 2022(XX), 1965 to GA Res. 45/90, 1990.

4. GA Res. 2142 (XXI), October 26th 1966.

5. GA Res. 2764(XXVI) November 9th, 1971 and GA Res. 33/183(L), January 24th, 1979.

6. GA Res. 2784 (XXVI) December 6th, 1971. Apartheid was also equated to slavery in GA Res. 31/6(I), November 9th, 1976 and to genocide in GA Res. 40/27, November 29th, 1985 and GA Res. 42/56, November 30th, 1987.

7. The use of the term "crime" in GA Resolutions concerning apartheid, is, according to Dr. Lador-Lederer, "due rather to political tactics than to sound penological thinking." 4 Israel YHR (1974) 109. See also Professor Sperduti, UN Doc.E/CN.4/SR 1197,

For their greater part, the resolutions address governmental racial discrimination policies employed in Southern Africa and in non-self governing territories. However, much as it is unavoidable to speak of apartheid without reference to South Africa, if it is to be considered a criminal offence contrary to the interests of the international community, apartheid does not benefit from "regionalisation".

Article II of the Apartheid Convention, for instance, stipulates that apartheid includes "policies and practices of racial segregation and discrimination as practiced in Southern Africa". This wording serves more harm than good. It contributes to an already very weak definition[1] of apartheid and perpetuates its image as a 'regional' criminal practice with global implications, rather than as a criminal offence of universal interest. [2]

Resolutions designating apartheid a 'crime against humanity' have been adopted by other international (regional) bodies such as the OAU[3], the League of Arab

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p.101. But contra see Graefrath, 11 German Foreign Policy, (1972) at p.396.

1. See p.16 infra.

2. There has been a strong movement to delete reference to Southern Africa, as it appears in the Apartheid Convention definition, by the ILC in its effort to draft a definition of the crime of apartheid. See ILC Report, GAOR, Supp. No.10 (A/44/10), 1989, p.157 para 164. See also Sixth Committee views on that Report, UN Doc. A/CN.4/L/443, 1990, p.32 para.89. Draft article 20 entitled "Apartheid" adopted by the ILC's Drafting Committee at the ILC's forty-third session, does not include reference to Southern Africa. UN Doc. A/CN.4/L.459/Add.1, 1991, p.5.

3. See CM/Res. 821 (XXXV), 35th Ordinary Session, Council of Ministers, 1980, UN Doc. A/35/463; CM/Res 854(XXXVII) Ibid., 37th Ordinary Session, 1981, UN Doc.A/36/534; AHG/Res. 112(XIX), 19th Ordinary Session, Assembly of Heads of State and Government, 1983, UN Doc. A/38/312; CM.Res. 936(XL), 40th Ordinary Session, 1984, UN Doc. A/39/207; and CM/Res. 1052(XLIV)/Rev., 44th Ordinary Session, 1986, UN Doc.A/41.654.

States,[1] the Non-Aligned Movement,[2] non-governmental organisations[3] and other regional conferences.[4] The ILC[5] and

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1. Political Declaration of the First Joint Conference of Heads of State and of Government of the Organisation of African Unity and of the League of Arab States. para. 5, UN Doc.A/32/61, 1977.

2. Political Declaration of the VIth Conference of Heads of State or Government, Havana, 1979, paras. 75,80,99 and 254. UN Doc. A/34/542.

3. International NGO Conference of Action Against Apartheid and Racism, Geneva, 1983, Declaration: paras. I and VI. UN Doc.A/38/309.

4. Xth Islamic Conference for Foreign Ministers, Morocco, 1979, Res.12/10-P, UN Doc. A/34/389; Latin American Regional Conference for Action Against Apartheid, Caracas, 1983, Declaration: paras. 1,3 and 9, UN Doc. A/38/451; Conference of Arab Solidarity with the Struggle for Liberation in Southern Africa, Tunis, 1984, Declaration, UN Doc. A/39/450; International Seminar on Racist Ideologies, Attitudes and Organisations Hindering Efforts for the Elimination of Apartheid and Means to Combat Them, Hungary, 1985, UN Doc. A/40/660-S/17477; and Vth Islamic Conference, Kuwait, 1987, Final Communique, Declaration and Resolutions, 12/5-P(IS), UN Doc. A/42/178-S/18753. The North American Regional Conference for Action Against Apartheid, Declaration, New York, UN Doc. A/39/370-S/16686, 1984. Canada and US participated as observers and while condemning apartheid practices, failed to make any reference to it as a criminal activity.

5. It was proposed to have the crime of apartheid in the Draft Code forming part and parcel of a category of practices known as Crimes Against Humanity. See Rapporteur's Seventh Report, UN Doc. A/CN.4/419, 1989. Apartheid appears in draft article 14(2) as a verbatim reproduction of definitional Article II of the Apartheid Convention. Draft article 14 was not adopted by the ILC at its 1989 session, but was referred to the Drafting Committee which has adopted a draft provision. See UN Doc. A/CN.4/L.459/Add.1, 1991. The ILC reported that a substantial majority of ILC members continued to endorse the presence of this practice in the Draft Code. See ILC Report to the GA, GAOR, Supp. No.10 (A/44/10), 1989, pp.155 - 158. The position in the Sixth Committee (UN Doc. A/CN.4/L.443, 1990, p.32) was similar to that in the ILC. However, some members expressed serious reservations concerning the inclusion of apartheid as a 'crime against

the IAPL[1] both include apartheid in their respective projects: the Draft Code of Crimes against the Peace and Security of Mankind[2] and the International Criminal Code.

Two international seminars[3] organised by the UN on apartheid and racial discrimination concluded that these practices violate human rights,the UN Charter and constitute "crimes against humanity" in "terms of the general principles of international law".[4] However, participants from Scandinavia, Japan, Venezuela, Canada and the US reserved their positions on the Conclusions accompanying the 1967 Zambia Seminar Report because they raised serious questions concerning the interpretation of the UN Charter and international law. The Proclamation of Teheran[5], also refers, en passant, to the condemnation of apartheid as a crime against humanity.

Further, the phrase "inhuman acts resulting from the policy of apartheid" found in Article 1(b) of the UN

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humanity' in the Draft Code, see ILC members: ILC Yrbk., 1986, v.1, Sir Ian Sinclair, p.105 para 13; Mr Balanda, p.108 para 37; Mr Tomuschat, p.115 para 38; and Mr McCaffrey, p.119 para 9.

See also Sixth Committee Report on the ILC's work for that session, UN Doc. A/CN.4/L.410, 1987 pp.103 and 125 paras 511 - 512 and 654 - 655 respectively.

1. 52 RIDP (1981) 131. See also Bassiouni, International Criminal Code, 1987, p.144.

2. See also ILC Draft Article 19 (3c) on State Responsibility, ILC Yrbk., 1976, v.II, pt.II, p.95.

3. See Seminar on Apartheid, Brasilia, UN Doc. St/TAO/HR 27, 1966, and Report of the International Seminar on Apartheid, Racial Discrimination and Colonialism in Southern Africa, Zambia, UN Doc. A/6818, 1967.

4. See Brasilia Seminar Report, p.11 para. 30 and p.13 para.35 and Res. No.5, p.42 para.98(c) and p.52 para.123 (I), of the Zambia Seminar Report.

5. Adopted by the International Conference on Human Rights, Teheran, May 13th, 1968. See UN Doc. A/Conf. 32/41, para 7.

Convention on Statutes of Limitation is partly responsible for the non-ratification of that convention by certain States.[1]

The evidence considered so far, reveals a marked tendency to place apartheid (compulsory racial separation) on the same level as racial discrimination in international law, i.e., to identify it as an unlawful and a prohibited practice.[2] The principal reason behind this development is that apartheid is a doctrine of racial prejudice and its implementation involves a broad range of human rights violations. Further still, the various sources reveal a concerted international effort, displayed by the use of such terms as 'crime against humanity' to present apartheid as a criminal practice.[3]

However, if apartheid falls within the wider notion of racial discrimination, why should apartheid rather than racial discrimination be singled out as a criminal offence? The answer lies partly with the form generally taken by apartheid in practice, and partly with the way opinio juris has developed concerning apartheid, racial discrimination and their inter-relationship over the last three decades.

On specific occasions the UN General Assembly[4] viewed the racial policy of apartheid comparably with that of

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1. See, Statement by France in the Third Committee's debate on the Draft Convention on the Suppression and Punishment of the Crime of Apartheid, UN Doc. A/C3/SR2008, p.169 para. 51; and Uruguay, UN Doc. A/C3/SR1573, p.8. Cf. Statement by Netherlands in the UN Human Rights Commission, NYIL, 1973, p.336.

2. Cf. Article 1(3) UN Charter; Article 2 Universal Declaration of Human Rights and Article 2(1) of the International Covenant. Also see, Judge Tanaka, S.W. Africa Cases, Diss. Op., ICJ Rep., 1966, p.284 et seq.

3. See Bassiouni, 9 Yale JWPO (1982) 202, who write that criminalising apartheid is protecting a variety of human rights including freedom from arbitrary arrest, torture, freedom of movement, religion, opinion, and association.

4. Res. 2438(XXII) 1968 and Res. 2787 (XXVI), 1971.

'nazism' and denounced both as criminal doctrines. The policies of Pretoria are similar to those of Hitler's Nazism, reports the Brazilia Seminar.[1] The Declaration of the World Conference to Combat Racism and Racial Discrimination[2] considers 'racism', racial discrimination and apartheid to be crimes against the conscience and dignity of mankind, and UN Special Rapporteur, Santa Cruz,[3] writes that "systematic and large-scale application of the policy of apartheid against the immense majority of the population (S. African), amounts to genocide."

In their efforts to establish the existence of a norm of non-discrimination under customary law, applicants in the S.W. Africa Cases[4] drew parallels between genocide and apartheid. The wording of statements for Applicants is also significant because reference is made to "an offender[5] (presumably S. Africa) allowed to avoid legal condemnation of his action by stating a protest."[6] Ugandan Representative, Mr Okia, speaking in the UN Third Committee's debate on the Elimination of all Forms of Discrimination, declared that "apartheid as practiced in South Africa was a form of genocide."[7]

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1. Op. cit., p.13 para.35.

2. Adopted at Geneva, 1978. UN Doc. A/33/262.

3. Study on Racial Discrimination prepared for the Sub-Commission on Prevention of Discrimination and Protection of Minorities. Revised version, UN Publication, 1977.

4. ICJ Pleadings, v.9, pp.351 and 354-356.

5. Emphasis added.

6. ICJ Pleadings, 1966, v.9 Respondent's comments on Applicants' assimilation of apartheid to crimes in international law such as genocide were directed to the question of customary rules and their formation in international law. Respondent neither admitted nor denied the validity of Applicants' argument. Ibid., v.10, pp.21 & 23.

7. GAOR, 27th Session, Meeting 1922, p.92 para. 23.

This body of opinion reveals that apartheid is considered to be a practice which shares its origins with other racially discriminatory practices such as genocide, representing the harshest and most dangerous manifestation of racial hatred. Their impact on international relations is such that they demand the specific attention of the international community, principally, because of the "systematic element", namely a series of unlawful actions organised, premeditated, and inflicted on a widespread scale (often as part and parcel of an ideology or government policy). This element has been identified in genocide and the Nuremberg concept of crimes against humanity. Jurists[1] and governments have also identified it in the practice of apartheid. This "systematic element" is a characteristic common to certain criminal offences in international law.

Austria[2] and Cyprus[3] have focused on the "collective" and "systematic" negation of human values typified by apartheid. Egypt[4] considers it to be a crime more serious than piracy and international terrorism. The Libyan Arab Republic [5] expressed its firm conviction that apartheid is a crime against humanity. The Ukrainian Soviet Socialist Republic[6] expressed similar sentiments as did Algeria,[7]

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1. See Graefrath, 11 German Foreign Policy (1972) 395; Butcher, 8 HR Qrtly (1986) 411; Delbruck, 8 Ency PIL p.38; and Ermacora, Study Concerning the Question of Apartheid from the point of view of International Penal Law, UN Doc. E/CN.4/1075, 1972, p.69 paras. 146 and 147.

2. UN Doc. A/33/262, 1978.

3. UN Doc. A/Conf.91/9, 1977.

4. UN Doc. A/33/262, 1978.

5. UN Doc. A/8768, p.11, 1972.

6. Ibid., p.14.

7. UN Doc. A/Conf. 91/9, v.II, p.20.

Bhutan,[1] Jamaica,[2] Mongolia,[3] Indonesia[4] and Gabon[5]. Australia[6] and Canada[7] have condemned apartheid without actually making any reference to its nature as a crime. Turkey[8] and Yugoslavia[9] have taken a broader outlook by focusing on racial discrimination and the denial of basic human rights rather than specifically on apartheid as a "crime against humanity, against the human conscience, and against human dignity".

I. The Apartheid Convention

Initial State Comment

The Apartheid Convention originates from the text of a Draft Convention on the Suppression and Punishment of the Crime of Apartheid[10] which was submitted by Guinea and the USSR in 1971 during the International Year for Action to Combat Racism and Racial Discrimination. Introducing the Draft Text in the Third Committee, the USSR representative[11] announced that the purpose of the preparatory document was to "affirm in juridical and concrete terms the rules of international law under which apartheid was denounced as a crime against humanity."

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1. Ibid., p.21.
2. Ibid., p.36.
3. Ibid., p.39.
4. Ibid., p.35.
5. Ibid., p.29.
6. UN Doc. A/33/262, Annex, p.2.
7. A/Conf. 91/9, p.22.
8. A/Conf. 91/9, p.45.
9. Ibid., p.50.
10. Hereafter referred to as Draft Text.
11. GAOR, 26th Session, 5th November, 1971. UN Doc. A/C.3/1859, p.230 para. 13.

The Governments of Poland,[1] Romania,[2] Chile,[3] and Libya[4] considered the Draft Text a major step forward for international criminal law. It marked a further move in the process (commenced in the Nuremberg period) of establishing norms of international law for the prosecution and punishment of "crimes against humanity". Hungary[5] and the German Democratic Republic[6] considered the Draft Text as an international instrument that would supplement existing treaties such as the Genocide Convention and the Convention on the Elimination of all Forms of Racial Discrimination.[7]

However, these views are not typical of general State reaction to the Draft Text and its raison d'etre. Sweden and Norway expressed a view shared by other States namely, that a convention will not "in practice add any new substance to the protection against racial discrimination already given by existing international agreements".[8]

China[9] and Austria[10] stressed the need for caution and attention when drafting technical and delicate legal texts such as the proposed instrument on apartheid. Madagascar[11] feared that a convention intended to proscribe a practice

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1. UN Doc.A/C3/SR. 1860, p.235, para. 3.

2. Ibid., meeting 2004, p.144 para.7.

3. Ibid., p.143 para. 1.

4. UN Doc. A/8768, p.11, 1972.

5. UN Doc. A/C.3/SR.2005, p.149 para. 4.

6. Ibid., meeting 2003 p.142 para. 28. See also Graefrath, op. cit., p.402.

7. 660 UNTS 195.

8. UN Doc. A/8768, p.13. See also Morocco, UN Doc. A/C.3/SR.2003, p.141 para.23.

9. Ibid., meeting 2007, p.159 para.36.

10. UN Doc. A/8768, p.7.

11. Ibid., p.11. Madagascar ratified the Apartheid Convention on May 26th, 1977.

largely rife in one part of the world, is likely to become a political document rather than a legal instrument.

II. Provisions of the Apartheid Convention Relevant to the Concept of the Criminal Offence and its Juridical Features

The Apartheid Convention is accused of being in violation of the nullum crimen sine lege principle because Article II defines apartheid, inter alia, by reference to practices of racial discrimination as occur in Southern Africa. Such broad language reveals attempts to render an act a criminal offence not on the basis of precise juridical terms but rather on the basis of a "geographic" reference to undefined policies and practices found in one corner of the globe.[1]

As long as this weakness in the Apartheid Convention remains the less is the convention likely to attract a body of signatories geographically representative of the international community. The less representative is the convention of the international community, the more its credibility suffers and the value of its contribution to the development of rules of international law concerning criminal offences becomes more questionable.

(a) The Question of Apartheid as a "Crime against Humanity"

One of the issues which has attracted much debate

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1. See, Clark writing in Bassiouni, International Criminal Law Volume 1 Crimes, pp.302-307; Booysen, 2 S.African YIL (1976) 58; and Bassiouni and Derby, 9 Hof. LR (1981) 534 para. 27. See also objections raised by government delegations during the discussion of the Apartheid Convention in the UN Third Committee: Papademas (Cyprus) UN Doc. A/C3/SR2003, p.143, October 22nd, 1973; Wilder (Canada) ibid. /SR2008 p.165, October 26th, 1973; Pardos (Spain) ibid., p.164; Cao Pinna(Italy) ibid., p.166 para. 30; and Absolum (New Zealand) ibid., p.167 para. 37. Also see declarations made by Chile and Uruguay expressing support for the moral content of the Apartheid Convention but finding difficulty with apartheid as defined in the convention. See, World Conference to Combat Racism and Racial Discrimination, UN Doc. A/33/262, 1978.

among States is the declaration that aparthied is a crime against humanity. In the Apartheid Convention this declaration appears in Article I. This form of designating criminal offences has a specific meaning in international law, namely that which was laid down in the Nuremberg and Tokyo Charters. Subsequently the concept of crimes against humanity was affirmed as a principle of international law by the UN General Assembly and later formulated as such by the ILC. Outside the parameter of its Nuremberg definition (the question whether that same definition requires revision is a separate issue), the concept of crimes against humanity ceases to be a juridical concept, i.e. a set of defined criminal offences in international law. It becomes a term of art capable of including any act or meaning which its employer wishes it to convey.[1] Thus, stricto sensu, the concept of "crimes against humanity" is defined and specific. Lato sensu it is abstract and vague.

The declaration of apartheid as a crime against humanity in the convention seems to reflect more the latter (lato sensu) rather than the former (stricto sensu) meaning. There are certain reasons which would support this conclusion. First, the convention contains no reference to the Nuremberg/Tokyo Charters. Second, there is no specific evidence suggesting that apartheid is a crime against humanity in the Nuremberg sense, although it is possible to argue that the definition of apartheid in the convention consists of practices which are in essence "murder, enslavement, deportation, political, racial and religious persecution,and other inhuman acts" i.e. crimes against humanity as defined in Article 6(c) of the Nuremberg Charter. Finally, there is little evidence in the travaux preparatoires and in other State declarations that apartheid was declared a crime against humanity within the meaning of the term as defined in 1945.

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1. See Section A on Crimes Against Humanity supra.

Several State representatives in the UN Third Committee expressed reservations to apartheid being declared a crime against humanity in the Draft Text. The United States,[1] the United Kingdom,[2] and Italy[3] affirmed that apartheid was an "abhorrent practice" and a "travesty of human rights", but they could not subscribe to the notion of apartheid as a crime against humanity.[4] Such a notion defies the established and specialised meaning of "crimes against humanity" in international law. Mexico[5] also subscribed to this school of thought and similar reservations were made at the 1978 World Conference on Racism by the Federal Republic of Germany on behalf of the EEC, by Greece and Portugal (at the time non-EEC members), by Switzerland, Sweden and Finland.

The description of apartheid as a crime against humanity weakens the significance of the concept of crimes against humanity, which has some of its origins in the post First World War period and subsequently developed as a principle of international law. The liberal use of the term "crime against humanity" confuses rather than separates, on the one hand a set of recognised criminal offences under international law and on the other hand, any number of practices which may be considered by some to be more than illegal under international law.

Accordingly, the plain wording used in the Genocide Convention: "a crime under international law" most certainly remains a more valid alternative for drafters of international instruments designed to proscribe specific practices as criminal offences.

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1. UN Doc.A/C.3/SR. 2003, p.141 para.12.

2. Ibid., meeting 2008, p.165 para.20.

3. Ibid., p.167 para. 33.

4. See also Statement by the Netherlands, NYIL (1973) 335.

5. UN Doc. E/CN.4/SR 1235, p.305.

(b) Jurisdiction

Objections have been raised against the manner in which the Apartheid Convention deals with matters of criminal prosecution. The trial of individuals for acts recognised as criminal offences under international law is a sensitive issue. A balance must be found between two vital interests for States: on the one hand, there is the protection of nationals and their fundamental guarantees abroad and on the other hand, there is a commitment to ensure that justice is done and that the offenders do not escape prosecution. It is difficult to find a formula which strikes a fair balance.

The traditional rule is that perpetrators of acts recognised under international law as criminal offences are considered hostis humani generis and therefore liable to be prosecuted wherever their presence is secured. One of the valid arguments in support of the application of the universality principle of jurisdiction is that it seeks to reduce "safe havens" for those who commit acts recognised as criminal offences under international law. However, the universality principle does not dispel States' concern that in certain jurisdictions the offender's right to a fair trial is unlikely to be guaranteed.[1] The institution of criminal proceedings against nationals in foreign territories could be politically rather than legally motivated.

This apprehension is expressed by some States,[2] in

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1. Note, for example, the objections raised by Pakistan in response to claims by Bangladesh authorities to prosecute Pakistani nationals for "crimes against humanity" and acts of genocide allegedly committed during the India/Pakistan conflict in 1971. See, Case Concerning Trial of Pakistani Prisoners of War, ICJ Pleadings, 1976, p.6 para. 10 and pp.42-43.

2. See: Finland on behalf of the Nordic Countries, A/C3/SR2007, p.159 para. 34; Turkey, ibid., para. 39; Belgium, ibid., para.44; Spain, A/C3/SR2008, p.164 para. 10; Canada, ibid., p.165 para 15; Brazil, ibid.;

particular the US[1] and the UK,[2] reluctant to become parties to treaties such as the Apartheid Convention where the universality principle is adopted.[3] Criminal offences in international law must be defined in as precise juridical terms as possible before any principle of jurisdiction, much less the universality principle, can be applied. States would properly be reluctant to apply the universal principle or to undertake international obligations which would allow foreign tribunals to exercise jurisdiction over nationals, in the absence of any link between the accused (other than his presence) and the forum State, for allegedly having committed manifestly ill-defined criminal offences. The Netherlands Representative at the United Nations, speaking on behalf of EEC member states during the debate in the Third Committee on the adoption of the Draft Text of the Apartheid Convention, stated:

> "We wish to confirm in particular our reservations with regard to the exercise of criminal jurisdiction in respect of acts and offences, imprecisely defined, committed outside the territory (of Contracting States) by persons who are not their nationals, even where there is no other significant contact between the offence and the forum State. Our reservations in this respect are especially strong in view of the imprecise manner in which the criminal offences have been defined".[4]

The Apartheid Convention raises another issue in matters concerning the exercise of criminal jurisdiction.

Italy, ibid., p.167 para.31; New Zealand, ibid., para. 36; and France, ibid., p.169 para. 51. Cf. Clark, op. cit., p.314 n.56.

1. See UN Doc. A/PV2185, p.12.

2. Ibid., pp.23-25.

3. Only State Parties to the Apartheid Convention may exercise the universality principle in respect of the crime of 'apartheid', but they may exercise it over nationals (including stateless persons) of any State party or non-party to the Convention. See Article V.

4. NYIL (1978) 216.

The issue is raised by reference in the treaty text to a separate international judicial body. Article V of the convention allows an "international penal tribunal" to exercise jurisdiction over perpetrators of apartheid in respect of States Parties recognising its competence. This provision de lege feranda is the "twin" provision to an almost identical clause in the Genocide Convention. The presence of such a provision in international treaties is to underline the severity of the nature of the acts they seek to proscribe as criminal offences under international law and to emphasise the need for a universal system of prosecution for those who perpetrate such offences.

States such as the USSR[1] and the German Democratic Republic,[2] which traditionally have found the idea of an international criminal court empowered to sentence individuals convicted for criminal offences under international law, alien to their understanding of international law, seemed to have changed their position by 1973 and expressed support for a system of universal prosecution of apartheid practices.[3]

Western European nations, Scandinavian countries, the US, Brazil, Canada and other Commonwealth countries find difficulties involved in the exercise of the universality principle of jurisdiction for the reasons outlined above. However, their position vis-a-vis the concept of an international criminal court is neutral not negative.[4] Most

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1. UN Doc.E/CN.4/SR 1198, p.107.

2. UN Doc. A/C3/SR2003, p.142 para. 48.

3. See statements made by Guyana UN Doc. A/C3/SR2004, p.145 para. 18; Iraq, ibid., p.146 para. 27; Nigeria, UN Doc. A/C3/SR1860, p.235 para. 6; and Cyprus, UN Doc. A/C3/SR1862, p.244 para 15. Cuba, UN Doc. A/C3/SR1860, p.236 para. 11 reiterated its understanding of an international tribunal exercising criminal jurisdiction as a limitation upon State sovereignty.

4. See: Denmark, UN Doc. A/8768, p.9; USA, UN Doc. A/C 3/SR 2003, p.140 para.12 and the Netherlands, UN Doc.

are indeed State Parties to the Genocide Convention which admits of the establishment of an international criminal court.

(c) Individual Criminal Responsibility

The principle of individual criminal responsibility is laid down in Article III which stipulates that all persons, including members of organisations, institutions and representatives of States who commit the crime of apartheid shall be punished "irrespective of motive" and regardless of whether they are resident in the locus delicti or "in some other State".

Article III embraces three important issues which are relevant to the principle of individual criminal responsibility and to the concept of the criminal offence in international law. First the term "representatives of States" is too broad and may include the Executive, the Legislature, the Judiciary and others in public service. It has raised questions of interpretation for some States.[1] The Representative for Honduras[2] in the UN Third Committee declared that it excludes diplomatic personnel accredited

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E/CN.4/SR.1196, p.94 and at UN Doc. A/8768 Add.1. p.2.

In the Case Concerning Trial of Pakistani Prisoners of War, ICJ Pleadings, 1976, p.43, Pakistan had expressed its readiness, in the absence of an international penal tribunal agreed upon by the parties concerned and functioning on neutral territory, to constitute a judicial tribunal "of such character and composition as will inspire international confidence" to try persons alleged to have committed genocide and other criminal offences under international law.

1. See Australia, UN Doc. A/C3/SR2004, p.144 para. 12, cf. p.148 para. 59, and Canada, UN Doc. A/C3/SR2008, p.167 para. 37.

2. UN Doc. A/C3/SR2008, p.168 para. 43. Contra, see Guyana UN Doc. A/C3SR/2004, p.144 para. 15. Cf. Clark, op. cit., p.310, and, for a South African interpretation see Booysen, op.cit., p.65.

overseas. But a restrictive interpretation of the term such as this would, indirectly, constitute a reservation to the principle of individual responsibility which is the essence of Article III. It would, furthermore, detract force from the intention of Article III to remove the "Act of State" doctrine as a defence for those who commit criminal offences under international law as enunciated at Nuremberg.

Second, Article III reiterates the strong commitment expressed by the convention in favour of the exercise of universal jurisdiction by stressing that perpetrators of apartheid shall be punished regardless of the place where the crime is committed. The Representative of Guyana[1] compared those who commit apartheid to war criminals and pirates: hostis humani generis.

Third, the conspicuous qualification in Article III, namely, that the principle of individual criminal responsibility shall apply to apartheid as defined in the convention "irrespective of the motive involved,"[2] would seem to suggest that no ground would excuse the crime of apartheid. If this be the case, then the phrase may be interpreted to imply that even where apartheid is committed in furtherance of political motives, the political offence doctrine and the political offence exception rule in extradition proceedings shall be inadmissable if invoked. The position is made clear in Article XI(1): apartheid as defined in the convention shall not be considered a political crime for the purposes of extradition.

Thus, in so far as it forms part of a larger effort to proscribe apartheid as a criminal offence under international law, the significance of Article III is its support for principles which are also applicable to a

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1. A/C3/SR2004, p. 145 para. 18.

2. The phrase was inserted at the suggestion of Mali, UN Doc. A/C34/SR2005, p.150 para. 19. No official explanation was given for the amendment. Cf. Clark, op.cit., pp.307-308.

number of other acts recognised as crimes under international law. It stipulates that individuals shall be personally responsible; that this responsibility shall be incurred regardless of the capacity in which the offender acted at the time of the offence; that he shall be liable to capture and prosecution wherever he is found; and that no motive, political or otherwise, will excuse or justify his conduct.

(d) Superior Orders

The Apartheid Convention, following in the footsteps of the Genocide Convention, is silent on the question of "superior orders" as a ground of defence. Some indication may perhaps be inferred from the principle of individual criminal responsibility, as described above, which applies across the board in Article III.[1] The question whether the non-applicability of "superior orders" as a defence for crimes committed under international law applies in the case of apartheid, depends partly on whether this principle is recognised as customary law, and partly on the status, so far undetermined, of apartheid as a criminal offence under international law.

III. Apartheid and Jus Cogens

There is division of opinion on whether apartheid represents violation of legal rights protected by jus cogens rules, even though the principle of non-racial discrimination and the crime of genocide are recognised as the "least controversial examples of the class"[2] of jus cogens rules. Certain lawyers are of the opinion that at present no proof can be given of apartheid to be in violation of a norm of international jus cogens.[3] Grounds submitted in support of this view, include: (a) the

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1. See Clark, op. cit., pp.308-309.

2. Brownlie, Principles, p.513.

3. Stein, 10 S.African YIL (1984) 12.

statement that apartheid has no definable content; and (b) in the S.W. Africa Cases Judge Tanaka objected in part and not in toto to the policy of apartheid.[1] A different position is adopted on this issue by the ILC. Though there is some division of opinion among its membership on the eligibility of apartheid as a candidate for the Draft Code, the ILC[2] seems generally inclined to recognise that the prohibition against apartheid is a peremptory norm of international law.

The well-being and development of peoples (concepts which apartheid violates and denies) have been recognised by the International Court as a "sacred trust of civilisation"[3] generating obligations erga omnes independently of any specific treaty text.[4] Human rights and their protection form part of this sacred trust[5] and enjoy the force of jus cogens.[6] Accordingly, if apartheid represents, as currently practised and understood, the (concurrent) violation of a substantial number of individual rights and freedoms, it is not unreasonable to argue that apartheid may form part of the jus cogens class.[7]

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1. See Booysen, op. cit., pp.90-93.

2. ILC Yrbk., 1984, v.II, pt.II, p.15 para 53. See also ILC Report on the work of its forty-first session, GAOR, Supp. No.10 (A/44/10), 1989, p.158 para 168.

3. ICJ Rep., 1950, p.7.

4. Ibid., p.9, and see also Judge Alvarez, ibid., p.181, part VI(2).

5. ICJ Rep., 1970, p.32.

6. Judge Tanaka, Diss. Op., ICJ Rep., 1966, p.298. Cf. Schachter, 178 Hague Receuil (1982) 339.

7. See Declaration of the Seminar on the Legal Status of the Apartheid Regime and Other Legal Aspects of the Struggle Against Apartheid. UN Doc. A/39/S/16706, 1984, p.10.

IV. Apartheid and Additional Protocol I of 1977 to the 1949 Geneva Conventions

The concept of apartheid has entered within the scope of the rules of law concerning armed conflict by virtue of Article 85 of Additional Protocol I of 1977 to the 1949 Geneva Conventions. Article 85(4)(c) provides:

> "In addition to the grave breaches defined in the preceding paragraphs and in the Conventions, the following shall be regarded as grave breaches of the Protocol, when committed wilfully and in violation of the Conventions or the Protocol: practices of 'apartheid' and other inhuman and degrading practices involving outrages upon personal dignity, based on racial discrimination."[1]

The Geneva Conventions provisions relating to the repression of "grave breaches" are supplemented by Additional Protocol I [Art.85(1)]. Thus, the permissibility of the application of the universal principle of jurisdiction and of the aut dedere aut punire principle operative under the Geneva Conventions now extend to apartheid when committed within the scope of application of the Conventions as well as (by virtue of Article 1 of Additional Protocol I) during armed conflict situations arising as a result of the exercise of the right to self-determination recognised in the UN Charter and in the Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States. Moreover, "grave breaches" under the Geneva Conventions and the Additional Protocol are by virtue of Article 85(5) of same Protocol declared "war crimes".

Experience and practical application may, in time, reveal whether Article 85 will contribute to the developing status of apartheid as a criminal offence under

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[1]. The provision was proposed by Tanzania and Uganda. UN Doc. CDDH/I/313. See generally: New Rules for Victims of Armed Conflicts - Commentary on the Two 1977 Protocols Additional to the Geneva Conventions of 1949, Bothe, M., (ed.), 1982, p.518 para.2.21; and Commentary on the Additional Protocols of 8th June, 1977 to the Geneva Conventions of 12th August, 1949, Pilloud, C., (ed.), 1987, p.1001 paras. 3510-3515.

international law. However, it is already clear that:

(a) Article 85(4)(c) does not define apartheid. State representatives at the Diplomatic Conference complained that this provision did not meet the standards of clarity in penal legislation applied to the other grave breaches. No improvement has been made, therefore, since the adoption of the Apartheid Convention.

(b) In view of the qualification of apartheid as a "war crime" within the scope of the Geneva Conventions and Additional Protocol I, the following difficulties may arise. It would seem that apartheid is at times a war crime and at other times a crime against humanity by virtue of the Apartheid Convention. Thus, when apartheid qualifies as a war crime, is it also possible that it concurrently constitutes a crime against humanity? Furthermore, is apartheid a crime against humanity in the sense of the term as defined in 1945, or in the lato sensu meaning as stipulated in the Apartheid Convention? Furthermore, is there any conflict between apartheid a war crime and apartheid a crime against humanity? If so, which of the two forms of apartheid as a criminal offence will prevail?

D. Torture

Torture is an unlawful act in international law and this statement is supported by an impressive body of evidence consisting of treaty provisions, [1] judicial

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[1]. See Universal Declaration of Human Rights, 1948, (Article 5); European Convention on Human Rights, 1950, (Article 3); International Covenant on Civil and Political Rights, 1966, (Article 7); American Convention on Human Rights, 1969, (Article 5); Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel Inhuman and Degrading Treatment or Punishment, (Hereafter cited as Declaration on Protection from Torture.) 1975; and African Charter on Human Rights, 1981, (Article 5). The First International Conference on the Protection of Human Rights in the Islamic Criminal Justice System

decisions,[1] national legislation[2] and doctrine.[3] The present

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declared that torture "constitutes a serious and grave violation of Sahriah Law, international human rights law, and the generally accepted principles of international law". For text of resolution see Bassiouni, 74 AJIL (1980) 629-630.

1. See, inter alia, The Greek Case, 12 Yrbk. ECHR (1969); Ireland v U.K. ibid., 19 (1976) 82, text of judgment also at 17 ILM (1978) 680; Filartiga v Pena-Irala, 630 F. 2d. 878 (1980). Hereafter cited as Filartiga. The contribution of this judgment vis-a-vis the status of torture as a crime, is discussed below. However, it represents one of the first judicial interpretations of the general status of torture in international law, committed during peace time, by a municipal court. Also see decisions of the UN Human Rights Committee, GAOR, A/39/40, 1981, Communication Nos: 83, 85, 103, 109, 110 and 123.

2. Torture is prohibited in the Constitution of almost every State in the civilised world. A table of the relevant constitutional provisions was drawn up in 1978 by Ackerman 11 Vand. JTL at p.691, Appendix I. Hereafter cited as Ackerman. Since 1978 a number of amendments have been made to the Constitutions of the following countries in order to provide for the prohibition of torture. Unless otherwise indicated the citation refers to the relevant provision in the Constitution: Bahrain, 19(d); Barbados, 15; Belize, 7; Burundi, 10; Canada Constitutional Act 1982, Schedule B, article 12; Cape Verde, 31(3); China, 38; Congo, 7; Democratic Peoples' Republic of Kampuchea, 35; Commonwealth of Dominica, 5; El Salvador, 27; Equatorial Guinea, 20(1); Ethiopia, 43(1); Guatemala, 19; Guinea-Bissau, 32(2);Guyana, 141; Haiti, 25; Honduras, 68; Iran, 38; Kiribati, 7; Republic of Korea, (South), 12(2); Kuwait, 31; Liberia, 21(e); Malta, 36(1) and The European Convention Act, 1987; Monaco, 20; Nauru, 7; Netherlands, 11; Nicaragua, 36; Nigeria, 31(1)(a); Philippines, 10; St Christopher & Nevis, 7; St Lucia, 5; St Vincent, 5; Sierra Leone, 10; Soloman Islands, 7; Somalia, 27; Spain, 16; Sri Lanka, 11; Sudan, 29; Suriname, 3; Sweden, 5; Turkey, 17; Tuvalu, 19; Viet-Nam (Socialist Republic), 69; Zaire, 13; Zimbabwe, 15; and Yemen, 45.

Ad Hoc legislation has been enacted by:
Barbados, German Democratic Republic, Jordan, Portugal and the USSR, See UN Doc. E/CN.4/1314, 1978, p.2 para 6; Hungary, UN Doc. A/39/499, 1984, p.8; Greece, Panama and Spain, ibid., /Add.1; and Thailand, ibid., /Add.2, p.2.

section, however, will consider the status of torture as a criminal offence in international law particularly since the entry into force of two multilateral conventions[1] designed to prevent torture by applying rules of criminal law.

I. International Instruments

(a.i.) The 1919 Paris Peace Conference

The origins of the international proscription of torture as a criminal offence date back to the period following the First World War. On the basis of documentary evidence supplied by Britain, France and other delegations at the 1919 Preliminary Peace Conference at Versailles, the Commission on the Authors of War, identified a number of charges committed by Turkish and German authorities against, among others, Turkish subjects.[2] The list includes the torture of civilians and the ill-treatment of prisoners of war. The Commission described such practices as "outrages against the laws and customs of war and of the

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3. See Ackerman, op. cit., p.690; Klayman, 51 Temp. LQ (1978) 449 at 513, and Draper, AJ (1976) 221. The following authors have discussed the recent UN and OAS instruments defining torture as a criminal offence but have not expressed views on its status as a crime in international law. See, Lerner, 16 Israel YHR (1986) 126; Donnelly, 33 NILR (1986) 1, Skupinski, 15 Pol. YIL (1986) 163, Macdonald, writing in Essays in Honour of Shabtai Rosenne, p.385, and NOTES by: J.G.S., 59 Aust.LJ (1985) 402 and Botterud, 8 ASILS-ILJ (1984) 67.

1. See: (i) Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Adopted by GA Res. 39/46, 1984. Entered into force 26th June, 1987. Text at 23 ILM 1027. Hereafter cited as UN Convention on Torture. (ii) Convention to Prevent and Punish Torture. OAS TS No.67. Adopted by OAS Res. 783 (XV-0/85), 9th Dec. 1985. Text at 25 ILM (1986) 519. Hereafter cited as OAS Convention on Torture.

2. See Report at 14 AJIL (1920) 95. Also see, Schwelb, 23 BYIL (1946) at p. 181.

laws of humanity"[1] and that they engender personal criminal responsibility.[2]

This finding provides: (a) one of the earliest international recommendations which argues that torture committed in time of war should be punished as a criminal offence; (b) gives concrete meaning to the provisions of international treaties in force at the time, inter alia, the Hague Conventions (II) 1899 & (IV) 1907, which stipulated that prisoners of war must be treated humanely[3] and that "lives of persons"[4] must be respected by the occupying Power; and (c) has contributed to the development of the concept of war crimes and, to that which in 1945, came to be known as "crimes against humanity".

