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23

THE OUTLOOK FOR INTERNATIONAL CRIMINAL JUSTICE

23.1 THE IMPORTANCE OF REACTING TO WIDESPREAD ATROCITIES

The First World War was dubbed 'the war to end all wars'. However, the Great War, as it was also called, brought to an end neither warfare nor man's inhumanity to man. Its legacy was slaughter on a scale never seen before and the disappearance of a whole generation of men from Europe. When it was over, it was generally felt that those responsible for starting the war or for committing atrocities should be brought to trial and punished. In addition to adopting in the peace treaties clauses designed to provide for the trial of the major figures responsible for the war and the crimes committed during its course, proposals were put forward for the establishment of a permanent criminal court. It was a dream, and it did not come true. The war's aftermath contained the seeds from which the Second World War would later erupt. Since then, some 250 conflicts of an international and non-international character have occurred. It has been estimated that, along with the death toll produced by authoritarian regimes, these conflicts have brought about the death or injury of more than 170 million persons as well as other inestimable harmful consequences.[1] In the course of these conflicts vicious crimes, in particular war crimes, were perpetrated. Furthermore, appalling offences such as genocide, crimes against humanity, and torture have been committed in time of peace. It would be facile to blame all these misdeeds on human wickedness and recall that since time immemorial man has been inhuman to man. It is a fact that the worst planners, perpetrators, or instigators of these crimes, including decision-makers, military leaders, and senior executors, have seldom been brought to account for their misdeeds. It is however also a fact that the frustration and dismay with which we witness all these horrors is accompanied by indignation and the feeling that it is imperative to react to inhumanity.

[1] See J. Balint, 'An Empirical Study of Conflict, Conflict Victimization and Legal Redress', in C. Joyner and C. Bassiouni (eds), 14 *Nouvelles Études Pénales* (1998), at 101.

The failure of States forcefully to respond to crimes is all the more striking because in the meantime the international community, chiefly through the United Nations, has proclaimed and laid down in international instruments a set of fundamental values such as peace, respect for human rights, and self-determination of peoples. To be consistent, any gross denial of such values, in particular international crimes, ought to have been repressed by bringing the alleged authors to trial. The astounding 'silence' of international criminal justice has once again brought to the fore one of the typical flaws of the present world community: the gulf between normative values and harsh realities, in other words the fact that the rich potential of international legal standards is not matched by their implementation.

Let us briefly ask ourselves why resort to criminal justice to suppress appalling international crimes has so far proved a relative failure.

Bringing to book the alleged perpetrators of international crimes in many cases proves to be in conflict with State sovereignty. The sovereign State tends to follow its own short-term interests, too often to the detriment of the general interests of the international community. It also tends to protect its nationals even when they have infringed fundamental values of the international community. It does so especially where the person in question has acted as a State agent (Head of State, member of cabinet, military official, etc.). In other words, faced with war crimes, crimes against humanity, genocide, torture, or international terrorism, sovereign States too often protect their nationals at all costs. They refrain from either exercising their territorial jurisdiction or acting upon the active nationality principle, and also refuse to extradite their nationals to other States, or to hand them over to international authorities. By the same token, as States are self-centred and loath to look into possible misdeeds committed in a foreign country and primarily affecting the human community living there, they tend to shy away from prosecuting foreigners who have allegedly engaged in criminal activity abroad.

Since however there can be no doubt that the sovereign State is still indispensable, as is shown by the anarchy that reigns in States lacking any central authority capable of protecting the general interests of the population and exercising effective control over it,[2] it proves necessary to reconcile the needs of State sovereignty with the demands of international criminal justice.

23.2 CURRENT TRENDS IN THE REACTION TO WIDESPREAD ATROCITIES

We should ask ourselves what could be done realistically to improve international criminal justice. However, before doing so, I shall briefly outline some interesting and

[2] Such States are dominated by clans, tribes, criminal organizations, or even terrorist groups. They are therefore incapable of acting as valid representatives of the State in relations with other members of the international community.

innovative trends that—in spite of the general hostility towards justice in the international environment, as noted above—are emerging in the international community as a result of the staggering upsurge in international criminality, noted most recently in the area of terrorism.

