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INTRODUCTION

International Criminal Law: *Civitas Maxima* —An Overview—

*Gerhard O.W. Mueller**

Two decades ago, when Professor Wise and I commenced editing our course book on international criminal law,¹ we were obliged to search for a definition which would attest to the subject's existence. At the time, we were greatly aided by Professor Schwarzenberger's now classic article, "The Problem of an International Criminal Law,"² in which he demonstrated, rather persuasively, that international criminal law does not exist in six different senses. This article proved helpful in organizing the subject matter in accordance with this hecta-partition.

Indeed, international criminal *law* did not exist for anybody looking for the twin of municipal criminal law. Except in a few extraordinary cases, there were then no constables, marshalls or sheriffs with jurisdiction to enforce court orders on the world-wide level, nor were there any international legislatures or courts in the municipal law sense. This, however, should not have bothered international lawyers who had always known that international law had its own peculiar means of self-expression. Nor should it have troubled the anthropologists of law who had always seen in law a self-fulfilling adherence and compulsion; nor should it unduly have worried the sociologists of law—for very similar reasons. Above all, it should not have worried twentieth century lawyers, particu-

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¹ INTERNATIONAL CRIMINAL LAW (Mueller & Wise eds. 1965) (Publication of the Comparative Criminal Law Project, vol. 2, 1965).

² 3 CURRENT LEGAL PROBLEMS 263 (1950); reprinted in INTERNATIONAL CRIMINAL LAW, *supra* note 1, at 3.

larly those working on the municipal level, who have long switched from primary reliance on litigation to less formal means of problem solving and dispute resolution: education, persuasion, standard setting, arbitration, mediation. This is the point at which municipal criminal law and international criminal law converge. In this sense law exists when things get done without bloodshed and to mutual satisfaction.

This issue's dedication to international criminal law attests to the vitality and growth of the field, *de lege lata* and *de lege ferenda*. The six articles fall naturally into two parts. The first three articles deal with issues of international criminal law in the substantive sense: the material criminal law and its underlying rationale (Friedlander, Bassiouni, Hassan). The remaining three articles are concerned with international criminal law in the adjective sense which, elsewhere, I have called "accommodation" law (Shupilov, Sternberg and Skelding, Cooper), yet they are not without substantive ramifications. Above all, they concentrate on the political element in international criminal law which, all too often, is the fly in the ointment.

Professor Friedlander traces the tortuous route of international criminal law from ancient times to today. He stresses its shortcomings, its unfulfilled promises and the obstacles still in the way of its perfection, echoing the concerns of many. Yet, if we were to judge municipal criminal law only in terms of the crime rates plaguing our cities, the delays in our courts, the statutes unenforced, it might also suffer equal condemnation.

The fact is, as Professor Bassiouni documents conclusively, that we now do have some twenty categories of international crime (up from one category a hundred years ago), many of them the creation of our worldwide quasi-legislature, the General Assembly of the United Nations. These crimes do reflect world consensus. True, there is in the current twilight zone between no international criminal law and a fully-developed international criminal law, no permanent tribunal with enforcement power. But perhaps that is a secondary consideration. A court needs standards to enforce; if there were to be no standards, no court would be needed. Moreover, the instruments by which international crimes have been defined clearly envisage trial by domestic courts, whether those of the site of the alleged crime, or those of the state in which the defendant is found (*aut dedere, aut judicare*). But Professor Bassiouni's compilation of substantive *International Criminal Law*, the best and most complete compendium in existence, also records the third possibility of disposition, one that is best described in Hugo de Groot's terms as a necessary consequence of *civitas maxima*, the international criminal tribunal. That was the solution at Nuremberg and Tokyo, and that is the mandated solution to apartheid and certain other designated crimes *jure gentium*. The rumblings in the International Law Commission and the General Assembly should engender some hope in this regard, especially if it be con-

sidered that many a government would be far happier to surrender an international offender to an internationally uninvolved tribunal than to suffer the embarrassment of a trial at home or by a requesting state with an ax to grind. Obviously, the choice according to *civitas maxima* must be approached with the greatest caution. Not only must there be a careful initial selection of least controversial offenses, but it may also be necessary to establish an indictment chamber in the first place, where some procedures arguably may end for want of the defendant's presence.³

Dr. Hassan explores virgin territory by examining a subject which has been tabu to scholars of international law, notwithstanding its popularity among criminologists: the justifications for, or theories of punishment for, crimes under international law. He has selected three of these theories for examination: deterrence, rehabilitation and retribution. He has also divided international crimes into three categories. The first two include offenses basically triable by national tribunals. The third category consists of the major crimes against humankind, triable by international tribunals on an ad hoc basis in the past, hopefully permanently in the future.