(a.ii.) The Nuremberg Charter and CCL No. 10, 1945

Torture was widely practised by the Nazis and the Japanese during World War II, but it is not specifically listed under any of the groups of crimes stipulated in the Nuremberg and Tokyo Charters. Articles 6(b) and 5(b) of the respective Charters speak of the "ill-treatment" of civilians and of prisoners of war as war crimes. Articles 6(c) and 5(c) refer to "inhumane acts" as a crime against humanity committed against the civilian population. Records of the International Conference on Military Trials held in London in 1945 offer no evidence or indication that the drafters of the Nuremberg Charter had torture specifically in mind, i.e. that they intended to include it as a separate criminal offence. Equally, there is no

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1. Report, op. cit., pp.113-115. But see Reservations submitted by the American Members who found exception, not with the Commission's conclusion that torture, as an unlawful practice is contrary to the laws and customs of war, but that it violated the so-called laws of humanity. The US Representatives preferred to think of torture as a violation of the "principles of humanity". Report, op.cit., p.134.

2. Ibid., p.117.

3. Common Article 4.

4. Common Article 46.

evidence which suggests the contrary, namely that the concepts of war crimes and crimes against humanity were meant to exclude the practice of torture. Count Four of the Indictment at Nuremberg alleged that civilians in Germany were tortured whilst in concentration camps.[1]

There was consensus at the London Conference that "ill-treatment" and "inhuman acts" were not merely unlawful practices but that they were considered "criminal violations of international law"[2] However, the United States delegation to the Conference insisted that no matter how atrocious and repugnant the atrocities committed by Germany before or during the War against Jews, against its nationals and against aliens present in its territory, criminal proceedings could only be instituted if it can be established that they were committed as part of the plan to wage an illegal war. Mr Justice Jackson,[3] Head of the US Delegation, was convinced that unless there was a "war connection", exercise of criminal jurisdiction by the Allies would be without foundation at law. This position prevailed and found expression in Article 6(c) of the Nuremberg Charter which allowed the International Military Tribunal to exercise jurisdiction over crimes against humanity only if they had been committed "in execution of or in connection with" war crimes and the waging of an illegal war (crimes against peace).

The Nuremberg Tribunal acknowledged that prisoners of war had been "ill-treated, tortured and mutilated, not only in defiance of the well-established rules of international law, but in complete disregard to the elementary dictates of humanity. Civilian populations in occupied territories suffered the same fate".[4] The Court[5] cited evidence given

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1. Cmnd. 6696, pp.30-31.

2. See Minutes of Conference Session held on 23rd July, 1945, Doc. XLIV, Jackson Report, p.335.

3. Jackson Report, pp.331 and 333.

4. Cmnd. 6964, p.45 (emphasis added).

by General Rudolph Hess confirming that torture was widespread; but it adhered to the provisions of the Nuremberg Charter and declared that it had not been satisfactorily proven that acts before 1939 were committed in execution of or in connection with crimes against the peace or war crimes and thus did not constitute crimes against humanity as required under Article 6(c) of the Charter.[1]

It is immaterial whether torture was considered to be "ill-treatment" under war crimes or an "inhuman act" under crimes against humanity. It is certain, however, that torture either as a war crime or a crime against humanity, or as both, was not considered to be a criminal offence for which there was individual criminal responsibility under international law if committed by a State against its own nationals not in pursuance of a plan to wage war or outside the conduct of hostilities. Therefore, if a repressive government practised torture against its own nationals or non-nationals present in its territory without violating the laws of war, and/or such practices did not form part of a plan to wage aggressive war, it seems that in 1945 there was insufficient international consensus to consider such practices to be the concern of the family of nations and thus to be subjected to penal sanctions (individual or otherwise) under international law. The position since 1919 had not changed.

Significant changes occurred with the enactment of CCL No. 10. This contained a definition of crimes against humanity different, in two fundamental respects, from the definition of same concept in the Nuremberg Charter: (i) the qualification ratione temporis ("before or during the war") found in the Nuremberg provision was not reproduced. Further, jurisdiction over crimes against humanity was not restricted ratione materiae, i.e. that they had to be

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[5]. Ibid., p.63.

[1]. Op.cit., p.65.

committed in connection with or in execution of war crimes or crimes against the peace; and (ii) torture is specifically included as a crime against humanity. In re Ohlendorf and Others (Einsatzgruppen Trial) a US Military Tribunal at Nuremberg held:

> "The Allied Control Council, in its Law No.10, removed this limitation (ratione materiae). [The jurisdiction of the present tribunal] is not limited to offenses committed during war, it is also not restricted as to nationality of the accused or of the victim, or to the place where committed....
> Torture, and similar crimes which heretofore were enjoined only by the respective nations now fall within the prescription of the family of nations".[1]

In another decision, it was also held that the crimes defined under CCL No. 10 "were crimes under existing rules of international law - some by conventional law and some by customary law".[2] Several convictions for torture, and for other crimes, were secured by military tribunals under CCL No. 10.[3]

It seems ironic, given the position taken by the US at the London Conference in 1945, but the decisions delivered by US military tribunals in 1948 suggest that international law concerned itself with crimes such as torture even if committed in time of peace, within the territory of any State, not necessarily in pursuit of a policy to wage aggressive war or in connection with the commission of war crimes, by nationals against fellow nationals and/or non-nationals present in that territory.[4] There is a stark and

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1. 15 Ann.Dig. 656 at 664. Emphasis added.

2. In re List and Others, ibid., at p.634.

3. See, among others, In re Von Leeb and Others (German High Command Trial), 15 Ann Dig. p. 376; In re List and Others, ibid., p.632 and In re Griefelt and Others, ibid., p.653.

4. Contra see, however, the decision delivered by same US Military Tribunal at Nuremberg In re Flick and Others, 1947. Cf. Prof. Gros, Chef du delegation, London Conference on Military Trials, Minutes of Session of July 24, 1945, Doc. XLVII, Jackson Report, p.360.

bold implication in the decisions delivered under CCL No. 10, namely that torture was seen to be in that class of criminal offences under international law for which there is individual criminal responsibility regardless of when, where or by whom they are committed; where the universality principle of criminal jurisdiction is applicable; and where the perpetrators are considered hostis humani generis. The formulation of the status of torture as a criminal offence under international law, in time of peace, dates from the immediate post 1945 period. As a result of the changes made in CCL No. 10 and subsequent judicial practice this would seem to be a correct understanding of the legal position as at late 1945 to 1948 were it not for a significant development in the codification of the concept of crimes against humanity in international law.

In 1950 the ILC, as directed by General Assembly Resolution 177(II),[1] formulated the Nuremberg Principles.[2] The ILC followed the Nuremberg Charter and Judgment slavishly. The ILC adopted the Nuremberg Charter definition of crimes against humanity and therefore required them to be committed in execution of or in connection with crimes against peace or war crimes.[3] This occurred, notwithstanding advice to the contrary submitted by Professor Pella.[4] The ILC also ignored the changes made in CCL No.10 and, further still, it did not take into account the contribution made by the then recently adopted 1949 Geneva Conventions. The contribution made by these conventions vis-a-vis torture is considered presently. However, while they do not indicate that torture is a crime

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1. Adopted on 21st November, 1947.

2. See, ILC Yrbk., 1950, v.I.

3. Ibid., v.II, p.377. See the dissenting views of two distinguished members of the Commission: Professors Scelle (ibid., v.I, p.55 para.90) and Brierly (ibid., p.57 para. 117).

4. Memorandum, op. cit., p.347.

against humanity as defined under CCL No.10, or that, when committed outside armed conflict, torture is a criminal offence under international law, they do reveal that torture is a prohibited practice for which there is personal criminal responsibility. The conventions do not require that torture must be committed as part of a larger criminal action such as waging aggressive war. This unfortunate regressive approach adopted by the ILC in 1950 constitutes a serious qualification to the general body of evidence concerning the legal status of torture.

The ILC's work on the Draft Code between 1950 - 1954 and subsequently since 1981 is also relevant to the practice of torture. During the first period the ILC debated three Reports on the Draft Code of Offences submited by Rapporteur Spiropoulos[1]. But in none of these Reports is torture specifically mentioned.

In the second phase of the ILC's consideration of the Draft Code, the Declaration on Protection From Torture was listed together with 23 other instruments concerning practices which, prior to the Second World War, "fell within the sphere of the exclusive sovereignty of States"[2] but currently are of concern to the international community. To date, the ILC has not provided for torture by way of a seperate provision within the Draft Code. At its forty-third session, the ILC Drafting Committee specifies torture as one of several practices constituting "systematic or mass violation of human rights". Comments by members to the effect that the concept of "inhumane acts", being part and parcel of the ILC definition of crimes against humanity, includes acts of physical violence

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1. First Report, UN Doc. A/CN.4/25, ILC Yrbk., 1950, v.II p.253; Second Report, UN Doc. A/CN.4/44, ibid., 1951, v.II, p.43 and Third Report, UN Doc. A/CN.4/85 ibid., 1954, v.II.

2. Second Report by Prof. Thiam, UN Doc. A/CN.4/77. ILC Yrbk., 1984, v.II, pt.I. p.94 paras 43 and 44. In particular see Ni, ibid., v.I, p.16 para 23 and Sir Ian Sinclair, ibid., p.29 para 10.

which degrade the human being, are the only clues by virtue of which torture may remotely be considered as coming within the Draft Code.[1]

(a.iii.) The 1949 Geneva Conventions

The concept of "humane treatment" is basic to the 1949 Geneva Conventions.[2] The conventions provide a network of provisions designed to safeguard the moral and physical integrity of the human being in times of international[3] and non-international[4] armed conflict. Torture is considered to be a grave breach of the conventions.[5] The universality principle of jurisdiction becomes applicable under the conventions where a "grave breach" has been committed. State Parties may also extradite rather than prosecute the

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1. See draft Article 21 UN Doc. A/CN.4.L.459, 1991, p.5. For background information see also Seventh Report submitted by Rapporteur Thiam, UN Doc. A/CN.4/419, 1989, p.13 paras 44-46. At the time of writing, a summary of the ILC's debates at its forty-first session (1989) have not been published. But, the Report to the GA on the ILC's work for that session (GAOR, Supp. No. 10, A/44/10, p.127) does not reveal that torture was identified by members as an inhuman act constituting a crime against humanity in the Draft Code. Op.cit., pp.163 - 168.

2. ICRC, Commentary - The Geneva Conventions of August 12th, 1949, Pictet, J., (ed.), v.1, p.52.

3. See: Article 12 common to Conventions (I) and (II); Article 13, Convention(III) and Article 27, Convention (IV).

4. See common Article 3 to the four conventions.

5. See Article 50, Convention (1); Article 51, Convention (II); Article 130, Convention (III) and Article 147, Convention (IV). These common articles originally formed part of a set of articles drafted in the first instance by a small team of government experts requested to consider the question of "war crimes" by the ICRC. In their Draft Article II entitled "Grave Violations" they listed a number of punishable acts, but torture was not included. Reference was made, however, to "great human suffering, serious injury to body or health, and a derogation from the dignity due to the person". See Pictet, op.cit., p.358.

perpetrator of a "grave breach". The conventions thus allow for the aut dedere aut punire principle,[1] but States are not obliged to apply this principle and its effectiveness is accordingly considerably weakened.[2] Perpetrators of "grave breaches" will be punished along with others who order them to be committed.

L'intention du legislateur is reported[3] to have been in accordance with the following:

> "The universality of jurisdiction in cases of grave violations justifies the hope that such offenders will not be left unpunished; and the obligation to extradite will help to make their repression general".

In their original draft form, the "grave breaches" provisions of the conventions were described as "crimes against the law of nations".[4] In so far as it is committed in the sphere of armed conflict, this description is true of torture. By virtue of Additional Protocol I of 1977 to the 1949 Geneva Conventions, this is also true of torture in so far as it is committed in armed conflicts "in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination."[5]

(b.i.) Declaration on Protection from Torture[6]

Article 7 of the Declaration obliges States to render torture a criminal offence under municipal law. Article 2

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1. See Article 49, Convention (I), Article 50, Convention (II), Article 129, Convention(III) and Article 146, Convention (IV).

2. See Draper, 114 Hague Receuil (1965) 159 and at 161.

3. Pictet, op. cit., pp.359-360.

4. Ibid., p.359 n.1.

5. Article 1 (4). See also Rodley, The Treatment of Prisoners under International Law, 1987, p.58.

6. Generally, see Rodley, op.cit., pp.25-35, 41-42 and 61-62.

describes torture as an "offence to human dignity", as a denial of the purposes of the UN Charter and as a violation of human rights and fundamental freedoms proclaimed in the Universal Declaration on Human Rights.

By virtue of these provisions the Declaration, adopted in 1975, marks perhaps the earliest official statement made by the UN implying that the practice of torture, other than as provided for under the law of armed conflict, is not merely illegal but may also be considered a criminal offence. The requirement made by Article 7 has been referred to as "an obligation"[1] and "an embryonic legal obligation".[2] However, the Netherlands Representative[3] who introduced the Draft Declaration prepared by the Fifth UN Congress on the Prevention of Crime and the Treatment of Offenders (1975)[4] declared in the Third Committee:

> "(The Declaration) should be regarded as a political document.....Without purporting to impose a legal obligation, the declaration imposed a moral obligation on States to ensure that their national legislation conformed."

The Representative for Sweden[5] also mentioned that the text is not legally binding. These statements are typical of the correctly cautious mood predominant among States when efforts are undertaken at the international level to proscribe certain practices as criminal offences.

The Declaration strengthens the prohibition of torture under international law. Professor Brownlie[6] suggests that

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1. Rodley, op.cit., p.31.

2. Draper, AJ (1976) 229.

3. Mr Speekinbrink, GAOR, UN Doc. A/C3/SR2160, 1975, p.268 para.5. Emphasis added.

4. See Rodley, op.cit., p.27 et seq.

5. Mr. Larsson, GAOR, UN Doc. A/C3/SR2165, p.306 para.56. See also, Mr. Wensley. (Australia), ibid., p.306 para. 54.

6. Basic Documents on Human Rights, 1981, p.35 Cf. Draper, op.cit., p.230 and Klayman, op. cit., pp.487-488.

it "constitutes evidence for the view that the prohibition of torture is an existing principle of international law". Further, by providing a sound juridical definition of torture (Article 1); by urging States to enact criminal legislation (Article 7); by stressing the importance of guidelines for law enforcement officials (Articles 5 and 6); by recommending implementation measures designed to prevent torture (Article 4); and by acknowledging the need to compensate victims of torture (Article 11), the Declaration certainly does not weaken the case for torture (committed outside armed conflict) as a criminal offence under international law.[1]

(b.ii.) UN Convention on Torture

A preambular paragraph in Draft International Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment submitted by Sweden[2] expressed the desire to convert the principles of the Declaration on Protection from Torture into binding treaty obligations and to adopt a system for their effective implementation.[3] Judging by initial State response[4] to the Swedish Draft, that text represented a conscious effort to proscribe torture not merely as an unlawful act but specifically as a criminal offence. Clearly, there was a significant change since 1945-1949 in the policy of

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1. The Declaration is cited as part of a body of evidence which strongly suggests that torture should be considered an "international crime" as the term is defined by the ILC in its Draft Articles on State Responsibility. Note in 17 Rev.ICJ (1976) 46.

2. UN Doc. E/CN.4/1285, 23rd January 1978. Hereafter referred to as Swedish Draft.

3. UN Doc. E/CN.4/1427, 1980, p.2 draft para.6. See the statements made by Austria and Denmark, UN Doc. E/CN.4/1314, 1978, p.3 paras. 11 & 12; and cf. Belgium, UN Doc. A/39/499, 1984, p.4 para.3; Canada, ibid., p.5 para.1; and the Netherlands, ibid., p.12 para. 4.

4. See UN Doc. E/CN.4/1314, pp.3-4.

governments concerning torture and its legal status. The notion of torture as a criminal offence committed outside armed conflict had begun to attract a wider audience and its acceptance, in principio, by States as such increased.[1]

The sub-headings which follow represent the most significant contributions made by the UN Convention on Torture vis-a-vis the proscription of torture as a crime and to the understanding of the concept of a criminal offence under international law.

(b.ii.1.) Jurisdiction

The Genocide and the Apartheid Conventions, though they do not exclude other grounds of jurisdiction, focus respectively on the territorial and universality principles of jurisdiction. In contrast the present convention (Article 5.1) offers State Parties a number of possible grounds on which jurisdiction may be exercised. Listed in the following order the grounds include: (a) the territorial principle; (b) the active personality principle - i.e. based on the nationality of the offender; (c) the passive personality principle - based on the nationality of the victim; and (d) the universality principle. An almost identical set of jurisdictional principles is found under the OAS Convention on Torture.

The intention of the drafters was to ensure that torturers would not, as far as possible, benefit from "safe havens". There was a clear unqualified consensus on this principle within the Working Group responsible for the drafting of the convention, within the UN Human Rights Commission and among States as reflected in their comments

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1. In response to the Swedish Draft, the Swiss Government declared:

> "It might be appropriate, on the occasion of the drawing up of a Convention against Torture, to extend the regime (of the 1949 Geneva Conventions) to all situations; this would be an important development in international law relating to criminal penalties".

UN Doc. E/CN.4/1314, p.8 para. 42.

on the Draft Convention. The US position is typical of this consensus: "torture is an offence of special international concern and should have broad jurisdictional bases".[1] There were, however, reservations made in the negotiating stages of the convention by States which could not accept the various principles of jurisdiction as they appeared in draft form. The comments made by States are evidence of the development of "opinio juris" concerning the application of principles of jurisdiction to emerging criminal offences under international law, and as such are relevant to the juridical characteristics of the concept of the criminal offence in international law.

The Principles of Jurisdiction

The territorial principle is recognised as a general principle of law and is accepted by States as a valid ground on which criminal jurisdiction may be exercised. It met with no difficulties in the drafting of the convention.[2]

By virtue of Article 5(1)(b) a State Party can exercise jurisdiction when the offender is its national, even though the offence occurred in the territory of another State Party. It was suggested that the word "national" ought to be substituted by "public official" or "employee of that State".[3] This would reflect and support the position in Article 1 of the convention which contains a definition of torture and suggests that, principally, torture is committed by public officials or agents of the State. The prevailing view was that the term "national" is a generally accepted concept in international law in connection with the establishment of jurisdiction.[4] The

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1. UN Doc. E/CN.4/1314, p.15 para. 69.

2. See Working Group Report, UN Doc. E/CN.4/1367, 1980, p.7 paras: 39-41. Hereafter referred to as 1980 WG Report.

3. Ibid., p.8 para. 42.

4. 1980 W.G. Report, p.8 para.43.

proposed amendment was not adopted, thus permitting the suggestion that the liability of the offender under the UN Convention on Torture is not necessarily limited to practices committed by persons in an official capacity notwithstanding the definition ratione personae of the crime of torture.

State Parties may also exercise jurisdiction, where the victim is a national if they consider it appropriate. The US proposed the deletion of this particular ground of jurisdiction declaring that it was "not widely accepted in international law".[1] It explained that State Parties could still exercise jurisdiction on the basis of the nationality of the victim if the principle was allowed under international law.[2] The USSR[3] expressed reservations in respect of the passive as well as the active personality principles of jurisdiction. It questioned their validity under international law.

Where a State Party does not offer to extradite an alleged torturer it shall be obliged to prosecute him under its own law. This obligation is imposed by virtue of Articles 5(2) and 7(1). The accused may be a national of the requested State and in accordance with traditional governmental policy it may refuse to extradite its own nationals regardless of whether or not the lex loci delicti is the same as that of the lex fori. The requested State may refuse to proceed with an extradition request purely for policy reasons. In any event, the (requested) State Party is obliged to prosecute if it does not extradite the accused. This is the aut dedere aut punure principle. In the event that other possible grounds of jurisdiction are not exercised by a State Party, this principle, under the

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1. UN Doc. E/CN.4/1314, p.3 para.15 and p.15 para.70.

2. This suggestion was made in view of article 8(3) of the Swedish Draft which specifically catered for this eventuality. An identical provision now appears in Article 5(1) of the Convention.

3. UN Doc. E/CN.4/1314, p.4 para. 22.

UN Convention on Torture, must be applied. The position in other treaties concerned with providing international penal sanctions for violations of human rights is more relaxed. There is no provision for the application of the aut dedere aut punire principle in the Genocide and in the Apartheid Conventions. High Contracting Parties to the 1949 Geneva Conventions may, if they so decide, apply the principle in respect of persons alleged to have committed "grave breaches" under the Conventions.

The aut dedere aut punire principle first appeared in the UN Convention on Torture in embryonic form in the Swedish Draft.[1] It was subsequently re-modelled and eventually adopted on the basis of a separate amendment introduced by the US.[2] The purpose of the amendment was twofold: (a) to ensure that application of the principle would be obligatory and thus reduce as far as possible the opportunities for State Parties to circumvent its application; and (b) to secure a universal system of prosecution for offenders. In the words of the US Government: "the creation of an obligation to prosecute or extradite (is) one of the most effective means of deterring torturers".[3] The amendment was well received.[4] There was general consensus among the drafters (at times implied and subject to some reservation) that it was necessary to tighten the net for perpetrators of torture. Prima facie evidence of this approach is when the aut dedere aut punire

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1. Cf. draft articles: 8(2),11 & 14, UN Doc. E/CN.4/1285. There was no corresponding provision in the Draft Convention for the Prevention and Suppression of Torture submitted by the IAPL. UN Doc. E/CN.4/NGO/213, 1st February, 1978. Hereafter cited as IAPL Draft.

2. UN Doc. E/CN.4/1314, p.17 para.79. The amendment had been influenced by a similar provision in the UN Convention on Crimes Against Internationally Protected Persons Including Diplomats (Article 3.2).

3. UN Doc. E/CN.4/1314, p.3, para. 15.

4. See France and Switzerland, ibid., paras: 81 & 82.

principle results in the application of universal jurisdiction.

Where a State Party refuses an extradition request; where neither the victim nor the offender are its nationals; and where the offence did not occur on its territory, it is obliged to prosecute. This is the position under the UN Convention on Torture and it reflects the classical application of the principle of universal jurisdiction. It has been described as "the most striking provision of the Convention."[1]

Both the Swedish and the IAPL Drafts provided for universal jurisdiction. Unlike the Swedish Draft, the IAPL Draft did not limit the exercise of universal jurisdiction to instances where a State Party had decided against extraditing the offender. Initial State response to this aspect of both Drafts was generally favourable - that of the US was most explicit:

> "the US believes (that) in addition to jurisdiction based on the territoriality and nationality (of the offender), universal jurisdiction should exist for acts of torture. Universal jurisdiction is appropriate since torture, like piracy, may well be considered an offence against the law of nations".[2]

The UK[3] maintained its traditional position on matters concerning the application of criminal jurisdiction. It reiterated its almost unqualified loyalty to the territorial principle. The UK Government's response to the provisions on jurisdiction in the Swedish Draft is as equally revealing of the status of torture, though different, as that of the US.

> "The United Kingdom considers that in contrast with offences of a more obviously international character, such as hijacking and attacks on

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1. Donnelly, op. cit., p.4.

2. UN Doc. E/CN.4/1314, p.14 para. 69. Emphasis added.

3. UN Doc. E/CN.4/1314/Add.1, p.3 paras.13 and 14. Emphasis added.

> internationally protected persons, the exceptionally wide extra-territorial jurisdiction conferred by Article 8 (now Article 5 of the UN Convention) in respect of torture goes beyond what is practical. The United Kingdom would find it difficult to breach the territorial principal and to accept even a limited degree of extraterritorial jurisdiction."[1]

The adoption of the universal principle of jurisdiction developed from an initial position of mixed reaction within the Working Group to one of almost universal support among governments. The principal argument submitted in favour of universal jurisdiction was that it constitutes a significant contribution to the prosecution of torturers; that it has been included in similar international treaties such as those concerned with the unlawful seizure of aircraft, hostage-taking and attacks against internationally protected persons; and that therefore torturers belong to that class of outlaws known as the enemies of all mankind.[2]

The objections against universal jurisdiction covered a wide range of concerns for governments and their policies. The objections ranged from the procedural - difficulties in the transfer of evidence from one State to another; to the substantive - universal jurisdiction would be invoked for political purposes which may result in the violation of the right to a fair trial for the accused. Some felt that:

> "the system of universal jurisdiction is not appropriate to deal with a crime that is not international in its nature, like those dealt with in treaties on hijacking and attacks upon

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1. But see Section 134 of the Criminal Justice Act 1988 which allows British Courts to apply universal jurisdiction over persons charged with committing torture.

2. See: 1980 W.G. Report, p.9 para.51; UN Human Rights Commission Report, 1981, p.57 para.25; 1982 W.G. Report, UN Doc. E/CN.4./1982 L.40, p.6 para. 22; and 1983 W.G. Report, UN Doc. E/CN.4/1983/63, p.5 para 21.

> diplomats". [It was also claimed that] "the intention of a State to prosecute a case of torture on the basis of universal jurisdiction could be interpreted by the State where the crime had been committed as a demonstration of lack of trust in its own judicial system, a violation of its sovereignty and even as an interference in its internal affairs."[1]

In response to the objection that the application of universal jurisdiction is at any rate academic in view of the fact that torture is generally committed by public officials with government consent (tacit or otherwise) and that, therefore, the likelihood of their prosecution is remote, it has been submitted that it is neither unknown nor hypothetical for official torturers to be found outside the locus delicti, or if different, outside the sphere of the lex patriae.[2]

The balance of opinion shifted significantly in favour of universal jurisdiction in the course of the work carried out between 1980-1984. The change occurred as a result of important measures introduced specifically to dispel some of the causes of concern expressed by governments. The call to render the aut dedere aut punire principle obligatory and to render the application of universal jurisdiction dependent upon this principle, were some of the measures adopted. As a result government representatives expressed readiness to support the principle.[3]

The effect of this amendment, and its impact upon State response, is most pertinent in assessing current State opinion concerning the application of the universal principle of jurisdiction in international law. Universal jurisdiction is acceptable if made part and parcel of a

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1. 1982 W.G. Report, p.7 para. 25.

2. 1982 W.G. Report, p.7 para. 26.

3. 1980 W.G. Report, p.9 para. 50; UN Human Rights Commission Report, 1981, p.56 and 57, para. 25; 1982 W.G. Report, p.7 para.62.

State Party's refusal to extradite.[1] In other words universal jurisdiction is seen as a measure of last resort. Indeed universal jurisdiction becomes operative only where the offender is not extradited either to the State Party on whose territory (including aircraft and vessels registered therein) the crime was committed or to the State Party whose national was the offender/victim. The position under the OAS Convention on Torture (see Article 14) does not circumscribe the application of the universal principle in this manner, although it remains dependant on the aut dedere aut punire principle. Accordingly, this removes any tacit element, present in the UN instrument, of a hierarchical order of jurisdiction among States Parties.[2] Extradition was seen by the drafters of the UN Convention on Torture and by some State Parties as a first option, and it would seem that an extradition request would most likely be granted to the State where the offence occurred, i.e. preference is given to any opportunity where, in fine, the territorial principle would apply. Indeed, during the course of the debate on jurisdiction it was suggested that: "an alleged offender should normally be tried by the State in whose territory the offence is committed."[3] However, this suggestion was not adopted.

Nonetheless, the concept of universal jurisdiction is widely indicative as a characteristic feature of criminal offences under international law. The controversy has been not whether the concept of universal jurisdiction is a

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1. This is the understanding of the applicability of the universality principle by the Netherlands. See, 19 NYIL (1988) pp.341 & 342.

2. It was suggested that the various grounds of jurisdiction in Article 5 of the convention would be exercised on the basis of a hierarchical system whereby the territorial principle would have preference over the others and the universal principle would be invoked last. See Uruguay, UN Doc. E/CN/4/1984/SR33, p.11 para. 37 and China in 1984 W.G. Report, p.5 para. 34.

3. 1982 W.G. Report, p. 5 para. 144.

principle of international law, but whether a particular practice is recognised as a criminal offence in respect of which universal jurisdiction may be exercised. This was the difficulty for States in the context of "apartheid" and, to a lesser extent, in so far as torture is committed in time of peace.

Other measures which have been inserted as a result of objections to the application of universal jurisdiction include, a guarantee that where the universality principle is applied the forum State shall apply the same standards of evidence as would ordinarily apply to crimes under national law and fair treatment shall be extended at all stages of the proceedings.[1]

Once these measures were adopted a number of States which had opposed universal jurisdiction were prepared to accept it.[2] There was a kinetic reaction. States[3] supported universal jurisdiction for torture in order not to stand in the way of consensus and this was almost unanimous after the UN Human Rights Commission adopted the Draft Convention.[4] One writer[5] has said of universal

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1. Article 7(2) and (3). See UN Human Rights Commission Report, 1981, p.58 para. 30 - p.60 para. 38; and 1982 W.G. Report, p.7 para. 27 - p.9, para. 36.

2. See: 1982 W.G. Report, p.6 para. 23; Argentina, 1984 W.G. Report, p.5 para. 27 and Brazil, ibid., p. 6 para. 31; Canada, UN Doc. E/CN.4/1984/SR32, p.13 para. 68, France, ibid., /SR33, p.3 para. 5, Senegal, ibid., p.7 para. 21.

3. See for e.g. Australia, Uruguay and China, 1984 W.G. Report, p.5 paras. 28 and 29.

4. Government replies are at UN Docs. A/39/499,/Add.1 and /Add.2. The following States tacitly accepted universal jurisdiction: Australia, Austria, Belgium, Burundi, Canada, Cyprus, Denmark, Finland, Ireland, Italy, Luxembourg, New Zealand, Panama, Portugal, Spain, Sweden, Switzerland, Syria, United Kingdom, Yugoslavia and Venezuela. The following accepted it explicitly and unreservedly: Greece, France, Netherlands, Norway and the USA.

5. Skupinski, op.cit., p.183.

jurisdiction in the UN Convention on Torture that it represents "the fundamental principle of the Convention".

(b.ii.2) Superior Orders

There were two original draft provisions concerning "superior orders". The provision in the Swedish Draft[1] read:

> "an order from a superior officer or a public authority may not be invoked as a justification of torture or other cruel, inhuman or degrading treatment or punishment."

In the IAPL Draft[2] the relevant provision read:

> "the fact that a person was acting in obedience to superior orders shall not be a defence to a charge of torture."

In the Swedish Draft, the question of "superior orders" is presented within the wider notion of excusability. The IAPL effort is more specific in terms of principles of criminal law. It focuses on denying the use of "superior orders" as a defence to presumably a criminal charge, whereas in the Swedish Draft the emphasis is on the general notion of torture as a non-justifiable unlawful practice rather than necessarily as a criminal offence. However, the term "public authority" in the Swedish format is a positive step. It prevents any official including high-ranking public officers, such as Cabinet Ministers, from invoking the "Act of State" doctrine.

It had been suggested[3] that "superior orders" may be considered in mitigation of punishment if justice so requires. The amendment was not adopted,[4] but the phrase is borrowed from Article 8 of the Nuremberg Charter and is evidence of an attempt by some of the drafters to apply to

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1. Draft article 2, see UN Doc. E/CN.4/1285, 1978.

2. Article V, UN Doc. E/CN.4/NGO/213, 1978.

3. See UN Human Rights Commission Report, 1979, p.40 para. 35.

4. UN Human Rights Commission Report, 1981, p.53 para. 185 (sub-para 13).

torture rules that had already been applied to acts recognised under international law as criminal offences. The corresponding provision (Article 4) in the OAS Convention on Torture which reads - "the fact of having acted under orders of a superior shall not provide exemption from the corresponding criminal liability" - was inserted on the advise of the Inter-American Juridical Committee because it reflects a principle of international law recognised and defined "when the Nuremberg Statutes were promulgated."[1]

The IAPL Draft provision, unlike the Swedish Proposal, contributes to the notion of torture as a criminal offence. The position under the OAS Convention on Torture is unambiguous. At any rate, State reaction to the provision on "superior orders" in the UN instrument, which followed the Swedish model, cannot be described as negative.[2] Some States have specifically included provision for "superior orders" in their legislation on torture[3] and some writers[4] offer the view that the non-applicablilty of the defence of "superior orders" applies to torture as a general principle of international law.

(b.ii.3) The Non-Derogable Nature of Torture

Article 2 of the UN Convention on Torture stipulates that "no exceptional circumstances whatsoever" including a state of war, the threat of war, internal political instability or any other public emergency may be invoked as

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1. OAS Doc. OEA/Ser. G., CP/doc. 1061/80. 19 ILM 630.

2. See Netherlands' reply, UN Doc. A/39/499, p. 12 para. 5.

3. See Greece, ibid., p.7, Panama, ibid., p.10, and the U.K. Criminal Justice Act 1988, Section 134(4) and (5). See also criticism on national legislation offered by Boulesbaa on Article 2.3 of the UN Convention on Torture in 12 HR Qrtly (1990) 53 at p.91.

4. See Boulesbaa, op.cit., p.93.

a justification for the practice of torture. A similar but more detailed provision is found in the OAS Convention on Torture. This includes, other than the cases listed in Article 1 of the UN convention, a state of seige, domestic disturbances or strife, suspension of constitutional guarantees, and disasters (which is broad enough to cover anything from a financial crisis to the most horrific natural catastrophe). Some of these circumstances have been specifically listed because of the particular political climate which prevails in Latin America. An interesting addition in Article 5 of the OAS Convention is that "neither the dangerous character of the detainee or prisoner, nor the lack of security of the prison establishment" shall justify torture. It was included by the drafters in order to ensure that the convention complied with the legislative practice of some OAS Member States where the principle is part of national law. No similar clause appears in the UN instrument.

The freedom from torture provision in: the European Convention on Human Rights, the American Convention on Human Rights and the International Covenant is entrenched as non-derogable. In its decision in Ireland v United Kingdom,[1] the European Human Rights Commission confirmed that the non-derogable rule prohibiting torture is absolute and knows no exception.[2] A more recent judicial affirmation of this principle is made in Filartiga by the US Court of Appeals: "there are few, if any, issues in international law today on which opinion seems to be so united as the limitations on a State's power to torture persons held in its custody".[3] Most States would subscribe to the view that torture committed in time of armed conflict and in time of

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1. 19 Yrbk. ECHR (1976) 750.

2. Cf. Rodley, op. cit., pp.77-78. See, intervention by Cocks, UK delegate Council of Europe, European Consultative Assembly, Debates 1st Session (Part II), 1949, 594, and, Klayman, op. cit., p.513.

3. 630 F.2d. 876 (1980) 881.

peace is an unlawful, prohibited, non-derogable practice. Writers[1] have suggested that the prohibition of torture is a norm of jus cogens.

It is most disappointing to find, therefore, that torture is not included with slavery, genocide and "apartheid" by the ILC, in its Draft Articles on State Responsibility,[2] as a serious breach of essential importance for safeguarding the human being; considered by the ILC to be typical illustrations of a breach of an international obligation so essential for the protection of fundamental interests of the international community that it constitutes an "international crime".

(b.ii.4) Torture - A Political Offence

Torture is inexcusable even if committed for instance as a measure to avoid a planned attack on innocent civilians. A submission that torture is committed for political motives will be unacceptable. This flows not only from the evidence in the foregoing sub-heading but also from the "travaux preparatoires" of the UN Convention on Torture. IAPL Draft Article XII specified that torture was not to be considered a political offence for the purpose of the convention. Neither the Swedish Draft (and the Convention as adopted) nor the OAS Convention contain any provision specifically dedicated to the question of torture and its status as a political crime. In its reply to the Swedish and IAPL Drafts, Switzerland[3] suggested that it was necessary to provide for the non-applicability of the political offence exception principle in the case of torture, and this notwithstanding the general provision stipulating that torture is inexcusable whatever may have been the motive/purpose for its commission. Switzerland

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1. Rodley, op. cit., p.70, and Hannikainen, op.cit., p.499 et seq.

2. Article 19, ILC Yrbk., 1976, v.II, pt.II, p.95.

3. UN Doc. E/CN4/1314, p.19 para. 90.

commended the IAPL Draft Article XII and France[1] supported the Swiss position.

(b.ii.5) The Status and Criminal Responsibility of the Torture

The Swedish and IAPL Drafts included definitions which provided that torture is a crime which may be committed either "by or at the instigation of a public official"[2] or, under Draft Article II of the IAPL Draft, by any other person "for which a public official is responsible". In other words, the travaux preparatoires to the UN Convention on Torture qualified the definition of torture ratione personae. This position now obtains in Article 1.1 of same convention which provides, inter alia, that:

> " 'torture' means any act .... inflicted by or at the instigation of or with the consent or acquiescence of a public official or other persons acting in an official capacity".

The position under the OAS Convention on Torture is similar, its definitive Article 2 does not refer to public officers. But, Article 3 provides that the following persons shall be held responsible for the crime of torture:

> " a. A public servant or employee who acting in that capacity orders, instigates or induces the use of torture, or who directly commits it or who, being able to prevent it, fails to do so.
>
> b. A person who at the instigation of a public servant or employee mentioned in subparagraph (a) orders, instigates or induces the use of torture, directly commits it or is an accomplice thereto."

This pattern in operative treaty provisions seems to suggest the following: notwithstanding the principle that there is individual criminal responsibility for crimes proscribed under international law regardless of the capacity (public or private) in which the perpetrator acts

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1. UN Doc. E/CN.4/314, p.19 para. 89.

2. This wording is common to both Drafts.

at the time of the commission of the offence, the torturer (under conventional law) incurs responsibility only when acting in an official capacity or when ordered to torture by a person acting in such a capacity. This position is also found under national law[1]. However, it is only proper and accurate to point out that there was some evidence present during the drafting stages of both the UN and OAS Conventions endorsing the more tenable view that individual criminal responsibility for torture in international law should be incurred regardless of whether or not the perpetrator acts in a public capacity at the time the offence is committed.

For instance, Barbados [2] in its reply to the Swedish and IAPL Drafts, suggested that reference to "public officials" in the definitive articles should be removed and the definition of torture not limited ratione personae. Similar recommendations were made by States in the UN Commission on Human Rights debating the draft convention[3]. Article 2 of a Draft Convention on Torture submitted by the Inter-American Juridical Committee [4] provided that regardless of whether a person is a public official or employee, those who commit, instigate, induce the use of, or, directly use, torture, or, may have had the obligation and the possibility to prevent it but failed to do so, incur criminal responsibility. The Inter-American Juridical Committee submitted that this provision was necessary "in view of the unfortunate events that

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1. Greece: Article 137a, Penal Code, see UN Doc. A/39/499/Add/1; Canada: Section 245.4, Penal Code amended by Act of 14th April, 1987; Thailand: Article 200, Penal Code, see UN Doc. A/39/499/Add.2; Panama: Article 160, Penal Code, Spain: Article 204 bis, Penal Code; and U.K., Section 134(1) and (2) Criminal Justice Act, 1988.

2. UN Doc.E/CN.4/1314/Add.4 p.3, para.9.

3. See UN Human Rights Commission Report, 1978, p.31 para.13 and ibid., 1979, p.37 para.17.

4. Text at 19 ILM (1980) 619.

frequently occur in a number of American States where persons or groups have tortured others for any reason, causing public disturbances or social unrest, which makes such occurrences international in nature".[1] However, notwithstanding this background, which may also be said to exist in certain other regions of the world, the argument which seems to have convinced the draftsmen of the UN[2] and OAS Conventions on Torture was that which considered acts of torture committed by public officials to be different in nature from, and inherently more serious than, that inflicted by private individuals.

Although the correct understanding of the UN and OAS Conventions on the question of individual criminal responsibility would appear to be that only persons acting in a public capacity incur responsibility for torture, Article 4 of the OAS Convention on Torture states that:

> "The fact of having acted under orders of a superior[3] shall not provide exemption from the corresponding criminal liability."[4]

The reference to "orders of a superior" rather than to the orders of a "superior officer or official" is not fortuitous. L'intention du legislateur, which, in this case, remained unaltered throughout the drafting stages of the OAS Convention, was to have Article 4, unlike Article 3, unqualified ratione personae thus rendering the non-acceptance of the defence of "superior orders" applicable to all torturers and not solely to those acting in an

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1. OAS Doc. OEA/Ser. G, CP/doc. 1061/80. 19 ILM (1980) at 629.