It seems that a few trends stand out. First, resort to the legal arsenal concerning *State* responsibility is increasingly yielding in importance, at least in the area of respect for individuals' fundamental rights, to actions and mechanisms for the enforcement of *individual* liability. No doubt in interstate relations the legal rules and machinery for invoking and enforcing State responsibility, that is, for reacting to wrongful acts of States, still possess considerable significance and are used by States, particularly in the area of commercial or territorial disputes and in other similar matters. Nevertheless, one can discern a tendency to shift attention from the interstate to the inter-individual level and to react to gross breaches and atrocities more by attempting to prosecute and punish individuals rather than by invoking the responsibility of the State for which they may have acted as State agents. It is indicative of this tendency that the provisions of the 1949 Geneva Conventions on compensation by States for grave breaches have remained a dead letter, whereas there is increasing resort to the criminal provisions of the Conventions.

Secondly, when resort is made to mechanisms for enforcing compliance by States with international law or at any rate for inducing them to respect international law, there is an increasing tendency to target *individuals* (sometimes in addition to States), and in certain cases even to use tools of international *criminal* justice. Two examples may help to clarify this point. In recent times the UN Security Council when adopting resolutions under Chapter VII of the UN Charter, in particular for the purpose of reacting to threats to peace, issued sanctions not against a State but against an individual or groups of individuals who, according to the Security Council, were responsible for promoting or carrying out the acts amounting to that threat. For instance, in some resolutions the Security Council has requested States 'to freeze without delay funds and other financial assets of Usama Bin Laden and individuals and entities associated with him' (see for instance SC resolutions 1333(2000), at §8(c), and 1390(2002), at §2(a)). It is notable that these enforcement actions include interim measures typical of criminal justice, namely the freezing of private assets belonging to an individual. Another example can be drawn from the practice of the European Union (EU). Recently, faced with the 'escalation of violence and intimidation of political opponents and the harassment of the independent press' in Zimbabwe, the Council of the EU, noting that Zimbabwe had engaged in 'serious violations of human rights and of the freedom of opinion, of association and of peaceful assembly', decided to take sanctions not only against the Government of Zimbabwe but also against 'those who bear a wide responsibility for such violations', namely a number of State officials starting with the Head of State, R. G. Mugabe. By legally binding acts the Council has requested member States among other things to freeze the private assets of those State

officials.[3] These examples show that the international institutionalized response to serious violations of human rights is in some respects moving away from the concept of 'collective responsibility' towards the more realistic and modern concept of 'individual accountability': in addition to holding accountable the State as such, resort has been made to the tools normally used for enforcing criminal liability in order to target the groups and individuals who act within and on behalf of the State; in other words, taking sanctions to target not only the State but also groups and individuals within that State.

This example provides a good opportunity to stress a further significant development. As noted above, when the Council of the European Union adopted a binding decision enjoining the 15 member States to take sanctions against both Zimbabwe and some of its leaders, the sanctions imposed included the freezing of the personal assets of the Head of State, R. Mugabe. This is the first time States have *disregarded* the customary rules on the *personal immunity* of foreign Heads of State. It is significant that the 15 European States have jointly brought about this notable deviation from universally accepted international standards for the purpose of enforcing effectively respect for human rights by a State and its leader. It is also notable that, so far, neither Zimbabwe nor any other State has contested the international legality of those sanctions. We may therefore be witnessing a gradual erosion—at least in connection with and as a reaction to systematic and large-scale breaches of human rights—of the authority of traditional international customary rules on the personal immunities of senior State officials. It may well be that this European decision is a signal of a change in international attitudes and behaviour. Indeed, if supported by future State practice, that decision may be destined to generate, at the normative level, an exception to those customary international law rules. Such exceptions could provide that the personal immunities of Heads of State and other senior State dignitaries may be disregarded as a result of collective decisions by groups of States or international organizations, whereas individual States would not be allowed on their own to set those immunities aside for risk of abuse.

Another interesting development, which occurred in the United States, evinces the increasing importance of legal tools proper to criminal justice. In some recent civil law cases, the US courts concerned resorted to *criminal law notions* as set out in the recent case law of international criminal tribunals, to settle issues relating to civil litigation (see for instance *Kadić* v. *Karadzić*, at 25–30, *Garcia J. G. and Vides Casanova C. E.*, at 3–7,[4] as well as *Doe* v. *Lumintang*, at 17–19). This development is indicative

[3] See Council Common Position of 18 February 2002 concerning restrictive measures against Zimbabwe (2002/145/CFSP), in *Official Journal of the European Communities*, 21.32.2002, L50/1; Council Regulation (EC) No. 310/2002 of 18 February 2002 on the same matter, ibid., L50/4; Council Common Position of 22 July 2002 amending Common Position 2002/145/CFSP, ibid., L195/1, Commission Regulation no. 1643/2002 of 13 September 2002, ibid., L247/22; and Council decision of 14 September 2002 implementing Common Position 2002/145/CFSP, ibid., L247/56.