Dr. Hassan's choice of a *raison d'être* of punishment for international crimes is that of deterrence. Yet, one is driven to ask whether, if that was the reason for punishing internationally, it has worked on the international level, much as it has worked, at least for some crime types, at the municipal level? Was deterrence really the underlying motive for such international criminal sentences as have been imposed? Indeed, it appears that two other rationales for punishment may have played a more dominant role. For example, when Napoleon Bonaparte was "sentenced" and sent to St. Helena, the sentencing purpose clearly was incapacitation. That theory, in addition to retribution, appears to have played a paramount role in the execution of the war criminals at Nuremberg. Retribution also played a considerable role in the Eichmann case, unless the motivation in that case could be classified as vindication.

The trouble with deterrence in international criminal law, far more so than in municipal criminal law, is that its moral-psychological leverage is clouded by the illusion of permanent and invincible power. Consequently, a good case can be made for basing an international criminal sanction primarily on other penal justifications, including retribution and vindication, reformation and incapacitation, although certainly not to the exclusion of deterrence. In this sense, perhaps, international criminal law, or at least that part of international criminal law which depends on sanctioning in the traditional sense, is no different from municipal criminal law.

³ Mueller, *Two Enforcement Models for International Criminal Justice*, in *ÉTUDES EN L'HONNEUR DE JEAN GRAVEN* 107 (1969).

The articles dealing with adjective criminal law examine subjects which unite—and potentially divide—us most in this world of conflicting values. First, the unison: Professor Shupilov's article demonstrates that, in the wake of the policy-making of the United Nations and its non-governmental organizations, especially the International Association of Penal Law (I.A.P.L. or A.I.D.P.), the world's scholars and policy makers have come a long common way in developing mutual understanding and common, joint or parallel approaches to problem solving in matters of international criminal law. Consider Shupilov's discussion of the Convention (among the Socialist countries) on the Extradition of Offenders Sentenced to Deprivation of Liberty to serve Punishment in the State of Citizenship, of August 27, 1979. This document is completely equivalent to conventions among the Western European nations and those among certain North American nations, which can be traced to the pioneering work of the United Nations Congresses on the Prevention of Crime and the Treatment of Offenders, preceded by the ancillary work of the N.G.O. Alliance of Organizations on Crime Prevention and Criminal Justice. The provision of similar institutional frameworks is the first positive step in the direction of an international law commonality.

Professor Shupilov's careful definition of legal assistance, "the composite of actions necessary for the enforcement of criminal responsibility in a particular case," is noteworthy. This is not to deny the desirability, indeed the expansion, of efforts of cooperation among states in matters of crime prevention and criminal justice, whether bilaterally, multilaterally, or globally, under the aegis of the United Nations or its non-governmental organizations. Shupilov and other authors, whom he cites, have properly noted the point.

But there is another important point of agreement between Professor Shupilov's paper and that of western colleagues. It concerns the exclusion from the political offense exception to the extradition rule, forcefully made by Professors Sternberg and Skelding. Yet it is also at this point of convergence that, in the past, nations have witnessed the greatest divergence. The interface of political-foreign policy and judicial considerations which overshadow the formulation and implementation of extradition policies are far removed from anything which can be called positive international criminal law. In countries where extradition decisions rest primarily with the executive, foreign policy considerations tend to predominate and exacerbate inter-national sensibilities. After all, one nation's freedom fighter is another nation's terrorist. If that is so, then Sternberg and Skelding's proposal to juridicalize the extradition decision (contra to a pending United States Senate Draft) would go a long way to defusing this area and bringing it closer to international criminal law.

This brings us to the most dangerous type of contemporary international offender, the terrorist, for whom the principle *aut dedere aut judi-*

care is most appropriate. But how does international criminal law deal with the terrorist before even being in the position of having to decide on trial or extradition? Professor Cooper deals with this question, which he knows so well, both academically and practically. Is it feasible to develop international and uniform standards for dealing with international hostage situations? Perhaps Professor Cooper's first step is the easiest: the development of standards defining the responsibilities and obligations of the host government toward the hostages in terms of due care to be exercised for their benefit, for example, providing for their protection and release, and ensuring them remedies and recourse for negligence or other violations of the standards. The second step is more difficult: what international means are feasible for ending a hostage situation? Is it ultimately necessary, possible, wise or feasible to create an international SWAT team which could be called to the scene at a moment's notice (with Security Council assent)? Perhaps this solution might be preferable to having Israel send a SWAT team to Entebbe, Germany (F.R.) one to Mogadishu and the United States one to Iran. What intermediate steps should be taken before such an armed venture is launched and, would there be time for any intermediate venture? Should consent of the host government be required? An armed venture absent the host government's consent would constitute a Charter violation.