2. For instance, the only concession, the US was prepared to make, in this respect, consisted in an amendment suggesting that the wording of the convention should cover civil and military officials. UN Doc. E/CN4/1314.

3. Emphasis added.

4. See 25 ILM (1986) 521. The draft provision of Article 4 in the text submitted by the Inter-American Juridical Committee (19 ILM 1980 at 620) was left largely unaltered.

official capacity. This "oversight" in the drafting of the OAS Convention does not appear in the UN Convention on Torture and Article 2.3 thereof provides:

> "An order from a superior officer or a public authority may not be invoked as a justification of torture."

Further evidence concerning the status and responsibility of the torturer is found in the leading case of Filartiga. There the US Court of Appeals (2nd Cir.) found that "torture committed by a State official against one held in detention violates established norms of the international law of human rights, and hence the law of nations".[1] The Court having examined international instruments concerned with the protection of human rights, including inter alia, relevant provisions of the UN Charter, the Universal Declaration of Human Rights, the American Convention on Human Rights, the International Covenant, the European Convention on Human Rights, and other instruments directly relevant to the prohibition of torture such as the UN Declaration on Protection From Torture, found that "official torture is now prohibited by the law of nations".[2] Neither the UN nor the OAS Conventions on Torture had been adopted at the time of Filartiga, but Article 1 of the UN Declaration on Prevention From Torture defines torture as a practice committed by or at the instigation of a public official.

In a subsequent judgment, Forti v Suarez-Mason[3] delivered in 1987, the North District Court of California reaffirmed the Filartiga ruling on the prohibition in international law of "official torture" and added:

> "purely private torture will not normally implicate the law of nations, since there is currently no international consensus regarding

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1. 630 F. 2d. 876 (1980) at 880.

2. Op.cit., at p.884, emphasis added. But see pp.881-883.

3. 672 F. Supp. 1531 (1987).

torture practiced by non-state actors."[1]

On this point, Forti v Suarez-Mason referred to a pronouncement made in 1984 in Tel-Oren v Libyan Arab Republic,[2] namely that the "(lack of) consensus on non-official torture (does not) warrant an extension of Filartiga".[3] The question of whether or not there is individual responsibility for torture by "non-state actors" arose in Tel-Oren because there motion for damages was brought by and on behalf of victims of a terrorist incident in Israel committed by members of, inter alia, the Palestine Liberation Organisation, whose status as a subject of international law was seriously doubted by the Court.[4]

Of the three Appellate Judges in Tel-Oren, Judge Edwards, addressed the question whether torture like piracy engendered responsibility for the individual in international law. He examined, as had been done previously by the Court in Filartiga, relevant instruments and travaux preparatoires on the prohibition of torture, i.e. the draft text of the proposed UN Convention on Torture and the Declaration on the Protection from Torture, which both defined torture as a practice committed by or at the instigation of public officials. "Against this background"[5], Judge Edwards concluded that there is insufficient evidence in international practice to extend the principle of individual responsibility for torture in

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1. Ibid. at p.1541. It should be noted that international responsibility may still be incurred by a State in international law for failure to provide a remedy for torture committed by individuals acting in a private capacity.

2. 726 F. 2d. 774 (1984).

3. Ibid., Judge Edwards, at p.795.

4. All three Judges concurred on this point. See Judge Edwards, p.791; Judge Bork, pp.805-806 and at p.819 and Judge Robb, p.825.

5. Op.cit., p.795.

international law committed by non-public officials.

The joint contribution of these three judgments to the status and individual responsibility of the torturer in international law is circumscribed ratione temporis and by virture of the facts particular to each case. Their contribution must be assessed in that light.

In both Filartiga v Pena-Irala and in Forti v Suarez-Mason the persons alleged to have practiced torture acted in a public capacity at the time the offences were committed. In the former case Pera-Irala was Inspector General of Police in Ascuncion Paraguay. In the latter case Suarez-Mason was a General (Commander 1st Army Corps) in the Argentine Military Forces. The position in Tel-Oren was slightly different with members of the Palestine Liberation Organisation being involved in the criminal practices. Furthermore, the sources available to the Court in Filartiga and Tel-Oren concerning the prohibition of torture in international law were either silent on the question of individual responsibility for "private" tortureres or referred only to torture committed by "public officials". In Filartiga (1980) and Tel-Oren (1984) the Courts could plead unavailability of the travaux preparatoires to the UN Convention on Torture in order to explain their decisions as formulated. But this reason is certainly not valid vis-a-vis the Forti (1987) case.

The principle governing international responsibility for perpetrators of torture, ideally, would be the following: torturers, either as private individuals or as public officials, acting singly or jointly under the supervision of public officials, incur criminal responsibility. The evidence submitted in this section appears to suggest otherwise. Least support is found in the judicial decisions reviewed above and it is unhelpful to argue (especially with regards to Tel-Oren): had the evidence in the travaux preparatoires reviewed by the Courts been otherwise a different conclusion may have been reached. This approach is unhelpful because in Tel-Oren,

where the question of responsibility for "privately practiced torture" had been formulated for decision, Judge Edwards remarked:

> "while I have little doubt that the trend in international law is toward a more expansive allocation of rights and obligations to entities other than States, I decline to read Section 1350 (Alien Torts Act) to cover torture by non-State actors, absent guidance from the Supreme Court on the Statute's usage of the term 'law of nations'[1]."[2]

Furthermore, even if judicial pronouncement on individual responsibility for privately practiced torture was forthcoming, responsibility under 28 USC 1350 can only be civil and not criminal.

Accordingly, the US Courts have yet to address the question whether (a) torture committed by private persons is contrary to international law and (b), if so, whether in addition to civil liability, criminal responsibility may also be incurred. It is interesting to see how judicial practice on this point will develop especially if an American Court and, it is not an unlikely possibility, were seized of an action brought by relatives of former hostages against aliens (such as hostage-takers not enjoying belligerent status) present in the US for committing torture.

The position of the US Government on the question of the status of the torturer in international law is disappointing and rather restrictive. It is contained in the reply to the original draft text of the UN Convention:

> "When there is no public official involvement of any kind it is highly probably that a torturer will be apprehended and punished under national laws. In this context an international convention is unnecessary."[3]

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1. Cf. Judge Robb, at p.827.

2. Op.cit., p.795.

3. UN Doc. E/CN.4/1314, p.6 para.29.

(b.iii.) OAS Convention on Torture

The concept of torture as conceived in the Swedish Draft (on which the UN Convention was modelled) differs significantly from that as perceived by the Inter-American Juridical Committee which was responsible for drafting the OAS Convention on Torture. The Committee described torture an "international crime" - this being the key phrase. In article 1 of the IAPL Draft torture was defined as a crime under international law and States[1] argued that such a declaration should be included in the UN Convention because "the practice of torture was shocking to the conscience of mankind". Writers[2] have also argued the case that, given its proscription in international instruments, in General Assembly resolutions and in submissions made by international non governmental bodies, torture cannot but be considered an "international crime".

The Inter-American Juridical Committee felt that it was necessary to define torture an "international crime" if the relevant rules in the American Declaration of the Rights and Duties of Man and the American Convention on Human Rights were to be given proper effect. The Committee drafted Article 1 so as to provide that "Contracting States confirm that torture is an international crime".[3] The Committee further decreed (Draft Article 4) that "all acts of torture or any other cruel, inhuman or degrading treatment or punishment shall constitute an offence against human dignity". This is the only remaining characterisation of torture which now appears in the second preambular paragraph of the OAS Convention. All references to either "international crime" or "crime under international law" in the OAS (and in the UN) Convention

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1. Austria, UN Doc. E/CN4/1314, p.8 para. 40; Barbados, ibid., para. 41; and the Holy See, UN Doc. E/CN4/1314/Add.3, p. 2 para. 5. See UN Human Rights Commission Report, 1978, p.30 para. 9.

2. 17 Rev.ICJ (1976) 46-47.

3. 19 ILM 619.

have been omitted. State Parties are obliged to enact legislation rendering torture a criminal offence.[1]

Some argue that, on account of these obligations, and since the "criminalisation" takes place at the domestic level, there is evidence which suggests that torture is not considered a criminal offence under international law.[2]

Further evidence in support of this argument is found in Article 7(2) of the UN Convention. It is provided that when State Parties submit cases for prosecution, after electing not to extradite the offender, the competent authorities shall treat a case of torture as they would "any ordinary[3] offence of a serious nature" under their own laws. The language is borrowed from corresponding provisions in the Hague and Montreal instruments on suppression of unlawful acts against aircraft and the unlawful seizure of civilian aircraft. However, the use of the phrase "ordinary offence" does not correspond to, or promote, the exceptionally grave nature of acts traditionally considered to be criminal offences under international law.[4] Accordingly, it seems to neutralise the position reflected by the drafts of the convention concerning the nature of torture.

However, the Inter-American Juridical Committee confirmed that it considered torture to be delicta jure

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1. See Article 6.

2. D'Zurilla, 56 Tul. LR (1981) 186 at p.207. It is important to remember that D'Zurilla's conclusions were reached on the basis of source material as at 1981.

3. Emphasis added.

4. See Iraq, UN Doc. A/39/466/Add 1. p.8 para. 5. Suggestions to include reference to "ordinary offence" in a parallel provision in the Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons Including Diplomats met with stern opposition from members of the ILC which was entrusted with preparing the first draft text. See, for e.g. Ustor, ILC Yrbk., 1972, v.I, p.221 para 36.

gentium. Accordingly, it thought it necessary that the convention ought to include specific provisions tailored for the prevention and suppression of such acts in international law. This is the explanation for the presence of the aut dedere aut punire principle; of the application of the universality principle; and of the non-acceptance of "superior orders" in the OAS Convention.

In their replies to the UN Draft Convention, OAS member States[1] acknowledged and supported the declaration of torture as "a crime under international law" which appeared in the OAS Draft Convention. Coupled with the remarks made by States in the provisions already considered under the UN Convention, the evidence in toto suggests that despite the absence in both the UN and OAS Conventions of a categoric declaration of torture as a crime under international law, there is sufficient reason to believe that most State Parties hold torture in this regard.

II. Judicial Decisions and Municipal Legislation

(a) Judicial Decisions

Chapter 28 USC Para 1350 provides:

> "The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."

Of the many actions brought under this inconspicuous, oft-forgotten, provision few have been held to be admissable[2] by US Courts as constituting violations of the

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[1]. See UN Doc. E/CN4/1984/SR33: Colombia, p.6 para. 17 and Argentina, p.12 para.42.

[2]. These include causes relating to:
(i) the unlawful seizure of a vessel and its disposition as a prize;
(ii) the seizure of neutral property upon the ship of a belligerent;
(iii) unjustified seizure of alien's property in a foreign country by a US officer;
(iv) failure to accord comity to ships of foreign countries; and,
(v) concealment of a child's true nationality coupled with the wrongful inclusion of that child on

law of nations for the purposes of Section 1350.[1] Torture committed by a person in a position of official authority has been added to the list by virtue of the decisions in Filartiga, Tel-Oren v Libyan Arab Republic and Forti v Suarez-Mason.

The District Court in Filartiga acknowledged the strong arguments made by plaintiffs that torture is an unlawful practice under international law, but it did not consider torture practiced by one person against another person of the same nationality met the Lopes test by which admissability of violations of the law of nations under 1350 is determined.[2] The Court of Appeals disagreed, reversed the judgment and found for appellant on the basis of the following evidence.

It considered the relevant provisions of the UN Charter and those of a host of international instruments concerned with the protection of human rights including specifically the Declaration on the Prevention from Torture. It paid due attention to "expert" evidence submitted by Professors Falk, Franck, Lillich and McDougal

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another's passport.
See Lopes v. Reederei Richard Schroder 225 F.Supp. 292 (1963) at 296.

1. The minimum standard by which subject-matter jurisdiction becomes operative for violations of the laws of nations under 1350 was defined in Lopes v Schroder. The Court defined the phrase "in violation of the law of nations", as meaning

> "at least a violation by one or more individuals of those standards, rules or customs (a) affecting the relationship between States or between an individual and a foreign State, and (b) used by those States for their common good and/or in dealings inter se". (op. cit., p.297)

This ruling was followed in ITT v Vencap Ltd, 519 F.2d. 1001 (1975) and in Dreyfus v von Finck, 534 F.2d. (1976).

2. Rickard, 30 Am. ULR (1981) 807 at pp.809 and 818.

submitted in a Memorandum[1] for the United States Department of State which appeared as amicus curiae. The Memorandum submitted that States are obliged under international law to respect the fundamental human rights of their citizens and that torture is a violation of international law.

> "While some nations still practice torture, it appears that no State asserts a right to torture its nationals. Rather, nations accused of torture unanimously deny the accusation and no attempt is made to justify its use. That conduct evidences an awareness that torture is universally condemned".[2]

The Court concluded that the duty to prohibit torture committed by a public official existed under conventional and customary international law. It felt that nations had made it "their business" through international and unilateral action to be concerned with domestic human rights violations which include torture. The Filartiga case was therefore justiciable.[3] In addition, the Court also held (a) it is dubious whether action by a State official in violation of the Constitution and of the laws of his country and wholly unratified by his government, could be considered an "Act of State"; and (b) "for the purposes of civil liability the torturer has become like the pirate and the slave-trader before him - hostis humani generis, an enemy of all mankind".[4]

The Filartiga pronouncement on the international law rule prohibiting torture committed by a public official was endorsed first in Tel-Oren v Libyan Arab Republic and subsequently in Forti v Suarez-Mason[5]. Of the three Appellate Judges in Tel-Oren, Judges Edwards and Bork

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1. Reproduced in 19 ILM (1980) 585.

2. Ibid., p.598.

3. Op. cit., at pp. 884 & 889.

4. Ibid., p.890 (emphasis added).

5. Judge Jensen, 672 F. Supp. 1531 at 1541.

excluded extending the principle to non-official torture.[1] In all three cases appellants/plaintiffs had no need to formulate their case that torture was a criminal offence under the law of nations. It sufficed for them to mount the hurdle of 28 USC 1350 by showing that torture was contrary to international law. However, it may be argued that, tacitly, they did consider torture to belong to the class of unlawful acts in international law known as delicti jure gentium by virtue of the fact that they claimed punitive damages in addition to compensatory damages for torture. In Tel-Oren, Judge Edwards observed that reference to pirates and hostis humanis generis, language employed in Filartiga, was not "fortuitous":

> "The inference is that persons may be suceptible to civil liability if they commit either a crime traditionally warranting universal jusidiction or an offence that comparably violates current norms of international law."[2]

Accordingly, the evidence afforded by the foregoing judicial practice reveals:
(a) that torture committed by a State official or person acting under "colour of the State" is a violation of international law; (b) that "official" torture gives rise to individual civil responsibility, and in that respect, places the "State" torturer in the same class of offenders as the pirate and the war criminal. Presumably, this means that, at least in theory, he becomes tortiously liable wherever present, regardless of his nationality or that of his victim and of the lex loci delicti; and (c) the "Act of State" doctrine cannot be invoked where torture is committed or ordered to be committed by a public officer simply on the basis of (i) his position and (ii) when the conduct is not ratified by Government.

In particular, Filartiga, being the decision which triggered recent human rights motions under Paragraph 1350

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1. See Judge Edwards, 726 F.2d. 774 (1984) at 795 and Judge Bork, ibid., at p.806 ff.14.

2. 726 F.2d. (1984) 781.

has been well received.[1] It is acclaimed by some as a cause celebre.[2] Others have identified the judgment as a revolutionary contribution to the traditional position of the individual in international law.[3] Certainly, Filartiga has made a significant impact on the international legal status of torture[4]. But, it leaves to others many unanswered questions. For instance, it remains to be seen whether an action under 28 USC 1350 will be admitted where torture is committed by an "official" acting with Government consent (tacit or otherwise) and where the lex loci delicti is silent on the prohibition of torture. It is also to be decided whether an action will be admissable for torture committed by a private individual and if individual responsibility is incurred what form will it take.[5] Furthermore, the question of torture as a criminal offence in international law remains very much unaddressed and the judicial practice cited here hardly begins to answer the question of individual criminal responsibility for torturers, although there may be a stronger case for

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1. The literature generated by this decision has been considerable. See generally: Rickard, op. cit., p.807; Barenblat, 16 Tex.ILJ (1981) 117; Rosen, 75 AJIL (1981) 149; Danaher, 33 Stan. LR (1980-81) 353; Symposium on Filartiga: 11 Ga.JICL (1981) 307 hereafter cited as Symposium. Cf. D'Zurilla, op.cit., p.202 et seq.

2. Rohlik, writing in Symposium, op. cit., p.330. Contra, see Rusk, ibid., p.311 and Hassan, 32 ICLQ (1983) 250 at 256.

3. Barenblat, op. cit., pp.135-136, and Sohn, Symposium, op.cit., p.309.

4. Rickard, op. cit., p.831, hails Filartiga as a "decision based on the sound legal conclusion that a new custom prohibiting torture has emerged as part of customary international law".

5. In Tel-Oren (op. cit., p.793) Judge Edwards would not venture further than acknowledging that support for individual responsibility in the "private arena" under international law is considerable and the arguments compelling.

this type of liability being incurred where the offender acts in a public capacity.

Filartiga and subsequent judicial affirmations are evidence of US judicial interpretation of the development of international law concerning torture. Alone they do not establish torture a criminal offence under international law.

(b) Municipal Legislation

Canada,[1] France,[2] Austria,[3] and Great Britain,[4] have enacted legislation in pursuance of their obligations under the UN Convention on Torture incorporating, inter alia, the Convention's definition of torture, rendering torture a crime justiciable before their national tribunals even if committed outside their territory and removing the applicability of the defence of "superior orders". In some cases the legislation was drafted/ enacted prior to the entry into force of the convention. Such legislative practice represents a sincere commitment, independent of conventional obligations, by States to punish torture as a criminal offence.

Significant changes in legislation have occurred also in Latin American States. In 1984 representatives of the non-military Government of Argentina[5] reported the enactment of a law making it a criminal offence for all who either

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1. See Act to Amend the Criminal Code, 14th April, 1987.

2. Law No.85/1407, 30th December, 1985. See article 689(2) Code Penal Procedural.

3. Stuck 1982, Bundesgesetzblatt, 1987. But as early as 1945, Austria, by virtue of Constitutional Act of 26th June 1945, Concerning War Crimes and National Socialist Crimes (Stuck 10, No.32), punished members of the armed forces or any other person who committed acts of torture on the basis of political or racial hatred.

4. Section 134 Criminal Justice Act, 1988.

5. UN Doc. E/CN4/1984/SR33, p.12 para. 43.

commit or fail to prevent or to denounce torture. Police officers, non-civilian personnel, judges and doctors are specifically included as likely "candidates" to incur responsibility in the course of their duties. Torture is also a criminal offence under Article 279 of the Penal Code of Colombia[1] and Article 160 of the Penal Code of Panama[2]. Thailand[3] also reported that torture is a criminal offence under Article 200 of its Penal Code. It considered torture to be an extraditable offence, implying that the political offence exception principle would not be entertained under current Thai extradition practice. The application of the aut dedere aut punire principle in cases of torture is also in accordance with Articles 4-11 of the Thai Penal Code.

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1. Ibid., p.6, para. 17.

2. UN Doc. A/39/499/Add.1, p.10 para. 5.

3. UN Doc. A/39/499/Add.2, p.3.

CHAPTER 7

Crimes Affecting the Political and Economic Interests of the International Community

A. "Air Law Crimes"

The concept of crimes committed on board aircraft; of the crime of unlawful seizure of aircraft; of unlawful acts committed against the safety of civil aviation, and, more recently, of the crimes of violence at airports serving international civil aviation, are provided for in international law by the following instruments adopted under the auspices of the International Civil Aviation Organisation[1]: (1) Convention on Offences and Certain Other Acts Committed on Board Aircraft, Tokyo, 1963;[2] (ii) Convention For the Suppression of Unlawful Seizure of Aircraft,[3] Hague, 1970; (iii) Convention for the Suppression of Unlawful Acts Against The Safety of Civil Aviation,[4] Montreal, 1971; and (iv) Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, Supplementary to the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, Montreal, 1988.[5]

It is not easy to group all the offences defined in the above instruments under one heading, but it is convenient. Often they are referred to by journalistic and imprecise legal headings such as "hijacking", "aerial" / "air" "piracy". In this section they are referred to as "air law crimes", a phrase which may also be open to

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1. Hereafter cited as ICAO.

2. 704 UNTS 219, UKTS No. 126, 1969. Hereafter cited as Tokyo Convention.

3. 860 UNTS 105, UKTS No.39, 1972. Hereafter cited as Hague Convention.

4. 974 UNTS 177 UKTS No.10, 1974. Hereafter cited as Montreal Convention.

5. UKTS, Misc. No.6 (1988); Cmnd.378. Hereafter cited as Montreal Protocol.

criticism on the basis that it is generic, but it has been coined for two reasons. First, the law concerning civil aviation (air law) is recognised as a specialised field in public and private international law. Second, the crimes discussed in this section all affect the safety of civil aviation in one form or another.

These instruments and their travaux preparatoires including other relevant source material such as draft proposals de lege ferânda adopted by academic bodies, municipal legislation, decisions of national tribunals, and doctrine, are examined under three headings relevant to the determination of the substance of the concept of criminal offence in international law: (a) the relationship between "air law" crimes and piracy jure gentium, (b) jurisdiction and (c) extradition - the political offence exception.

I. Analogy with Piracy Jure Gentium

Of the various crimes defined under the Tokyo, Hague and Montreal Conventions, the analogy with piracy jure gentium principally occurs vis-a-vis unlawful seizure of aircraft, popularly known as "hijacking" or "aerial hijacking". The analogy takes place on two levels: on the one hand there is the question of designation, i.e. assimilation of the two crimes simply by referring to one as the other. On the other hand, the rules regulating piracy jure gentium are systematically analysed by writers in order to see whether they are applicable, in particular, to unlawful seizure of aircraft.

(a) Question of Designation

The Council of Europe adopted resolutions[1] and made recommendations[2] endorsing the adoption of the Hague Convention describing unlawful seizure of aircraft as "a crime against humanity" and a crime of air piracy. The ILA submitted a draft resolution for adoption at its Fifty-

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1. Res. 450 (1970).

2. Recommendation 613 (1970).

Fourth Hague Conference in 1970. The draft resolution made a broad reference to piracy jure gentium (sea and air) but it was not adopted. At the Diplomatic Conference which adopted the Hague Convention, Ghana,[1] Greece,[2] and Costa Rica,[3] respectively, (a) requested that the offence of unlawful seizure of aircraft in the Draft Hague Convention be given a specific name: "air piracy" or "aircraft hijacking"; (b) considered "the pirate in the air" to be extradited or prosecuted in all circumstances; and, (c) the aircraft hijackers deserved to be treated as "offenders of mankind".

At the drafting stages of the Montreal Convention, the observer for the International Federation of Airline Pilots Association[4] expressed the desire that the future convention "shall provide for the concept of international crimes that would be adequately punishable anywhere in the world."[5]

States Parties to the Hague Convention which have enacted legislation to make unlawful seizure of aircraft a specific crime under their domestic laws, such as the United States,[6] the United Kingdom[7] and India[8], have called such legislation the Hijacking Act or The Anti-Hijacking Act. Under the India Tokyo Law Act (No. 20) 1975, Section 6(1) thereof provides that any court having jurisdiction in respect of piracy committed on the high seas shall also have jurisdiction in respect of offences committed on board

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1. See SA Doc No. 8, in ICAO Doc. 8979, 1972, LC/165-2, p.33.

2. See SA Doc No. 40, ibid., p. 91.

3. See SA Doc. No. 53, ibid., p.108.

4. Hereafter cited as IFAPA.

5. See ICAO Doc. 8936 - LC/164, 1970, v.1, p.5 para. 18.

6. Public Law No.93 - 366, August 5th, 1974.

7. Chapter 70, 1971.

8. Indian Parliament Act No. 64, 1982.

aircraft wherever the locus delicti may be.

Endorsing the conclusion of the Hague Convention, President Nixon declared[1]:

> "most countries, including the United States, found effective means of dealing with piracy on the high seas a century and a half ago. We can - and we will - deal effectively with piracy in the skies today".

Writers have adopted the terms "air piracy", "aerial piracy" and "hijacking" frequently to refer to the crime of unlawful seizure of aircraft and often used them as convenient headings for learned articles on the subject.[2] One,[3] in particular, described legislation enacted by Japan[4] in view of its obligations under the Tokyo Convention as "Anti-Air Piracy Law". At times these references to unlawful seizure of aircraft as "aerial piracy" or "hijacking" may simply reflect stylistic expediency. But in certain circumstances references to piracy jure gentium, such as within drafts de lege feranda submitted at international fora, may be employed purposely to portray a specific juridical meaning.

(b) Piracy Jure Gentium and Unlawful Seizure of Aircraft

Those[5] that have taken the definition of piracy

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1. 63 US Dept. Bull., 1970, p.342.

2. See, among others, Friedlander, writing in Bassiouni, International Criminal Law Volume 1 Crimes, p.455; Dinstein, 7 Israel LR (1972) 193; Poulantzas, Ned. Juris. (1970); Jacobson, 5 Cor. ILJ (1972) 165.

3. Yamamoto, 15 JAIL (1971) 70.

4. Law Concerning Punishment for Unlawful Seizure of Aircraft and Similar Crimes (Law No. 68 of 1970).

5. See, inter alia, Yamamoto, op. cit., p.77; Galicki, 3 Pol. YIL (1970) 181; Dinstein, op. cit., p.197; and Van Panhuys, 9 Col. JTL (1970) 7; Schwarzenberger, 24 CLP (1971) at 260; Schubber, Jurisdiction Over Crimes on Board Aircraft, 1973, pp.187-188, and at 43 BYIL (1968-69) 199. See also majority views submitted by members of the 18th Commission of the Institute of International Law in response to questionnaire on

contained in the 1958 Geneva Convention on the High Seas and applied it to the concept of unlawful seizure of aircraft as defined in the Tokyo and Hague Conventions, have all reached the conclusion that unlawful seizure of aircraft is not piracy jure gentium; principally for the following reasons:

> 1. The "external" requirement under Article 14 of the Geneva Convention on the High Seas namely that an attack is to be made by one vessel or aircraft against another, is almost invariably missing in current incidents of unlawful seizure of aircraft. Only one aircraft is usually involved.
>
> 2. Piracy under the Geneva Convention must be committed for private ends. In cases of unlawful seizure of aircraft this usually occurs for non-private, i.e. for "political", purposes.
>
> 3. Piracy must be committed on the high seas, whereas unlawful seizure of aircraft, more often than not, occurs over the territory of at least one State.
>
> 4. Piracy is committed by private persons whereas under the Tokyo and Hague Conventions unlawful seizure of aircraft may be committed by any person.

Oppenheim[1] defined piracy jure gentium on the basis of international practice, i.e. as incorporating acts considered to be piratical even though not falling within the strict meaning of piracy committed animo furandi by one private vessel against another. Thus Oppenheim postulated the following definition of piracy:

> "every unauthorised act of violence against persons or goods committed on the open sea either by a private vessel against another vessel or by the mutinous crew or passengers against their own vessel".

This definition, coined in 1954 prior to the adoption of the Geneva Convention on the High Seas, has been

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hijacking of aircraft. 54 Annuaire (1971) 559.

1. International Law, v.I, p.609.

employed by some writers[1] in order to argue the case for unlawful seizure of aircraft to be considered a crime in international law, in respect of which, like piracy jure gentium, the universal principle of jurisdiction is applicable. This thesis is supported on a number of grounds.

First, Oppenheim's definition does not necessarily require more than one vessel for piracy to be committed. Second the 1958 Geneva Convention includes aircraft along with vessels in defining piracy. Third, Article 11(1) of the Tokyo Convention obliging States Parties "to take all appropriate measures to restore control of the aircraft to its lawful commander or to preserve his control of the aircraft", has been interpreted as "constituting a general authority to all parties to exercise jurisdiction - a limited type of piracy".[2] This interpretation is based on the following facts: (i) the Tokyo Convention does not specify the application ratione loci of State Parties' obligation to preserve and restore control of the aircraft and (ii) given that a State Party may not, without consent, intervene in the territory of another State, such right may be exercised only on the high seas or over terra nullius.[3] Fourth, the Hague Convention has broadened, ratione loci, the suppression of unlawful seizure of aircraft under conventional international law. Its inclusion of the aut dedere aut punire principle provides for the application of a broad jurisdictional base. The fifth, and final ground, is that in view of the fact that unlawful seizure of aircraft is a common feature of international civil aviation, "the case for granting international jurisdiction over hijacking is today as compelling as the case for granting similar jurisdiction over piracy on the high seas". The raison d'etre here is the following:

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1. Jacobson, op. cit., p.169.

2. Shubber, op. cit., pp.186-187, and at 43 BYIL pp.203.

3. Contra see Poulantzas, op. cit., p.570.

> "The picture of the traditional pirate is that of 'a professional robber who sails the sea in a pirate ship to attack and plunder other ships.... such ships are a menace to the interests of every state which has access to the sea'. If professional 'pirates' carry out their acts in the air, do they not provide an equal menace to every state?.... Thus, should not airspace, regardless of the territory beneath it, be equated in cases of piracy with the high seas and therefore justify the exercise of universal jurisdiction?"[1]

Certainly, there are elements common to piracy jure gentium and unlawful seizure of aircraft. Nonetheless it is best to keep the two concepts separate. Analogies may have been drawn between piracy jure gentium and unlawful seizure of aircraft and these certainly played a major role in drafting the Hague Convention. But the status of unlawful seizure of aircraft has developed quite independently from the already existing crime of piracy jure gentium as a crime under international law.

II. Jurisdiction

(a) Juridical Nature of the Crime

Several comments have been made by government and non-government representatives declaring the offences under the three principal conventions "international crimes". This label was mainly addressed to unlawful seizure of aircraft defined by the Tokyo Convention and which obliges States Parties to take all appropriate measures to take and restore control of the aircraft to its lawful commander or to preserve his control. As we have seen, some[2] have interpreted this obligation as a sui generis type of piracy implying the applicability of universal jurisdiction by State Parties. Others[3] have criticised the Tokyo Convention

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1. Jacobson, op. cit., p.165.

2. Schubber, op. cit., pp.186-187.

3. Memorandum on Unlawful Seizure of Aircraft submitted by the International Transport Workers' Federation, ICAO Doc. 8939 - LC/164, v. II., p. 69 para. 8 and at

for failing to declare unlawful seizure of aircraft

> "a specific and internationally recognised criminal offence.... The only worthwhile deterrent against the hijacking of a civil aircraft can be provided by its recognition by the world community as an international crime, which should be universally punished with maximum severity."

At the Hague Diplomatic Conference, the Austrian delegate[1] held that "hijacking is an international crime and it seemed reasonable to argue that all States involved by any act of hijacking should claim the right to prosecute offenders". The ILA[2] also called for the "internationalisation" of criminal offences committed on board aircraft, including unlawful seizure of aircraft and explained that an -

> "offence is 'international' if national laws punish it irrespective of the place where the criminal act has been committed or if the courts of all States are competent to prosecute the presumed perpetrator of the offence, without regard to the place where the offence was committed."

The United Nations Under-Secretary General for Legal Affairs[3] and some States[4] expressed the desire to extend the notion of "international criminal offences" to unlawful acts against international civil aviation.

(b) Bases of Jurisdiction

The following are instances in which States Parties to the three conventions may exercise jurisdiction. Some are common to all three. These are: (i) the State of registration of the aircraft on board which the offence is

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p.70 para.10.

1. ICAO Doc. 8979 - LC/165 -1., p.71 para. 40.

2. ICAO Doc. 8877, 1970 - LC/161 - I, p. 159.

3. ICAO Doc. 8877 - LC/161, v.I, p. 173.

4. In particular see LC Working Draft No. 786, para 2. submitted by Tanzania, Uganda and Kenya. ICAO Doc. 8936, 1970, LC/164 - 2, p.232.

committed. In the Montreal Convention this jurisdictional ground is also extended to crimes committed against the aircraft itself. In the Hague and Montreal Conventions jurisdiction is also exercisable, where the aircraft is leased without crew, by the State in whose territory the lessee has his principal place of business or permanent residence. (ii) Jurisdiction may be exercised in accordance with national law.

Other bases of jurisdiction are either common to the Hague and Montreal Conventions or particular to the Tokyo Convention. Each is discussed in the light of preparatory material relevant to the particular convention.

The Tokyo Convention[1]

This convention, based on a draft text proposed in 1958 in Montreal and adopted in 1959 in Munich, addressed, principally, offences committed on board aircraft. The criminal law of some States covered such offences but others did not. The intention of the drafters was to provide uniform rules concerning exercise of extraterritorial jurisdiction. It was felt that it will serve a useful purpose to formulate a statement of an internationally agreed principle.[2] This resulted in acknowledging that the State of registration of the aircraft is competent to exercise jurisdiction and States Parties to the Tokyo Convention are obliged to take measures to establish their jurisdiction in this respect. However, the travaux preparatoires of the Tokyo Convention indicate that it did not establish the principle of extra-territorial jurisdiction for States in respect of offences committed on board aircraft registered under their flag. Thus Professor Cheng[3] has written:

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1. See generally ICAO Doc. 8111, 1959, LC/146, vols. I and II.

2. Ibid., v.II, p.21 para.5.

3. Writing in Contemporary Problems in International Law:

> "what one finds is that under international law a State is entitled to quasi-territorial jurisdiction over all aircraft bearing its nationality and all persons and objects on board wherever they may be, but that many States have singly omitted to exercise that jurisdiction in their domestic laws by failing to extend their laws and the jurisdiction of their courts to their aircraft, when they are outside the national boundaries, and to all persons and objects on board. What the contracting parties to the Tokyo Convention have done in its Article 3(2) (obliging States Parties to establish jurisdiction in respect of offences committed on board aircraft bearing their nationality) is merely to undertake to exercise a right which they already enjoy under international law. It would be wrong, in the writer's opinion, to see in this article a conferment by the treaty on the contracting parties of a right which the contracting parties did not previously possess; for this would mean that those States which exercise such jurisdiction prior to the treaty or without being parties to the treaty would be infringing international law. This is not so."

The drafters of the Tokyo Convention also considered various texts de lege feranda providing for various applicable bases of jurisdiction.

The Comite Juridique International de l'Aviation[1] meeting first at Geneva in 1912, later in Prague in 1922 and in Rome in 1924, drew up an International Code of the Air which laid down that jurisdiction ought to be exercised by the following States: (i) the subjacent State where acts endanger its public order and (ii) in all other cases, by the State of registration including offences occurring over the high seas. At its 1930 session in Budapest, the Comite Juridique reported that these principles of jurisdiction were not exclusive.

In 1922, and, in amended form in 1924, the ILA[2] laid down a number of principles establishing that the aircraft

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Essays in Honour of George Schwarzenberger, 1988, p.33 (hereafter cited as Contemporary Problems).

1. ICAO Doc 8111-146/LC-II, p.97.

2. ICAO Doc. 8111-LC/1460-II, p. 107.

is subject to the jurisdiction of the State of its registration when flying over the high seas or over terra nullius. In 1937 the Institut de Droit International[1] provided the following list of jurisdictional bases: (a) the subjacent State, (b) the State of registration, (c) the State on whose territory the crime has effect and as a subsidiary base, (d) the State where the aircraft lands. The passive and active personality principles were added to this list in a Draft International Convention On Competence In Cases of Extraditable Offences Committed In An Aircraft In Flight, prepared by the International Criminal Police Commission.[2]

Other drafts de lege ferânda included variations of the above bases of jurisdiction: some expressing a general preference for the State of registration[3] while others laid down concurrent jurisdiction for the State of registration and the subjacent State, submitting passive and active personality principles as subsidiary bases of jurisdiction.[4] There were few recommendations endorsing the universal principle of jurisdiction. The IAPL made one such recommendation at its Congress in Athens in 1957 vis-a-vis

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1. Ibid., p.109.

2. Ibid., p.111.

3. See, Draft Convention on Nationality of Aircraft, 1929, prepared by Professor Schrieber for the International Chamber of Commerce; Draft Convention on Jurisdiction with Respect to Crime; 1952, prepared by Professor Cooper for the ILA at its session in Lucerne; The Harvard Research Draft Convention on Jurisdiction with Respect to Crime, 1935; Draft Convention on Penal Offences Committed on Board Aircraft, prepared by Professor Zlatonic, 1957 for the VII International Congress of Penal Law. See ICAO Doc. 8111 - LC/146 - II, pp. 121, 123, 117 and 137 respectively.

4. See Draft Conventions Regarding Penal Offences Committed on Board Aircraft, 1957, prepared by Professors Chauveau and Meyer, respectively, for the VII International Congress of Penal Law, Athens. ICAO Doc. 8111 - LC/146 - II, pp. 131 and 133.

"infractions which seriously compromise the security of aerial navigation".[1]

On the basis of this source material ICAO's Legal Committee accepted the general principle of the law of the "Flag State" and this appears in Article 3(1) of the Tokyo Convention: "the State of registration of the aircraft is competent to exercise jurisdiction over offences committed on board". In addition, members[2] of the Legal Committee submitted a number of other jurisdictional bases to be included, almost as an exception to the general principle of the Flag-State rule:

1. Where the offence has effect on the territory of a State ("objective" territorial principle).

2. Where the offence is committed by or against a national of the State (active and passive personality principles).

3. Where the offence is against the security of the State (protective principle).

4. Where the offence is a breach of air-navigation rules and

5. Where jurisdiction is to be exercised in accordance with obligations stipulated in an international agreement.

This proposition was adopted, in principle, and appears in the form of Article 4 in the Tokyo Convention. It reflects a compromise between two views aired during the drafting debates. On the one hand, it was expected that the State in whose territory the aircraft was flying at the time of the offence would forego its claim to jurisdiction. On the other hand, some considered the airspace of that State as the proper locus delicti and therefore that State rather than the State of registration was entitled to exercise jurisdiction on the basis of the territorial principle. In addition, this formula had the added

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1. Ibid., p.180.

2. See Norway and Federal Republic of Germany, ICAO Doc. 8111 - LC/146 - I, pp.88-89.

advantage of including a number of traditional bases of jurisdiction in international law; subsequently to be included in international instruments proscribing criminal offences.

Although, neither the final text of the Tokyo Conference nor its travaux preparatoires reveal, as do those of other treaties discussed in this Part III, that the casus foederis of the instrument was to render perpetrators of crimes committed on board aircraft akin to hostis humani generis by such measures as the "aut dedere aut punire" rule, the adoption of a number of generally recognised bases of jurisdiction confirm that the Tokyo Convention, in fine, adheres to the no "safe haven" approach.[1]

The Hague Convention

The jurisdictional bases in the Hague Convention number four. States Parties may exercise jurisdiction when the offence is committed on board the aircraft registered in their territory and when an aircraft lands in their territory with the offender on board. These were favourably received in the ICAO Legal Committee. Barbados[2] added a further ground of jurisdiction. It proposed that jurisdiction should also be exercised by the State whose nationality the lessor of the aircraft enjoys, or by the State in whose territory the lessee has his principal place of business.

Austria[3] and IFAPA[4] both submitted separate, but not unrelated, amendments extending the sphere of jurisdiction

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1. See comment by Spain's representative in the Legal Committee who said that the provision on jurisdiction "alone would justify the existence of the (Tokyo) Convention". ICAO Doc. 8302 - LC/150 - v.I, p.52.