[4] In this case the two defendants, the former Defence Minister and former Director of the Salvadoran National Guard, both living in Florida, were sued for damages for their command responsibility in the killing of various persons in Salvador by members of the Salvadoran National Guard. Command responsibility is provided for in the US Torture Victim Protection Act of 1991. Nonetheless, the US courts that pronounced on this case relied heavily on not only *Yamashita*, but also on ICTY case law (see decision of 30 April 2002, at 3–7). See also the Instructions of the judge to the jury of the District Court, at 6–9.

both of an increasing osmosis between civil and criminal litigation and also of the greater and greater importance being acquired by legal tools proper to criminal law.

Finally, there is an area where current trends would seem at first sight to go in a direction contrary to the trends underscored so far, but which in fact bear out the increasing emergence of individuals on the international scene and, more importantly from our viewpoint, offer potential for the future development of criminal justice. There have been many cases where, on practical or legal grounds, individuals have been unable to vindicate rights breached by foreign State officials, through criminal action brought either in their own State or in the foreign State whose agents perpetrated the offence. In many of these instances individuals have turned to *civil litigation* and brought a claim against the *State* on whose behalf those allegedly responsible had acted (or, in the unique case of the United States, against the individuals allegedly responsible). For instance, Dutch nationals sued the Japanese Government for ill-treatment in civilian internment camps in the Dutch East Indies during the Second World War (*Sjoerd Albert Lapre and others*, at 12–38); nationals of the Federal Republic of Yugoslavia brought a case in Italy against the Italian State for alleged breaches of the laws of warfare in 1999 in Belgrade (*Marković*, at 3–6); Chinese nationals brought a claim against Japan before the Tokyo District Court for the use by Japanese forces of bacteriological weapons in China during the Second World War (*Germ warfare* case); a case was brought in the United Kingdom against Kuwait for acts of torture allegedly perpetrated in Kuwait (*Al-Adsani* v. *Kuwait* at 537–51; the case was subsequently brought before the European Court of Human Rights: see *Al-Adsani* v. *United Kingdom*); Greek nationals filed claims for compensation against Germany in Greece for crimes committed during the Second World War (*Prefecture of Voiotia* v. *FRG*, at 511–14); and the same has happened in the United States (see *Princz* v. *FRG*, at 604–12) . In all these cases individuals have ultimately relied upon a scheme typical of interstate relations: bringing before national courts claims for compensation against the State allegedly responsible. True, most of these claims have been dismissed: in essence they have stumbled against the obstacle of sovereign State immunity.[5] Nonetheless, these cases show the emergence of individuals on the international level. In other words, individuals no longer accept that their interests, legal claims, and human concerns be managed by their national States in diplomatic dealings. They no longer accept that their interests must be channelled through the diplomatic action their State may undertake at the interstate level. They wish to take their rights in their own hands. Therefore to vindicate their claims they turn either directly to courts of their own State or to those of the foreign State allegedly responsible. Clearly, there

[5] This also holds true for *Marković*, where the action against the State allegedly responsible for a breach of an international rule had been brought before the courts of that State. See *Marković*, at 6–9 (the Court held that war acts are a typical expression of governmental acts over which no judicial review is admissible; according to the Court, legal questions relating to the legality of such acts may only be settled at the international level, through negotiations between States).

An exception is established by *Prefecture of Voiotia* v. *FRG*, where the Greek Court of Cassation held Germany responsible for the killing of Greek civilians in June 1944 and awarded damages to the relatives of the victims (at 511–14).

is huge potential here for recourse to criminal justice. As in most of these cases individuals are more interested in international stigmatization of misconduct and retribution than in monetary compensation for past misdeeds, it would be appropriate for them to turn to criminal courts, provided such courts have the jurisdiction and power to enforce their judgments. This is therefore an area where criminal justice could develop and expand, provided one finds a realistic path and offers viable legal options.