The third step is even harder: Professor Cooper suggests that hostage takers, whether insurgents, terrorists or criminals *lucris causa*, ought to be held to minimum standards for the treatment of their hostages. There has, of course, been considerable reluctance to extend the benefit of the Geneva Conventions to incidents of this sort for fear of thereby giving recognition and legitimacy to criminal enterprises. Apart from that, it is doubtful that those who have already shown their contempt for law—national and international—by engaging in a terrorist hostage situation are likely to be influenced by additional criminal or civil liability for unfair treatment of their victims. But then, the concept "hostage takers," as noted, is a broad one, ranging all the way from the predatory criminal to the quasi-head of a quasi-government, aiming at the establishment of the independence and dignity of a theretofore subjugated nation.

All nations whose birth was marked by bloody revolutions fully appreciate the forcible desire to gain independence and sovereign dignity. There are a pitiful, yet glorious, few nations whose birth was not marked by bloodshed. Yet, if the United Nations can record any major accomplishment, it is this: while the one-third of its founding membership had to shed blood in streams in order to gain sovereignty, the two-thirds who joined subsequently had to shed blood, if at all, only in rivulets. That is the true accomplishment of the United Nations and it is the cornerstone of the three articles in the second half of the issue. It is the search for a means to differentiate between those who seek dignity and independence

within the confines of the United Nations Charter and those who are intent on exploiting international divergences *lucris causa*. The standards which Professor Cooper envisages clearly can be made to govern the former; it is hopeless to expect the latter to comply. The International Commission of the Red Cross has been instrumental in the implementation of these emerging principles, for example, by the repatriation of officers from belligerent countries captured by insurgents to their home countries.

International criminal law is a field of vast paradoxes. Its international scope is disputed by some; its status as law by others. Its scope and jurisdictional claim are as broad as the universe, yet the number of scholars and practitioners is smaller than the smallest kinship group of the most remote Micronesian village. Over the years the ancestors of this kinship group have become the revered elders: Meili, Schwarzenberg, Pfenninger, the Gluecks, Pella, Graven, Glaser, Ancel, Jescheck and Oehler. The discussions and disputes among our kin, nationalities quite aside, are those of a village community which impacts the destiny of the world, if not the universe.

During the generation in which the world witnessed and participated in the ascendancy of the world body, disputes have gradually shifted from the policy level, on which there was vast initial agreement, to the technical level. These disputes have become less overwhelming and frequently they are less attributable to fundamental divergences than to problems of communication. The world community is, after all, dependent on an imperfect communications network. Efforts to surmount such technical problems and make international criminal law a reality are hopefully balanced by the demonstrated willingness to find commonly acceptable solutions.

Here there is solace in the comments of various contributors. Professor Shupilov alluded to it when he identified, as a separate category of international cooperation in criminal justice, the growing willingness of states to share their experiences with a view toward keeping crime rates low in all countries. This is particularly important since the nations of this world have become increasingly interdependent. If international criminal law is to achieve the stature of a policy instrument parallel to that which municipal criminal law has become, there must be international cooperation through the only vehicle in existence which fosters such cooperation: the United Nations. Cooperation in efforts to contain national and international criminality by the various mechanisms of existing U.N. policy-making and legislative bodies, principally the Committee on Crime Prevention and Control, serviced by the Crime Prevention and Criminal Justice Branch, and the International Law Commission, serviced by the Office of Legal Affairs, is critical.

The apparatus for a just world crime prevention system cannot be built in a day—or a week. The scholarly contributions to this journal are

a testimonial to the distance already traversed. The immediate future can envisage little more than further adhesion to international instruments and, above all, a willingness to participate in joint exercises for training and conditioning the functionaries of all of the criminal justice systems, and cooperate in the task of containing the world's crime rates. A few years hence, States may be equipped to take the next step, a joint and coordinated effort through an international system of law enforcement to control man's last uncontrolled plague: crime.⁴

⁴ In this regard see Mueller & Besharov, *The Existence of International Criminal Law and its Evolution to the Point of its Enforcement Crisis*, in *A TREATISE ON INTERNATIONAL CRIMINAL LAW* (Bassiouni & Nanda eds. 1973).