2. ICAO Doc. 8979-LC/165-2, p.35, SA Doc No. 9.

3. See SA Doc. No. 42 in ICAO Doc.8979-LC/165 - 2, p.94 and ibid., LC/165 -1, pp. 74 -75.

4. SA Doc. No. 29, ibid., p.73.

to allow for the application of universal jurisdiction. They differed in so far as Austria's amendment qualified the application of this principle by virtue of the aut dedere aut punire principle. These proposals were formulated in view of the grave nature of the practice of unlawful seizure of aircraft, which is of concern to the whole of the international community. Switzerland,[1] the United Kingdom,[2] the ILA[3] and the United Nations Under-Secretary General for Legal Affairs[4] endorsed universal jurisdiction which may become operative under the terms of Article IV(2) of the Convention.

The Montreal Convention

The Montreal Convention largely follows the Hague Convention. It includes provision for universal jurisdiction which was supported by the same delegations as at the Hague Diplomatic Conference.[5] But with regards to jurisdiction ratione materiae the Montreal Convention differs from the Hague Convention in that it is not particular to one offence, but general to unlawful acts against the safety of civil aviation.

A number of writers[6] have concluded that the effect, particularly of the Hague and Montreal Conventions, has been to "internationalise" the offences they proscribe. By this they mean that they have rendered certain unlawful practices criminal offences under international conventional law. One of the factors which identifies this

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1. ICAO Doc 8979 - LC/165 - 1, p.75 para. 15.

2. Ibid., Para. 18.

3. ICAO Doc. 8877 - LC/161, 1970, p.159.

4. Ibid., pp.173-174.

5. See also ICAO Doc. 9081 - LC/170-1: Switzerland, p.40, and Japan, p.55.

6. Quintana, 30 Int. RCP (1972) 28 and Van Pauhuys, 9 Col. JTL (1970) 16.

proscription process consists of an expansive jurisdictional regime consisting, in part, of traditional principles of jurisdiction and, in part, other bases of jurisdiction necessitated by the scope ratione materiae of the convention concerned.

The universality principle and the aut dedere aut punire regime in the Hague and Montreal Conventions, now also applicable to unlawful acts of violence committed at airports serving international civil aviation by virtue of the Montreal Protocol[1], are invariably singled out in the literature as the key features which have helped to render these practices crimes in international law for States Parties.[2]

The applicability of these jurisdictional principles to "air law" crimes was considered in a recent decision of the District Court of Columbia in US v Junis[3]. Defendant, a national and resident of Lebanon was charged, inter alia, with crimes committed against aircraft and the taking of hostages. The charges related to the hijacking of a Royal Jordanian Airlines aircraft in 1985. Defendant was captured in 1987 by US Federal Agents in international waters, arrested and taken to the United States. The only connection between the lex fori and the defendant, other than his presence in US territory, is the fact that a number of the passengers taken hostage were US nationals. The Court exercised jurisdiction on the basis of universality and passive personality principles provided for under legislation enacted in pursuance of treaty obligations contracted by the United States as party to the UN Convention on Hostage-Taking and the Hague and Montreal

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1. Article III.

2. See Cheng, Contemporary Problems, p.35; Shubber, 22 ICLQ (1973) at 713-714; Address by Mr. Malmborg at ASIL Meeting on "New Developments in the Law of International Aviation: The Control of Aerial Hijacking", 65 AJIL (1971) at 77.

3. 681 F. Supp. 896 (DDC 1988).

Conventions[1]

The Court rejected defendant's motion that the universality and passive personality principles do not apply to hostage-taking and "aircraft piracy" on the basis that these practices, like piracy jure gentium, are not crimes in international law in respect of which the doctrine of universal jurisdiction applies, and furthermore, that the United States does not recognise the passive personality principle as a legitimate ground of jurisdiction in international law. On the contrary, the Court having considered international treaties, doctrine, judicial practice and municipal legislation, including Congressional debate, concluded that the universality and passive personality principles are recognised bases of jurisdiction under international and domestic law. The Court stated that in relying on these principles:

> "the United States is (not only) acting on behalf of the world community to punish alleged offenders of crimes that threaten the very foundations of world order, but the United States has its own interest in protecting its nationals".[2]

(c) Priority of Jurisdiction

This question arose largely during the deliberations of the Tokyo Convention which was actually intended to remedy rather than create conflicts of criminal jurisdiction for States Parties. It occupied much time in the discussions and has received due attention in the relevant literature.[3]

In 1958 the ICAO Legal Sub-Committee discussed the

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1. See 18 USC Para 1203 (Hostage-Taking Act (1986) and Para 32 (Destruction of Aircraft Act 1956).

2. Op.cit., at p.903. See also Clarizio writing in 83 AJIL (1989) 94 at p.99.

3. See generally, Boyle and Pulsifer 30 Jnl. ALC (1964) 311 et seq.

question of priority of jurisdiction.[1] One proposal suggested that the State of registration would have sole jurisdiction in specified circumstances, while the State in whose airspace the offence is committed will have jurisdiction over offences committed under other specified circumstances. The scope was to prevent offences going unpunished while other States would have renounced jurisdiction. Another proposal suggested that a system would be set-up ranking States which would exercise jurisdiction. Should an offender be found in a State ranking lowest that State would refrain from exercising jurisdiction until States of a higher rank had decided against taking jurisdiction. Both proposals contain traces of the aut dedere aut punire principle. Both were rejected by the Sub-Committee[2] as well as by the Legal Committee.[3]

The basis on which a priority system of jurisdiction was rejected is summed up in a Note[4] drawn up by the Chairman of the Sub-Commmitee. It was reported that any system of priority will result in undesirable circumstances alienating rather than attracting signatories to the proposed convention. Under a "ranking" system of priority the State which has presence of the offender is obliged to wait for a request from higher ranking States before it can

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1. Among the texts de lege feranda before the sub-committee, a Draft Convention submitted by the International Criminal Police Commission (8111-LC/146-v.II, p.111) included a provision on priority of jurisdiction. It contemplated the following ranking of States:
(1) the State whose security or public order interests have been affected; (protective principle).
(2) the national State of the victim (passive personality principle).
(3) the subjacent State (territorial airspace).
(4) the State of registration (law of the flag).
(5) the national State of the offender (active personality principle).

2. ICAO Doc. 8111 - LC/146-II, p.22 paras 6. and 6.1.

3. ICAO Doc 8111 - LC/146-II, p.7. para. 5.

4. Ibid., pp. 183-188.

prosecute. Where it receives several extradition requests, it may not be in a position to extradite because, either all but the "ranking" State would yet have to submit an extradition request, or because there may be no extradition agreements between the various States concerned. Thus the proposed convention would have to have a full set of rules on extradition, addressing such issues as the extradition of nationals and the political offence exception question. The Note examined each proposed system of priority and found fault with each as follows:

a) that which places first the State whose security has been threatened: definition of offences against a State's security may not be recognised as such by others thus providing a gap in the punishment of offenders, consequently delivering a severe blow to the scope of the convention.

b) that which places first the territorial State: there may be many States claiming to be the territorial State where the elements of an offence occur on board an aircraft flying over several territories.

c) that which places first the Flag State: this prejudices the subjacent State such as when an aircraft is destroyed by explosives while flying in territorial airspace killing persons in its territory.

d) that which places first the State of landing: difficulties arise because there may be no connection between the State where the aircraft lands and the locus delicti. In addition, the offence may not be punishable under the law of the State of landing and furthermore it may be difficult to determine which shall be the State of landing where the aircraft has stopped in more States than one.

e) that which places first the national State of the offender or of the victim: difficulties immediately arise where there are persons of various nationalities on board.

In the Legal Committee's debates Mr (later Lord)

Wilberforce[1] for the United Kingdom said that "any priority system invariably led to difficulties in connection with processes of extradition and, without a procedure for extradition, a priority system became meaningless." Generally, there was a negative response to the idea of a priority system of jurisdiction.[2] But some delegations did attempt to submit concrete proposals.

The US Representative[3] expressed favour for a priority system of jurisdiction ranking the State of registration and the territorial State (i.e. the territorial airspace within which the offence is committed) as having concurrent primary jurisdiction. Argentina[4] endorsed this general view and added that "where the State of first landing is the same as the State in whose territorial airspace the offence took place, the priority is prima facie beyond question". Spain[5] first proposed that the State of registration had priority, second place went to the State of first landing and finally the State in whose airspace the offence was committed. A joint proposal was finally submitted and voted upon.[6]

The Legal Committee rejected the concept of a system of priority of jurisdictions. The Tokyo Convention reflects this position. But it contains in Article 3 affirmation of the principle that the State of registration is competent to exercise jurisdiction. The drafters

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1. ICAO Doc. 8111 - LC/146-I, p. 85.

2. See, ICAO Doc. 8302 - LC/150, v.I: Italy and Portugal, p.54; Sweden, p.55; Denmark, p.63; Netherlands, pp.55 and 65, and at v.II p.31; and ibid., Australia, p. 67 and Federal Republic of Germany, p.70.

3 ICAO Doc 8111 - LC/146, p. 87. See also Doc. 8302 - LC/150 - II, p.65 para 2 and ibid., v.I, p.56.

4. ICAO Doc. 8111 LC/146 v. II, p.45.

5. ICAO Doc. 8302/LC 150 v.I, p.54. See subsequent draft amendments by Spain, ibid., p.94.

6. ICAO Doc. 8302 - LC/150 v.II, pp.70 - 71.

specifically point out that recognition of this principle does not imply in any manner exclusive jurisdiction of the law of the flag.[1]

The question of priority of jurisdiction did not trouble the Diplomatic Conference at the Hague as it did at Tokyo. The matter was not addressed as a separate issue, although there was talk from some delegations[2] of universal jurisdiction as a "subsidiary" means of jurisdiction.

In matters of extradition the United States[3] submitted that where several requests were submitted to a State holding the offender preference should be given to the State of registration. A general endorsement of this principle is found in a USSR proposal amending the draft aut dedre aut punire provision to read:

> "if the State of registration of the aircraft declares its denunciation of its right to exercise jurisdiction over the criminal, it shall be obliged to submit the case to its competent authorities for prosecution".[4]

Similar statements implying a preference for the State of registration of the aircraft to be the first to exercise jurisdiction, were made during the drafting of the Montreal Convention.[5] The view that universal jurisdiction should be considered as a subsidiary basis of jurisdiction was also expressed.[6]

None of the three Conventions contain any provisions purporting to resolve conflicts of jurisdiction. Certain writers[7] have submitted that Article 4 of the Hague

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1. ICAO Doc. 8111-LC/146 v.I, p. 86 and v.II, p. 29 para. 6.3.

2. See Austria, ICAO Doc. 8979-LC/165-1, p.74 para. 10.

3. ICAO Doc. 8979 - L/165 v.2, pp.74-75.

4. ICAO Doc. 8979 - LC/165 v.2, p. 79 para. 7.

5. See Canada, ICAO Doc. 8939 - LC/164 v.I, p. 8 para.2.

6. Spain, ICAO Doc. 9081-LC/170-2, p.93.

7. Dinstein, op. cit., pp.201-204.

Convention constitutes a system of priority whereby the State of registration, the State in which the aircraft lands, and the State of the operator, rank first, followed by the State which has presence of the offender (universality principle). Finally, jurisdiction may be exercised in accordance with national law. Others[1] have refuted such interpretations on the basis of the lack of any supporting evidence in the treaty text and relevant travaux preparatoires. Indeed, the evidence reveals a volatile approach among the drafters and the final texts would seem to indicate two general principles: (i) States give first preference to the territorial principle. (ii) State participants at the Hague and Montreal Conferences looked upon the universal principle of jurisdiction as a means of last resort.

(d) The Aut Dedere Aut Punire Principle

The "extradite or prosecute" obligation appears principally in the Hague and Montreal Conventions, although it was included, in embryonic form, in the travaux preparatoires before the Tokyo Conference. Switzerland,[2] for instance, had proposed that where the State, which has been handed the offender by the aircraft Commander does not have or does not wish to exercise jurisdiction, it shall enquire into whether the offence which he is alleged to have committed is extraditable and shall seek to extradite him. This is the converse of the aut dedere aut punire principle. The United Kingdom[3] submitted a similar draft provision to the effect that the offender would be set free on the expiry of seven days from his arrival in the landing State unless that State charges him with an offence, or, a request for his extradition is made. But it was the United

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1. Feller, 7 Israel LR (1972) 208.

2. ICAO Doc. 8302 - LC/150 - II, p.62. See also Netherlands, ibid., p.49 para 10.

3. Ibid., p.100.

States which singly, and later, jointly with Venezuela, clearly outlined an "extradite or prosecute" formula at Tokyo.[1] The United States draft would have made it possible for any Contracting State to prosecute the offender, if either the State of registration or the State in whose airspace the offence was committed, after receiving notification by the State which captured the offender, declined to exercise jurisdiction. The joint United States/Venezuelan draft proposal limited the right to prosecute to the State having custody of the offender.

In the Hague and Montreal Conventions the "extradite or prosecute" principle is central to the scope of the instruments. A draft preamble[2] to the Hague Convention considered that it is necessary to take appropriate measures to facilitate prosecution and extradition of offenders in order to deter commission of these offences of "grave concern".[3]

In draft form the aut dedere aut punire provision would oblige the Contracting State which had presence of the offender, to submit, "if it does not extradite the alleged offender, the case to its competent authorities for their decision to prosecute him". The spirit of this clause finds its origin in Article 6.2 of the European Convention on Extradition[4] which stipulates that if the requested State Party does not extradite its nationals it shall, at the demand of the requesting State Party, submit the case to this competent authorities "in order that proceedings may be taken if they are considered

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1. Ibid., p.102.

2. See ICAO Doc. 8979 - LC/165 v.2, p.15 and Doc. 8877 - LC/161, p.12.

3. But neither the Hague nor the Montreal Convention contains any preambular language refering, explicitly or implicitly, to extradition and/or prosecution of offenders.

4. ETS No. 24.

appropriate".[1]

The wording in the European Convention is less categoric than the draft submitted at the Hague Conference in that it does not purport to oblige State Parties to prosecute. Some States[2] took exception to the Hague Draft because of the mandatory language used. Others, such as the United Kingdom,[3] Italy[4] and Indonesia[5] endorsed the extradite/prosecute concept, even though this would mean exercising jurisdiction on the universality principle. This is acceptable because of the extreme gravity of the offence. Spain[6] considered the convention to be a "dead letter" if the extradite or prosecute formula was excluded.

An amendment to the draft provision submitted by the Legal Committee was made by a large number of delegates substituting the words "for their decision to prosecute him" by "for the purpose of prosecution". This wording neither creates an obligation to prosecute nor necessitates that the case results in criminal proceedings being instituted. This is the compromise described by some as both "beneficial and inimical"[7] in that offenders who are not extradited are not necessarily prosecuted. Thus, the possibility of non-prosecution remains for States which harbour perpetrators of these "politically" oriented

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1. See France, ICAO Doc. 8877 - LC/161 v.I, p. 69 para. 33.

2. ICAO, Doc. 8979 - LC/165, v.2, Tanzania, p.83; Malaysia, ibid., p.133 para 3 and France, ibid.

3. ICAO Doc. 8979 - LC/165, v.I., p.75 para. 18.

4. ICAO Doc. 8877 - LC/162, v.I., p.16 para 4.

5. Ibid., para 5.

6. ICAO Doc.8979 - LC/165 v.I., p.75 para 17.

7. See Abramovsky, 13 Col JTL (1974) 398. In vol. 14, ibid., p.294, same writer submits that common Article 7 (incorporating the aut dedere aut punire rule) of the Hague and Montreal Conventions, "substantially weakens" their scope.

crimes.

However, the sponsors of the amendment included, inter alia, that the submission of the case to the competent authorities shall take place "whatever the motive for the offence and whether or not the offence was committed in its territory".[1] The sponsors also added that the decision to be taken by the competent authorities shall be made as required when a serious offence is committed under domestic law.

The sponsorship of the amendment was largely composed of Western European and American nations, Uganda being the only African nation in that group. The phrase "whatever the motive for the offence" proved extremely unpopular among African nations[2] because, it was submitted, that unlawful seizure of aircraft is a crime to be considered on its own merits according to the circumstances in which it is committed. It was suggested that this phrase should be substituted by the words "without exception whatsoever".[3] Proposals to delete the wording introduced by the multi-state sponsored amendment were rejected in the Commission of the Whole.[4] But at the plenary meeting the suggestion to have the phraseology altered found general support and was adopted as such.[5] The phrase "whether or not the offence was committed in its territory" was retained.

In his end of conference statement, the United States

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1. See S.A. Doc. No. 72 in ICAO Doc. 8979 - LC/165 v.2, p.75.

2. See, ICAO Doc. 8979 - LC/165 v.1, Kenya, p.130 para 45; Tanzania, ibid., para 47; Congo, ibid., para. 48; Cameroon, ibid., p.131 para. 52 and Zambia, ibid., para 51.

3. United Arab Republic, ibid., p.131 para 53 and Kenya, ibid., p.177 para 8.

4. ICAO Doc. 8979 - LC/165 v.I, p. 1. p.136.

5. ICAO Doc. 8979 - LC/165 v.I, pp.177 - 182.

delegate[1] at the Hague specifically identified the extradite or prosecute formula as an "emphatic obligation - applying whatever the motivation of the hijacker"; and argued, that on the basis of this and other criteria, among them provision for the universal principle of jurisdiction, the Hague Convention recognises unlawful seizure of aircraft as a serious crime in international treaty law.

At the Montreal Conference the mood concerning the aut dedere aut punire rule was very similar to that at the Hague. Typical of that mood is a comment made by IFAPA[2] stating that the extradite/prosecute formula need be included in a convention on unlawful acts committed against civil aviation "in conformity with the principles established in the Hague Convention for the Suppression of Unlawful Seizure of Aircraft". The United Kingdom[3] included the aut dedere aut punire principle in a Draft Convention submitted in preparation of the Montreal Convention.

United Nations General Assembly Resolution 2645 (XXV) on Aerial Hijacking[4] called upon states "to take all appropriate measures to provide for the prosecution and punishment of persons who perpetrate (unlawful acts against civil aviation), or, for the extradition of such persons for the purpose of their prosecution and punishment." The Consultative Assembly of the Council of Europe recommended[5] that the Committee of Ministers considers taking up sanctions against States which have refused to either extradite or prosecute aircraft hijackers and perpetrators of offences against civil aviation.

Endorsement of the aut dedre aut punire rule is also made in the vast literature which the Tokyo, Hague and

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1. ICAO Doc. 8979 - LC/165 v.1, p.136, ibid., p.203.

2. ICAO Doc. 9081 - LC/170 v.2, p.67 para 3.

3. ICAO Doc. 8936 - LC/164 v.2, p.117.

4. Adopted 30th November 1970.

5. Para 9. II. Recommendation 613 (1970).

Montreal Conventions have generated. Some[1] have described the "extradite/prosecute" provisions in the Hague and Montreal Conventions as "key" clauses. One writer[2] in particular submits that as a result of this provision: "just as the 'high seas pirate' is considered by international law to be hostis humani generis, the enemy of all mankind, the hijacker is deemed to be the enemy of all those nations who ratify the Hague Convention". Professor Cheng[3] opines that this provision has contributed, to a substantial degree, in rendering the crimes which form the scope of the various conventions criminal offences in international law.

The aut dedere aut punire principle and the question of priority of jurisdiction (especially where several extradition requests are involved), once again, generated discussion during the drafting of the 1988 Additional Protocol to the Montreal Convention. Member delegations of the Legal Committee stressed that the State of occurrence, i.e. the airport where the offence is committed should have primary jurisdiction because, clearly it is most closely connected with the offence: "it bears the major brunt of the consequences; has the responsibility for the security and has most of the evidence".[4] The Netherlands even proposed that the State in whose territory the offender is present "should not be obliged to exercise its jurisdiction if the State primarily concerned, i.e. the State of occurrence, does not request extradition."[5] Such a proposal

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1. Jacobson, 5 Cor. ILJ (1972) 181, White, Rev. ICJ (1971) No. 6. p.39, and 12 HILJ (1971) at p.67.

2. Abramovsky, 13 Col.JTL (1974) 397.

3 Contemporary Problems, p.35. See also Zotiades, 23 RH (1970) 20 et seq.

4. ICAO Doc. 9502 - LC/186, pp.4-5, 1987. The USSR (pp. 4-19 para.4:62) proposed that where there are several extradition requests preference should be given to the State of occurrence.

5. Ibid., pp. 4-19 para 4:61.

was not acceptable because it departed from principles in the Hague and Montreal Conventions and in other treaties which have come into force since that time. The Committee adhered to this approach and refused to consider a system of priorities not to upset "the delicate balance" between the extradite and prosecution formula, a cornerstone of the Hague and Montreal Conventions.[1]

III. The Political Offence Exception to Extradition

The crimes which the drafters of the Tokyo Convention addressed were largely ordinary crimes under municipal law committed extraterritorially. The traditional rules of extradition apply to the offences under the Tokyo Convention and these include the political offence exception question. However at the Hague and in Montreal several representatives[2] submitted draft proposals on the lines of Article VII of the Genocide Convention which denies the applicability of the political offence exception rule. Israel,[3] USSR,[4] Ireland,[5] Spain,[6] Brazil,[7] Singapore,[8] and non-governmental organisations,[9] all submitted comments to the effect that the conventions should clearly reflect

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1. ICAO Doc. 9502 -LC/186, p.4-20 para.4:63.

2. Hague Convention: see Ghana, S.A. Doc. No. 8 p.34 in ICAO Doc. 9879 - LC/165, v.2; United States, S.A.Doc. No. 28 p. 69, ibid; Paraguay, S.A. Doc. No. 75, p.135, and the Montreal Convention: see IATA, ICAO Doc. 8936 - LC/164, v.1, p.7 para 1 and in ICAO Doc. 9081 - LC/170-1, p.52.

3. ICAO Doc. 8877 - LC/161 v.1, p.180.

4. ICAO Doc. 8979 - LC/165 v.1, p.64 para. 49.

5. Ibid., v.2, SA Doc. No. 18, p. 53.

6. Ibid., SA Doc. No. 61, p.117.

7. ICAO Doc. 8939 - LC/164 v. I, p.88 para. 4.

8. ICAO Doc. 9081 - LC/170 v.I, p.45.

9. ICAO Doc. 9936 - LC/164 v.II, p.71 para 14.

the position in the Genocide Convention. Notwithstanding these proposals the Hague and Montreal Conventions fail in this respect. But such a provision appears in Article 1 of the Council of Europe Convention on the Suppression of Terrorism:[1]

> "For the purposes of extradition between Contracting States, none of the following offences shall be regarded as a political offence or as an offence connected with a political offence or as an offence inspired by political motives:
> a. an offence within the scope of the Convention for the Suppression of Unlawful Seizure of Aircraft, signed at the Hague on 16 December 1970;
> b. an offence within the scope of the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, signed at Montreal on 23 September 1971."

As already recorded above the phrase "whatever the motive" in the aut dedere aut punire clause was deleted at the drafting stages of the conventions, although some States have submitted that its substitute: "without exception whatsoever" means that the political offence exception rule is not applicable when Contracting Parties submit cases for prosecution to their competent authorities.[2] In addition, common Article 8 of the Hague and Montreal Conventions provides that the offences are to be deemed extraditable implying that they are to be treated as common and not as political crimes and that Contracting States are obliged to include them in any extradition agreement concluded between them in the future. This provision together with common Article 7 are the principal clues in the operative provisions of these conventions

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1. ETS No. 90.

2. See Metsalampi writing in Essays in Honour of Erik Castren, 1979, p.46 at p.53. But contra see Mankiewicz, 37 Jnl. ALC (1971) 205 who argues that notwithstanding the qualificatory language in common Article 7, prosecuting authorities in Contracting States may still accept the political offence plea, as they would in respect of other municipal law crimes of a serious nature. See also White, op. cit., p.43.

revealing a preference among the drafters for the exclusion of the applicability of the political offence plea.

This view finds a good deal of support among writers.[1] The ILA[2] and members of the Institut de Droit International, endorsed this view in response to a Questionnaire on Highjacking of Aircraft.[3]

B. Crimes Committed Against Internationally Protected Persons and Diplomats

The concept of crimes committed against internationally protected persons and diplomats is a development of the broader regime of rules in international law which extend legal protection to a specific class of persons entrusted with the delicate duty of conducting international relations and diplomacy.

The origin of the concept of these crimes ratione personae may be traced in the following sources: (a) in the writings of classical jurists in international law. De Vattel[4] wrote,

> "Whoever does violence to an ambassador or to any other public minister attacks the common safety and welfare of all nations and renders himself guilty of a grevibus crime against all nations."

(b) In early judicial opinion it was held that an attack upon the person of an ambassador hurts the common safety and well-being of nations. The offender becomes guilty of

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1. Green, 22 Chitty's LJ (1974) 135; McMahon, 38 Georgtwn LJ (1970) 1136; Malik, 9 IJIL (1969) at 70, and Zotiades, op. cit., p. 23.

2. Draft Resolution on Piracy, ILA (1970), p.709 para. 5.

3. 54 Annuaire (1971) 562-563.

4. The Law of Nations, or the Principles of Natural Law: Applied To The Conduct And To The Affairs of Nations and of Sovereigns. Ch VII, Sec. 80, 1916, (Trans.) Gregory, G.D.

a crime against the whole world.[1] And, (c), proscription of the crime in early 19th century national penal codes.[2] Islamic law, too, provides for the prohibition and punishment of crimes against internationally protected persons.[3] But the most recent and constructive contribution to this particular class of crimes has been made by the adoption and entry into force of two multilateral instruments: (1) Convention to Prevent and Punish the Acts of Terrorism Taking the Form of Crimes Against Persons and Related Extortion that are of International Significance[4] and (2) Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents.[5] Relevant provisions of these conventions, their travaux preparatoires, diplomatic statements and legislative practice, reveal standards and measures which have been considered necessary by States for the proscription of acts as criminal offences under international law. They are, therefore, directly relevant to the question of the juridical features of the concept of criminal offence in international law.

I. Designation of the Concept

A draft set of articles presented to the ILC, which

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1. Respublica v De Longchamps, Dallas 1 in 1 US Sup.Ct.Rep. (1784). See also Moore, op.cit., v.IV, p.627, 1906. Cf. Eichmann, 36 ILR 293.

2. Spain: Articles 260, 262, 263, 265 and 266 of the 1822 Penal Code; Portugal: Articles 159 and 160 of the 1886 Penal Code; and Brasil: Article 76 of the 1830 Penal Code. See Saldana, 10 Hague Receuil (1925) 314 para.3.

3. Bassiouni, 74 AJIL (1980) 609.

4. OAS Doc. AG/doc. 88 Rev.1, Corr.1, 1971. Text also at: 10 ILM 255. See, Inter - American Juridical Committee, Statement of Reasons, at 9 ILM 1250. Hereafter cited as OAS Convention on Internationally Protected Persons.

5. 1035 UNTS 168. Hereafter cited as UN Convention on Internationally Protected Persons.

was entrusted with the formulation of the UN Convention on Internationally Protected Persons, declared the present category of offences: "international crimes".[1] The general view within the ILC was one which considered the crimes to be delicti jure gentium. The nebulous meaning of the term "international crime", however, created a number of difficulties and several members requested its deletion, although some[2] interpreted it by reference to criminal offences under international law such as piracy jure gentium, slavery or "hijacking". To this extent, the term "international crime" indicated the regard in which the concept of crimes against internationally protected persons was held. Other ILC members[3] suggested "crimes of international significance", "crimes of international concern" or simply "crime" as alternative terms.

The ILC decided against the use of "tags" to describe the scope of the draft articles ratione materiae. But this view was not shared by some States[4] in their replies to the ILC Draft Articles. In its consideration of same Draft Articles, the Sixth Committee reported that a number of government representatives considered the crimes to be of such a serious nature as to equate them with "crimes against the peace and security of mankind."[5] Writers[6] have described the concept as international crimes against humanity punishable regardless of the locus delicti.

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1. See Working Paper submitted by R. Kearney, UN Doc., A/CN.4/L. 182, ILC Yrbk., 1972, v.II, p.201. Hereafter cited as Kearney Draft.

2. See ILC Yrbk., 1972, v.I, Ago, p.11 para 26 and Yasseen, p.12 para 39.

3. See ibid., Nagendra Singh, p.19 para 15 and Sir Humphrey Waldock, p.18 para 6.

4. See Jamaica and Japan, ibid., v.II, p.339.

5. UN Doc. A/8892, 1972, p.18 para 119.

6. Brach, 10 Col.JTL (1971) 409.

II. Jurisdiction

The ILC had before it the Kearney Draft, a working paper submitted by Uruguay[1] and a further Draft Convention submitted by Denmark.[2] Collectively these travaux preparatoires would provide States Parties with the possibility of exercising criminal jurisdiction on the basis of territoriality and of the nationality of the victim, i.e. the passive personality principle (Rome Draft), and the universality principle (Kearney Draft). In the Rome Draft the universality principle could only be invoked in cases where the offender, being present in the territory of a State Party, was not to be extradited either to the State Party on whose territory the crime was committed or to the State Party whose national was the victim. The Uruguay Draft did not include a provision specifically stipulating that States Parties may exercise or establish jurisdiction. It did provide, however, (Draft Article 9) that for the purposes of co-operation in the prevention and punishment of same crimes, States Parties would be obliged to include them as punishable offences under their criminal laws.

The aut dedere aut punire principle was common to all the draft texts placed before the ILC, but each provision was worded in terms which differed significantly from one text to the other. The Kearney Draft contained a general statement to the effect that the State Party in whose territory the offender may be found shall either detain him or take such measures as may be necessary to ensure his presence for trial or extradition. The Rome Draft followed the formula coined in the Hague and Montreal treaties discussed in Section A above, in other words, a State Party which does not extradite the offender would be

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1. UN Doc. A/8410, 1971. Hereafter cited as Uruguay Draft.

2. UN Doc. A/8710/Rev.1, 1971. (Known and hereafter cited as the Rome Draft). Text also at ILC Yrbk., 1971, v.II, p.335.

obliged "without exception whatsoever and whether or not the offences were committed in its territory" to submit the case to its competent authorities for the purposes of prosecution. In terms of the concept of the criminal offence in international law the principle as formulated, and included in the Rome Draft, underlines as universal and non-derogable the concept of crimes committed against internationally protected persons. In sharp contrast, the Uruguay Draft resembled more an extradition agreement rather than the draft basis for a convention proscribing criminal offences in international law. The Uruguay Draft was clearly influenced by the OAS Convention on Internationally Protected Persons. The emphasis there is principally on extraditing the offender. Indeed, the relevant "either extradite or prosecute" provision (Draft Article 5) of the Uruguay Draft is worded in almost identical terms as the operative Article 5 of the OAS instrument.[1]

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[1]. The text of the relevant provisions are reproduced for comparative reasons:

Uruguay Draft

> "Where a person whose extradition is sought in respect of one of the crimes specified in article 1 is not extraditable because he is a national of the State applied to or because of some other constitutional or legal obstacle to extradition, the State applied to shall be required to refer the case to the competent authorities for prosecution as if the act in question had been committed in its own territory. The decision rendered by the said authorities shall be communicated to the applicant State."

OAS Convention

> "When extradition requested for one of the crimes specified in Article 2 is not in order because the person sought is a national of the requested State, or because of some other legal or constitutional impediment, that State is obliged to submit the case to its

The final version adopted by the ILC (Draft Article 6) differed again from the travaux preparatoires. It read as follows:

> "The State Party in whose territory the alleged offender is present shall, if it does not extradite him, submit, without exception whatsoever and without undue delay[1], the case to its competent authorities for the purpose of prosecution, through proceedings in accordance with the laws of that State."[2]

The obligation to prosecute "without exception whatsoever" was retained but reference to "whether or not the offence is committed in its territory" was deleted on the basis that the draft articles already provided for extraterritorial jurisdiction. The phrase "without undue delay" was inserted in order to ensure that alleged offenders would not be kept in detention for an unreasonable period of time before being brought to trial.[3] The ILC reported that the aut dedere aut punire principle embodied in Draft Article 6 was basic to the whole set of Draft Articles.[4] This view was endorsed by most ILC members. Mr. Elias[5], in particular, described it as the most important provision in the Draft.

ILC Draft Article 6 was adopted unamended by the Sixth Committee[6]. Some States[7] favoured deletion of the phrase

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> competent authorities for prosecution, as if the act had been committed in its territory. The decision of these authorities shall be communicated to the state that requested extradition ...."

1. Emphasis added.

2. ILC Yrbk., 1972, v.II, p.318.

3. See ILC Commentary, ILC Yrbk., 1972, v.II, p.318 para 3.

4. Ibid., para 1.

5. Ibid., v.I, p.208 para 33.

6. UN Doc. A/9407, 1973, p.13 para 76.

"without exception whatsoever" because it was ambiguous and it would prove unworkable if, for instance, both the offender and the victim were internationally protected persons. The USSR, the United Kingdom and Panama spoke in favour of the article as drafted.[1] The Brazilian representative[2] applauded the ILC for including the phrase "without undue delay" for it improved upon the parent treaty sources: the Hague and Montreal Conventions. The Sixth Committee adopted Draft Article 6 by 72 votes with none against and 32 abstentions.[3]

In replies preceeding and following the ILC's Draft Articles, States representing a wide political spectrum including Denmark, Jamaica, US, Japan, Morocco, USSR, Israel, Rwanda, Oman, and Yugoslavia expressed a firm belief in the aut dedere aut punire principle and its inclusion in a convention on crimes committed against internationally protected persons. The principle was preferred by these and by a substantial number of other States to the application of the principle of universal jurisdiction simplicitur because, as submitted by Italy, "it has been adopted in recent conventions on the repression of international criminal acts and is now accepted by the international community".[4] The universality principle would only be acceptable if its application is rendered part and parcel of the aut dedere aut punire principle.

Article 3 of the UN Convention on Internationally Protected Persons provides:

"1. Each State Party shall take such measures as

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7. See Nigeria, UN Doc. A/C.6/SR1419, 1973, p.107 para 8 and Jamaica, UN Doc. A/C.6/SR1437, 1973, p.213 para 7.

1. UN Doc. A/C.6/SR1437, 1973, p.214. See also Unired Kingdom reply, ILC Yrbk., 1972, v.II, pp.344-345.

2. UN Doc. A/C.6/SR1419, 1973, p.106 para 3.

3. See UN Doc. A/C.6/SR.1437, 1973, p.215 para 23.

4. UN Doc. A/9127, 1973, p.31.

> may be necessary to establish its jurisdiction over the crimes set forth in article 2 in the following cases:
> (a) when the crime is committed in the territory of that State or on board a ship or aircraft registered in that State;
> (b) when the alleged offender is a national of that State;
> (c) when the crime is committed against an internationally protected person as defined in article 1 who enjoys his status as such by virtue of functions which he exercises on behalf of that State.
>
> 2. Each State Party shall likewise take such measures as may be necessary to establish its jurisdiction over these crimes in cases 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.
>
> 3. This Convention does not exclude any criminal jurisdiction exercised in accordance with internal law."

Thus, the territorial, active and passive personality principles are included in the convention. The passive personality principle does not apply stricto sensu because a State Party may exercise jurisdiction on the basis that the victim enjoyed the status of an internationally protected person by virtue of his appointment as such rather than by virtue of his status as a national of that State Party. The universality principle forms part and parcel of the aut dedere aut punire principle and, as in the UN Convention on Torture, it becomes operative where extradition to the States Parties which may take jurisdiction under the convention, does not take place.

Again, the circumscription of the universality principle by reference to the States Parties identified in the relevant jurisdictional clause, in part, reiterates the tacit presence of some hierarchical order among the various bases of jurisdiction. State opinion and travaux preparatoires endorse this assessment.

Priority of Jurisdiction

In the case of several requests for extradition, the request of the State in whose territory the crime was committed is most likely to succeed. The territorial principle is almost invariably placed at the top of any list ranking bases of jurisdiction.

Thus, during the drafting of the UN Convention on Internationally Protected Persons, the Netherlands distinguished between the State which has presence of the offender from other States closely connected with the crime as having primary jurisdiction and as such "have a moral duty to request extradition".[1] It[2] supported a hierarchical system for jurisdictional bases designed to resolve conflicts among States wishing to take jurisdiction. The Netherlands proposal placed the jurisdictional bases in the order as that which largely appears in Article 3 of the convention. The proposal included the passive personality principle even though Dutch law does not permit exercise of jurisdiction on that basis.[3]

The Kearney Draft contained a provision which ranked extradition requests in order of preference. First preference was given to the State where the crime was committed if it submitted an extradition request within three months of receipt of notification of the offender's presence in the requested State. Second preference was given to the State whose national was the victim of the crime (passive personality principle).

Such a system does not appear in the OAS Convention on Internationally Protected Persons.

The provisions on jurisdiction in the UN Convention on Internationally Protected Persons have set standards which

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1. UN Doc. A/PV2202, 1973, p.30 para 308. Emphasis added.

2. 5 NYIL (1974) 246.

3. See Explanatory Memorandum, NYIL (1985) 370-371. See also Japan, ILC Yrbk., v.II, 1972, p.339 and Jamaica, UN Doc. A/C.6/SR.1417, 1973, p.99 para 33.

have been followed by the drafters of subsequent treaties concerning practices such as the taking of hostages and the prevention of torture. The Chairman[1] of the ILC's Working Group on the Draft Articles stressed that provision for extraterritorial jurisdiction in the draft text was not revolutionary but reinforced existing rules and principles of international law. ILC members reiterated that the question of universality and extraterritorial jurisdiction formed the casus foederis of the proposed convention. In their explanation of vote in the UN General Assembly, States have highlighted the obligation to prosecute the offender, if he is not extradited, as forming the object and purpose of the UN Convention on Internationally Protected Persons.[2] A reservation to the relevant clauses would according to some violate Article 19 of the Vienna Convention on the Law of Treaties. Writers[3] have acknowledged the aut dedere aut punire principle as being the "key provision" of the convention.

Jurisdiction under the OAS Convention

The position concerning the exercise of jurisdiciton under the OAS Convention on Internationally Protected Persons is similar but significantly not identical to that under its UN counterpart. The OAS convention does not list a number of bases upon which States Parties may take jurisdiction. It does, however, incorporate the aut dedere aut punire principle, but that provision (Article 5) is worded in a way as to imply that States Parties ought, in the first place, to extradite the offender and only when serious legal grounds render extradition impossible such as

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1. Mr.Tsuruoka, ILC Yrbk., 1972, v.I, p.196 para 3.

2. See UN Doc. A/PV 2202, 1973: Canada, p.21 para 209; Italy, p.23 paras 230-232 and the Netherlands, p.29 para 304.

3. Wood, 23 ICLQ (1974) 910-811 and Friedlander writing in Bassiouni, International Criminal Law Volume 1 Crimes, p.487.

where the offender is a national of the requested State, shall criminal proceedings be instituted in the forum State. The explanation offered by the Inter-American Juridical Committee[1] encourages this interpretation of Article 5:

> "if the state to which the extradition request is directed cannot for some reason deliver the person concerned, it has the international obligation to try him in its own territory, just as if the crime had been committed there."

The Committee did not consider the concept of crimes committed against internationally protected persons, including diplomats an "international crime, as genocide". The Committee did not elaborate on the meaning of this statement but only cared to admit that these type of crimes violate accepted norms and standards of international law. Further evidence submitted by the Committee suggests that it viewed crimes against internationally protected persons as a separate class of criminal offences under international law. The evidence included, inter alia, writings of prominent Latin-American jurists such as Professor Quintilliano Saldana[2] who recognises crimes committed against internationally protected persons as crimes against the law of nations; and relevant international practice acknowledging the non-applicability of the political offence exception to crimes committed against Heads of State and Government including other internationally protected persons. The Committee also recognised that these crimes constitute a form of terrorism and that terrorist acts are traditionally accepted as delicti jure gentium.