The trends highlighted above may seem disparate and heterogeneous, yet a common thread unites them. This is the forceful emergence of individuals on the international level, either as the authors of international crimes or of gross and large-scale breaches of human rights, or as the victims of those crimes or breaches. The international community is gradually realizing that it must deal directly with perpetrators of serious crimes by authorizing national courts to prosecute and punish them through the establishment of international tribunals or by taking sanctions that directly target individuals even if they are very high ranking State officials. By the same token, the international community cannot any longer allow claims and complaints of victims to be 'filtered' through State channels and machinery. It is therefore trying to ensure that these victims are able to appear before national or international courts in order to vindicate their rights directly and without any intermediary.

The Statute of the ICC to a large extent compounds and encapsulates most of these trends, for it also envisages the prosecution of alleged authors of serious crimes, and allows victims both to promote international justice—hence stigmatization of criminality and retribution (see however 22.2)—and to appear before international bodies to claim compensation for any damage suffered from international crimes.

23.3 RESORTING TO IMPROVED TRUTH AND RECONCILIATION COMMISSIONS

I shall now briefly canvass the possible avenues open to those eager to ensure that the promise of justice is fulfilled. I shall also underline the possible merits of each possible option.

It should be admitted that on many occasions, depending on special historical, political, or social circumstances, it may prove appropriate to respond to the widespread perpetration of international crimes not only by resort to judicial process, but also by a different response. In addition to bringing to trial at least some of the alleged authors, it may prove helpful to establish Truth and Reconciliation Commissions. This may be done, in particular, when there are too many perpetrators, and therefore it would prove too difficult, costly, or time consuming to institute trial proceedings for all, or when the former government is still strong and any major trial of all the

persons who orchestrated or ordered atrocities would be likely to jeopardize the stability and viability of the new democratic government. We have, however, seen above (1.2.3(D)) the major flaws of such Commissions. It is therefore not necessary to dwell on them now. Rather, it is fitting to set out the conditions on which the Commissions may be accepted as a useful and appropriate supplement to criminal justice. To be effective, the Commissions should be entrusted with the following tasks:

1. Deal with alleged war crimes, crimes against humanity, torture, or terrorism committed by *low- or middle-level offenders*. As for genocide, the extreme gravity of this crime and the need to protect groups against their extermination seem always to impose a judicial response, so that the alleged perpetrators are brought to book and duly punished. Similarly, those who have allegedly planned, instigated, masterminded, or ordered the commission of such crimes (i.e. the military and political leaders) should be prosecuted and tried either by a national criminal court or at the international level.

2. The aforementioned low- or middle-level perpetrators should, either on their own initiative, or at the request of the national authorities (or at the behest of the victims or at the suggestion of an international tribunal), be brought before the Commission to admit their crimes in *public hearings* and give evidence about crimes committed by others. *Victims* should be allowed to air their grievances fully.

3. The Commissions should not only discover facts and elements of criminal liability, but also *shed light on the social, political, ideological, and historical causes of the conflict*, so as to contribute to indicating to the appropriate State authorities the ways of removing those causes to the extent that this is possible.

4. If the Commissions are satisfied that full disclosure has been made and, if need be, reparation (as determined by the Commissions) has been paid to the victims, they might grant individual *pardon* to the persons concerned (alternatively and depending on the constitutional mechanisms of the relevant State, the Commission could *propose to the Head of State the granting of a pardon*). Pardon would entail exemption, for the individual on whom it is bestowed, from the punishment the law inflicts for the crime he has committed, *not obliteration of the crime*. Such obliteration could only follow from amnesty; however, the ICTY, in *Furundžija* (§155), held in 1998 that amnesty for international crimes is contrary to international *jus cogens*. Other courts have taken the same stand (see *supra*, 17.1).

5. If the Commissions consider that the persons asking for pardon have not fully disclosed their own crimes or the crimes perpetrated by others with whom they were connected, or, although not indigent, have failed to pay full compensation to the victims, they might turn over the file to a criminal court of the relevant State (if the judiciary of such State is independent and fully upholds all the principles of democracy and fair justice), or, alternatively, to an international tribunal. The same should hold true for cases where the Commissions find that the atrocities committed

by the applicant are so extensive and appalling as to render pardon unwarranted. (Where the crimes are not political in nature but private, there should also be no amnesty.)[6]

6. The Commissions should co-operate with national criminal courts or the appropriate international tribunal. In particular, they could hand over to those courts or to an international tribunal any evidence they collect against military or political leaders (so that those persons could then be prosecuted in court), in addition to submitting to them the files of those persons who have not met the standards set by the Commissions for the granting of judicial pardon.

