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Introductory Remarks

by *Denis Szabo**†

International criminal law is a recent branch of the law of Nations (*ius gentium*). In medieval times, and even up to the end of the 16th century, the moral order imposed by the Catholic Church on the Western World constructed a framework and principles that were scarcely questioned. Although Christian monarchs were subject, in principle, to the moral dictates of the Church, infractions were numerous and the crimes perpetrated atrocious. In many cases, the norms on which this order was based were sanctioned by those who exercised the temporal power. Excommunication, the supreme punishment, was the fate of those declared guilty of crimes against the natural order and was justified by divine law.

This natural order gave way under the pressures of modernization which, since the Reformation, transformed the Western World into a juxtaposition of sovereign powers. These sovereign states from one industrial revolution to the next became established as autarchical entities at the juridical level. The sovereignty of the people, as proclaimed by Rousseau, was gradually imposed at the end of the 18th century in a majority of Western countries. Its principle, that of democratic government, is no longer contested in most countries of the world; at least in those countries which adhere to the Charter of the United Nations. Authoritarian governments exercise their power "on behalf of the people" as the authorized representative of the peoples' sovereignty. The sovereigns who referred to one another as "cousin," emphasizing that they belonged to the "same world," finally disappeared. Simultaneously, the concept of international order collapsed.

The bloody confrontations of the national sovereignties in the second half of the 19th century culminated in the last two world wars, and dramatically showed the consequences of the breakdown of the natural order, based on a certain consensus concerning the morality of the conduct between sovereign national states. Thus, since the end of the 19th century, the world has seen the birth and the extremely slow development of

* The editors of the Journal are to be congratulated for their worthwhile and successful initiative.

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international law and its specialized branch, international criminal law.

The Geneva Convention, following the humanitarian example of the Swiss, has been inaugurating a whole series of international treaties which have culminated in the creation of an International Court at The Hague, charged with arbitrating and often judging very limited types of international disputes. The birth of the United Nations after the second world war and the agreements instituting the jurisdiction of the international court of Nuremburg are developments that increasingly evidence the protection of human rights proclaimed in the Universal Declaration ratified by the member states of the United Nations. The agreements concerning genocide, apartheid, and terrorism are among the most important initiatives that occupy so many chapters of a "Treaty of International Penal Law," which is gradually emerging following the first efforts to define a "war of aggression" after the first world war.

As in all legislative work, the question of the effectiveness of punishment is of the essence. It is the major weakness of national penal law. Maintaining law and order in pluralist democracies is becoming increasingly problematic. Respect for habeas corpus and the principle of presumption of innocence are justly considered major acquisitions for the protection of individual liberties. Yet this respect depends on the good faith of the protagonists in a criminal trial. The law is manipulated by the strong to defeat the weak and by the astute to defeat the naive. Above all, sanctions are exercised within the framework of a discretionary power that threatens to divert the laws from their objectives of justice and equity. Today, and in North America particularly, the effectiveness of the law in the protection and safety of persons and property is regarded as leaving much to be desired. Discussions about deterrence, punishment and resocialization are very lively, and opposing points of view are expressed with equal vigour.

Under such conditions, it is not surprising that international criminal law cannot boast of spectacular results. Nor should it be surprising that in some contexts, international criminal law does not even exist. In fact, since the problem of resocialization is of little concern internationally (although the action of the United Nations in occupied Japan in 1945 was close to it), where international criminal law is concerned, the guilty are rarely punished. There is no universal consensus on the subject of international criminal law itself. For some, only sovereign States are subject to it, having ratified the treaties; for others, the individual is equally responsible for his acts, even when executing the orders of a superior. The complex and disappointing history of extradition treaties and their application illustrates the difficulty of ensuring the punishment of criminal acts involving the jurisdiction of sovereign States. Lastly, there is deterrence, which even in national criminal law has never been the object of satisfying tests and evaluations. Although the assumption of deterrence is a cor-

ner stone of criminal law, its effectiveness and influence have never been established. Yet the principle of deterrence remains the sole justification, if not the *raison d'être*, of international criminal law. The international community, reflected by the States' ratifying conventions, projects a desire to see such a principle honored. Having none of the means available for the other objectives of the law—neither punishment, resocialization nor, most of the time, coercion—international criminal law mainly has an educational function.

A challenge to order and international morality, however, is not lacking. In particular, the terrorism of today and the kidnappings that result are often a test of the laws, treaties and conventions. Unfortunately, "private" justice, illegal according to the laws, is practiced almost unhindered at the international level. The terrorists' bid for power is met by counter-terrorism justified by the States. These practices are becoming more and more widespread and accepted by the public, but they are rather discouraging for the future of international criminal law.

This depressing situation, however, has not discouraged the scientific community which, within the framework of government or scientific organizations, continues the long and arduous quest for the construction of an international body endowed with true judicial institutions (police, courts and even "Spandau," especially for war criminals). Are the peace-keeping forces of the United Nations not a foreshadowing of an international police force? Are the anti-terrorist pacts of the Council of Europe not contributing to the creation of a law armed with sanctions? The idea of an international criminal court is regularly on the agenda of the discussions of a European jurisdiction.

The present volume is a valuable contribution to the debate concerning the issues this introductory comment has briefly outlined. The following works of well-known experts broaden the horizons and probe the questions in depth.