III. Legislative Practice

States Parties have enacted legislation in fulfilment

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1. See Statement of Reasons for the Draft Convention on Terrorism and Kidnapping, 9 ILM 1268. Hereafter referred to as Committee.

2. 10 Hague Receuil (1925) pp. 227

of their obligations under the UN and OAS instruments. The United Kingdom, Australia, Canada, and New Zealand have all passed legislation which allows for the exercise of jurisdiction, inter alia, on the basis of the presence of the offender in their territory. The UK 1978 Internationally Protected Persons Act requires the act committed overseas to be also recognised as a criminal offence under English law and ignorance of the victim's status is not a defence; whereas, under Section 9 of the Australia 1976 (Internationally Protected Persons) Act such lack of knowledge constitutes an acceptable defence. Under the relevant US provisions (18 USC Paragraph 1116) jurisdiction over crimes committed against foreign officials, official guests and internationally protected persons may be exercised on the basis of the universality principle irrespective of the locus delicti or the nationality of the offender. Jurisdiction in the United States may also be taken on the basis of the nationality of the offender (active personality principle) and of the victim (passive personality) even though these two jurisdictional bases are not specifically stipulated in Paragraph 1116. This was held by the District Court of California in US v Layton,[1] where defendant was charged with having conspired, aided and abetted in the murder of US diplomats in Guyana. It was submitted that the Court lacked subject matter jurisdiction because all events occured outside United States territory. The Court found the legislative history of Paragraph 1116 to be unequivocal, namely that Congress intended for jurisdiction to exist in all circumstances including those pertinent to this case.

IV. The Crimes as Political Offences

Crimes committed against internationally protected

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1. 509 F. Supp. 212 (1981).

persons and diplomats are extraditable crimes. The Uruguay Draft (Article 1) and Article 2 of the OAS Convention on Internationally Protected Persons consider them to be "common" and not political crimes. The Kearney Draft (Article 1), and the ILC Draft Articles excluded the application of the political offence exception rule.[1] Some ILC Members[2] explained that the phrase "without exception whatsoever" in the aut dedere aut punire clause is intended to exclude this very rule. States[3] supported this position and included it in their legislation[4] and extradition treaties.[5] The understanding that a crime is not accepted as a political offence when committed either against a Head of State or of Government or a member of Government has its origins in the so-called "attentat" clause in extradition practice.[6] The "attentat" clause excludes from the political offence exception crimes committed against persons who hold public office. The OAS and the UN Conventions on Internationally Protected Persons have widened the sphere of application of the "attentat" clause

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1. The phrase: "regardless of motive" was included by the ILC in its Draft Article 2 obliging States Parties to legislate for the criminal offences defined in the Draft Articles. See UN Doc. A/9407, 1973, p.5. The Sixth Committee deleted the phrase. See UN Doc. A/9407, 1973, pp.7-8.

2. ILC Yrbk., 1972, v.I: Elias, p.208 para 35 and Ushakov, ibid., p.209 para 42.

3. ILC Yrbk., 1972, v.II: Canada, p.332, Japan, p.339, Yugoslavia, p.346, and Brazil and Greece, UN Doc. A/C.6/SR.1421, 1973, p.120 paras 13-15, and Portugal, UN Doc. A/PV2202, 1973, p.29 para 298.

4. See for example: UK 1978 Internationally Protected Persons Act, Section 3(1).

5. United States - United Kingdom Supplementary Extradition Agreement, 1985, (Article 1) and United States - Canada Extradition Treaty, 1971, (Article 4(2)(i)). See also Draft Single Convention on the Legal Control of International Terrorism, ILA (1980), p.497

6. See Van den Wijngaert, op.cit., p.135.

to crimes committed against all internationally protected persons including diplomats. The exclusion of the political offence exception rule to this class of offences constitutes the casus foederis of the 1977 European Convention on Terrorism.[1] Some[2] have even submitted that under contemporary international law no motive, political or otherwise, will excuse crimes committed against internationally protected persons. It has been suggested that States, regardless whether Parties to relevant treaties, are under a generally binding obligation to deny the "political offence" remedy to perpetrators of such crimes and may incur international responsibility if they fail to prosecute or to extradite the offenders. In the Iran Hostages Case[3] the International Court concluded that the Iranian authorities were fully aware of their international obligations to protect foreign diplomats in their territory; that they had the means to provide such protection; that they failed to do so[4] and thus incurred international responsibility. But, the International Court, having decided not to consider whether Article 13 of the UN Convention on Internationally Protected Persons constituted a basis for jurisdiction, did not entertain the US claim that Iran was under an international obligation to prosecute or extradite the "authors of the US Embassy invasion and jailors of the hostages". The International Court did not address the question whether the "jailors" had committed criminal offences in international law, much less what form and shape international responsibility

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1. Article 1(c), ETS No.9.

2. See: Mr. April (Canada) UN Doc. A/C.6/SR.1432, 1973, p.190 para 18; Przetacznik, Protection of Officials of Foreign States According to International Law, 1983, p.103, and at 9 RBDI (1973) 465 et seq., also see, Lador-Lederer, 4 Israel YHR (1974) 132. Cf. Rozakis, 23 ICLQ (1974) 52.

3. ICJ Rep., 1980.

4. Ibid., p.32 para 68.

engendered by same offences would assume.

C. The Taking of Hostages

The status of the practice of the taking of hostages (hostage-taking)[1] as a criminal offence in international law has, like torture, developed within two regimes: that which operates in time of war and that which operates in time of peace.

The UN has adopted an international instrument[2] to provide for the proscription of hostage-taking as a criminal offence in time of peace. But it is not operative where the offence is committed within the territory of a single State, i.e. where both the hostage and hostage-taker are nationals of that State and same hostage-taker is found, after the commission of the offence, in the territory of that State.[3]

The Hostages Convention has been described approbatively as "a remarkable achievement in the development of international criminal law".[4] Relevant provisions of the convention shall be examined in order to verify whether they subscribe to, differ from, or, weaken, rules applied to similar practices by virtue of other conventions. Thus, we may assess the development of norms which regulate the commission of certain internationally proscribed criminal offences, and, at the same time, continue to identify the features characteristic of the concept of criminal offence in international law.

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1. The two terms are used interchangeably in this section.

2. International Convention Against The Taking of Hostages, adopted by GA Res. 34/146, 17th December, 1979. Also at 18 ILM 1456. Hereafter cited as Hostages Convention.

3. See Article 13.

4. Kapoor, 21 IJIL (1981) 253 at 258.

I. In Time of War

There was no general consensus on the existence of a rule prohibiting the taking of civilians hostage during armed conflict until the immediate post World War II period. During the First World War Germany practiced hostage-taking of civilian population in the occupied territories of France and Belgium on a widespread and unprecedented scale.[1] There was some inconsistency in military manuals in force at the time on the subject of taking of civilians as hostages. The French Manual forbade hostage-taking in all circumstances. The practice was also forbidden in the Manual on Laws of Naval Warfare prepared by the Institut de Droit International. The British Manual of Military Law (1914), however, stipulated that hostage-taking is legitimate in order to ensure proper treatment of wounded and sick and members of armed forces captured by enemy belligerents. Provision concerning hostage-taking was also included in the Instructions for the Government of Armies in the Field issued by the United States (1863).[2] Hostage-taking is reported, as shown by diplomatic history, to be a method by which States attempted to secure international law and observance of treaty obligations.[3] At the Paris Peace Conference in 1919, Prime Minister Lloyd George is reported to have attempted to persuade President Wilson to agree to the holding of important German prisoners of war hostage in order to ensure surrender of war criminals by Germany to the Allies for trial on violation of the laws and customs of war in accordance with Articles 228 and 220 of the Treaty of Versailles.[4]

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1. See Garner, International Law and the World War, 1920, v.1., p.298 para 195; p.301 para 196 and p.303 para 197.

2. See Verzijl, International Law in Historical Prospective, v.IX, Ch. III, Section 9, p.166.

3. Roxburgh, 14 AJIL (1920) 35.

4. Willis, op.cit., p.82.

Some writers have condemned the practice. In particular Professor Garner[1] described it as a practice "contrary to the most elementary notions of humanity and justice", which is also totally in "disregard of the well-established distinction between the rights of non-combatants and those of lawful belligerents".

The 1919 Commission on the Authors of War reported on the "arrest[2] and execution of hostages"[3], but its list of violations of the laws of war specified "putting hostages to death" rather than hostage-taking; although there was also mention of "internment of civilians under inhuman conditions". The Report, including the list, are evidence of what constitutes violations of the laws of war. But the Commission noted that the list was not an exhaustive statement of these violations. The Commission further recommended that there should be individual criminal responsibility for breaches of the laws of war. These practices and recommendations were incorporated in domestic law by some countries after the Second World War.[4]

Hostage-taking did not appear as a war crime under conventional law until 1949. The Hague Conventions of (II) 1879 and (IV) 1907 contained no provision on the taking of civilians as hostages. The Nuremberg Charter specified "killing" and not "taking" of hostages as a war crime in Article 6(b). At the London Conference on Military Trials the United Kingdom Delegation submitted imprisonment of nationals of occupied countries in concentration camps and prisons, as examples of atrocious breaches of the laws and

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1. Op. cit., pp.308-311.

2. Emphasis Added.

3. 14 AJIL (1920) at pp.113-114.

4. See, for example, The Australia War Crimes Act 1945 before its amendment by the 1988 War Crimes Amendment Act.

customs of war.[1] But there is no record of a discussion on the practice of hostage-taking per se at the Conference.[2] The Indictment[3] at Nuremberg cited both "taking" and "killing" of hostages as war crimes. It also stated that both practices were in breach of Regulations attached to the 1899 (II) and 1907 (IV) Hague Conventions. Further, the Indictment stated that these practices constituted conduct which was contrary to general principles of criminal law as derived from the criminal laws of all civilised nations including the internal penal laws of the countries in which they were committed and Article 6(b) of the Charter. This is a clear statement endorsing hostage-taking as a criminal offence. But the fact that all references including facts and figures appear in the Indictment under the heading "killing of hostages" weakens the authority of that statement.[4] In turn, the Nuremberg Judgment acknowledged that "hostages were taken in very large numbers from the civilian populations in all the occupied countries, and were shot as suited the German purposes."[5] This, and further references in the Judgment to hostage-taking are all bound with the loss of life resulting from that very same policy. The Nuremberg Tribunal considered this to be a war crime as defined in Article 6(b) of its constituent Charter being declaratory of the laws of war. But it is unclear whether the Court treated hostage-taking distinct from hostage-killing as a war crime and thus a criminal offence in international law.

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1. See Draft Indictment of the German Major War Criminals, Jackson Report, p.260.

2. Other than in the Nuremberg Charter, "killing of hostages", appeared in a US Draft on Definition of War Crimes, Doc. LVI, 31st July, 1945, Jackson Report, p.395.

3. Cmd. 6696, p.22.

4. See History UNWCC, p.225.

5. Cmd. 6964, p.45.

Other sources equally reveal inconsistency on the question of hostage-taking as a crime. The International Law Commission for Penal Reconstruction and Development[1] did not specify "taking" but only "killing" of hostages as war crimes. However, the Legal Committee of the UNWCC recommended "indiscriminate mass arrests for the purpose of terrorising the population, whether described as hostage-taking or not" to be considered as a war crime. The UNWCC accepted the recommendation.[2] There is also some support in the literature for the taking of hostages as a criminal offence. Melen[3] has written that taking hostages in order to maintain order in occupied territory is contrary to international law. This view is based on three grounds: 1) the practice is at variance with the position under customary law. The practice of hostage-taking to keep order in occupied territory is said to have disappeared at the end of the 18th century. It was resorted to only during the First and Second World Wars and it was unilaterally introduced by the Germans. 2) It violates certain rules contained in the Hague Convention (IV) 1907, and, 3) it is contrary to general principles of law recognised by civilised nations. These grounds were fully endorsed by Lord Wright.[4] Others took a different view. Hammer and Salven[5], Readers in Politics and Government at Columbia University and Barnard College respectively, wrote at the time, that "the taking and killing of hostages is not per se illegal. Under ordinary wartime circumstances where the

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1. Established by Resolution II at the Conference Between Allied Governments and the Department of Criminal Science in the University of Cambridge, 1941. See proceedings ed. by L. Radzinowcz and J.W. Cecil Turner.

2. History UNWCC, p.172.

3. 24 RDI Sc.Dip.Pol. (1946) 17-25.

4. WC Law Rep., vol.VIII, 1949, pp.ix-x. Cf. Lord Wright, 25 BYIL (1948) 298.

5. 38 AJIL (1944) 20.

occupant has violated no legal duty to the civilian population, hostages may legitimately be taken, and if necessary, killed, to maintain order". The writers admitted that the practice of hostage-taking as practiced by the German forces during World War II assumed illegal proportions but it could not be abandoned as a legal instrument of war.

Shortly after the Nuremberg Judgment was delivered a number of important decisions relevant to the question of hostages were delivered by military tribunals under CCL No.10. The leading case is US v List and Others[1]. The accused, high-ranking German officers in command during the occupation of Greece, Yugoslavia, Albania and Norway, were charged, inter alia, with issuing and executing orders to have 100 hostages shot for every German soldier killed and 50 hostages shot for every German solider wounded. The US Military Tribunal at Nuremberg (1947-48) distinguished between, on the one hand, the taking of hostages by one nation to compel another to comply with the laws of war, and, on the other hand, the taking of innocent civilians in occupied territory hostage as a guarantee against attacks and acts of sabotage by unlawful resistance forces. The Tribunal addressed itself to the second purpose of hostage-taking and held such practice to be lawful in international law when certain conditions and preliminary measures are taken by the occupying forces. The necessary conditions include: (a) hostage-taking should only be a measure of last resort; (b) it may be carried out as a matter of military expediency; and (c) the civilian population must be actively or passively involved with the acts in view of which hostage-taking is adopted. The Tribunal did not define active or passive involvement, but required an effective link to be shown between the

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1. WC Law Rep. 1949, vol VIII, p.34. See also In re Kesselring, ibid., p.1 and In re Holstein and Others ibid., p.22.

population and the activities carried out.[1] The judgment does not provide any guidance in determining whether or not hostage-taking is a war crime. On the contrary it endorses the practice given the presence of certain conditions in armed conflict.[2]

In the immediate post-war period the question of hostage-taking as a criminal offence in international law was discussed by the ILC in the context of two separate, though related, draft projects: (i) the 1950 Nuremberg Principles and (ii) the Draft Code of Offences (1950 - 1954 and subsequently since 1984).

The ILC debated the candidature of war crimes as one of the crimes to be listed in the proposed Nuremberg Principles. The question arose whether the definition of the concept of war crimes was to take the form of an enumerative provision or simply a declaratory one. ILC member Francois[3] favoured the enumerative approach and this was well supported by the other members of the ILC.[4] M. Francois suggested that the "execution of hostages" should be specified as a war crime, but his proposal remained unaddressed. The concept of war crimes was defined in the Nuremberg Principles as in Article 6(b) of the Nuremberg Charter thus excluding altogether any reference to hostage-taking.[5].

Replying to the ILC's proposal to draft a Code of Offences Against the Peace and Security of Mankind, the

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1. Op. cit., pp.78-79.

2. Lord Wright, WC Law Rep., vol.VIII, p.viii, criticised this decision as not being representative of the law on war crimes.

3. ILC Yrbk., 1949, p.198 para 78.

4. See ILC Yrbk., 1949, v.I: Amado, p.199 para 80; Hsu, ibid., para 81; Cordova, ibid., para 82; Brierly, ibid., para 83; and Alfaro, ibid., para 86.

5. See ILC Yrbk., 1949, v.I, p.199 para 94.

Government of Pakistan[1] declared that "the taking of hostages (i.e. living pledges for the good behaviour of third parties) is barbaric and should be included in the draft code of offences". This statement was identified by ILC Member el-Khoury[2] who endorsed Pakistan's viewpoint during the debate on the Formulation of the Nuremberg Principles. He suggested including hostage-taking as a war crime. But there was great division on this within the membership, as can be seen in the voting on the proposal by Mr. el-Khoury.[3]

Those who argued in favour of including hostage taking pointed out that it would be improper for the ILC to endorse the Nuremberg Charter in excluding the taking of hostages as a war crime per se: surely the prohibition of hostage-taking "was one way of preventing hostages from being killed".[4] Other members[5] who formed part of this school of thought felt it incumbent upon the ILC as a body of draftsmen:

> "(who) should accept proposed changes, in order to bring harmony into the formulated principles. The survival of a barbarous practice did not look well in the company of principles which declared certain acts against peace and crimes against humanity to be in the same category as war crimes, and made individuals responsible for such crimes, irrespective of domestic law, official status or superior order".[6]

Article 34 of Geneva Convention IV of 1949, which specifically prohibits hostage-taking, was cited in support of the argument that this is an unlawful and criminal

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1. ILC Yrbk., 1950, v.II, p.253.

2. Ibid., v.I, p.54 para 72.

3. Five votes were cast in favour, five against and one absention. ILC Yrbk., 1950, v.I, p.61 para 24.

4. Cordova, ibid., p.55 para 80.

5. Ibid., Mr. Hsu, p.60 para 16 and Mr. Yepes, para 16.

6. See Hsu, ibid., para 16d.

practice.[1]

A few members adopted a neutral position[2]. The most interesting, and, perhaps accurate, is that taken by the eminent jurist Professor Brierly[3] who, though endorsed in principle the outlawing and criminal nature of hostage-taking, was not certain that the practice was considered unlawful and a criminal offence in international law at the time the Nuremberg Charter was drafted and the Nuremberg Judgment delivered. He submitted that on this basis alone, it would be improper for the ILC to reflect erroneously the current state of international law vis-a-vis the taking of hostages. He suggested that the Commission should note, de lege feranda, that hostage-taking should be prohibited. This indeed is the final position taken by the ILC concerning hostage-taking within the framework of the Nuremberg Principles. The relevant Nuremberg Principle (VI) reproduces the Nuremberg definition of war crimes, i.e. it excludes hostage-taking.[4] The definition was accompanied, however, by a footnote stating that during discussions the ILC took note and referred to Article 34 of 1949 Geneva Convention IV.

At the ILC's second session (1950) there was only scant reference to hostage-taking as a crime within the Draft Code of Offences[5]. The practice was neither discussed at that session nor the subsequent one (1951). The only reference to hostage-taking was made by government

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1. See el-Khoury, ibid., p.55 para 81, Hudson, ibid., para 86, and Hsu, p.60 para 16a and 16b.

2. See Sandstrom, ILC Yrbk., 1950, v.I, p.54 para 76 and Mr. Kerno, UN Assistant Secretary - General for Legal Affairs, ibid., para 85, who submitted that the term "war crimes" was broad enough to include hostage-taking.

3. ILC Yrbk., 1950, v.I, p.55 paras: 79 & 84 and p.61 para 18.

4. ILC Yrbk., 1950, v.II, p.377 para 118-119.

5. See Mr. Hudson, ILC Yrbk., 1950, v.I, p.148 para 12a.

delegates in the UN Sixth Committee responding to the ILC's Nuremberg Principles.[1] It was reported that the question of hostage-taking deserved more consideration than it received and some said that it should have been included as a war crime. Hostage-taking did not feature in the discussions during the ILC's sixth session (1954) in which the Draft Code of Offences was adopted. The provision on war crimes where hostage-taking, if at all, would have been included, read simply: "acts in violation of the laws or customs of war" constitute an offence against the peace and security of mankind.[2]

When the ILC re-addressed the question of the Draft Code nearly thirty years later, the new Rapporteur, Mr Thiam,[3] included the offences defined in the Hostages Convention among a number of offences to be considered as suitable for inclusion in the Draft Code. "The phenomenon in question has become so widespread that it is now necessary for the taking of hostages to be dealt with in a special provision in the draft Code, in cases where it contains any international elements".[4] Hostage-taking was now addressed not simply as a criminal offence separate from the concept of war crimes but as a criminal offence per se committed in peace time. However, a significant number of ILC members, though firm believers in the criminal nature of the practice of hostage-taking, were not convinced that, in peacetime, at any rate, this practice was such as to qualify as an offence against the peace and security of mankind.[5]

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1. See Belgium, ILC Yrbk., 1951, v.II, p.55 para 115.

2. See Draft Article 2, ILC Yrbk., 1954, v.II, p.152.

3. See Second Report, ILC Yrbk., 1984, v.II, pt.I, p.89.

4. Ibid., para 54.

5. ILC Yrbk., 1984, v.I: Ushakov, p.24 para 13; Lacleta Munoz, p.26 para 30; Calero Rodriguez, p.32 para 28; Quentin Baxter, p.37 para 10; and Yankov, p.50 para 37.

Only a few[1] expressed opinions in favour of including the practice. The position was very similar in the Sixth Committee[2] when it considered the ILC's Report on its work at its thirty-sixth session. Hostage-taking was not discussed by the ILC at its subsequent sessions on the project of the Draft Code.

The current legal position concerning hostage-taking in armed conflict is found in the 1949 Geneva Conventions. Common Article 3 prohibits hostage-taking in non-international armed conflicts. Hostage-taking is also prohibited under Geneva Convention IV (Article 34) and this applies to all armed conflicts: international and domestic. Additional Protocol I of 1977, which extends the application of the Geneva Conventions to armed conflicts in which peoples are fighting against colonial domination and racist regimes, supplements in part Geneva Convention IV and reiterates the prohibition of hostage-taking (Article 75.2.c.). The taking of hostages under Geneva Convention IV is considered a "grave breach" and "grave breaches" of the Four Geneva Conventions are declared war crimes by Additional Protocol II. Hostage-taking is subject to the aut dedere aut punire regime applicable under the 1949 Conventions. The rules regulating war crimes in international law now extend to the taking of hostages in time of war.

II. In Time of Peace

The practice of hostage-taking committed in peacetime increased dramatically over the last three decades.[3] There were no international legal instruments which addressed this emerging problem comprehensively, indeed international

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1. See ILC Yrbk., 1984, v.I: Sir Ian Sinclair, p.30 para 14, Francis, p.37 para 13, and Balanda, p.49 para 28

2. UN Doc. A/CN.4/L.382, 1985, p.23 para 59.

3. See Nanda, 6 Ohio NULR (1979) 89 at pp.90-91, Shubber, 52 BYIL (1981) 205 and Kaye, 27 Am. ULR (1977-1978) 440-442.

law did not prohibit hostage-taking in time of peace.[1] The instruments regulating unlawful acts on board aircraft and crimes committed against internationally protected persons, though serving as models for the fomulation of the Hostages Convention[2] only address the question of hostage-taking in part. The Hostages Convention was adopted to remedy the situation.[3]

(a) The Hostages Convention

The Hostages Convention is perceived as an expression of the international community that hostage-taking constitutes a "threat to international peace and security and that indeed it ought to be treated as a crime under international law".[4] There are three principal aspects of the convention relevant to the concept of criminal offence in international law. These are (a) preambular provisions telling of State opinion; (b) jurisdiction and (c) the political nature of the offence. Each aspect is considered in turn.

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1. See Nanda, op.cit., p.92, and Poland, GAOR, Supp. No.39 A/32/39, 1977, p.33 para 19.

2. The Federal Republic of Germany submitted a working paper which served as the basic draft text of a convention for the Ad Hoc Committee. See UN Doc. A/AC. 188/L.3, Annex II, in A/32/39, 1977. Hereafter cited as FRG Draft. See also representative of the Federal Republic of Germany, A/32/39, p.16 para 28; Nanda, op.cit., p.108 and Kapoor, op.cit., p.273.

3. GAOR, Supp. No.39, A/32/39: Federal Republic of Germany, p.16 para 28 and p.70 para 9; and, Mexico, p.20 para 6; and GAOR, Supp. No.39, A/33/39, 1978, Canada, p.65 paras 10 & 11.

4. Kapoor, op. cit., p.256. (Emphasis added). Endorsement of this position is found in UN Resolutions. See: SC Res. 579 (1985), Meeting 2637, 18th December, 1985 and SC Statement on the Achille Lauro incident, Meeting 2618, 9th October, 1985.

(a.i.) The Preamble

General Assembly Resolution 31/103 [1] which established the Ad Hoc Committee entrusted to draft the Hostages Convention recognised that hostage-taking "violates human dignity". In discussions of the Ad Hoc Committee, Chile declared that tolerating the taking of hostages is equivalent to "legitimising a crime which was repugnant to the conscience of mankind".[2] Canada stated that hostage-taking endangered the orderly conduct of international relations.

> "[It constitutes a flagrant violation of] the moral and legal foundations of the United Nations,..... Hostage-taking should be punishable under international law since it was clear that in many cases criminal laws of individual countries were not adequate to deal with the perpetrator who seized or killed hostages in one country and sought refuge in another".[3]

Some of the terms used to describe hostage-taking are reminiscent of similar descriptions of practices already considered such as apartheid, torture and crimes committed against internationally protected persons. Further, these initial remarks by government representatives reveal a need felt by States to bring into operation a universally applicable regime of rules designed to prohibit hostage-taking in time of peace and to punish the perpetrators wherever present. This is the casus foederis of the Hostages Convention and it is recognised in the Preamble. In the fourth preambular paragraph[4] the State Parties considered that hostage-taking is "an offense of grave concern to the international community and that any person

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1. Adopted 15th December, 1976.

2. A/32/39, p.18 para 8. Emphasis added.

3. Ibid., pp.21-22 para 11. Emphasis added.

4. See commentory offered by Lambert, Terrorism and Hostages in International Law - A Commentary on the Hostages Convention 1979, 1990, p.74.

committing an act of hostage-taking shall either be prosecuted or extradited". In this respect the Preamble differs significantly from other preambular provisions in conventions already considered. With other treaties the aut dedere aut punire principle appears in the operative provisions.

(a.ii.) Jurisdiction

The exercise of jurisdiction in respect of hostage-taking under the convention is laid down in Article 5.[1] State Parties are obliged "to take measures as may be necessary to establish jurisdiction". They are not actually obliged to exercise jurisdiction, but to take steps to ensure (and this may involve enacting legislation) that the crimes under the convention are justiciable before national tribunals on the various bases of jurisdiction listed in Article 5. [2] The instances when State Parties would be competent to exercise jurisdiction are broad and several. They are the following:

i. Jurisdiction may be exercised by the State where the crime is committed. Under this head we also find that where the locus delicti is on board a vessel or aircraft, the State of registration may exercise jurisdiction. They are considered as extensions of State territory in accordance with international law.

ii. Jurisdiction may be exercised by the State whose nationals committed the crime. Under this head States Parties may, if they consider it appropriate, extend this basis of jurisdiction to stateless persons habitually resident in their territory.[3]

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1. For a detailed analysis of Article 5 see Lambert, op.cit., pp.133-165.

2. See Lambert, op.cit., pp.142-143. Contra, see Shubber, op. cit., p.220.

3. Generally see Shubber, op.cit., p.223 para 4. Article IV of the Apartheid Convention also obliges High Contracting Parties to enact appropriate legislation to prosecute stateless persons who have committed the offence of apartheid. A similar base of jurisdiction is found in Ordinance of 28th August, 1944, enacted

iii. Jurisdiction may be exercised by the "target State", i.e. when hostage-taking is committed in order to compel a State to do or to refrain from doing something. This basis of jurisdiction approximates mostly the so-called protective principle where jurisdiction is exercised by a State whose security or public order is threatened or placed in jeopardy. In this case there may be no connecting factor between the State exercising jurisdiction and the offender or the victim other than that the State is the scope for which the offence has been committed.

There is no similar provision in the conventions discussed in this chapter.

iv. Jurisdiction may be exercised by the State whose nationals are the victims of the offence (passive personality principle). The passive personality principle was adopted in the final session of the Ad Hoc Committee.[1] The principle features prominently in immediate and more recent post 1945 legislation concerning war crimes and crimes against humanity.[2]

v. A State Party may also exercise jurisdiction where the hostage-taker is present in its territory. This is the principle of universal jurisdiction because the link between the State Party exercising jurisdiction and the offender is none other than his presence in its territory. The principle, as we have seen, is found in a number of instruments. In the Hostages Convention, as with others, the principle forms part and parcel of the aut dedere aut punire principle. It will be discussed in that context.

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by France to punish war criminals. But the position there is the inverse to the provision in the Hostages Convention. The Ordinance gives French courts jurisdiction for war crimes committed against, and not by, stateless persons resident in France.

1. A/34/39, p.12 para 47.

2. See, inter alia,: China, Law Governing The Trial of War Criminals, 1946; Belgium, Law of 20th June, 1947; Norway, Law on the Punishment of Foreign War Criminals, 1946; France, Ordinance of 28th August, 1944; Yugoslavia, Law of 25th August, 1945; Netherlands, Extraordinary Penal Law Decree 1943, as amended by Law of 10th July, 1947; Canada, Criminal Code Amendment Act 1987; and Australia, War Crimes Act 1945 as amended by the 1988 War Crimes Amendment Act.

Response to the Principles of Jurisdiction

Territorial Principle

The territorial principle met with no objections during the Ad Hoc Committee's debates on the drafting of Article 5. The territorial principle as submitted in the FRG Draft remained unchanged, i.e. it includes exercise of jurisdiction by the flag State. It was eventually adopted as such by the General Assembly.[1]

Active Personality Principle

Chile[2] was not in favour of including the nationality (active personality) principle of jurisdiction. It would only accept this principle if the offender was actually present in the territory of the State whose nationality he enjoyed. The Netherlands proposed[3] that jurisdiction should be exercised by the State whose nationals commit the offence in the territory of a Contracting State or on board a ship or aircraft registered in a Contracting State. The Netherlands envisaged[4] that an unqualified assertion in the convention in favour of the active personality principle "would lead to complications". Other members of the Ad Hoc Committee expressed support for the active personality principle.

Passive Personality Principle

There was much discussion with regard to the converse of the above principle, namely the passive personality principle which allows the State whose nationals are the victims of the offence to exercise jurisdiction. This principle, unlike the above, was not included in the FRG

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1. See, generally, Shubber, op. cit., p.220 and Kaye, op. cit., p.477.

2. See A/32/39: p.86 para. 15, and in A/33/39: p.41 para 14.

3. See UN Doc.A/AC.188/L.14, in A/32/39, p.114.

4. A/32/39, p.89 para 7.

Draft. It was inserted by France specifically to remedy the jurisdictional gap in same FRG Draft.[1]

There was division of opinion among States on the acceptability of this principle. Some[2] did not object to it as such. But, in view of a proposal in the draft convention that States Parties may exercise jurisdiction in accordance with national law, it was felt redundant. Others[3] considered the nationality of the victim as a subsidiary basis of jurisdiction, whereas another view emphasised that the passive personality principle would lead to jurisdictional problems of immense proportions especially where the hostages are of varied nationality.[4] The United States and the USSR reiterated their opposition to the principle as they have done in the debates on the UN Convention on Torture. The US[5] submitted that not all States have embraced this principle and applied it to internationally proscribed crimes. The USSR[6] found the principle "interesting" but endorsed the US position and added that the drafters of the convention ought to pay due consideration to international law; implying a lack of international consensus concerning the acceptability of the passive personality principle to crimes defined by international instrument.

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1. See UN Doc. A/AC.188/L.13 in A/32/39, p.113. Also see A/33/39, p.41 para 15 and Sweden, A/33/39, p.43 para 27.

2. See Canada, A/33/39, p.44 para 31 and Japan, A/32/39, p.85 para 10.

3. See Algeria, A/33/39, p.44 para 32.

4. See the Netherlands, A/32/39, p.89 para 7, and in A/33/39, p.39 para 6. The position was also endorsed by States as diverse as the United Kingdom, A/33/39, p.40 para 11 and Iran, ibid., p.43 para 26.

5. A/33/39, p.43 para 24.

6. Ibid., p.44 para 29.

Comentators[1] on the Hostages Convention have stressed that this basis of jurisdiction is questionable. As evidence they offer the rejection of the passive personality principle in a number of authoritative sources including, inter alia, Judge Moore's Dissenting Opinion in the Lotus Case,[2] the Harvard Draft Convention On Jurisdiction,[3] the Second Restatement of Foreign Relations Law of the United States[4], and the writings of publicists[5].

It is important to note, however, first, that the Third Restatement[6] recognises that the passive personality principle, though not "generally accepted for ordinary torts and crimes, it is becoming increasingly accepted as applied to terrorist and other organised attacks on a State's nationals by reason of their nationality, or to assasination of a State's diplomatic representatives or other officials". Second, the American Law Institute cites Article 5.1.c of the UN Convention on Torture as further support in favour of the application of the passive personality principle in respect of crimes in international law.[7] Third, this principle has been included in legislation enacted in pursuance of States Parties' obligations under the Hostages Convention.[8]

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1. Shubber, op. cit., pp.223-224, and in Jurisdiction Over Crimes Committed On Board Aircraft, 1973, p.80; Kaye, op. cit., p.478 and Lambert, op.cit., pp.152-154.

2. PCIJ Rep., Ser. A, No. 10, p.92.

3. 29 AJIL (Supp.) (1935) 579.

4. Article 30(2). Adopted and promulgated by the American Law Institute, 1965, p.86. Hereafter cited as Restatement.

5. See Jennings, 33 BYIL (1957) 146 at 155.

6. Article 402, 1987, p.240.

7. See Third Restatement, Reporters' Notes, p. 243 para.3.

8. See Clause 1.3(e) of the Canada Criminal Law Amendment

The Protective Principle

The principle listed third in Article 5 approximates the protective principle.[1] Where hostages are taken "in order to compel that State to do or abstain from doing any act", same State may exercise jurisdiction. This basis of jurisdiction was drafted differently in the FRG Draft. There it was stated that jurisdiction is exercised when "that State itself or an international organisation of which the State is a member is to be compelled to do or abstain from doing anything". It is not clear whether this draft provision required the presence of a "target State" in all circumstances, i.e. even where the offence would be directed squarely at the international organisation. Thus, hostages would be taken either to compel a particular State to do or to abstain from specific conduct: direct compulsion, or to compel an international organisation, of which the "target State" is a member, to perform or refrain from performing a particular act: indirect compulsion.

Several States advocated the deletion of any jurisdictional competence on the basis of international organisations being the subject of unlawful demands.[2] Mexico endorsed this position because it felt that the universal principle of jurisdiction would otherwise become operative.[3] The authors of the FRG Draft could not

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Act, 1985.

1. It has also been suggested by Lambert, op.cit., pp.151-152, that the "effects doctrine of territorial jurisdiction" is similar to the jurisdictional base contemplated in Article 5(1)(c).

2. See Netherlands proposal, UN Doc. A/AC.188/L.14 in A/32/39. See also Japan, A/32/39, p.85 para 9 and at A/33/39, p.43 para 25; Iran, ibid., p.43 para 26 and Nigeria, ibid., p.45 para 33.

3. A/32/39, p.78 para 26. See also the United Kingdom, which was prepared to compromise only if it were stipulated that jurisdiction is exercisable by the State in whose territory the international

appreciate the concern expressed.[1] Canada[2] supported their position, and this for the same reasons given by Mexico and the United Kingdom which favoured deletion. It felt that as many States as possible should be able to establish jurisdiction, particularly those which were not directly affected if no other State wished to exercise jurisdiction. The United States[3] considered the draft provision as contributing to the development of international law and stressed the need to ensure that international civil servants should be free from the risk of being taken hostage. It was prepared, however, to review its position if this basis of jurisdiction caused serious difficulties.[4] The Ad Hoc Committee adopted the Netherlands proposal and deleted all references to "international organisations".[5]

Universal Jurisdiction and the "Aut Dedere Aut Punire" Principle

Article 5.2 of the Hostages Convention obliges States Parties to take jurisdiction where the offender is present in their territory and is not extradited to the States in Article 5.1, i.e. to the locus delicti, or the national State of the offender/victim, or the "target State". Thus Article 5.2 contemplates the exercise of universal jurisdiction because there is no link between the offender and the forum State other than his presence in its territory. One writer[6] has described the presence of this

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organisation has its Head-Quarters, A/32/39, p.88 para 5 and at A/33/39, p.40 para 9.

1. A/32/39, p.93 para 7.

2. A/33/39, p.44 para 30. See also Yugoslavia, ibid., p.45 para 34.

3. A/32/39, p.84 para 8.

4. A/33/39, p.42 para 23.

5. A/34/39, p.12 para 48.

6. Nanda, op.cit., p.104.

principle in the Convention as a "desirable basis to combat hostage-taking". This is an accurate as possible an account of initial State response to the presence of the universality prinipcle in the proposed convention.[1]

The aut dedere aut punire principle becomes operative as a result of Article 8[2] of the Hostages Convention which does not oblige the State Party on whose territory the offender is found to extradite him, but to submit the case to its competent authorities for the purposes of prosecution if indeed it does not proceed with extradition. The relevant State authorities are obliged to take action as they would in the case of an ordinary offence of a grave nature under domestic law. This clause corresponds with similar provisions in the Hague (Article VII) and Montreal (Article 7) Conventions and that in the UN Convention on Internationally Protected Persons (Article 7).

The obligation for States Parties under Article 8 is to submit the case to their competent authorities "without exception whatsoever" and "whether or not the offence was committed on their territory". These qualifying words reflect clearly the regard in which the offence of hostage-taking is held by the drafters of the convention, i.e. as extremely serious crimes of particular concern to the international community.

As already indicated in the consideration of other crimes in this chapter, the phrase "without exception whatsoever" (which also appears in Article 7 of the UN Convention on Internationally Protected Persons) constitutes, albeit indirectly, a challenge to attempts at

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1. See Chile, A/32/39, p.18 para 7; Phillippines, ibid., p.25 para 1; Poland, A/33/39, p.42 para 19. Mexico (A/32/39, p.78 para 26) felt that the application of the universality principle to acts of hostage-taking was acceptable in time of war but excessive in peace time. Subsequently it expressed unqualified support for universal jurisdiction (Ibid., p.90 para 11).

2. See Lambert's commentary on Article 8, op.cit., pp.187-208.

rendering hostage-taking an excusable crime, for example, by declaring it a political offence. The phrase "whether or not the offence is committed in its territory" (not included in Article 7 of the UN Convention on Internationally Protected Pertsons) endorses the principle that, within a specific regime of international conventional rules, States are obliged to exercise jurisdiction in respect of certain crimes.

France[1] and the Netherlands[2] proposed amendments to limit the obligation to prosecute only if an extradition request from another State Party had been submitted and refused. In the Ad Hoc Committee and in the Sixth Committee the Netherlands opined that the State Party which has presence of the offender should be obliged to prosecute only when:

> "a much more directly involved State does not ask for extradition. In other words, if the State primarily concerned with the case does not deem it necessary or opportune to request the extradition of the offender in order to prosecute him, we see no reason why the State where the offender happens to be found, should be obliged to prosecute him".[3]

The Netherlands answered the objection that the prosecute/extradite obligation in the "hijacking" conventions and in that on crimes committed against internationally protected persons was not qualified in the manner proposed, simply by answering, without offering any explanation, that those conventions were different to this on hostages.[4]

The French/Netherlands proposals found little support and were eventually withdrawn.[5] The "no safe-haven"

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1. UN Doc. A/AC.188/L.13 in A/32/39, Annex II, Item K.