23.4 ENHANCING THE ROLE OF NATIONAL COURTS

National courts should play an even greater role in prosecuting and punishing international crime. Clearly, international courts, whenever they are established (and this is not a frequent occurrence, to say the least) *cannot* pronounce on all crimes against humanity or gross breaches of human rights or humanitarian law occurring on a daily basis in so many parts of the world. They may have no jurisdiction over some of these crimes. Or, if they do have jurisdiction, prosecution and trial proceedings may turn out to be protracted, if only because of the difficulty in collecting the necessary evidence. By and large, the principle of 'complementarity' (or 'subsidiarity') enshrined in the Rome Statute of the ICC seems sound: as a rule it is for *national* courts to adjudicate on international crimes.

To this end, national legislatures should provide those courts with the necessary legal tools to enable them to exercise criminal jurisdiction.

In particular, more use should be made of courts endowed with *territorial* jurisdiction, for they are the courts best fitted to try this category of crimes (but we saw above why often such courts refrain from pronouncing upon crimes). Also, more extensive use of the principle of *active or passive nationality* would prove helpful. The State of nationality of the alleged perpetrator would seem to have at least a moral duty to institute proceedings. In spite of the limitations inherent in the passive nationality principle, the State of nationality of the victims should also be sympathetic to victims who have suffered, and replace revenge by impartial and fair justice. These States, however, seldom take action, either for lack of the necessary legal wherewithal or for lack of 'political' will.[7]

It is therefore imperative to prompt States: (i) to pass legislation providing for

[6] That was the position at the South African Truth and Reconciliation Commission: if a person was killed or tortured for reasons wholly unrelated to apartheid, the crime did not fall within the ambit of the Commission's powers of amnesty.

[7] Two cases in point are the recent decisions of Australian courts on the alleged acts of genocide against Australian aborigines ordered or connived at by Australian State officials (see Federal Court of Australia, *Nulyarimma* v. *Thompson*, and *Buzzacott* v. *Hill*, 2 September 1999, in 39 ILM (2000), 20 ff.). Although Australia was bound both by customary rules on genocide and the 1948 Convention on genocide, the courts were unable to pronounce on the alleged genocidal acts for lack of the necessary implementing legislation.

jurisdiction over international crimes; (ii) to implement such legislation; (iii) in particular, to enact legislation necessary for the implementation of the relevant 'criminal' provisions of the four 1949 Geneva Conventions and the two Additional Protocols of 1977, and bring these provisions into effect; and (iv) to ratify international treaties designed to impose the obligation to prosecute authors of some categories of crimes (for instance, the 1984 Convention on torture and the various treaties on terrorism) and bring them into effect.

23.4.1 RESORT TO UNIVERSAL JURISDICTION

Another means of reconciling respect for the current structure of the international community, based on a plurality of sovereign States and the need for effective criminal justice, might involve expanding the jurisdiction of State criminal courts by extending their jurisdiction to all international crimes, wherever the crime is committed and whatever the nationality of the alleged author or victim. This would involve enlarging the *universal* criminal jurisdiction of States.

As was pointed out above (see *supra*, 15.5.1) there are two categories of universal jurisdiction: *absolute* jurisdiction (where national prosecution may be commenced even if the suspect is not on the territory of the prosecuting State) and *conditional* jurisdiction (where the presence of the suspect on the territory of the State is a necessary condition for instituting criminal proceedings).

Resort to a broad conception of universality entails among other things that courts may entertain criminal proceedings against foreign Heads of State or foreign senior State officials, provided only that someone lodges a complaint.[8] This however may involve the risk of abuse as well as friction in international relations, particularly when the foreign State official, because of the initiation of criminal proceedings against him, may end up being hindered in the exercise of his functions, being de facto barred from travelling abroad for fear of prosecution or even arrest. Admittedly, the risk of abuses may be tempered by the existence of personal immunities accruing to senior State officials on official missions abroad, as well as to diplomatic and consular agents (see 14.2). Nonetheless, it would be judicious for prosecutors, investigating judges, and courts to invoke this broad notion of universal jurisdiction with great caution, and only if they are fully satisfied that compelling evidence is available against the accused. Generally speaking it would seem harmful or at least illusory to transform national judges into some sort of 'knights errant of human nature', in the words attributed to Beccaria,[9] charged with righting the most serious wrongs throughout the world.