2. UN Doc. A/AC. 188/L.14, ibid. Annex II, Item L.

3. See NYIL (1979) p.384, (emphasis added), and ibid., (1981) p.239, and in, A/33/39, p.47 para 46.

4. A/32/39, p.89 para 8.

5. A/34/39, pp.15-16.

principle could not be compromised. The following statement by Canada in support of the prosecute/extradite provision is typical of the general position:

> "the fundamental legal principle underlying the three Conventions (i.e. Hague, Montreal and New York i.e., that on crimes against internationally protected persons) was, in essence, "prosecute or extradite", and that principle should provide the basis for the work of the Committee particularly in view of the fact that those Conventions had been widely accepted by States with differing political orientations, in all regions of the world."[1]

Priority of Jurisdiction

A number of States Parties may be entitled to exercise jurisdiction under the convention in a given set of circumstances for instance, nationals of State A take hostage nationals of States B and C in State D. The offenders are subsequently apprehended in State E. Further, the offence was committed in order to induce State F to release a number of prisoners considered to be "political offenders" by the hostage-takers. States A - F inclusive, all parties to the Hostages Convention, may exercise jurisdiction as provided under Article 5. The question immediately arises where will the offenders be tried. The convention, like its parent treaties, does not settle this matter of priority over jurisdiction. But there is some evidence in the travaux preparatoires which suggests that the drafters considered the various principles listed in Article 5 as representing some hierarchical order.

The Netherlands[2] referred to "primary compulsory jurisdiction" to be taken by States Parties in the

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[1]. A/32/39, p.22 para 12. See also Japan, ibid., p.28 para 10 and at A/33/39, p.51 para 18; Sweden, A/32/39, p.23 para 16; Lesotho, ibid., p.35 para 24; Syria, ibid., p.36 para 31; the U.S., ibid., p.89 para 10; United Kingdom, A/33/39, p.47 para 50; and the USSR, ibid., p.47 para 49.

[2]. A/33/39, p.39 para 6.

following order: (i) by the territorial State; (ii) by the national State of the hostage-taker; and (iii) by the "Target-State". The Netherlands opposed jurisdiction to be taken on the basis of the passive personality and universality principles. The Netherlands reiterated its position declared during the adoption of the UN Convention on Internationally Protected Persons, namely that States Parties with primary jurisdiction "bear the heaviest burden of the Convention. [They] have at least a moral duty to request extradition when the alleged offender is found in a state which under normal jurisdictional rules, would have no involvement with the crime at all."[1]

Chile submitted a scheme very similar to that of the Netherlands but differed significantly in that its proposal introduced the universality principle for the Netherlands' active personality principle.[2] Other States too distinguished between primary and subsidiary jurisdiction but each of them have placed different heads of jurisdiction falling within each of these categories.[3] The Federal Republic of Germany, authors of the original draft, accepted a distinction between primary jurisdiction under Article 5.1 and subsidiary jurisdiction under Article 5.2, but they wanted to increase rather than decrease the number of States Parties having primary jurisdiction.[4]

These various State positions address the problem of jurisdictional conflicts but do not resolve it. There is little consistency among the responses. It emerges clearly, however, that universal jurisdiction, as a means of punishing hostage-taking in time of peace, is considered a necessary though subsidiary basis of jurisdiction. Other

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1. See NYIL (1981) 239.

2. A/33/39, p.41 para 14.

3. See, the United States, A/33/39, p.43 para 23; Algeria, ibid., p.44 para 32 and Nigeria, ibid., p.45 para 33.

4. A/33/39, p.42 para 20.

bases (particularly the territorial principle) are largely considered as primary jurisdiction. Universal jurisdiction is considered as a "safety-net", a means of last resort, a buffer between international justice and lawlessness. The legislative practice of States Parties to the Hostages Convention reveals that they are prepared to have the jurisdictional bases as listed in Article 5 incorporated into national law.[1]

(a.iii.) The Political Nature of the Offence

Unlike the position obtaining in the Genocide (Article VII) and in the Apartheid (Article 11) Conventions, the Hostages Convention does not stipulate that the crime of hostage-taking should not be considered a political offence for the purposes of extradition. The FRG Draft too was silent in this respect. But Mexico[2] had submitted the following proposal:

> "None of the provisions of this Convention shall be interpreted as impairing the right of asylum".

The principle behind this proposal is found in Article 15 of the Hostages Convention:

> "The provisions of this Convention shall not affect the application of the Treaties on Asylum, in force at the date of the adoption of this Convention, as between the States which are parties to those Treaties; but a State Party to this Convention may not invoke those Treaties with respect to another State Party to this Convention which is not a party to those treaties."

The question immediately arises whether the position under the Hostages Convention has provided an escape clause for hostage-takers. What is the position where a person

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1. See Canada, Criminal Law Ammendment Act, 1985 (Clause 1.3) and see Title 18 USC Para 1203; the U.K. Taking of Hostages Act 1982; the New Zealand Crimes (Internationally Protected Persons and Hostages) Act 1980; and Japan Law No. 52 of 1987. On the Japanese legislation see Itoh, 32 JAIL (1989) 18.

2. A/AC.188/L.6 in A/32/39, p.111 para 2.

takes hostages for political purposes and subsequently escapes to another country where he presents himself to the local authorities and requests asylum? In the Ad Hoc Committee debates the US[1] declared that hostage-taking, like attacks on internationally protected persons and diplomats, was inadmissable in all cases regardless of the circumstances. This statement was addressed at comments made principally by African and Non-Western European States to the effect that the convention must not prejudice the principle of self-determination.[2]

The US[3] added that it was unnecessary to include provisions on asylum in the convention because asylum may always be granted without prejudicing the obligation under the convention to prosecute the hostage-taker if he is not extradited to a State on account that he may be prosecuted for his political views. He may indeed be extradited to a third State, such as the national State of the victim by virtue of Article 5 of the convention. This understanding endorsed the Mexican[4] position, namely that the obligation to prosecute is paramount notwithstanding that "the crime of taking hostages could have political implications, could have a political intent, or be related to other political activities."[5]

While some States[6] expressed concern at the prospect that the Hostages Convention would remain silent on asylum,

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1. A/32/39, p.55 para 26.

2. Nigeria (A/32/39, p.59 para 45) objected to the US principle that certain acts were unjustifiable regardless of their motives.

3. A/32/39, p.91 paras 22 & 23.

4. Ibid., para 20.

5. See also Japan, A/33/39, p.51 para 18.

6. Venezuela, A/32/39, p.55 para 24 and Chile, ibid., p.91 para 19.

others[1] insisted that it ought to exclude same provisions on asylum. Article 10 of the convention renders extraditable the offences of hostage-taking between States Parties, i.e. hostage taking is to be included in existing, as well as in future, extradition agreements. For those States Parties where extradition is dependent on the existence of an extradition treaty, the Hostages Convention shall serve as a legal basis for extradition. State Parties which do not require extradition to be conditional on an extradition treaty are obliged to recognise the offence as extraditable. Further, the offence of hostage-taking is, for the purpose of extradition, considered as if it has also been committed in the territories of the States required to establish jurisdiction under Article 5.

This provision, in addition to the statements made by members of the Ad Hoc Committee, the presence of the aut dedere aut punire principle and the broad jurisdictional bases included in the convention all constitute evidence which indicates that if the political offence exception rule were to be invoked in extradition proceedings concering the crime of hostage-taking under the convention, it is unlikely to be successful.

D. International Terrorism

The evidence available on terrorism as a criminal offence in international law is substantial but its value is greatly conditioned by the principal difficulty, so far unresolved, namely the absence of an acceptable legal definition of terrorism as a criminal offence. A discussion of the multifaceted problems inherent in a definition of terrorism as a criminal offence in international law is beyond the scope of this study. Suffice it to say that the concept of terrorism shares a history similar to that of

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[1]. Nicaragua, ibid., p. 56 para 30.

aggression as defined by the UN.[1]

The failure to find a satisfactory solution to the definitional issues largely explains the absence of an international, non-regional, instrument on the subject. But this does not mean that efforts at drafting such an instrument have not been undertaken.

An early treaty is the Convention for the Prevention and Punishment of Terrorism concluded in 1937 by the League of Nations[2]. Its drafters were motivated by the assassination of King Alexander I of Yuogslavia in France on October 9th, 1934. Terrorism is defined in Article 1.2 as "criminal acts directed against a State and intended or calculated to create a state of terror in the minds of particular persons, or a group of persons or the general public". In particular, High Contracting Parties are obliged (Article 2), inter alia, to render as criminal offences, any wilful acts causing death or grievous bodily harm or loss of liberty to Heads of States, their hereditary or designated successors, their wives or husbands, persons charged with public functions or holding public positions when the act is directed against them in their public capacity.

Though the League of Nations Convention has never entered into force and was ratified by only one State, India, it is relevant vis-a-vis the development of legal

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1. See 1973 Report of the UN Ad Hoc Committee on Terrorism (established by GA Res. 3034 (XXVII), 18th December, 1972), UN Doc. A/9028 and the Report for 1979, GAOR, Supp.No.37 A/34/37. The ILA considered the topic of international terrorism at the following Conferences: New Delhi, ILA (1974); Madrid, ILA (1976); Belgrade, ILA (1980); Montreal, ILA (1982); Paris, ILA (1984); Seoul, ILA (1986) and Warsaw ILA (1988). See, in particular, the Reports of the debates at the Belgrade (ILA (1980) pp. 505-519) and Montreal (ILA (1982) pp. 366-375) Conferences.

2. LN Doc. C549 M.385. 1937.V., reproduced in Ferencz, ICCt, v.I, p.380. Hereafter referrred to as League of Nations Convention.

measures applicable to internationally proscribed crimes in the following respects:

(i) The drafters made a statement of principle whereby they reaffirmed:

> "the principle of international law in virtue of which it is the duty of every State to refrain from any act designed to encourage terrorist activities directed against another State and to prevent the acts in which such activities take shape, undertake as hereinafter provided to prevent and punish activities of this nature and to collaborate for this purpose".[1]

A similar statement is found in draft preambular paragraph 2 of a Draft Convention For The Prevention and Punishment of Certain Acts of International Terrorism submitted by the United States to the UN Ad Hoc Committee on Terrorism.[2]

(ii) Article 8 of the League of Nations Convention deems extraditable acts of terrorism defined therein. Article 8 also provides that where extradition is conditional on an extradition treaty, High Contracting Parties may rely on its provisions for the extradition of the crimes proscribed. Article 8 has proved to be a model for the drafting of similar provisions on extradition in other treaties that have been examined in Part III of this thesis.

(iii) Article 9 obliges High Contracting Parties to prosecute nationals where extradition of nationals is prohibited and when presence of the perpetrators has been secured by the national State of the offender. This provision constitutes a partial application of the aut dedere aut punire principle which is found in more recent instruments, but which is not limited in its application ratione personae.

(iv) Finally, Article 10 provides for a qualified application of the universal principle of criminal jurisdiction. High Contracting Parties shall prosecute and punish foreigners present in their territory who have committed said terrorist acts outside the lex fori as if the offences had been committed within the lex fori as long as:

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1. See Article 1.

2. See UN Doc. A/C.6/L.850, 25th September, 1972, hereafter cited US Draft Convention.

(a) extradition has been demanded and refused for reasons not connected with the offence;
(b) the courts of the High Contracting Party have jurisdiction in respect of offences committed abroad; and
(c) the national State of the offender recognises jurisdiction exercised in respect of offences committed abroad.

The three principal measures identified above, namely: (i) a quasi-application of the universal principle of jurisdiction; (ii) perpetrators are either to be extradited or prosecuted; and (iii) the statement that a particular act is an extraditable crime, are also to be found in the US Draft Convention[1], in the European Convention on the Suppression of Terrorism[2], and in a Draft Outline of Single Convention on Legal Control of International Terrorism[3] prepared by the ILA at its Fifty-Seventh Conference in Madrid, including a Statement of Rules of International Law Applicable to International Terrorism[4] adopted by Resolution No. 7 of 1984 at the ILA's Sixty-First Conference in Paris. At its Sixty-Second Conference (1986) in Seoul the ILA focus on terrorism concentrated specifically on matters

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1. See Draft Articles 3, 4.2, and 7.

2. This does not define terrorism, it merely lists a number of practices which are not to be considered as political offences (Article 1). See also Article 7. ETS No 90, 1977.

3. See Article II.(2) & (3) and Article III, ILA (1976), p.143 et seq. See also Professors Radoynov (ibid., pp.122-123); Dimitrijevic (ibid., p.125); Greenburgh (ibid., p.132); and Shearer (ibid., p.136) who expressed views in support of the general outlook that terrorists like pirates are hostis humani generis and that the most suitable method of reaching them is through the application of the aut dedere aut punire principle. Similar views had been expressed at the Fifty-Sixth Conference, ILA (1974), which first addressed the topic of International Terrorism, see comments by Professors Lakshmikanth Rao Penna (ILA (1974), p.160); Jethmalani (ibid., p.162); Dinstein (ibid., pp.163-164); Lipper (ibid., p.169); and Cabral (ibid., p.172).

4. See Articles 4,5,6 and 7, ILA (1984), pp.6-7.

concerning extradition.[1] A set of draft articles submitted at the Seoul Conference excluded certain defences such as that of the political offence and that of "superior orders".[2] At the same conference, Committee Member Professor Hatano (Japan) identified the aut dedere aut punire principle as a basic obligation to be incorporated in the proposed draft articles on extradition in the same fashion as the principle applies in international treaty practice concerning the proscription of acts as criminal offences.[3] This proposal, along with a number of other measures including, a range of jurisdictional principles accompanied by a priority system for resolving conflicts of jurisdiction and the non-applicability of the defence of statutes of limitation, now appear in the ILA's updated Draft Articles on Extradition in Relation to Terrorist Offences.[4]

These legal measures and others such as provision for direct individual criminal responsibility are not only included in drafts prepared by the ILA[5], but also by the ILC. In the ILC's 1954 Draft Code "terrorist acts" formed part of the definition of the concept of aggression. Aggression was defined, inter alia, as "the undertaking or

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1. See, Legal Problems of Extradition in Relation to Terrorist Offences, ILA (1986), p.559.

2. Ibid., Draft Article II, A, (Clarifications), p.562.

3. See ILA (1986), pp.566-567. Further see GA Resolutions urging States to apply the aut dedere aut punire principle to terrorism: Res. 34/145, op. para 11, 17th December, 1979; 38/130, op.para 6, 19th December, 1983; 40/61, op.para 8, 9th December, 1985; 42/159 op. para 5(b), 7th December, 1987; and 42/29 op. para 4(b), 4th December, 1989.

4. See ILA (1988), pp.1034 et seq.

5. See Resolution No.7 of 1984, ILA (1984), p.7. The ILA Explanatory Report (ibid., pp. 315-316), stated that application of these principles to terrorism had been motivated by their application to crimes in international law as formulated in the Nuremberg Principles by the ILC.

encouragement by the authorities of a State of terrorist activities in another State".[1] In its subsequent efforts on the preparation of a Draft Code, the ILC initially followed the 1954 model, i.e. reference to terrorism was included as part and parcel of the concept of aggression.[2] Terrorism was not, therefore, allocated a separate provision as a distinct crime. But, unlike the 1954 version of the Code, terrorism was defined in terms provided by the definition of the 1937 League of Nations Convention.[3] That definition has been retained by the ILC. During its forty-third session (1991) the Drafting Committee has adopted a

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1. See Draft Article 2(6) ILC Yrbk., 1954, v.II, p.151. See also ibid., 1985, v.II, pt. II, p.17 para 91.

2. See ILC Yrbk., 1985, v.II, pt.I, pp.77-80 paras 124-154.

3. The ILC updated that definition of terrorism in so far as it included reference to unlawful seizure of aircraft and hostage-taking. See draft article 4 (Second Alternative) Para.D.b.iii & iv, ILC Yrbk., 1985, v.II, pt.I, p.83. See also draft article 11(4), ibid., 1986, v.II, pt.I, p.84. Subsequently, reference to terrorism within the Draft Code appeared in the Rapporteur's Sixth Report (UN Doc. A/CN.4/411, 19th February, 1988, p.16) as draft article 11(3), Second Alternative, i.e. as part and parcel of the crime of intervention. At its fortieth session (1988) the ILC provisionally adopted a draft article on aggression but omitted all reference to acts of terrorism. The ILC referred the matter of intervention as a crime commited by States, which included reference to acts of terrorism, for consideration by the Drafting Committee. See ILC Yrbk., 1988, v.II, pt.II, p.65 para 278. The matter was considered again at the forty-first session (1989) which resulted in the provisional adoption of a draft article 14 on "Intervention", see GAOR, Supp. No.10 (A/44/10) p.182. Summary Records of ILC debates for the forty-first session (1989) sessions have not been published at time of writing. But, at the ILC's following session a seperate provision on international terrorism reappeared. See draft article 16, GAOR, Supp. No.10 (A/45/10) pp.62-64. Summary Records of the ILC for its forty-second session (1990) are unpublished at time of writing. Also generally, see McCaffrey, 84 AJIL (1990) 930.

separate draft article 24 on International Terrorism.[1]

A substantial part of the ILC membership has favoured the inclusion of terrorism in the Draft Code, but almost every single member who spoke in favour differed as to how terrorism ought to be defined; and this division persists.[2]

The value of the source material provided by the ILA and the ILC on the status of terrorism as a crime under international law is evidential but far from conclusive.

The question of defining terrorism as a crime is not the only issue over which a continuing debate is recorded. An issue of broader concern is whether the best approach to apply legal controls over this concept is piecemeal rather than general. Treaty practice, UN General Assembly Resolutions inviting States to become parties to treaties which deal with aspects of international terrorism,[3] and

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1. See UN Doc. A/CN.4/L.459/Add.1, 1991, p.7.

2. See the comments of the following members at the ILC's thirty-seventh session, ILC Yrbk., 1985, v.I: Jacovides, p.14 para 16; Calero Rodrigues, p.17 para 39; Sir Ian Sinclair, p.24 para 23; Mahiou, p.31 para 16; Balanda, p.34 para 33; Ogiso, p.44 para 26; Razafindralambo, p.47 para 43; Njenga, p.49 para 13; McCaffrey, p.55 para 53; Yankov, p.58 para 15; Diaz Gonzalez, p.59 para 28; Ushakov, p.62 para 49; Huang, p.64 para 16; Arrangio-Ruiz, p.66 para 38; Roukounas, p.69 para 56; Tomuschat, p.70 para 15; Lacleta Munoz, p.74 para 29; and Jagota, p.77 para 56. At the following ILC Session few were the members who expressed their views on terrorism. See, ILC Yrbk., 1986, v.I: Lacleta-Munoz, p.144 para 10; Ushakov, p.145 paras 24-25 and contra, see Sucharitkul, p.159 para 22. See ILC debates at Meetings 2053-2061, ILC Yrbk., v.I, 1988.

   Division of opinion on the definition of terrorism and of its perception as a crime committed only by persons acting on behalf of the State is also present in the Sixth Committee. See UN Doc. A/CN.4./L.410, 1987, pp.122-123 and Doc. A/CN.4/L.456, 1991, pp.18-19.

3. See: GA Resolutions: 3034 (XXVII) op.para 5; 41/102; 32/147; 34/145, op.para 8; 38/1309 op.para 5; and 42/159 op.para 9; and 44/29 op.para 5.

State comment[1] is source material which endorses the view that the piecemeal approach is preferred.[2] The piecemeal approach avoids the pitfalls of generality and this is especially appropriate given that the concept has strong political overtones. There is hardly any evidence, other than drafts de lege ferenda and an unratified treaty adopted more than five decades ago, that an international treaty defining international terrorism as a crime is the best response to this phenomenon in international law.

A recent effort in this piecemeal direction has been the adoption by the IMO of a Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, and, a Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf[3].

42/159 op.para 9; and 44/29 op.para 5.

1. In observations and comments submitted by States in response to a request of the UN Secretary-General, who was directed by GA Res. 34/145, 1979, to compile a report on national legislation concerning terrorism, the following States reported that their legislation on terrorism was the result of their international obligations contracted in virtue of their ratification of international treaties such as that on hostage-taking, unlawful seizure of aircraft, crimes committed against internationally protected persons including diplomats and unlawful acts against the safety of civil aviation. See, UN Doc. A/36/425, 1981: Denmark (pp.8 and 25); German Democratic Republic (pp.8 and 26); Greece (p.9); Qatar (p.9); Sweden (pp.20 and 32-37); Ukrainain SSR (pp.20-21 and pp.39-40); USSR (pp.21-22 and pp.40-43); and USA (pp.22-23 and pp.43-48). See also Recommendation by the UK (UN Doc.A/AC.160/WG/R.2) in GAOR, A/34/37, p.26 para 93, recommending that States not yet parties to those treaties which deal with aspects of international terrorism ought to ratify them; and endorsing regional efforts undertaken by the OAS and Council of Europe on terrorism.

2. For an innovative approach to the problem of applying legal controls to terrorism, see a recent contribution by Cassese, 38 ICLQ (1989) 589.

3. See IMO Docs. SUA/CON/15, 1988 and SUA/CON/16/Rev.1, 1988. Texts reproduced in 27 ILM (1988) at pp.672 &

These instruments were drafted in part as a response to the outcries generated by incidents such as that of the Achille Lauro in 1985 and thus, principally, to protect order in international navigation through the application of criminal law rules.

The IMO Convention is tailored on instruments discussed in this and the preceeding chapter. Accordingly, it includes provision for various bases of jurisdiction including the universality principle, the aut dedere aut punire principle and the declaration of the offences as extradictable crimes, which now seem to be sine qua non provisions in treaties of this nature. They apply mutatis mutandis to the IMO Protocol by virtue of Articles 1(1) and 3 thereof. These juridical characteristics are not only fashioned but drafted along parallel provisions in the "parent" treaties of the IMO Convention. They differ, however, in the following ways. **Jurisdiction**. Article 6 (1) and (2) of the IMO Convention divides the various bases of jurisdiction into two categories: "obligatory" and "discretionary".[1] The former bases comprise the territorial and active personality principles while the latter comprise the passive personality and the protective principles. The State in whose territory a stateless person is habitually resident, may also take jurisdiction and this is included in the "discretionary" group of jurisdictional bases. The universality principle is also provided for but does not form part of either the "obligatory" or "discretionary" group of jurisdictional bases.

The question of a hierarchical system among the various bases is another factor which presents itself in this context, as it has with the conventions already

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685 respectively. Hereafter referred to as IMO Convention and IMO Protocol respectively. Generally see Plant, 39 ICLQ (1990) 27, Halberstam, 82 AJIL (1988) 269 at 291, and Joyner and Francioni both at 31 GYIL (1988) at 230 and 263 respectively.

1. See Plant, op.cit., p.44, Joyner and Francioni, op.cit., pp.251 and 276 respectively.

discussed. The text of the IMO Convention does not, prima facie, suggest such a system to be operative, the travaux preparatoires are not helpful[1] and there is already a division of opinion in doctrine on this point. Some consider the "obligatory and discretionary" bases as primary bases of jurisdiction and the universality principle as a secondary base of jurisdiction.[2] Others consider the obligatory bases as an obvious representation of priority over the "discretionary" bases, and they even go as far as to assert that the flag state has preference should a conflict arise within the "obligatory" group of jurisdictional bases.[3]

The universality principle appears, as is now practice in international conventions of this nature, as part and parcel of the application of the aut dedere aut punire principle defined in Article 10 of the convention. Article 10 is drafted in a manner which combines elements from parallel provisions in the Hague and Montreal Conventions and the UN Convention on Internationally Protected Persons. Accordingly, where an offender is not extradited, the obligation to prosecute under the IMO Convention is without exception whatsoever, whether or not the offence is committed in the lex fori, and the submission by the State Party of the case to its competent authorities for prosecution shall be without undue delay.

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1. Plant, op.cit., pp.30 n.13, member of the UK delegation at the IMO Diplomatic Conference, reports that "in view of the limited available financial resources, no summary records were kept, although a record of the decisions of the conference was kept."

2. Plant, op.cit., pp.45-47. However, his review of the various bases of jurisdiction contains no indication that the drafters considered Article 6 (the jurisdictional clause) of the convention to provide a system of priority among the jurisdictional bases. See Halberstam, op.cit., p.302.

3. Francioni, op.cit., pp.277-278.

The either extradite or prosecute principle, as with identical provisions in other treaties, is hailed by commentators as the "key provision" of the IMO Convention.[1] **Extradition.** By virtue of Article 11 the crimes defined in the IMO Convention and in the Protocol are considered extraditable. As is the case with the crimes defined by treaties considered in this chapter there is no reference in the convention to the non-applicability of the political offence exception rule. It is reported, however, that Kuwait had submitted proposals to have the matter expressly included in the Convention.[2]. The omission by the drafters to include such a provision in the treaty has been severely criticised by writers and considered a dangerous lacuna in the attempt to proscribe practices as criminal offences under international law.[3]

The evidence presented in this section on international terrorism suggests: (i) that there is general agreement that international terrorism deserves to be considered as a criminal offence by the international community; and (ii) that any effort at producing a universal instrument designed to apply the force of criminal law to the concept is invariably thwarted by problems of definition. However, a common feature of the multifaceted efforts that have attempted to regulate the concept of international terrorism, include, in part or in whole, several rules and principles of international law, applicable vis-a-vis established criminal practices which have been identified and discussed in Part III of this study.

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1. Plant, op.cit. p.49 and Halberstam p.292.

2. See Plant, ibid., p.50 and at p.33 ff.23.

3. See Joyner and Francioni, op.cit., pp.258-260 and pp.283-284 respectively.

CHAPTER 8

Other Practices

The practices examined in this Chapter are practices in respect of which efforts have been made or are being made to declare them criminal offences under international law. Currently, their status as such remains de lege feranda but, nonetheless, they merit examination.

A. Unlawful Dissemination of Narcotic Drugs and Psychotropic Substances

The source material relevant to the status of unlawful distribution of narcotic drugs and psychotropic substances[1] (popularly known as "drug trafficking") as a criminal offence under international law is quite convincing, and of the practices discussed in this chapter, "drug trafficking" is the most likely to join the ranks of other delicti jure gentium.

There is a substantial number of treaties, spanning the greater part of this century, which prohibit[2] and provide for the punishment[3] of "drug trafficking". Some instruments concluded under the auspices of the League of Nations such as the 1925 International Opium Convention (Articles 28 and 29) and the 1936 Geneva Convention for the Suppression of Illicit Traffic in Dangerous Drugs include provisions which allow States Parties to ensure that their laws allow for the exercise of jurisdiction on the bases of

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1 This term is used here to include both chemically and agriculturally produced substances.

2. See Agreement Concerning The Suppression of the Manufacture of, Internal Trade In And Use of, Prepared Opium, 1925. 51 LNTS 337.

3. See International Opium Convention, 1925, 81 LNTS 317. Article 28 stipulates that Contracting Parties agree to make punishable breaches of domestic laws and regulations which enforce the provisions of the convention. Similarly, see Articles 2 and 5 of the 1936 Convention for the Suppression of the Illicit Traffic in Dangerous Drugs. 198 LNTS 300.

the territorial and of the active personality (in respect of offences committed in the territory third States) principles. The active personality principle is also found in Article 3 of the 1936 Geneva Convention. Article 7 of same convention provides an embryonic form of the either "extradite or prosecute" formula present in more recent treaties concerned with the criminal proscription of unlawful acts. Article 7 provides that where the laws of a "country" (not necessarily being a Contracting Party), which do not allow nationals to be extradited, the alleged offender shall be prosecuted in his national State as if the offence, though committed "abroad" (not necessarily in the territory of another Contracting Party) had been committed in its own territory. Furthermore, Article 8 provides that crimes committed abroad (i.e. not necessarily in the territory of a High Contracting Party) by foreigners present in the territory of a High Contracting Party, may be tried in that State which has secured their presence as long as two conditions are satisfied: (a) extradition for the foreign offender has been requested and denied on grounds independent of the offence per se; and (b) the law of the requested State permits jurisdiction to be taken for offences committed abroad by foreigners. Finally, Article 9 provides that the offence of illicit traffic in drugs shall be deemed an extraditable crime and is to be included in extradition treaties between the High Contracting Parties.

In these various provisions we find rules allowing for extraterritorial jurisdiction applicable to acts deemed punishable by international agreement. We also find traces of the aut dedere aut punire approach to combatting illegal practices of international concern.

The 1961 Single Convention on Narcotic Drugs[1], amended by Protocol in 1975 [2], has repealed, in so far as States

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[1]. 520 UNTS 151.

[2]. 976 UNTS 106.

Parties are concerned, League of Nations and other post World War II conventions concerning illegal trade in drugs.

The Preamble to the 1961 convention considers, inter alia, that "effective measures against abuse of narcotic drugs require co-ordinated and universal action". With regards to criminal law Article 36 is the relevant provision. It provides that each State Party shall adopt measures to render the following punishable as criminal offences:

> "cultivation, production, manufacture, extraction, preparation, possession, offering, offering for sale, distribution, purchase, sale, delivery on any terms whatsoever, brokerage, dispatch, dispatch in transit, transport, importation and exportation of drugs".

But State Parties are obliged to adopt legislative measures subject to their constitutional limitations. This qualification weakens considerably the effectiveness of Article 36.

Further Article 36.2.a.(iv) provides that nationals and foreigners may both be prosecuted by the High Contracting Party in whose territory the offence is committed. They will also be prosecuted by the High Contracting Party on whose territory they are found if they are not extradited. There is an obligation to prosecute here, even possibly on the basis of universal jurisdiction. But there is no obligation to extradite. This is similar to the position concerning the aut dedere aut punire principle as discussed in various treaties in the preceeding chapters.

However, the position in Article 36 would seem to be that where the locus delicti is the territory of one State Party and the offender is apprehended in the territory of another, the State Party which has presence of the offender should first seek to extradite rather than to prosecute the offender. It is stipulated that the offender shall be prosecuted "by the Party in whose territory he is found if extradition is not acceptable in conformity with the law of the Party to which application is made". Article 36 does

not provide for circumstances where the locus delicti is the territory of a non-State Party and the offender is subsequently found in the territory of a State Party.

Finally Article 36.2.b. recommends as "desirable" to have the offences included in extradition agreements between High Contracting Parties. This recommendation is now mandatory by virtue of the 1975 Protocol.

A most substantial contribution to the status of "drug trafficking" as a crime under international law was made via General Assembly Resolution 39/141 [1] entitled "Draft Convention against Traffic in Narcotic Drugs and Psychotropic Substances and Related Activities". Resolution 39/141 incorporates in Annex the working text of a proposed draft convention. Therein are included a significant number of proposals which feature in most of the treaties reviewed in other chapters of this Part. These common features include: (a) the question of designation - Draft Article 2 declares "drug trafficking" a "grave international crime against humanity"; (b) the non-applicability of the political offence exception - Draft Article 5 provides that the practices shall not be considered political crimes for the purpose of extradition; (c) the non-applicability of the principle of statutory limitation - Draft Article 6; (d) the concept of individual criminal responsibility - Draft Article 7; (e) territorial and extraterritorial bases of jurisdiction - Draft Article 10; and finally, (f) reference to the justiciability of the crimes before an international criminal court - Draft Article 11.

In 1988, the UN adopted a Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances[2] but its provisions concerning the applications of criminal law

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[1]. Adopted on 14 December 1984.

[2]. See UN Doc. E/CONF.82/15, 19th December, 1988. Text also at: 28 ILM (1989) 497. See Sproule and St. Denis, 27 Can. YIL (1989) 263, for a general commentary on the treaty's principal provisions.

principles are considerably weaker than those of the draft convention described above presicely because it largely failed to reproduce in substance those same principles. The provisions on jurisdiction and the aut dedere aut punire principle are the only survivors of the draft convention.

Following the IMO Convention, the 1988 instrument discriminates between various bases of jurisdiction in respect of which States Parties are either obliged or permitted to take such measures as are necessary to establish their jurisdiction over the offences (Article 4). The territorial, "Flag State", and active personality (but this applies only when the national is present in the territory of his own State) principles are mandatory grounds for taking jurisdiction. The universality principle and the active personality principle (applying in all other cases) are permissable grounds for taking jurisdiction. The "effects doctrine" is also present in the convention and it is permissable for States Parties to take jurisdiction when there is a conspiracy or an attempt to commit a crime occuring outside their territory but having effect within their territory.

Contrary to treaty practice identified in Chapters 5 to 7 above, the aut dedere aut punire principle does not feature as a separate provision under the 1988 Convention, but as part and parcel of the provision on extradition (Article 6.9.) In addition, the relevant wording is far from standard and the phrases "without exception whatsoever" and "whether or not the offence is committed in its territory" relative to States Parties' obligation to submit the case to their competent authorities for prosecution, are conspicuously absent from the convention.

More source material relevant to the developing status of drug trafficking as a crime under international law is de lege feranda but, it clearly reveals a commitment to adhere to principles of law now standard in international effects to proscribe criminal practices. This is evidenced

by the presence of a provision (Article XIV) on drug offences in a Draft International Criminal Code prepared by Professor Bassiouni[1], and especially, by the recent (provisional) adoption of a Draft Article X by the ILC within the context of its Draft Code. At the Forty-Second Session (1990) the ILC has included a provision which renders drug-traffickers, regardless of their capacity at the time of commission and of the locus delicti, liable to punishment. Accordingly criminal liability is incurred even if the offence takes place within the territory of one single State. The ILC has stressed, however, that a "mass element", as is present in the concept of crimes against humanity and genocide, is necessary in order to bring the crime of drug-trafficking squarely within the reach of relevant international criminal law rules.[2] The draft provision has been improved by the Drafting Committee at the ILC's forty-third session.[3]

The ILC's approach to "drug trafficking" as a suitable candidate for inclusion in the Draft Code has, therefore, changed from an initially divided position to its current opinion that this is a practice which deserves to be suppressed and its perpetrators punished by the same principles of international law as the classical pirates and war criminals before them.[4]

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1. International Criminal Code, 1987, p.163.

2. See ILC Report, GAOR, Supp.No.10 (A/45/10) pp.31-34 and 67-70.

3. See draft article 26, UN Doc.A/CN.4/L.459/Add.1, 1991, p.8.

4. At its thirty-eight session (1986) ILC members rejected, very categorically, the notion that "drug trafficking" was a crime against the peace and security of mankind. See Tomuschat, p.114 para 35; and Razafindralambo, p.129 para 28 in ILC Yrbk., 1986, v.I. In favour, however, see, ibid., Balanda, p.107 para 34; Jacovides, p.121 para 30; Arangio-Riuz, p.123 para 59 and Roukounas, p.117 para 54. At its forty-first session (1989) several members deemed "drug trafficking: a crime against peace and against

The applicability of principles such as universal jurisdiction, aut dedere aut punire, justiciability regardless of motive, no time-limits for prosecution and the non-acceptance of "superior orders" for drug-traffickers have been endorsed by writers in their contributions on the international legal status of this practice.[1] In addition, recent practice reveals that the illegality of certain practices is considered to be such by States to warrant the use of force to bring the offenders to trial. This has been the case when Panama's former dictator General Noriega was seized in Panama City by US military forces in 1989 and subsequently arraigned in the United States for "drug trafficking". Alongside the protection of nationals, one of the recognised grounds in international law in respect of which use of force by States is permissible, the United States identified the seizure and arrest of General Noriega, "an indicted drug trafficker", as one of four reasons explaining the decision to send military personnel into Panama.[2]

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humanity, in addition to being a form of terrorism: "narco-terrorism". See GAOR, Supp. No.10 (A/44/10) pp.170-171. Sixth Committee views have, in the main, endorsed the ILC's effort to render "drug trafficking" a universally punishable crime, see UN Doc. A/CN.4/L.443, 1990, pp.37-38. But, reservations to this general view are still recorded within the Sixth Committee. See its report of the ILC's Report on the work carried out at its forty-second session, UN Doc. A/CN.4/L.456, 1991, pp.20 & 33-36.

1. See Blum, 13 Israel LR (1978) 194 and Bassiouni, writing in International Criminal Law Volume 1 Crimes, p.507. Some writers have included narcotics dissemination in a catalogue of unlawful acts listed as international offences. See Dinstein, 5 Israel YHR (1975) 65 and Friedlander, 52 RIDP (1981) 393.

2. See 84 AJIL (1990) 545 at 547. Four years previously, US military aircraft forced a civilian (Egypt Air) passenger aircraft, flying over the high seas and carrying four persons who had unlawfully taken control of a cruise liner, The Achille Lauro, and its passengers hostage, to land at a NATO military base in Sicily. The four criminals had killed a US national during the course of the incident. On the legality or

B. Damage to the Environment

The principle of criminal liability in relation to environmental harm is de lege feranda and in formulating that principle there are problems ratione materiae and ratione loci.

So far efforts de lege feranda to apply the concept of delicta jure gentium to the environmental question have been undertaken by the ILC in two of its draft projects: that concerning the Draft Code and that concerning the doctrine of State Responsibility.

Draft Article 19.3.d. is the relevant provision in the ILC's Draft Articles on State Responsibility (Part I). It provides that:

> "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;"[1]

constitutes an "international crime".

As originally drafted by Professor Ago the above provision was worded in significantly different terms. Then appearing as Draft Article 18.3.c., it read as follows:

> "The conservation and the free enjoyment for everyone of a resource common to all mankind".[2]

Until such time as the ILC's Drafting Committee considered 18.3.c., which was then re-fashioned as 18.3.d.

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otherwise of these "persuasive" measures taken by the US in the Achille Lauro incident see Cassese, 38 ICLQ (1989) 601-603 who also addresses the applicability or otherwise of the universality principle of jurisdiction vis-a-vis American action taken.

1. ILC Yrbk., 1976, v.II, pt.II, p.96. See ILC Commentary, ibid., p.109 para 32 & p.121 para 71.

2. ILC Yrbk., 1976, v.II, pt.I, p.54. See also Ago's scant comments on Draft Article 18.3.c. in his Report (ibid., p.52 para 148) which seem to suggest that the inclusion of the "environmental question" as an "international crime" was almost accidental. During the ILC's debate on Article 18.3.c., Ago admitted that it was de lege feranda. Ibid., v.I, p.253 para 48.

and reading as finally adopted, the ILC membership was generally hostile to it[1], although some[2] did suggest that the concept of the common heritage of mankind should be the proper substitute for "resource common to all mankind." Notwithstanding the divided position in the ILC, it reported that its membership expressed full agreement with Article 19.3.d. [3] But Sixth Committee[4] views reiterated serious doubts concerning the status of environmental harm as an international crime. Bulgaria and the Federal Republic of Germany specifically objected to Draft Article 19.3.d. in their replies on the ILC's Draft Articles on State Responsibility.[5]

It is in the context of the Draft Code that efforts have been made to place acts against the environment in the same class as other traditional delicta jure gentium. Within this framework the ILC attempts to apply to acts which damage the environment certain legal measures such as the principle of individual criminal responsibility, the justiciability of the act as a crime by virtue of the universal principle of jurisdiction, the applicability of the aut dedere aut punire rule, and the non-applicability of defences such as "superior orders" and statutes of limitation, which all form part of the Nuremberg legacy and are applicable vis-a-vis the more generally accepted

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1. See ILC Yrbk., 1976, v.I: Ushakov, p.73 paras 4 & 5; Ustor, p.84 para 41; and El-Erian, p.87 para 8.

2. See, ibid., Rossides, p.83 para 75; Njenga, p.246 para 79 and later El-Erian, p.244 para 48. Castenada, p.243 para 35, was in favour of including unlawful action to alter climatic change. For a recent review of the developments in the field of climatic change and the concept of common heritage of mankind engendering erga omnes obligations in international law, see Editorial Comment, 84 AJIL (1990) 525.

3. ILC Yrbk., 1976, v.II, pt.II, p.121 para 71.

4. GAOR, A/31/370, 1976, p.62 para 174 - p.63 para 178.

5. ILC Yrbk., 1981, v.II, pt.I, p.72 and p.75 respectively.

criminal offences in international law.

The environmental damage question was considered within the context of the Draft Code from the ILC's thirty-sixth (1984) to the thirty-eighth sessions (1986) and later at its forty-first (1989) and forty-third (1991) sessions.

In 1984, "acts causing serious damage to the environment" were considered candidate for inclusion in the Draft Code.[1] The general position of the ILC was favourable in principle[2], but the Sixth Committee[3] report reveals division of opinion in this regard.