It would seem therefore appropriate to opt for *conditional* universal jurisdiction

[8] For example, Belgian judges have received complaints against several well-known personalities, including Augusto Pinochet and Fidel Castro, the Israeli prime minister Ariel Sharon, a current foreign minister (of the Congo), the former leaders of the Khmer Rouge, a former Moroccan minister, and a former Iranian prime minister.

[9] This image does not appear in the Harlem edition, the last edition revised by Beccaria; however, it does appear in some translations, for example, the English translation of 1775. (See C. Beccaria, *An Essay on Crimes and Punishment*, reprinted (Brookline Village, Ma.: Branden Press Inc., 1983), at 64, 'as if judges were to be the knights errant of human nature in general'.)

whenever the suspect or accused is an incumbent senior foreign State official not enjoying personal immunities under international law, or a former State official (to whom personal immunities, if any, no longer accrue because he has left office). Arguably, it would be realistic and practical for national lawmakers to deal with universal jurisdiction over foreign State officials by promulgating a law akin to that in force in Germany,[10] and in France,[11] or even to improve upon them. For example, they could decide that whenever an international crime is prohibited by a treaty ratified by the State, or by a rule of customary international law, the State on the territory of which the suspect or accused is found is authorized to initiate criminal proceedings and exercise criminal jurisdiction subject to some strict conditions: (i) that the State where the crime was committed neither exercises its jurisdiction nor requests the extradition of the suspect or accused, or, if the territorial State does request extradition, (ii) that it is clearly incapable of, or for any reason cannot ensure a fair, expeditious, and effective trial. A further condition should be that (iii) the foreign State official does not enjoy, or no longer enjoys, the personal immunities from criminal prosecution provided for in international law for some senior dignitaries or diplomats.[12]

Of course, in addition to the possible adoption of general legislation, any time a State has ratified a treaty on international crimes (for instance, the 1984 Convention on Torture) laying down the *forum deprehensionis* principle, the State will apply that principle and accordingly exercise universal jurisdiction on the strength of the national rules implementing the relevant provisions of the treaty.[13]

[10] See para. 6, Ch. 9 of the Criminal Code (*Strafgesetzbuch*), which stipulates that German law applies with regard to all acts committed in foreign countries that Germany is obliged to punish by virtue of an international treaty incorporating the principle of universal jurisdiction. Although German case law normally requires some connecting factor (*Anknüpfungspuntkt*) between the crime and Germany, such as residence of the accused in Germany, the Federal Court held, in its judgment of 21 February 2001 in the *Sokolović* case (not yet published), that a connecting factor is not indispensable. (In this case, the accused had resided in Germany for twenty years and returned there regularly to receive his retirement pension.)

On the German system in general, see R. Roth and Y. Jeanneret, 'Droit allemand', in Cassese and Delmas-Marty (eds), *Juridictions nationales*, at 19–22. On the case law concerning Article 6(1) of the German Criminal Code, especially the crime of genocide, see in particular A. Eser, 'Völkermord und deutsche Strafgewalt—Zum Spannungsverhältnis von Weltrechtsprinzip und legitimierendem Inlandsbezug', in *Strafverfahrensrecht in Theorie und Praxis, Festschrift für Lutz Meyer-Gossner* (Munich: Beck, 2001), at 3–31 (this paper was written prior to the judgment in the aforementioned *Sokolović* case of 21 February 2001).

[11] Article 689–1 of the French Code of Criminal Procedure provides that 'pursuant to the international conventions referred to in the following articles [that is, Articles 689–2 to 689–7, referring to treaties on torture and various forms of terrorism] any person guilty of any of the offences listed in those articles . . . may be prosecuted and tried by French courts if that person is present in France'.

[12] See also the conditions set out in the Joint Separate Opinion of Judges R. Higgins, P. Kooijmans, and T. Buergenthal in *Case Concerning the Arrest Warrant of 11 April 2000* (Judgment of the International Court of Justice of 14 February 2002), at §§59–60.

[13] Plainly, the conditional universality principle may be tainted by a serious limitation. When applied to a former Head of State or government or senior member of cabinet or diplomat, the principle may result in these persons never being brought to trial if they are prudent enough to avoid travelling to a country where they could become amenable to judicial process. Similarly, a foreign State requesting their extradition on the basis of the absolute universality principle is likely to come up against a blunt refusal by the national authorities to hand over the former senior official (unless this official is out of favour with the new government). It would however appear that the need to forestall possible abuses should make this eventuality acceptable, however seriously it may run counter to the fundamental imperatives of international justice.