In 1985, the ILC discussed the question of defining the concept of crime against peace and security of mankind. The Rapporteur tabled a definition (Draft Article 3 First Alternative)[4] which virtually reproduced Draft Article 19 of the ILC Draft Articles on State Responsibility including sub-paragraph 3d thereof. Accordingly the question of environmental change as a crime per se was not debated. But the membership was generally opposed to Draft Article 19 being reproduced verbatim as a definition of the concept of crime against peace and security of mankind.[5] The position in the Sixth Committee's report for this session was much the same as that in the ILC[6].

In 1986, the Rapporteur included damage to the environment within the general definition of crimes against

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1. ILC Yrbk., 1984, v.II, pt.II, p.16 para 58.

2. ILC Yrbk., 1984, v.I: Calero Rodrigues, p.32 para 31; Ogiso, p.35 para 49; Jagota, p.41 para 10. See also Sir Ian Sinclair, p.30 para 15 expressing caution on the inclusion of "environmental crime".

3. UN Doc.A/CN.4/L.382, 1985, p.22 paras 54-55.

4. See ILC Yrbk., 1985, v.II, pt.I., p.81.

5. Generally see ILC Yrbk., 1985, v.I, Meetings: 1879-1889 inclusive.

6. See UN Doc. A/CN.4/L.398, 1986, pp.29-31.

humanity.[1] The response, again, was divided as to whether this topic ought to be included in an international code of crimes.[2] The state of affairs persisted in the Sixth Committee's consideration of the ILC's Report for the 1986 [3] and the 1989 session where the relevant draft article on crimes against humanity was resubmitted[4], incorporating a sub-clause on "any serious and international harm to a vital asset, such as the human environment".[5]

Amidst the division of opinion in the ILC and Sixth Committee on the status of environmental damage as a criminal offence there was consensus on one factor, namely that only "serious" and "internationally" committed harm to the environment could ever be admitted as candidate crime in the Draft Code.

At its forty-third session the ILC's Drafting Committee adopted a draft article 26 entitled "Wilful and Severe Damage to the Environment" which reads:

> "An individual who wilfully causes or orders another individual to cause widespread, long-term and severe damage to the natural environment shall, on conviction thereof, be sentenced [to

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1. Draft Article 12(4), ILC Yrbk., 1986, v.II, pt.I, p.86 and at pp.61-62 paras 66-76.

2. In favour see (ILC Yrbk., 1986, v.I) Francis, p.101 para 8; Sucharitkul, p.102 para 13; Calero Rodrigues, p.103 para 24; Balanda, p.108 para 38; and Mahiou, p.128 para 11; Jagota, p.125 para 79; Razafindralambo, p.129 para 29, Rasheed Mohammed Ahmed, p.132 para 52 and Diaz Gonzalez, p.133 para 66 all expressed fervent support without adressing the juridical difficulties involved such as the wording of the provision. Contra, see Sir Ian Sinclair, p.105 para 17 and McCaffrey, p.119 para 10.

3. UN Doc.A/CN.4/L.410, 1987, p.103.

4. See Seventh Report on the Draft Code, UN Doc.A/CN.4/419, 1989, p.11.

5. See ILC Report, GAOR, Supp.No.10 (A/44/10) pp.168-170 and Sixth Committee Report UN Doc.A/CN.4/L/443, 1990 p.36.

....]".[1]

A Draft International Criminal Code prepared by Professor Bassiouni[2] incorporates the "international offence of environmental depradation". It is one of the few texts, which though de lege feranda, attempts a comprehensive definition:

> "The significant pollution by a state, in breach of an international obligation, of the air, sea and rivers in a manner which impacts on other states, or causes damage or harm to another state, or which significantly affects the viability and purity of these elements, or which destroys in whole or in part, or significantly harms the fauna and flora of the sea and international navigable rivers; and the willful destruction of the endangered species, or allowing their willful destruction, constitutes the offence of environmental depredation."

Another recommendation for criminalising conduct harmful to the environment was made by a group of experts in Recommendations and Legal Principles adopted on Environmental Protection and Sustainable Development[3]. They called for "effective criminal liability to be established and applied by states for actions of their nationals which have a detrimental effect upon the environment, in particular on ecosystems and species of international significance, and including those actions in areas beyond the limits of national jurisdiction". The Group also adopted a draft text of a convention on the same topic but did not include a provision on criminal responsibility. They only provided for the traditional concept of State responsibility (Draft Article 21).

The literature on the status of acts harmful to the environment as crimes in international law is scant. Some[4]

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1. See UN Doc. A/CN.4/L.459/Add.1, 1991, p.8.

2. International Criminal Code, 1987, p.170.

3. Experts Group on Environmental Law of the World Commission on Environment and Development, 1986.

4. See Nanda, 52 RIDP p.432.

have simply put the question: should there not be an effort toward a progressive codification of international crimes pertaining to environmental pollution? Others[1] have undertaken a methodological analysis of the status of such acts in international law. They question, in the light of relevant sources including treaties, international resolutions and general principles of law, whether relevant rules of international law applicable to crimes such as violations of the laws of war, torture, and unlawful seizure of aircraft, are also operative vis-a-vis practices harmful to the environment. One writer[2] in particular argued for the prosecution of members of corporations, as the true and most effective sanction against offenders who damage the environment. The argument suggests that the corporate veil should be lifted to permit the prosecution of company executives responsible for changing the environment. Support for this theory was found in post Second World War trials where officers were charged, inter alia, for war crimes and where the defence of "superior orders" was rejected.

A number of international instruments relevant to the protection of the environment[3] contain provisions obliging Contracting Parties to enact or make provision for the punishment of violations of specific operative treaty obligations. Such provisions are also found in conventions

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1. McCaffrey writing in Bassiouni, International Criminal Law Volume 1 Crimes, p.541.

2. Iseman, 37 Albany LR (1972) 61 at pp.63 and 74.

3. See, inter alia, International Convention for the Regulation of Whaling, Washington, 2nd December, 1946, 161 UNTS 72; Convention for the Prevention of the Marine Pollution by Dumping from Ships and Aircraft, Oslo, 15th August, 1972, 119 UKTS (1975); Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, 1972; and Convention for the Prevention of Marine Pollution from Land-Based Sources, Paris, 4th June, 1975, 64 UKTS (1978). But see the chronological analysis of McCaffrey, op.cit., pp.547-549.

such as those on genocide, apartheid, unlawful seizure of aircraft and unlawful acts committed against the safety of civil aviation. But, unlike these conventions, the instruments concerning environmental protection do not include provisions which have come to identify the criminal proscription of practices in international conventional law such as the exercise of jurisdiction on the basis of universality or the obligation to prosecute where extradition does not take place: aut dedere aut punire.

C. Economic Aggression

The concept of economic aggression, like its parent source aggression, is capable of more than one definition particularly in political terms. It is a volatile concept and thus escapes definition in juridical terms. For this reason alone, therefore, the status of economic aggression as a criminal offence in international law is very dubious.

The concept of economic aggression invites questions which challenge directly its very raison d'etre. For instance, the question which often presented itself in the UN's efforts to define the broader concept of aggression, is whether economic aggression is a separate concept per se. Is it a direct or an indirect form of aggression? Should it be defined to include the use of armed force? At which point does the use of economic measures imposed by one State to the detriment of another constitute economic aggression? Must the measures be such as to induce a military response from the victim State or would any set of unfavourable economic conditions constitute economic aggression? If the economic measures are such that threaten the political independence of a State, is there a right to exercise force in self-defence?[1]

These questions have been amply addressed in other

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[1]. On this point see Bowett, Self-Defence in International Law, 1958, p.106.

writings[1] and they are essentially beyond the scope of the present study. It is important, however, to reiterate the following recorded data.

The term "economic aggression" appears in diplomatic instruments as early as 1916. It is reported[2] to have been employed in the drafting of a resolution by the British delegation at the Paris Peace Conference calling for Allied action to be taken after the First World War against German "economic aggression".[3]

At the United Nations San Francisco Conference in 1945 a Brazilian proposal to oblige UN Member States to refrain in their international relations from the threat or use of economic measures, was voted down.[4]

A number of governments have produced working papers or draft resolutions containing provisions defining the concept of economic aggression. These were submitted during the initial phase of United Nations efforts to define the broader concept of aggression.

In 1952 Bolivia[5] drafted a resolution which included as acts of aggression: the threat or use of force by a State to deprive another of economic resources. The Bolivian proposal met with criticism in the 1953 UN Special Committee studying the question of defining aggression[6]. The United Kingdom and Brazil, members of that Committee,

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1. See, Roling, 2 NILR (1955), 170; Farer, writing in Cassese, The Current Legal Regulation of the Use of Force, 1986, p.121; and Rifaat, op.cit., pp.124 - 127.

2. See Bowett, op. cit., p.106.

3. House of Commons Debates, August 2nd, 1916, Vol 85 col. 341.

4. Cf. Article 2(4) UN Charter. See Bowett, op. cit., p. 106 and Higgins, The Development of International Law through the Political Organs of the United Nations, 1963, p.177 n.40.

5. GAOR, UN Doc.A/C6./L.211, 1952, Paragraph 3. Text also reproduced in Ferencz, Aggression, v.II, p.92

6. See UN Doc. A/2638, 1953, pp.8-10.

submitted that to extend the concept of aggression beyond the traditional view of armed attack was tantamount to amending the Charter.[1] The United States[2] representative pointed out that if the concept were to be included in a definition of aggression it would increase rather than decrease the circumstances in which States would purport to resort to use force in self-defence. However, other member States on the Committee such as the USSR,[3] Iran[4] and Dominican Republic[5], were, in principle, in favour of including the concept of economic aggression. In support of its proposal Bolivia[6] outlined three fundamental principles which are violated by an act of economic aggression: (i) the political independence of States, (ii) the concept of equality among States and (iii) the principle of non-interference in the domestic affairs of States.

Another draft resolution defining aggression was submitted by the USSR[7]. This draft resolution included a definition of economic aggression which was worded in terms broad enough to include use of force.[8] But Mexico[9]

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1. Ibid., p.9 para 75.

2. Ibid., p.10 para 79.

3. Ibid., p.9 para 74.

4. Ibid., para 73.

5. Ibid., para 72.

6. Ibid., p.8 para 70.

7. UN Doc. A/AC.66/L.2/Rev.1. in Annex to the Report of the 1953 Special Committee on the Question of Defining of Aggression, UN Doc. A/2638, 1953, p.13.

8. Operative paragraph 3 reads:
> "That State shall be declared to have committed an act of economic aggression which first commits one of the following acts:
>
> (a) Takes against another State measures of economic pressure violating its sovereignty

submitted a Working Paper amending the USSR proposal by stipulating that there is economic aggression only if it is accompanied by or involves use of force. Other States such as Argentina[1] put forward another view, namely that the concept of aggression should not be limited to armed aggression but should include other forms such as economic aggression which do not necessarily involve use of force.

From 1952 to 1972 various UN Special Committees working on the definiion of aggression and the Sixth Committee reporting on the work of these Special Committees all record a constant pattern, i.e. a division of opinion among member government delegates as whether to exclude or include and, therefore, define the concept of economic aggression (with or without reference to use of force).[2]

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and economic independence and threatening the bases of its economic life;

(b) Takes against another State measures preventing it from exploiting or nationalising its own natural riches;

(c) Subjects another State to an economic blockade".

Operative paragraph 6 prevents justification of economic aggression on the basis of political, strategic or economic circumstances.

9. See UN Doc. A/AC.66/L8, reproduced in Annex to UN Doc. A/2638, 1953, p.14. But see also comments of the Mexican delegate on draft definition of aggression submitted to the Special Committee on the Question of Defining Aggression in 1956, UN Doc. A/3574, Annex II, p.32 para 6:

> "the definition of aggression should be confined to the idea of the use of force, and thus leave out of consideration the so-called indirect, ideological or economic forms of aggression".

1. See GAOR, UN Doc. A/2689, 1954, p.2.

2. See Sixth Committee Reports: GAOR, UN Doc. A/2322, 1952, p.88, paras 28 and 32; UN Doc. A/2806, 1954, p.11 paras 20-23; Report of the Special Committee

Articles 15 and 16 of the Charter of the OAS[1], jointly, provide that (Member) States shall not intervene in the external and internal affairs of other (Member) States and this prohibition is not limited to the use of armed force, but to any other form of interference "against the personality of the State or against its political, economic[2] and cultural elements". States may not use "measures of an economic character in order to force the sovereign will of another (Member) State and obtain from it advantages of any kind".

Operative paragraph 4 of the United Nations Declaration on the Granting of Independence to Colonial Countries and Peoples[3] decrees that:

> "all armed action or repressive measures of all kinds[4] directed against dependent peoples shall cease in order to enable them to exercise peacefully and freely their right to complete independence, and the integrity of their national territory shall be respected".

These international instruments are often cited in support of the case for outlawing aggression, in particular, economic aggression. But there is no evidence

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A/3574, 1956, p.8 para 63; Report of the Special Committee A/7185/Rev.1., 1968, p.23 paras 51 and 52; Sixth Committee Report, A/7402, 1968; Report of the Special Committee, A/7620, 1969, p.16 para. 27; Sixth Committee Report, A/7853, 1969, p.4 para 13; Report of the Special Committee, A/8019, 1970, pp.8-10 paras 26-30; Sixth Committee Report, A/8171, 1970, p.4 para 21; Report of the Special Committee, A/8419, 1971, pp.8-10 paras 26-30; Sixth Committee Report, A/8525, 1971, p.5 para 26; and Sixth Committee Report, A/8929, 1972, p.5 para 23.

1. 119 UNTS (1951-1952) 3

2. Emphasis added.

3. Adopted by GA Res. 1514 (XV), 14 December, 1960. Brownlie, Basic Documents on Human Rights, p.28, writes that this Declaration "is in the form of an authoritative interpretation of the (UN) Charter rather than a recommendation".

4. Emphasis added.

in these sources, including the debates in United Nations bodies, which even remotely suggests that economic aggression constitutes a criminal offence.

There is hardly any literature on the question of economic aggression as a criminal offence under international law and its source value is, therefore, minimal. Publicists who have addressed the concept of "international economic crime"[1] admit: (i) that currently this is a matter for national law; (ii) that international law does not prevent States from proscribing certain economic practices occurring abroad as criminal offences, but restricts individual States from enforcing such crimes; and (iii) the law of international responsibility, though it may have a part to play in controlling certain types of harmful international economic activity, is currently in content and in application, undeveloped and imprecise.

The ILC is the principal body which has made considerable inroads in the "criminalisation" of economic aggression in international law. The concept was proposed for inclusion as a crime against peace in the Draft Code on the basis that "there are economic measures which, in unequal relationships, take the form of aggression".[2] Generally, the membership of the ILC has been for the

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1. This is a term with its own problems of definition. It may or may not be synonymous with the concept of economic aggression. It is used by Marston cited in Malekian, International Criminal Responsibility of States, 1985, p.147.

2. See Second Report on the Draft Code, A/CN.4/377, ILC Yrbk., 1984, v.II pt. I. p.100 para 80. In the Sixth Committee (UN Doc. A/CN.4/L.382, 1985, p.24 para 62) some government representatives identified the following practices as forms of economic aggression: "undermining the principle of permanent sovereignity over natural resources, direct military intervention in defence of vital interests, and coercive measures against Governments which exercised prerogatives inherent in sovreignity such as nationalisation". These examples are worded in very general terms. They reflect the difficulties involved in defining economic aggression as a crime.

concept to be included under the proposed code.[1] But serious reservations are also recorded indicating that the concept of economic aggression is largely a political rather than a legal concept[2]. Sixth Committee considerations of the Draft Code broadly reflect the division in opinion recorded within the ILC. Some government representatives emphasised that aggression may come in the form of economic measures which threaten international peace and security and therefore should qualify as criminal offences. Others, while accepting the validity of this viewpoint, reiterated that the concept of economic aggression was too vague and nebulous to be considered for inclusion in an international code of crimes.[3]

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1. See ILC Yrbk., 1984, v.I: Ni, p.16 para 30; Diaz Gonzalez, p.21 paras 26-28; Ushakov, p.24 para 16; Lacleta Munoz, p.25 para 23; Njenga, p.44 para 34; and Yankov, p.51 para 37; and ibid., 1985, v.I: Jacovides, p.14 para 17; Mahiou, p.32 para 19; Balanda, p.34 para 37; Flitan, p.42 para 9; Razafindralambo, p.47 para 42; Diaz-Gonzalez, p.60 para 32; Huang, p.64 para 20; and Jagota, p.76 para 58.

2. See ILC Yrbk., 1984, v.I, Rapporteur Thiam, p.8 para 18 and Mr. Al-Qaysi, p.19 para 10, and, ibid., 1985, v.I: McCaffrey, p.55 para 52; and Yankov, p.58 para 19.

3. See UN Docs. A/CN.4/L.382, 1985, p.24. paras 63-67; A/CN.4/L.398, 1986, p.25 paras 102 - 105 and A/CN.4/L.410, 1987, p.105 para 533.

PART IV

CHAPTER 9

Individual Criminal Responsibility

The principle of individual responsibility for crimes committed under international law has been amply addressed in Part III supra. Accordingly, consideration will only be given in this chapter to source material which has not been discussed under any of the headings in the preceeding chapters. The relevant source material consists prinicipally of the work of the ILC and the contributions of publicists whose writings did not focus on the study of crimes examined in Part III.

1. The Work of the International Law Commission

(a) The Nuremberg Principles

The Nuremberg Principles, adopted in 1950 and drafted in the wake of the Nuremberg and Tokyo Charters, reflect the well accepted principle namely, that the individual is personally responsibile for crimes committed under international law. It is not surprising, therefore, that Nuremberg Principle I enunciates the principle in explicit terms:

> "Any person who commits an act which constitutes a crime under international law is responsible therefor and liable to punishment"[1]

The ILC and the Sixth Committee[2] debates on Principle

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1. ILC Yrbk., 1950, v.II, p.374 paras 98-99.

2. See ILC Yrbk., 1951, v.II, p.49 paras 53-59. Yugoslavia (ibid., para 55) did suggest, however, that the principle of individual criminal responsibility ought to be applicable only vis-a-vis the crimes defined at Nuremberg and not in respect of crimes in international law generally.

> domestic laws. It was not a matter of repeating the terms of the (Nuremberg) Charter, which was limited by the facts which the Tribunal had to judge, but of trying to extract therefrom general principles of international law."[1]

Unfortunately, majority views in the Sixth Committee[2] objected to the fact that Nuremberg Principle II attempted to alter the traditional status of the individual in international law (i.e. as a non-subject) and to assert the supremacy of international law over national law. In particular, the United Kingdom suggested that punishment of individuals for crimes defined under international law could be secured, by permitting States to exercise jurisdiction over them, without altering "the classical concept that international law solely governs relations between States."[3] This viewpoint was endorsed by other Sixth Committee members all of whom (in 1950), though desirous to see individuals tried for crimes defined under international law, refrained from subscribing to a written affirmation of the concept of individual criminal responsibility in an international code of crimes.

Nuremberg Principle III echoes the recommendations of the 1919 Commission on the Authors of War, Article 7 of the Nuremberg Charter (and the parallel provisions in the Tokyo Charter (Article 6) and (II.4.a) of CCL No.10) and Article IV of the Genocide Convention. It provides:

> "The fact that a person who committed an act which constitutes a crime under international law acted as Head of State or responsible Government official does not relieve him from responsibility under international law."[4]

Once again the debate centred around questions of drafting. The ILC had no difficulty in accepting the

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1. ILC Yrbk., 1950, v.I, p.38 para 16.

2. See ILC Yrbk., 1951, v.II, pp.49-51.

3. See Fitzmaurice, ibid., p.49 paras 63 & 64.

4. ILC Yrbk., 1950, v.II, p.375.

substance of this provision.[1] But there were two significant points which emerged in the debate. The first concerned the question of mitigation of punishment and the second concerned the proper designation of persons acting on behalf of the State. Both are discussed in turn.

The Nuremberg Charter held that the official position of the major war criminals would not be considered as a factor for mitigating punishment. This was followed by the drafters of the Tokyo Charter and CCL No.10, but not by those of the Genocide Convention. In the formulation of Nuremberg Principle III the ILC followed the Genocide Convention and omitted reference to mitigation of punishment.[2] The Commission felt that it was up to tribunals to decide whether the office/position held by a defendent could serve, per se, as a mitigating factor in the determination of punishment.[3]

With respect to the second point i.e., the designation of persons acting on behalf of the State, the ILC Rapporteur adopted the term "public official". But the Nuremberg Charter (Article 7) refers to "responsible officials in Government Departments", which is also the position in Article II 4(a) of CCL No.10 (Article 6 of the Tokyo Charter refers only to "official position"), whereas the drafters of the Genocide Convention selected "constitutionally responsible rulers" and "public officials". The ILC considered the term "public official" to be too broad in scope. It opted for the phrase "responsible Government official" which subscribed to the practice laid down at Nuremberg and under the Genocide Convention. The scope is to affirm that immunity of Heads of States and of Government from criminal prosecution in

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1. Ibid., v.I, p.39 para 70 - p.42 para 123.

2. See, however, Nuremberg Principle III in draft form. ILC Yrbk., 1950, v.II, p.192.

3. Ibid., v.II, p.375 para 104. See debate, ibid., v.I, p.39 para 73 - p.40 para 92.

international law is not without exception, and that the view which believes that there is no personal accountability for crimes under international law committed by government officials because they constitute "Acts of State" is unacceptable.

> "A Head of State or high official who, under customary international law, could invoke the responsibility of the State as a defence, could not do so in the case of a crime under international law".[1]

This is the meaning of Nuremberg Principle III. The ILC intended to assert the international criminal responsibility of high ranking officials and separate it from that of lower ranking officials such as Group Captains and the private soldier.[2] The criminal responsibility of lower ranks is covered, generally, by Nuremberg Principle I which applies to all individuals and, particularly, by Nuremberg Principle IV (discussed below in section 2) which removes the acceptance of "superior orders" as a defence for crimes under international law.

Terms such as "responsible government official", "Heads of State" and "constitutionally responsible ruler" used at Nuremberg and in instruments adopted in the post 1945 era[3] reflect the dictates imposed upon drafters by the exigencies of the times in which the crimes were committed. The international community, suffering from the horrific experience of the Second World War and shocked by the atrocious violations of international law that leaders of nations and of governments were capable of planning and implementing, was largely concerned with ensuring that such

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1. Spiropoulos, ILC Yrbk., 1950, v.I, p.41 para 117 and at para 112.

2. See ILC members Hudson and Cordova, ibid., p.40 paras 93 and 95.

3. See, however, the "grave breaches" provisions of the 1949 Geneva Conventions which speak of "persons committing or ordering to be committed, any of the grave breaches". Emphasis added.

persons would not escape punishment.

Current practice continues to be dictated by contemporary circumstances. For instance, acts of international terrorism are frequently committed by persons acting in a non-public capacity. Accordingly, the trend in treaties proscribing some aspect or other of international terrorism such as hostage-taking or unlawful acts committed against the safety of civil aviation, or in airports serving international civil aviation, or against the safety of maritime navigation, is to adopt a broad and all embracing phrase such as: "any person"[1] or "alleged offender". However, in certain instruments where human rights violations are designated criminal offences, such as the UN and OAS Conventions on Torture, and the casus foederis of the treaty is conditioned ratione personae, we find reference to "public official" or "person acting in an official capacity" or "public servant".

(b) The Draft Code of Offences: 1950-1954

The priniciple of individual criminal responsibility was enunciated as Basis of Discussion No. 2 by Rapporteur Spiropoulos in the first of the three reports submitted to the ILC on the Draft Code of Offences. It read as follows:

> "1. Any person, whether acting in an official capacity or as a private individual, who commits any of the acts mentioned in Basis of discussion No.1 (this contained a list of criminal offences) shall be responsible therefor under international law and liable to punishment.
>
> 2. Any person in an official position, whether civil or military, who fails to take the appropriate measures in his power and within his jurisdiction, in order to prevent or repress acts punishable under this code shall be responsible therefor under international law and liable to punishment."[2]

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[1]. This phrase generated problems of its own for the ILC when formulating the principle of individual criminal responsibility. See below pp.8-9.

[2]. ILC Yrbk., 1950, v.II, p.278. See also ibid., p.260

This clause was accepted in principle[1] but it was held that:

> "the rule establishing responsibility for crimes under international law ought to be drafted in a general way, without distinction as to the position occupied by the individual or the capacity in which he acted."[2]

ILC members Professor Brierly[3] and Mr Sandstrom[4] emphasised that Heads of State and of Government should be specifically referred to in the draft provision on criminal responsibility because "it was the Commission's intention not to recognise their traditional immunity in the code. The immunity of heads of States had been a long established principle but it should no longer remain inviolate."[5]

The principle as stated in Basis of Discussion No 2 was adopted as part and parcel of Draft Article 1 by the Rapporteur in his Second Report.[6] But it was suggested that the principle of individual responsibility should be enunciated in a separate provision as Draft Article 2.[7] In addition, the recommendation previously adopted by the ILC i.e., to include specific reference to Heads of State and Government in the relevant provision, had not been adhered to by the Rapporteur. It was submitted that the general wording of Draft Article 1 covered all persons including

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para 46, and Pella's Memorandum to the ILC (Yrbk., 1950, v.II, p.315 para 68).

1. The issue did arise, however, whether the Draft Code of Offences ought to make provision for the concept of State criminal responsibility. See ILC Yrbk., 1950, v.I, p.105 para 77 - p.106 para 96. See also ILC Report, ibid., v.II, p.380 para 151.

2. Ibid., v.II, p.268 para 86.

3. Ibid., 1950, v.I, p.155, para 102.

4. Ibid., para 105.

5. Brierly, op.cit., supra.

6. UN Doc. A/CN.4/44, 1951. See ILC Yrbk., 1951, v.II, p.43.

7. ILC Yrbk., 1951, v.I, p.57 para 26-31.

Heads of State and Government. However, some members continued to insist on the recommendation.[1]

The position remained largely unchanged in the third and final report[2]. Sixth Committee views were not radical[3] and Draft Article 1 was finally adopted by the ILC as follows:

> "Offences against the peace and security of mankind, as defined in this Code, are crimes under international law, for which the responsible individuals shall be punished."[4]

A provision on non-immunity of Heads of State and responsible government officials was also adopted by the ILC as Draft Article 3:

> "The fact that a person acted as Head of State or as responsible government official does not relieve him of responsibility for committing any of the offences defined in this Code".[5]

Draft Article 1 as adopted by the ILC in 1954 is essentially a weak attempt at stating the principle of individual criminal responsibility. The wording adopted in Nuremberg Principle I is by far a more lucid and authoritative statement. At the expense of being succinct, the 1954 ILC Draft Code of Offences presumes rather than affirms the principle of individual criminal responsibility. It does represent, however,:

> "that for the first time a body of jurists (have) stated that individuals could be held criminally liable for international crimes committed by them

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1. Ibid., 1951, v.I, p.82 paras 7 - 24.

2. See UN Doc. A/CN4/85, 1954. However, Professors Scelle and Cordova (ILC Yrbk., 1954, v.I, p.125 paras 17 and 19 respectively) attempted, unsuccessfully, to insert a phrase in article 1 to the effect that responsible individuals shall be punished by an international criminal court.

3. See UN Doc. A/CN.4/85, p.12.

4. See ILC Yrbk., 1954, v.II, p.151.

5. ILC Yrbk., 1954, v.II, p.152.

in the performance of their functions."[1]

(c) The Draft Code: 1985 - 1991

At its thirty-sixth session (1984) the ILC decided to limit the applicability of the principle of criminal responsibility under the Draft Code to individuals.[2] At its following session the ILC considered a draft article which consisted of two alternatives differing ratione personae. ILC members were asked to elect between "individuals" (alternative 1) and "State authorities" (alternative 2) as subjects "who commit an offence against the peace and security of mankind are liable to punishment".[3] The first alternative found general acceptance because it is all-emcompassing,[4] although some members did suggest that specific reference to "State authorities" ought to be included alongside the generic term "individuals".[5] Sixth

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1. See Amado, ILC Yrbk., 1954, v.I, p.124 para 16.

2. See ILC Yrbk., 1984, v.II, pt.II, p.11 para 32 and p.17 para 65a. This policy was largely endorsed by the Sixth Committee (UN Doc. A/CN.4/L.382, 1985, p.15 paras 20-26) but reservation was made to the effect that the ILC should not abandon discussion of the concept of State criminal responsibility.

3. See Draft Article 2, ILC Yrbk., 1985, v.II pt.I p.81.

4. See comments by the following members, ILC Yrbk., 1985 v.I: Jacovides, p.13 para 10; Calero Rodrigues, p.15 para 25; Malek, p.18 para 42-46; Sir Ian Sinclair, pp.22-23 paras 8-12; Ushakov, p.26 paras 32-41; Riphagen, pp.35-37 paras 5-12; Sucharitkul, p.37 para 25-30; Flitan, p.41 para 1-10; Ogiso, p.43 para 18; Razafindralambo, p.45 para 31; Njenga, p.47 para 1; Barboza, p.49 para 17-19; McCaffrey, p.53 para 37; Yankov, p.56 para 3-7; Diaz Gonzalez, p.58 para 22; Arrangio-Ruiz, p.65 paras 28-31; Roukounas, p.68 paras 51-53; and Tomuschat, p.70 para 10. See also ibid., v.II, pt.II, p.13 paras 57-60.

5. ILC Yrbk., 1985, v.I: see Francis, p.40 para 36; Huang, p.65 para 22; Roukounas, p.68 para 53 and Lacleta-Munoz, p.73 para 22.

Committee[1] views endorsed the position within the ILC as did some of the States which submitted replies[2] on the project of the Draft Code.

At the ILC's thirty-eight session (1986) a fourth report on the Draft Code was submitted which contained two draft articles (3 and 8.1.a) directly relevant to the principle of individual criminal responsibility.

The first provision (draft article 3) provided:

> "Any person who commits an offence against the peace and security of mankind is responsible therefor and liable to punishment".[3]

This provision reopened the debate on whether, in addition to individual, State criminal responsibility ought to be provided for in the Draft Code. But the ILC[4] and the Sixth Committee[5] reiterated their position in favour of individual responsibility simpliciter.

The second provision considered by the ILC at its thirty-eight session is draft article 8.1.a :

> "Apart from self-defence in cases of aggression, no exception may in principle be invoked by a person who commits an offence against the peace and security of mankind. As a consequence:
> (a) The official position of the perpetrator, and particularly the fact that he is a Head of State or Government, does not relieve him of criminal

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1. See UN Doc. A/CN.4/L.398, 1986, pp.16-18 paras 39-51. There was one dissenting view (para 44) which emphasised that a code limited ratione personae to individuals would not be effective in practice.

2. See ILC Yrbk., 1985, v.II, pt.I, p.84

3. ILC Yrbk, 1986, v.II, pt.I, p.82.

4. See comments by ILC members in ILC Yrbk., 1986, v.I: Illueca, p.137 paras 25-30; Ushakov, p.145 para 20; Jagota, p.148 para 50; Calero Rodrigues, p.155 para 52; Sucharitkul, p.158 para 13 and Thiam, p.174 paras 8-12.

5 UN Doc. A/CN.4/L.410, 1987, paras 485-492 and 594-596.

responsibility."[1]

This exception to individual criminal responsibility is one of the legacies of the Nuremberg Charter. It was also included (though in different form), as we have seen, in Draft Article 3 of the 1954 Draft Code of Offences. The ILC membership endorsed the principle behind this provision[2]. But hardly any comment was made concerning its purpose namely, to enunciate the rule that: perpetrators of crimes against the peace and security of mankind (being crimes under international law) incur criminal responsibility regardless of whether or not they acted in a private capacity or on behalf of the State at the time of the commission of the offence.[3]

These two key provisions relevant to criminal responsibility re-appeared in the Rapporteur's fifth report[4] at the ILC's thirty-ninth session. Draft article 3 was re-drafted with minor but significant alterations. Draft Article 8.1.a reappeared in identical form but as Draft article 11.[5] It generated least discussion in the ILC and Sixth Committee debates and is thus discussed first.

Due to lack of time it was not considered by the ILC's Drafting Committee to which it was referred at the thirty-

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1. ILC Yrbk., 1986, v.II, pt.I, p.83.

2. See comments by the following members, ILC Yrbk., 1986, v.I: Illueca, p.140 para 39; Sir Ian Sinclair, p.142 para 62; Jagota, p.149 para 53; Ogiso, p.150 para 6; Balanda, p.151 para 19; McCaffrey, p.157 para 8-10; Sucharitkul, p.158 para 18; Barboza, p.164 para 73 and Thiam, p.177 para 37. The following members, however, suggested drafting amendments: ibid., see Tomuschat, p.154 paras 43 and 44, and Calero-Rodrigues, p.155 para 59. See also Sixth Committee views UN Doc. A/CN.4/L.410, 1987, p.118 paras 616 and 617.

3. See Rapporteur's Report ILC Yrbk., 1986, v.II, pt.I, p.79 paras 235-240.

4. UN Doc. A/CN.4/404, 1987, ILC Yrbk., 1987, v.II, pt.I, p.1.

5. See ILC Yrbk., 1987, v.II, pt.I, p.9.

ninth session.[1] It was to be considered at the next session. Notwithstanding this decision, Sixth Committee views[2] on ILC's work at its thirty-ninth session endorsed the Rapporteur's commentary that this provision is to be modelled along the lines of the parallel provision (Article 7) of the Nuremberg Charter. It was also suggested, and properly so, that reference to responsibility means responsibility "under international law" and these clarificatory words ought to be included at the end of the clause.

Draft article 11, unlike its counterparts: Nuremberg Principle III and Draft Article 3 of the 1954 Draft Code of Offences contains no reference ratione materiae. Perhaps such degree of qualification was considered unnecessary by the Rapporteur. Curiously, it solicited no serious comment from members during the ILC debate at its thirty-ninth session. A typical comment was: "Draft Article 11 is acceptable".[3]

Draft article 11 was provisionally adopted with some amendments by the ILC at its fortieth (1988) session.[4] The term "perpetrator" has been substituted by "individual". This amendment has occured across the whole range of draft articles adopted by the ILC and its relevance to the concept of individual responsibility is discussed presently in connection with draft article 3. As

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1. See ILC Yrbk., 1987, v.I, p.63 para 31 and p.226 para 5. See also, ibid., v.II, pt.II, p.12 para 58-61.

2. See UN Doc. A/CN.4/L.420, 1988, p.31 para 95-96.

3. One member, Calero Rodrigues, ILC Yrbk., 1987, v.I, p.15 para 5, did suggest that the content of draft article 11 was better placed within the Code as part and parcel of draft article 3. But, in particular, see views of (ibid.) Barsegov, p.14 para 52; Rao, p.17 para 32; Hayes p.24 para 39; Njenga, p.26 para 51; Solari Tudela, p.26 para 60; Yankov, p.29 para 7; Eiriksson, p.34 para 58; Shi, p.33 para 45; Prince Ajibola, p.37 para 13; and Gutierrez, p.38 para 23.

4. See ILC Yrbk., 1988, v.I, p.289.

adopted draft article 11 reads:

> "The official position of an individual who commits a crime against the peace and security of mankind, and particularly the fact that he acts as[1] head of State or Government, does not relieve him of criminal responsibility."[2]

The reference ratione materiae, i.e. to crimes against the peace and security of mankind, has been included whereas the suggestion to add "under international law" qualifying criminal responsibility at the end of the clause was not; and this despite reports that article 11 "contains elements for several of the formulations" found in parallel clauses in 1945 instruments such as the Nuremberg Charter and the Nuremberg Principles.[3] Finally, the words "he acts as" Head of State or Government have been inserted in place of "he is" a Head of State or Government. The proposal is meant to ensure that responsibility is incurred even in circumstances such as when control is exercised over territory occupied or annexed unlawfully and crimes defined in the code are committed in the course of the occupation.[4]

Draft article 3, the other provision relevant to individual criminal responsibility, was submitted to three phases of discussion. The first phase concerned its discussion by the ILC in plenary session were it was endorsed by the majority of the members.[5] A small minority

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1. Emphasis added.

2. See ILC Yrbk., 1988, v.II, pt.II, p.71. This provision has remained unchanged up to the ILC's forty-third session (1991). See UN Doc. A/CN.4/L.459, p.6.

3. ILC Yrbk., 1988, v.II, pt.II, p.71.

4. Ibid., p.71 para 4.

5. See ILC Yrbk., 1987, v.I: Tomuschat, p.8 para 7; Reuter, p.10 para 20-21 and at p.41 para 45-47; Mahiou, p.11 para 27; Bennouna, p.11 para 34; Barsegov, p.12 para 43; Francis, p.17 paras 34-35; Koroma, p.19 para 45; Graefrath, p.20 para 4; Jacovides, p.21 paras 15-16; Njenga, p.24 para 43;

proposed substituting the term "individual" by "natural person", deleting draft article 3 and replacing it by a provision stating that the code applies to crimes committed by natural persons.[1] These suggestions clearly reveal efforts to identify explicitly that the individual is the primary subject of international criminal responsibility. But, despite the endorsement of this position by the ILC membership in toto, a substantial number of members insisted that the Commission ought to make provision, clearly indicating: (a) that a State may nonetheless incur international responsibility where crimes committed against the peace and security of mankind are attributable to it; and (b) that the concept of individual criminal responsibility operative within the Draft Code is without prejudice to the concept of State criminal responsibility. The need to reiterate these points of clarification resulted from the unfortunate confusion by some members of issues concerning international responsibility.

A State will incur international responsibility should it fail to honour one of the obligations contracted under the proposed code, such as if it fails either to extradite or to prosecute the alleged perpetrator of a crime defined under the Draft Code. Individuals who commit crimes defined under the code, regardless of whether they act on behalf of the State or in a private capacity at the time of

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Solari Tudela, p.26 para 55; Yankov, p.27 para 66; Arrangio-Ruiz, p.29 paras 11 & 18; Illueca, p.31 paras 21-24; Shi, p.32 paras 30 & 34; Prince Ajibola, p.36 paras 4-5; Ogiso, p.38 para 27; Boutros-Ghali, p.42 para 3; McCaffrey, p.43 para 20; Razafindrolambo, p.45 para 5; Pawlak, p.55 para 32; Diaz Gonzalez, p.56 para 43 and Beesley, p.57 para 59.

1. See ILC Yrbk., 1987, v.I: Hayes, p.23 para 31; Eiriksson, p.34 para 49; and Sepulveda Gutierrez, p.37 para 17 who went as far as to say that the term "individual" lacked clarity because, in his view, a crime against the peace and security of mankind can only be committed by a person acting on behalf of the State.

the offence, will always incur criminal responsibility. However, the question remains whether States too may become criminally liable along with the individual perpetrators when the crimes were committed by persons acting on their behalf. Thus the issue formulated for determination is: does international law admit State criminal responsibility in addition to the traditional responsibility of States? If so, what form does this concept of State criminal responsibility take, and how does it differ from that which is traditionally recognised? The concept of State criminal responsibility is addressed in Chapter 10.

In order to appeal to demands made by ILC members, Rapporteur Thiam conceeded that a paragraph could be added to draft article 3 stating, explicitly, that other than the criminal responsibility of individuals under the Draft Code a State may incur international responsibility for crimes against the peace and security of mankind committed by individuals acting on its behalf.[1] This suggestion was adopted by the ILC's Drafting Committee, which marks the second phase of the formulation of draft article 3 [2]; and now provisionally adopted reads as follows:

> "1. Any individual who commits a crime against the peace and security of mankind is responsible for such crime **irrespective of any motives invoked by the accused that are not covered by the definition of the offence**[3] and is liable to punishment therefor.
>
> 2. Prosecution of an individual for a crime against the peace and security of mankind does not relieve a State of any responsibility under international law for

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1. See ILC Yrbk., 1987, v.I, p.60 para 12.