As stated above (15.5.1(B)), a different category of universal jurisdiction could be adopted for international crimes allegedly perpetrated by *low-ranking* military officers or other junior State agents, or even *civilians*. As I have already noted (*supra*), normally these persons are not well known, and their travels abroad do not make news. Therefore, issuing arrest warrants against them even when they are abroad would make it possible for them to be apprehended as soon as they enter the territory of the prosecuting State.

23.5 NATIONAL CRIMINAL JUDGES AND INTERNATIONAL COURTS

A crucial question is that of the relationship between national criminal judges and international courts. In my opinion, resort to national courts exercising territorial, national, or universal jurisdiction offers an advantage compared with international criminal courts. National judges have all the coercive arms of the State at their disposal. Normally—and I emphasize the word 'normally'—they can therefore render justice more effectively.

However, by pleading for a widening of the criminal jurisdiction of national courts, I do not intend to underestimate the merits of international criminal courts. On the contrary, I consider that these courts can play an essential role in at least four ways.

First of all, they can incite national judges to broaden their jurisdiction, or at least to exercise it under their traditional grounds of jurisdiction. Indeed, as I have already pointed out above, for over forty years after the entry into force of the 1949 Geneva Conventions national courts have not used the universal jurisdiction they derived from these Conventions. They have only begun to discover that they are endowed with such jurisdiction since the establishment by the United Nations of the two ad hoc criminal tribunals in 1993 and 1994.

Secondly, international courts can replace national judges whenever these judges are unable or unwilling to render justice in a fair, impartial, and efficient manner.

Thirdly, on many occasions international courts and tribunals may prove more impartial than national courts, particularly those of the State where the crime was perpetrated, and therefore where tensions, animosity, and popular resentment may exist jeopardizing the fairness of a trial.

Finally, only international courts can take adequate and appropriate judicial action when a case involves very complex international crimes. This is particularly so either when these crimes implicate powerful political and military leaders, or when the evidence is widely scattered over many countries, as the investigation then requires powers going beyond those at the disposal of the national judge.

It should nevertheless be added that at present a number of major Powers appear reluctant to accept the jurisdiction of international tribunals and even to submit to the ICC. It is a matter of regret that such States as the USA, Russia, and China oppose the Court, and the Superpower is actively trying even to shun its jurisdiction over US

nationals that possibly commit crimes in a State party to the ICC Statute.[14] It is to be hoped that this negative attitude, inconsistent with the ideals firmly embedded in the US Constitution and the American historical tradition, will gradually wane and eventually disappear.

23.6 USING MIXED CRIMINAL COURTS AND TRIBUNALS FOR INTERNATIONAL CRIMES

On some occasions the establishment of mixed or 'internationalized' courts such as those set up in East Timor, in Kosovo, or in Sierra Leone, may appear to be a better solution than resort to national courts or to international criminal tribunals.

Plainly, there are situations where the *national judicial system* has collapsed due to civil strife or protracted internal commotion. Think for instance of what has happened in Colombia. There, resort to national courts would be of no avail. Other cases are those where, although a judicial system does exist and works fairly smoothly, ethnic or religious tensions are so strong that the judiciary is also 'contaminated' and proves therefore unable to administer justice when faced with international crimes grounded on ethnic or religious divides. Think for instance of such situations as Bosnia and Herzegovina. The system of 'internationalized' courts could prove very effective also when the ICC is firmly established: indeed, it may ensure a proper functioning of the complementarity mechanism and prevent the Court from being flooded with hundreds of cases because of the inadequacy of national systems due to the collapse of the local judiciary. Mixed or 'internationalized' courts will prove even more important whenever the collapsing official apparatus is that of a State that is not party to the ICC Statute.

Similarly, the appalling terrorist acts perpetrated against US territory in 2001 would probably be the appropriate subject matter for 'internationalized' courts. Adjudication of those crimes in US courts might lead observers to believe that the fundamental principle of presumption of innocence could hardly be respected. In addition, as those courts may impose death sentences, European States that apprehend alleged culprits may be obliged to refuse to hand them over to US courts on human rights grounds. Furthermore, these crimes have wide ramifications in many countries; the

[14] As is well known, the USA is pursuing this purpose both by entering into bilateral agreements with States that are, or may become, parties to the ICC Statute, and by having the Security Council adopt resolutions exonerating US personnel from the Court's jurisdiction. See in this respect resolution 1422(2002) adopted by the Security Council on 12 July 2002. Under para. 1, the Security Council '*requests*, consistent with the provisions of Article 6 of the Rome Statute, that the ICC, if a case arises involving current or former officials or personnel from a contributing State [i.e. contributing to peace-keeping or peace-enforcing operations established or authorized by the UN Security Council] not a Party to the Rome Statute over acts or omissions relating to a United Nations established or authorized operation, shall for a twelve-month period starting 1 July 2002 not commence or proceed with investigation or prosecution of any such case, unless the Security Council decides otherwise.' Para. 3 stipulates that 'Member States shall take no action inconsistent with paragraph 1 and with their international obligations'.

prosecution may therefore have to search for and collect the evidence in many States and will therefore need the co-operation of those States. Also in this respect a mixed or 'internationalized' tribunal would seem to be the proper forum. In addition, trials conducted before such tribunals would expose the terrorist acts and their context much better than trials before an 'ordinary' national court.

Other instances where the national judicial system is inadequate and needs to be bolstered by an international component is that of Palestine, where courts could be beefed up by international prosecutors and judges, so as to prosecute and try serious crimes of terrorism in a fair, effective, and expeditious manner.

In addition, one may bring before 'internationalized' courts crimes against humanity, torture, or genocide perpetrated in some authoritarian countries, where the political system still protects the alleged perpetrators, while neighbouring countries refuse on political grounds to take action against them.

23.7 SOME TENTATIVE CONCLUSIONS: THE NEED TO WORK FOR CRIMINAL JUSTICE ON VARIOUS FRONTS

Human rights have by now become a *bonum commune humanitatis* (a common asset of whole humankind), a core of values of great significance for the whole of humankind. It is only logical and consistent to grant the courts of all States the power and also the duty to prosecute, bring to trial, and punish persons allegedly responsible for intolerable breaches of those values. By so doing, national courts would eventually act as 'organs of the world community'. That is to say, they would operate not on behalf of their own authorities but in the name and on behalf of the whole international community. Thus, at long last the theoretical construct put forward in the 1930s by the great French international lawyer Georges Scelle, the construct he termed *dédoublement fonctionnel* (role-splitting), for long a Utopian doctrine, would be brought to fruition and translated into reality.[15] Scelle emphasized that, since the international legal order lacks legislative, judicial, and enforcement organs acting on behalf of the whole community, national organs may perforce have to fulfil a dual role: they may act as State organs whenever they operate within the national legal system; they may act qua international agents when they operate within the international legal system. In a way, for Scelle, national officials exhibit a sort of 'split personality'. That is to say, although from the point of view of their legal status they are and remain State organs, they can function either as national or as international agents.

As a result of the present state of affairs and the trends emerging in the world community, Scelle's doctrine has come to acquire an enhanced vitality, at least as far

[15] See G. Scelle, *Précis de droit des gens. Principes et systématique*, I (Paris: Librairie du Recueil Sirey, 1932), at 43, 54–6, 217; II, at 10, 319, 450; Idem, 'Théorie et pratique de la fonction exécutive en droit international', 55 HR (1936), 91–106. On this doctrine see A. Cassese, 'Remarks on Scelle's Theory of Role Splitting (*dédoublement fonctionnel*) in International Law', 1 EJIL (1990), 210 ff.

as the social function of law enforcement is concerned, and in spite of the growing tendency of States to institute international or mixed criminal tribunals and courts.

However, as we have seen above, resort to national courts is not free from deficiency, any more than are the other available means of reacting to atrocities and other gross violations of human rights, namely the establishment of Truth and Reconciliation Commissions, of international criminal tribunals, or of mixed or 'internationalized' courts. None of these avenues is flawless. Probably the best response to atrocities lies in a prudent and well-thought-out combination of the various approaches, seen not as alternatives but as a joint reaction to the intolerable suffering we are obliged to witness every day.

In conclusion, I consider it is the *combination of more incisive action* by the most effective societal and institutional devices of the many available to lawmakers that could send a shock-wave through the practice of impunity. Let me repeat again that international criminal law is a branch of law that, more than any other, is about human wickedness and aggressiveness. It also deals with how society faces up to violence and viciousness to try to stem them to the extent that this is possible. Clearly, given the magnitude of the task, there is *no single response* to the multifarious aspects of international criminality. One must perforce resort to a whole gamut of responses, each most suited to a specific condition, effectively to stem international crimes.

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