2. Ibid., pp.233-235.

3. The wording in italics is intended to remove any possible grounds of exculpability based on motive. The Drafting Committee was inspired by a similar provision in the Apartheid Convention. Ibid., p.233 para 12 and v.II, pt.II, p.14.

an act or omission attributable to it."[1]

The Sixth Committee's views mark the third phase of the consideration of draft article 3. It was strongly recommended that the language concerning "motive" in paragraph 1 is to be deleted because (a) it is not important enough to warrant its inclusion in the code and (b) it may be in breach of the principle "nullum crimen sine lege".[2]

2. The Defence of Superior Orders

(a) The Nuremberg Principles

"
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."[3]

This is the relevant provision initially considered by the ILC in its formulation of the Nuremberg Principles. It is an almost verbatim reproduction of Article 8 of the Nuremberg Charter. Though there was consensus[4] on the principle as drafted above, the question whether or not "superior orders" ought to be considered as a mitigating factor in the determination of punishment remained a thorny issue.[5]

A compromise was achieved by deleting the last sentence and inserting the phrase: "provided a moral choice was in fact possible to him."[6] Nuremberg Principle IV was

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1. ILC Yrbk., 1987, v.I, p.225.

2. See UN Doc. A/CN.4/L/420, 1988, p.19 paras 43-44.

3. ILC Yrbk., 1950, v.II, p.193.

4. ILC member Yepes, ILC Yrbk., 1950, v.I, p.43 para 125 and at p.45 para 3 expressed dissenting views on the inclusion of Principle IV.

5. See summary records of the debate, ILC Yrbk., 1950, v.I, Meeting 46 p.43 - Meeting 47 p.47.

6. See ILC Yrbk., 1950, v.II, p.375 para 104.

adopted as amended. The amendment was suggested by Professor Brierly[1] on the basis of the Nuremberg Judgment. Thus the ILC considered the question of "superior orders" as dealt with in the Nuremberg Judgment to reflect the customary law position.

Nuremberg Principle IV found general acceptance in the Sixth Committee[2], but the question of exculpability where "no moral choice" is possible, attracted some debate. Some representatives suggested its deletion because it would place a heavy burden on the soldier in circumstances where the consequences of refusing to execute orders would result in some form of punishment which would not remove all moral choice. Others would have had it deleted because it might increase the number of acquittals.

(b) The Draft Code of Offences: 1950-1954

Originally the provision on "superior orders" was formulated in the same manner as the draft version of Nuremberg Principle IV.[3] But when the Commission adopted this provision it reverted to the wording of Nuremberg Principle IV as adopted and, as Draft Article 4, came to read as follows:

> "The fact that a person charged with an offence defined in this Code acted pursuant to order of his government or of a superior does not relieve him from responsibility, provided a moral choice was in fact possible to him".[4]

Comments submitted in 1951 by States on the ILC's text of the Draft Code of Offences found objection with the phrase "provided a moral choice was in fact possible to

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1. Ibid., v.I, p.43 para 128.

2. See ILC Yrbk., 1951, v.II, p.52 para 88 - p.53 para 98.

3. See Basis of Discussion No.2 ILC Yrbk., 1950, v.II, p.278 and Rapporteur's commentary at pp.270-272. See also Draft Article II, ILC Yrbk., 1951, v.II, p.61.

4. ILC Yrbk., 1951, v.II, p.137.

him". Egypt proposed that this phrase should be substituted by:

> "provided that, in the existing circumstances, the possibility of acting contrary to such an order was open to him".[1]

This recommendation was eventually adopted by the ILC subject to some minor drafting changes:

> "The fact that a person charged with an offence defined in this Code acted pursuant to an order of a Government or of a superior does not relieve him of responsibility in international law if, in the circumstances at the time, it was possible for him not to comply with that order."[2]

The Egyptian amendment provides two key factors which further underline the concept of the individual's criminal responsibility for committing crimes under international law. The first is the introduction of the words "international law" following "responsibility". This reiterates the principle of international criminal responsibility for the individual. The second, is found in the proviso which, unlike earlier drafts including Nuremberg Principle IV, endorses the nature of "superior orders" as a non-absolute defence allowing for mitigating circumstances, and at the same time, avoids the extra-legal concept of "moral choice".

(c) The Draft Code: 1986-1991

Draft article 8.1.c. studied by the ILC at its thirty-eight session (1986) provided that:

> "Apart from self-defence in cases of aggression, no exception may in principle be invoked by a person who commits an offence against the peace and security of mankind. As a consequence:
>
> (c) The order of a Government or of a superior does not relieve the perpetrator of responsibility, unless he acted under the threat of a grave, imminent and irremediable

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1. See UN Doc. A/CN.4/85, 1954, p.28.

2. ILC Yrbk., 1954, v.II, p.152. Emphasis added.

peril;"[1]

This clause departs from the 1954 version of the Draft Code in three ways significant to the concept of individual criminal responsibility in international law:

(i) The key words "under international law" following "shall not relieve him from responsibility" which appear in Draft Article 4 of the 1954 version have been ommitted;

(ii) The "mitigating factor" clause has been deleted and replaced by a concept of "grave, imminent and irremediable peril"; and,

(iii) the question of the non-applicability of "superior orders" does not appear as a separate legal provision.

Draft article 8.1.c. attracted two general comments from the ILC membership[2]. The first is that, in principle, "superior orders" is not acceptable as a ground exonerating the individual offender from criminal responsibility. The second is that draft article 8.1 in toto, and in particular, sub-paragraph (c) need re-thinking and re-drafting. The concept of "grave, imminent and irremediable peril", was not welcomed by the majority of members. It seemed to lend itself too readily to subjective interpretation.[3]

The criteria of "grave, imminent and irremediable peril" were identified by the Rapporteur as measures by which coercion is determined and where there is coercion there is room for exculpability. Post 1945 war crimes decisions by military tribunals were cited in support of the general theory that coercion may be a defence in the execution of orders, having regard: (a) to the specific circumstances of each case i.e., due consideration be given

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1. See ILC Yrbk., 1986, v.II, pt.I, p.83.

2. ILC Yrbk., 1986, v.I, Meetings 1964-1967.

3. Draft article 8.1.c hardly received any comment in the Sixth Committee's review of the ILC's work at its thirty-eight session. See UN Doc. A/CN.4/L.410, 1987, p.119 para 621.

to the personality of the perpetrator, the nature of his duties, and the context in which the order was given; and (b) to the fact that the offender was deprived of the freedom to choose right from wrong.[1] However the Rapporteur indicated that the concept of crimes against humanity including the crimes of genocide and apartheid constitute exceptions to the rule concerning "superior orders" as laid down in draft article 8.1.c.[2] Thus, in so far as these crimes are concerned "superior orders" is to be denied as a ground of defence. Such an excpetion is harmful because it discriminates between practices which are all considered criminal offences under a single code of crimes. It also creates an unnecessary hierarchy among the crimes defined therein.

At the following session, draft article 8.1.c was totally redrafted and appeared as draft article 9 (d) which reads:

> "The following constitute exceptions to criminal responsibility:
>
> (d) the order of a Government or of a superior, provided a moral choice was in fact not possible to the perpetrator."[3]

The differences between the above clause and its predecessor are self-evident. First, by virtue of the new introductory words to the provision, "superior orders", far from being a non-absolute ground of defence with mitigating circunstances, is now a priori an exception to criminal responsibility. Second, the standards of "grave, imminent, and irremediable peril", happily, have been deleted. But, the position has reverted to the "moral choice" formula as originally suggested in 1951 by Brierly and adopted in Nuremberg Principle IV. Third, the wording of sub-

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1. See ILC Yrbk., 1986, v.II, pt.II, p.77 paras 218-226.

2. See ILC Yrbk., 1986, v.II, pt.II, p.77 para 217-234.

3. See ILC Yrbk., 1987, v.II, pt.I, p.7.

paragraph (d) is weak because it gives rise to questions of interpretation: what is intended by the term "in fact"? Unfortunately, the Rapporteur's commentary offers no assistance.[1]

The ILC discussion on draft article 9(d) reveals the following points:

(a) Draft article 9 constitutes a list of extenuating circumstances which might affect the punishment awarded by the tribunal. It is not a list of exceptions to responsibility. This is also true of paragraph d. Indeed, it was suggested that 9(d) should be reformulated on the basis of Article 8 of the Nuremberg Charter.[2]

(b) The concept of "moral choice" should be deleted. In particular, suggestion was made that 9(d) should be deleted altogether. However, should the ILC decide to retain it, reference to "moral choice" ought certainly be omitted.[3]

(c) The question of non-applicability of "superior orders" vis-a-vis crimes committed under international law dates from the First World War period. It forms part and parcel of the Nuremberg Principles. Its importance in the Draft Code is such that it warrants a separate provision.

Sixth Committee views endorsed the above points.[4]

Draft article 9 was sent to the ILC Drafting Committee[5], but due to lack of time it was not considered at the thirty-ninth [6], fortieth[7] (1988), forty-first (1989)[8] and

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1. See ILC Yrbk., 1987, v.II, pt.I, p.9 paras 19-22.

2. Ibid., v.I, see: Graefrath, p.21 para 9 and Njenga, p.25 paras 49-50.

3. ILC Yrbk., 1987, v.I, see: Barsegov, p.14 para 52; Rao, p.17 para 31; Koroma, p.19 para 48; Jacovides, p.23 para 9; Yankov, p.28 paras 4-5; Shi, p.33 para 44; Eiriksson, p.34 para 56; and Sepulveda Gutierrez, p.37 para 22.

4. See UN Doc. A/CN.4/L.420, 1988, p.31

5. See ILC Yrbk., 1987, v.I, p.63 para 31.

6. Ibid., p.226 para 5.

forty-second (1990)[1] ILC sessions. At the forty-third session (1991) the ILC Drafting Committee recommended the following provision, which reveals that ILC suggestions made at the thirty-ninth session were taken into consideration.

" Article 11
Order of a Government or Superior

The fact that an individual charged with a crime against the peace and security of mankind acted pursuant to an order of a Government or superior does not relieve him of criminal responsibilty, if, in the circumstances at the time, it was possible for him not to comply with the order."[2]

Draft article 10 (currently numbering 11) complements the provision on "superior orders" and provides:

" Responsibility of the superior

The fact that a crime [offence] against the peace and security of mankind was committed by a subordinate does not relieve his superiors of criminal responsibility, if they knew or had [possessed] information enabling them to conclude, in the circumstances at the time [then existing], that the subordinate was committing or was going to commit such a crime [offence] and if they did not take all [the practically] feasible measures within their power to prevent or repress [suppress] the crime.[3]

This provision does not have a corresponding clause in either the Nuremberg Principles or the 1954 Draft Code of

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7. See ILC Report to the GA. GAOR, Supp. No.10, (A/43/10) p.140 et seq.

8. See ILC Report to the GA. GAOR, Supp. No.10, (A/44/10) p.173 et seq.

1. See ILC Report to the GA. GAOR, Supp. No.10 (A/45/10) p.54 et seq.

2. See UN Doc. A/CN.4/L.459, p.5.

3. See UN Doc. A/CN.4/L.459, 1991, p.5. The words in parenthesis include the wording used when the article was first drafted. They have been deleted at the forty-third session by the Drafting Committee. See ILC Yrbk., 1986, v.II, pt.I, p.83. The present drafting is more accurate but does not alter the substantive meaning.

source" of draft article 11 is Article 86.2 of Additional Protocol I of 1977 to the 1949 Geneva Conventions. At the ILC's thirty-eight session (1986) draft article 11 attracted very little comment[1] and the position was very much the same in the Sixth Committee's review of the ILC's work for that session.[2] It generated slightly greater interest at the ILC's thirty-ninth session (1987)[3] and in the Sixth Committee's Report for that session.[4] The general feeling was that it could be easily replaced or accompanied by a provision on complicity in the code. Draft article 11 has been provisionally adopted (as already indicated) at the ILC's fortieth session (1988)[5], reconsidered at the forty-third session and draft provisions on complicity, conspiracy and attempt have been submitted at the ILC's forty-second session (1990)[6]. It remains to be seen whether both provisions will be adopted by the Commission,[7] but the fundamental legal principle in draft article 11 relevant to the concept of individual responsibility is that a superior, regardless of whether he conspired with, incited, ordered, or acted as accomplice, in the commission of crimes defined under the Draft Code, is a subject of criminal responsibility and may be tried by appropriate tribunals.

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1. See ILC Yrbk., 1986, v.I: Sir Ian Sinclair, p.142 para 63; Lacleta Munoz, p.143 para 6; Sucharitkul, p.158 para 19 and Barboza, p.165 para 75.

2. See UN Doc. A/CN.4/L.410, 1987, p.119 para 624.

3. See ILC Yrbk., 1987, v.I, Meetings 1993-2000.

4. See UN Doc. A/CN.4/L.420, 1988, p.30.

5. See ILC Yrbk., 1988, v.II, pt.II, p.70.

6. See UN Doc. A/CN4/430, 1990.

7. The relevant provision on conspiracy, complicity and attempt has been referred to the Drafting Committee. See GAOR, Supp. No.10 (A/45/10) pp.15-30. For Sixth Committee views see UN Doc. A/CN.4/L.456,1991, pp.23-33.

criminal responsibility and may be tried by appropriate tribunals.

The position concerning "superior orders" in the ILC's work on the Draft Code is yet to be determined. The combined contribution of the 1954 Draft Code of Offences and that of the text currently under consideration is de lege feranda. The present wording of article 9(d) of the Draft Code generates its own difficulties as identified above. In particular, the abscence of specific reference to international criminal responsibility incurred under international law detracts force from the rule as formulated for adoption.

Notwithstanding these difficulties, the ILC has largely embraced the principle formulated at Nuremberg and subsequently in international practice. In addition, the ILC has taken the further step of asserting that the success or otherwise of the invocation of "superior orders" as defence for crimes committed under international law, is without prejudice to the question of the personal criminal responsibility of the superior who may equally be answerable for his role in the commission of the crime.

3. Doctrine

The criminal responsibility incurred by individuals for committing certain internationally unlawful acts is recorded in the writings of the classical publicists. In their treatises on the law of nations both Grotius and De Vattel record the position under classical law. De Vattel identified ill-treatment of women and children by belligerents, use of poisoned weapons, and "assassination" as practices so heinous and contrary to civilised order that every State is permitted to seize and to try the alleged offender.

> "There is to-day no Nation in any degree civilised which does not observe this rule [of the prohibition of the above practices in time of

> war] of justice and humanity[1]..... The sovereign who makes use of such execrable means should be regarded as an enemy of the human race, and all Nations are called upon, in the interest of the common safety of mankind, to join forces and unite to punish him[2]."

In Blackstone's Commentaries of the Laws of England[3] we find violations of safe-conduct, infringements of the rights of ambassadors and piracy as the three principal offences (crimes) against the law of nations which when committed "all mankind must declare war" against the perpetrator who may be punished by any "community [on the basis of] the rule of self-defence."

The position under contemporary international law is authoritatively stated by Brownlie[4]:

> "Since the latter half of the nineteenth century it has been generally recognised that there are acts or omissions for which international law imposes criminal responsibility on individuals and for which punishment may be imposed, either by properly empowered international tribunals or by national courts and military tribunals."

The debate on the status of the individual as a subject of international law has also generated considerable comment relevant to the principle of individual criminal responsibility. It is argued that traditional criminal offences in international law such as piracy, war crimes, crimes against humanity and genocide are evidence that the individual is obliged under international law to refrain from committing certain acts for which there is personal responsibility. Accordingly, in addition to personal fundamental rights and freedoms guaranteed under international law, the individual is also

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1. The Law of Nations On The Principles of Natural Law v.III, p.283 para 145. Emphasis added.

2. Ibid., p.289 para 155.

3. Vol.IV, at p.71.

4. Principles, p.561 para 5.

a subject of obligations imposed by international law.[1]

The concept of criminal offence in international law and the responsibility it involves for individuals seriously challenge the traditional theory that States alone are subjects of international law.

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1. See, among others, Marshall-Brown, 18 AJIL (1924) p.532; Spiropoulos, 30 Hague Receuil (1929) p.196; Eagleton, 39 Proc. ASIL (1945) p.23; Levy, 12 UCLR (1945) 313; Donnedieu de Vabres, 70 Hague Receuil (1947) 564; Schneeberger, 35 Georgtwn LJ (1947) 481; Ehard, 43 AJIL (1949) 240; Lauterpacht, International Law and Human Rights, 1950, pp.42-45; Manner, 46 AJIL (1952) 428; Glaser, Droit International Penal Conventionnel, 1954, v.I, Chapter II, Section I, pp.56-59 & 63; Section II, pp.63-70 and Section III, pp.70-76; St.Korowicz, 50 AJIL (1956) 533; Bischop, 8 Annales FDI (1959) 122; Balladore-Pallieri, Diritto Internazionale Pubblico, 1962, p.220 para 69; Norgaard, The Position of the Individual in International Law, 1962; Carnegie, 39 BYIL (1963) 402; Brownlie, 50 Va.LR (1964) 435 at pp.448-451; Friedmann, The Changing Structure of International Law, 1964, p.232; Trumpy, 34 Annuaire AAA (1964) 120; Fenwick, International Law, 1965, at p.151; Tucker, 36 Univ. CLR (1965) 341; Cavare', Le Droit International Public, v.I, 1967, p.486; Oda writing in Sorensen, Manual of Public International Law, 1968, p.469; Lauterpacht, International Law - Collected Papers, v.I, 1970, p.141 para 50; Rhyne, International Law, 1971, p.121; Baade, writing in The Future of the International Laegal Order, 1972, v.IV, p.291; Prakash Sinha and Tornaritis writing in Bassiouni, Treatise, 1972, v.1, pp.122 & 103 respectively; Green, Law and Society, 1975, pp.247-249; Higgins, 24 NYLSLR (1978) 11; Levi, Contemporary International Law, 1979, p.78; Janis, 17 Cor. ILJ (1984) 61; Komarov, 29 ICLQ (1980) 21; and Snee, 25 St. Louis ULJ (1982) 891.

CHAPTER 10

State Criminal Responsibility

1. Consideration of the Concept by the ILC

Since its eighth session in 1956 to date the ILC has been working on the codification of the topic of State Responsibility. It is within the context of this topic rather than that of the Draft Code of Crimes Against the Peace and Security of Mankind[1] that the concept of State

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[1]. Since 1984, the ILC has not discussed the concept of the criminal responsibility of States during its work on the Draft Code. The reasons for this are explained, in part, by the decision of the ILC to have the scope ratione personae of the Draft Code limited to individuals. Furthermore, there is divided opinion on whether the Draft Code should make provision at all for the criminal responsibility of States. At any rate, the topic was addressed at the sessions cited below, but it was never properly defined and those who supported it gave the general impression that a State could incur international responsibility for criminal offences in international law. However, there is hardly any evidence in the relevant summary records of the ILC debates which indicates that State criminal responsibility was understood as representing anything other than the traditional form of international responsibility incurred in respect of the commission of criminal offences in international law. See ILC Yrbk., 1984, v.I: Jagota, p.41 para 15; Koroma, p.43 para 27 and Balanda, p.49 para 32; ibid., v.II, pt.II, p.11 para 32; Sixth Committee Report, UN Doc. A/CN.4/L.382, 1985, pp.15-16; ibid., 1985, v.II, pt.I, paras 11-17; Sixth Committee Report, UN Doc. A/CN.4/L.398, 1986, pp.16-18; ibid., 1986, v.II, pt.I, p.70 para 148; Sixth Committee Report, UN Doc. A/CN.4/L.410, 1987, pp.98-99; ibid., 1987, Sixth Committee Report, UN Doc. A/CN.4/L.420, 1988, p.18.

At its forty-second session (1990) the ILC debated the question of establishing an international criminal court. See Eight Report on the Draft Code, UN Doc. A/CN.4/430/Add.1, 1990. It was decided that the court's jurisdiction ratione personae would, for the time being, exclude States. See, GAOR, Supp. No.10 (A/45/10) p.47 para.128. The limitation of the court's jurisdiction ratione personae to individuals was endorsed in the Sixth Committee, UN Doc. A/CN.4/L.456, 1991, p.44. Views in favour of extending the principle of criminal responsibility to States, were in a distinct minority.

criminal responsibility has been addressed by the ILC. It will be discussed in this chapter in four stages represented by four Rapporteurs: Professors Garcia-Amador, Ago, Riphagen and Arrangio-Ruiz, who have contributed to the Commission's work in this field over a forty year period. Further, the discussion will separate, as far as possible, the theoretical content of the concept of State criminal responsibility from that concerning the form which such responsibility may take if it were capable of being implemented.

Professor Garcia-Amador presented a Memorandum and six reports to the ILC on the topic of State Responsibility.[1] The question of criminal responsibility of States arose during debates of the first and second reports. It has already been recorded[2] that Professor Garcia-Amador distinguished between wrongful acts in international law which give rise to civil liability and those which engender criminal punishment. However, Garcia-Amador reiterated the rule that criminal responsibility in international law can only be incurred by individuals whereas civil responsibility is incurred by States.[3] This was also the

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In replies submitted by States on the proposal to establish an international criminal court, no mention was made to the effect of extending the jurisdiction ratione personae of the court to subjects other than individuals. See UN Docs. A/CN.4/429, /Add.1,2,3, & 4, 1990.

1. See Memorandum in UN Doc.A/CN.4/80, 1954, ILC Yrbk., 1954, v.II, p.21; First Report, UN Doc.A/CN.4/96, ibid., 1956, v.II, p.173; Second Report, UN Doc.A/CN.4/106, ibid., v.II, p.104; Third Report, UN Doc.A/CN.4/111, ibid., v.II, p.47; Fourth Report, UN Doc.A/CN.4/119, ibid., v.II, p.1; Fifth Report, UN Doc.A/CN.4/125, ibid., v.II, p.41; and Sixth Report, UN Doc.A/CN.4/134 and Add.1., ibid., v.II, p.1.

2. See Chapter 3 above.

3. See ILC Yrbk., 1956, v.II, pp.188-189. See also Basis of Discussion No.II ibid., p.219.

general feeling within the ILC although some members[1] did accept, but only as a matter of principle and without offering any explanation, that the concept of criminal responsibility of States was conceivable. A more concrete explanation of the concept of State criminal responsibility was offered by Professor Ago (later to succeed Garcia-Amador). He submitted that the concept of the criminal responsibility of States does not mean responsibility arising from failing to make reparation as a result of crimes committed under international law nor for failing to punish the individual perpetrators concerned. But it means that the State responsible actually incurs some form of punishment.[2] Reprisals were suggested by Ago as a possible form of this type of international criminal responsibility of States.[3]

Until Ago's appointment as Rapporteur, the ILC had not expressed any definite position concerning the validity or otherwise of the concept of the criminal responsibility of States. The most substantial contributions on the topic only emerged during Ago's term of office.

Initially, in the 1960's between the ILC's fifteenth and twenty-first sessions the debate of a number of memoranda submitted by various ILC members in 1963 represents the only occasion[4] in this period where the principle of State criminal responsibility was discussed. The ILC members who advocated the view that it was time for the Commission to place on record that States, like individuals, may be punished in international law, did not explain their thesis. They merely stated it as a matter

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1. See Francois and Scelle ibid., v.I, p.239 paras 3 and 5 respectively.

2. ILC Yrbk., 1957, v.I, p.170 para 23.

3. Ibid., p.157 para 63.

4. See, however, comments by Eustathiades at the ILC's twenty-first session, ILC Yrbk., 1969, v.I, p.115 para 15.

of principle, while others who endorsed it reiterated their advice that the ILC should adhere solely to the study of State "civil" responsibility because the question of criminal liability of States was more a political rather than a legal matter. Some even felt that it was dependant upon the establishment of an international criminal tribunal, which is considered to be an unlikely occurrence. The following citations clearly reflect the mood in the ILC on the topic of State criminal responsibility for the period under consideration:

> "The traditional legal principle which exempted collective entities from all criminal liability has been superseded; criminal liability can now be imputed not only to the public representative directly responsible for the injury but also to the entity in whose name he acted.
> .... (T)here are acts and omissions for which a State is answerable both civilly (reparation) and penally, in the same manner as an individual who causes an injury to another person."[1]

However, the general response to the above was the following:

> "....(A) discussion of the topic (of State criminal responsibility should not be included).... in a draft intended to be submitted to over one hundred States...."[2]

Certainly the most concrete proposals issued by the ILC on the criminal liability of States occurred in the 1970's between the Commission's twenty-second and thirty-first session. ILC records for 1970 show that its membership was prepared to accept that there are unlawful acts in international law which are more serious than others and which may constitute criminal offences giving rise to a separate regime of international responsibility for the offending State than that traditionally provided

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1. See Memorandum by Mr. Modesto Paredes, ILC Yrbk., 1963, v.II, p.244 paras 1 and 2. See also Tsuruoka, ibid., p.249 para 9.

2. See Gross, ibid., p.230.

for under international law.[1]

In 1976 the concept of "international crime" was introduced by Professor Ago when he drafted Article 19. The impressive source material employed by Ago to formulate Draft Article 19 and its relevance to the definition of the concept of criminal offence in international law has been considered in Chapter 3 above. The present section, however, concerns Ago's understanding of the principle of criminal liability of States which is summarised as follows:

(a) the fact that relevant source material, such as judicial decisions, reveals that the international responsibility incurred by States is invariably the obligation of offending States to make reparation, does not exclude other forms of international responsibility which result from the breach of a particularly serious international obligation such as that which constitutes a criminal offence in international law.

(b) The commission of practices such as genocide, apartheid and colonialism, which have emerged largely since the Second World War, cannot be adequately redressed by the traditional forms of international responsibility. The State perpetrating such offences must become subject to a heavier penalty under international law than simply providing reparation.

(c) The trial and punishment by States of persons who, acting on behalf of another State, have committed crimes under international law, does not represent the criminal responsibility of the State whose officials have committed crimes in international law.

(d) Quite independent of the personal responsibility that may be incurred by officials, acting on behalf of a

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1. See ILC Yrbk., 1970, v.I., Tabibi, p.183; Reuter, p.187; Ustor, p.209 para 2; Thiam, p.213; Rosenne, p.219 and Elias, p.222. See also, however, the criticism offered by Sette-Camara, ibid., pp.183-184 and Castren, p.186.

State, the State itself, as a separate entity, may incur criminal liability under international law, for instance if it wages a war of aggression or participates in the commission of the crime of genocide. In addition it must be stated that, the commission of crimes under international law by persons acting in a public capacity does not invariably trigger the penal responsibility of the State represented.

(e) Finally, Ago concludes that States other than the national State of the public official who commits a crime in international law, ought to bring the individual offenders to trial. Further, the State whose national committed such crimes while holding public office should be subject to a separate form of "criminal" responsibility in international law.[1]

The foregoing points constitute as clear an enunciation of the concept of State criminal responsibility as is likely to be offered by the ILC. It is important to note that, except for some members[2] who suggested total severance of diplomatic and economic relations as a form of State criminal responsibility, the ILC's consideration of Draft Article 19 does not provide any indication whatsoever of what is meant by State criminal responsibility in international law. The majority of members' comments advised on how the wording of the draft article could be improved. Official response[3] can only be described as generally negative of Draft Article 19. In the Sixth Committee,[4] for instance, the reasons given to explain why Article 19 was unacceptable, ranged from problems of

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1. ILC Yrbk., 1976, v.II, pp.27-33.

2. See ILC Yrbk., 1976, v.I, Martinez Moreno, p.70 para 25.

3. See the Federal Republic of Germany, ILC Yrbk., 1981, v.II, pt.I, p.74 and Sweden, ibid., p.78.

4. See UN Doc. A/31/370, 1976, p.43 et seq.

peace and security.

> 3. Subject to Article 103 of the United Nations Charter, in the event of a conflict between the obligations of a State under paragraphs 1 and 2 above, and its rights and obligations under any other rule of international law, the obligations under the present article shall prevail."[1]

This provision was referred to the ILC Drafting Committee because although it represented a concept which was acceptable in principle to the ILC membership, it was generally found to be inadequate and poorly drafted.[2] The Sixth Committee's response was very similar. It was suggested that the rights and duties of the immediate parties i.e., the offending and the victim State, should be properly identified; that draft article 6 should be dealt with in a separate chapter in Part II of the Draft Articles and that the system of mandatory sanctions operative under the UN Charter should be applicable in the context of "international crimes".[3] In 1983 the ILC re-evaluated its position with most of the members not really defining the concept of the criminal liability of States but expressing the view that the concept should be developed. Rapporteur Riphagen[4] reiterated some of the possible consequences triggered by "international crimes" which he had identified in the previous session (1982) and added: (a) the erga omnes character and (b) the right of UN intervention in matters involving the commission of an "international crime", as additional elements typical of the concept of "international crime". Sixth Committee's views on the

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1. See ILC Yrbk., 1982, v.II, pt.I, p.48.

2. ILC Yrbk., 1982, v.I., Malek, pp.206-207; Sir Ian Sinclair, p.213 para 11; Jagota, p.216 para 33; Barboza, p.218 para 9; Balanda, p.220 para 25; Lacleta-Munoz, p.222 para 31; Ushakov, p.223 paras 43-45; Koroma, p.234 para 32 and Quentin-Baxter, p.238 para 17.

3. See UN Doc. A/CN.4/L.352, 1983, pp.36-41.

4. ILC Yrbk., 1983, v.II, pt.I, p.11 para 58 - p.12 para 62.

ILC's work at its 1983 session were much divided: some advocated the view that the study of the concept of State criminal responsibility should be abandoned, while others who favoured its study to be continued, disagreed on whether or not the draft articles ought to define the consequences engendered by the commission of "international crimes".

In 1984 the greater part of article 6 was reformulated as draft article 14 and a new article 15 was also introduced purporting to regulate the consequences of the crime of aggression. Articles 14 and 15 are reproduced below but they were largely criticised by the ILC at its 1984 and 1985 sessions principally for the following reasons: (a) States' obligations in respect of "international crimes" need further elaboration than those specified in article 14; (b) UN Charter provisions were not intended to cater for State criminal responsibility and therefore should not be implemented as such; and (c) the crimes listed in Draft Article 19 of Part I should be reflected in Part II of the Draft Articles. In the Sixth Committee's consideration of articles 14 and 15 the following points were raised in addition to those outlined in the ILC debates. These are, that the doctrine of State immunity ought not to apply where "international crimes" have been committed and States should be obliged to punish the individual perpetrators of same crimes. The principle of universal jurisdiction was mentioned in this context. Articles 14 and 15 read as follows:

" Article 14

1. An international crime entails all the legal consequences of an internationally wrongful act and, in addition, such rights and obligations as are determined by the applicable rules accepted by the international community as a whole.

2. An international crime committed by a State entails an obligation for every other State:

(a) not to recognize as legal the situation created by such crime; and

(b) not to render aid or assistance to the State which has committed such crime in maintaining the situation created by such crime; and

(c) to join other States in affording mutual assistance in carrying out the obligations under subparagraphs (a) and (b).

3. Unless otherwise provided for by an applicable rule of general international law, the exercise of the rights arising under paragraph 1 of the present article and the performance of the obligations arising under paragraphs 1 and 2 of the present article are subject, mutatis mutandis, to the procedures embodied in the United Nations Charter with respect to the maintenance of international peace and security.

4. Subject to Article 103 of the United Nations Charter, in the event of conflict between the obligations of a State under paragraphs 1, 2 and 3 of the present article and its rights and obligations under any other rule of international law, the obligations under any other rule of international law, the obligations under the present article shall prevail.

Article 15

An act of aggression entails all the legal consequences of an international crime and, in addition, such rights and obligations as are provided for in or by virtue of the United Nations Charter."[1]

In 1986 Rapporteur Riphagen presented the first draft set of articles of Part III. Comments relevant to the concept of "international crime" expressed at this thirty-eight session merely acknowledged the fact that this concept necessitated further elaboration. Riphagen's draft articles for Part III hardly touched upon the concept of "international crime". In the following session (1987) Professor Arangio-Ruiz succeeded Riphagen as Rapporteur and in the 1988 session presented his preliminary report on Part II and Part III of the draft articles ab initio. Professor Arangio-Ruiz stated that he would treat the legal consequences flowing from "international delicts" and

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[1]. See ILC Yrbk., 1984, v.II, pt.I, p.4.

"international crimes" separately.[1]

A second report[2] was presented at the ILC's 1989 session where the Rapporteur explained, inter alia, that the concept of punitive damages awarded against States reflect payment as compensation being proportionally in excess of the material loss or harm actually suffered by the victim State. These type of damages were recommended by the Rapporteur as an ideal form of the concept of State criminal responsibility in international law. The argument advanced in favour of the application of punitive damages is that in the absence of international institutions competent to punish sovereign States, such type of damages will deter rich and powerful States, otherwise punishable solely by traditional forms of reparation, from committing international crimes.[3]

The ILC membership supported this line of approach. Indeed the erga omnes character of "international crimes"; the duty of States not to assist the offending State and the duty to help the victim State, were reiterated as characteristics particular to the concept of "international crime". However, the following points of dissent are recorded in the ILC debates. Several members disagree with regard to (a) the manner in which State criminal responsibility is to be provided for in the draft articles; (b) provision for remedying non-material loss including the concept of punitive damages; and, (c) the principle of State criminal responsibility per se, which continues to be challenged as being inconsistant with the progressive development of international law and considered redundant within the proposed Draft Articles.[4] The position within

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1. See UN Doc. A/CN.4/416, 1988, pp.4 and 7.

2. See UN Docs. A/CN.4/425 and Add.1, 1989.

3. Ibid., see paras 138, 139 and 141.

4. See ILC Reports on its work at the 1988 and 1989 sessions in GAOR, Supp.No.10, (A/44/10) pp.194-198 and in (A/45/10) pp.181-188.

the Sixth Committee is largely similar to that in the ILC.[1]

2. Doctrine

Few are the writings of publicists which squarely address the question: is there a criminal responsibility for States in international law? These writings may be divided into two groups representing those for and against the concept.

The argument traditionally promoted by those who do not subscribe to the theory of State criminal responsibility is the following: States are sovereign entities in international law and they may only incur an obligation to make reparation for internationally wrongful acts. States may and will incur international responsibility either for promoting, encouraging, tolerating, assisting, participating and facilitating the commission of criminal offences in international law or for failing to prevent the commission of same offences, or failing to punish the responsible individuals. But in all events that responsibility shall not be in the form of criminal punishment. Criminal responsibility in international law can only be incurred by physical persons. The members of this school of thought include publicists of international repute but especially those whose contributions have been inspired by the ILC's Draft Article 19 on international crime and State responsibility.[2]

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1. See UN Doc. A/CN.4/L.443, 1990, pp.41-43.

2. See: Resolutions and Recommendations of the International Law Institute, Annuaire, 1951, p.361; Drost, The Crime of State, 1959, Bk.I., p.283 para 175 and especially para 181 at p.297 where he described the concept of State criminal responsibility in international law as "legally senseless, morally meaningless, politically pernicious, sociologically incorrect, psychologically erroneous, penologically inexpedient and impracticable"; Starace, 153 Hague Receuil (1976) 267 at 293-294; Diaconu, 12 Rev.Rom. (1978) pp.358-369; Marek 14 RBDI (1978-79) 460; Dupuy, Annuaire FDI (1979) 539; idem., 84 RGDIP (1980) 449; De Stoop writing in Australia and International Law,

Publicists who have advocated the theory of the international criminal responsibility of States are definitely in a minority. These may be further sub-divided into two categories. On the one hand there are those who merely accept the theory in principle without explaining what they understand by the criminal responsibility of States in international law or what form such responsibility may take.[1] On the other hand, and these

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1984, p.178; The Crimes of State, Weiler, J.H., (ed.), 1989, see in particular Graefrath (pp.161-169) who, though not admitting the principle of State criminal responsibility, accepts that a victim State is entitled to demand guarantees of non-repetition from the offending State and, singly or collectively with other States, to take jurisdiction over the offending State's alleged offenders to prosecute them even if they acted on behalf of the State; also Aldrich (p.219) and Dominice (p.257); and finally see Gilbert, 39 ICLQ (1990) 345 for a most recent contribution on ILC Draft Article 19 and the concept of State criminal responsibility which is described as currently representing "a flight of academic fantasy".

1. Sir Hartley Shawcross in his opening argument as Chief Prosecutor before the Nuremberg Tribunal, Opening Speeches, pp.56-57, reiterated the accepted view that States may incur responsibility for criminal acts. But this is quite different from saying that there is a criminal responsibility in international law for States. This position was adhered to in his closing arguments, Closing Speeches, p.56, but then it was also submitted there that "there is no substance at all in the view that International Law rules out the criminal responsibility of States and that since, because of their sovereignity, States cannot be coerced, all their acts are legal." Lauterpacht, International Law and Human Rights, p.41 does not exclude the concept of State criminal responsibility and refers the reader to Oppenheim's 7th edition on international law which is edited by Lauterpacht. Munch and Triffterer both writing in Bassiouni, Treatise, vols.I & II, p.144 and p.86 respectively, accept the criminal responsibility of States in international law but only if an international criminal court were established. See also Bassiouni and Derby, 9 Hof.LR (1981) at 539-540 who identify the principle of criminal responsibility of juridical entities in international law as if it were a customary rule applicable whenever criminal offences are committed in international law. The validity of this statement is questionable,

represent an even smaller minority, there are those who have actually been bold enough to offer concrete ideas explaining the meaning of the criminal liability of States in international law. For this reason alone it is worthwhile to reproduce relevant extracts. Oppenheim's treatise provides:

> "The State, and those acting on its behalf, bear criminal responsibility for such violations of international law as by reason of their gravity, their ruthlessness, and their contempt for human life place them within the category of criminal acts as generally understood in the law of civilised countries ..... Moreover, the extreme drastic consequences of criminal responsibility of States are capable of modification in the sense that such responsibility is <u>additional to and not exclusive of the international criminal liability of the individuals guilty of crimes committed in violation of International Law</u>."[1][2]

Accordingly, Oppenheim clearly separates individual criminal responsibility of persons who commit crimes in international law when acting as organs of the State from the criminal responsibility of the State <u>qua</u> State, which in turn implies something more than the traditional forms of international responsibility. Oppenheim suggests that State criminal responsibility may take the following form: measures and sanctions taken in pursuance of Chapter VII of the UN Charter. In addition, Oppenheim also considers the punishment of persons responsible for war crimes on the basis of universal jurisdiction as a form, in itself, of State criminal responsibility.[3]

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particularly because it is offered by Bassiouni & Derby as part of a discussion of the forms of international responsibility arising from breaches of the Apartheid Convention which hardly represents international consensus.

[1]. Emphasis added.

[2]. <u>International Law</u>, v.I, pp.355-357 para 156(b).

[3]. Ibid., p.356.

Brownlie[1] records military occupation, the demilitarization or the destruction of offensive capabilities of a State, reprisals, pacific blockade and even suspension or expulsion from international organisations, as forms of the criminal responsibility of States in international law suggested by other writers. Brownlie's own conclusion, however, is that the concept of State criminal responsibility:

> "has no legal value, cannot be justified in principle, (and) [t]o attempt to go beyond compensation would seem to be impracticable; and if it were practicable, it would be immaterial whether the surplus was regarded as a fine or exemplary damages..... In general the concept is futile though not juridically impossible".[2]

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1. Use of Force, pp.150-154. See also Rifaat, Aggression, p.130.

2. Op.cit., pp.152-153. See also, System of the Law of Nations, v.I, pp.32-33, 1983, and Shaw, International Law, p.408.

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