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ARTICLES

The Foundations of International Criminal Law: A Present-Day Inquiry

by
Robert A. Friedlander*

I. THE SEARCH FOR A DEFINITION

In a now celebrated essay published five years after the conclusion of the Second World War, Professor Georg Schwarzenberger raised the controversial issue of whether or not international criminal law exists.¹ His answer to this selfposed question was straightforward and resolute: "[I]n the present state of world society, international criminal law in any true sense does not exist."² More than three decades later, the distinguished British legalist had not deviated from his original position: "[T]here is little chance for any [International] Criminal Law in the substantive sense."³

A second group of scholars, mainly American, has been less hostile in its approach, but nevertheless cautious and tentative in reaching its conclusions. For example, one prominent publicist of the immediate post-World War II generation defined the nature of international criminal law in terms of jurisdiction, both national and transnational.⁴ Another commentator of the same time period ignored the concept altogether, deter-

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¹ Schwarzenberger, *The Problem of an International Criminal Law*, 3 CURRENT LEG. PROBS. 263 (1950), reprinted in INTERNATIONAL CRIMINAL LAW 3-36 (G. Mueller & E. Wise eds. 1965) [hereinafter cited as INTERNATIONAL CRIMINAL LAW]. Further references made to the Schwarzenberger analysis will be taken from the Mueller and Wise compilation.

² Schwarzenberger, *supra* note 1, at 35.

³ Letter to author, Harpenden, England, July 2, 1982.

⁴ P. JESSUP, TRANSNATIONAL LAW 35-71 (1956).

mining international criminality to consist of specific violations of international law or human rights, and the related criminal processes to be part of public international law in its general function.⁵ A third analyst of a succeeding decade also shied away from the notion of an international criminal law, substituting in its place the concept of crimes under recognized international law, such as piracy and war criminality.⁶ Even a contemporary scholar, who accepted the theory in principle, nonetheless defined the subject matter as "a special case of the practice of punishment"⁷

There is a third group which has adopted a *contra* position, that slowly seems to be gaining ascendancy, particularly on the European continent. Their view is that international criminal law not only exists, however primitive its nature, but that it is a historical phenomenon firmly rooted in the past and continues to expand into the present.⁸ The most sweeping definition has been put forward by a leading contemporary authority: "[I]nternational criminal law is that branch of the international legal system which represents one of the strategies employed to achieve, in respect to certain world social interests, this greater degree of compliance and conformity with the goals of the world community of prevention, preservation, and rehabilitation."⁹

The influential American scholar, Quincy Wright, chose a more moderate and far simpler approach. Since the concept of crimes against international law is well-established, and since liability for those criminal acts is also well-founded, it is only logical to conclude that international crimi-

⁵ See C. FENWICK, *INTERNATIONAL LAW* (4th ed. 1965).

⁶ G. VON GLAHN, *LAW AMONG NATIONS: AN INTRODUCTION TO PUBLIC INTERNATIONAL LAW* 692-719 (2nd ed. 1970).

⁷ Wise, *Prolegomenon to the Principles of International Criminal Law*, 16 N.Y.L. FORUM 562, 573 (1970).

⁸ Cf. W. FRIEDMANN, *THE CHANGING STRUCTURE OF INTERNATIONAL LAW* 167-170 (1964); C. LOMBOIS, *DROIT PÉNAL INTERNATIONAL* (2nd ed. 1979); S. WILLIAMS & A. DE MESTRAL, *AN INTRODUCTION TO INTERNATIONAL LAW: CHEIFLY AS INTERPRETED AND APPLIED IN CANADA* 145-149 (1979); J. STARKE, *AN INTRODUCTION TO INTERNATIONAL LAW* 76-80 (8th ed. 1977); Wright, *The Scope of International Criminal Law: A Conceptual Framework*, 15 VA. J. INT'L L. 561 (1975); Green, *New Trends in International Criminal Law*, 5 ISRAEL Y.B. ON HUMAN RIGHTS 9 (1981) [hereinafter cited as Green, *New Trends*]; Dinstein, *International Criminal Law*, 5 ISRAEL Y.B. ON HUMAN RIGHTS 55 (1975); Bassiouni, *An Appraisal of the Growth and Developing Trends of International Criminal Law*, 45 REVUE INTERNATIONALE DE DROIT PÉNAL 405 (1974) [hereinafter cited as Bassiouni, *Appraisal*], reprinted in M.C. BASSIOUNI, *INTERNATIONAL CRIMINAL LAW: A DRAFT INTERNATIONAL CRIMINAL CODE* 1-36 (1980) [hereinafter cited as DRAFT CODE]; *INTERNATIONAL CRIMINAL LAW*, *supra*, note 1; A *TREATISE ON INTERNATIONAL CRIMINAL LAW* (M.C. Bassiouni & V. Nanda eds. 1973) [hereinafter cited as TREATISE]; and, especially, *BIBLIOGRAPHY ON INTERNATIONAL CRIMINAL LAW* (B. de Schutter & C. Eliaerts eds. 1972) [hereinafter cited as BIBLIOGRAPHY].

⁹ Bassiouni, *Appraisal*, *supra* note 8, at 405-406.

nal law does in fact exist.¹⁰ Wright's unusual argument depends in part upon the curious notion that crimes can be committed against a body of substantive principles, and that they are loosely defined as those acts which violate a fundamental international interest.¹¹ The predominant view, on the other hand, places its emphasis upon injuries to rights and avoidance of duties established by treaty and convention.

Although accepting the theoretical notion of an international criminal law, the most prominent French expert prefers a "more restrained" approach, focusing upon the "jurisdictional localization of an infraction in a settled legal system."¹² In other words, despite the use of international terminology, his major emphasis is actually upon jurisdiction and domestic procedures which derive their competence from treaties, conventions, reciprocity, and interstate cooperation.¹³ Utilizing this means of analysis, the penal aspect of international criminal law becomes most important, stressing trial, adjudication, and judgment. It constitutes, in a sense, "the internationalization of municipal criminal law."¹⁴

There is one other approach to international criminal law which deserves mention—namely, the doctrine of state responsibility. This concept, a legacy from the aftermath of the Second World War, implies that international misconduct by a nation-state, if it involves gross violations of prevailing legal norms, may be considered a criminal act which will incur criminal liability.¹⁵ It also stems from the influence of the distinguished Rumanian legalist Vespasian Pella, who first argued his theory of criminal state responsibility in a widely-read treatise published in 1925.¹⁶ Although the latter view has been challenged by a number of European specialists, including several Soviet academicians,¹⁷ the debate has not

¹⁰ Wright, *supra* note 8, at 577.

¹¹ *Id.* at 567.

¹² Lombois, *Le droit pénal international*, 50 REVUE INTERNATIONALE DE DROIT PÉNAL 55 (1980).

¹³ *Id.* at 66-70. See also the comments of Schutte, *Enforcement Measures in International Criminal Law*, 52 REVUE INTERNATIONALE DE DROIT PÉNAL 442 (1981).

¹⁴ Bassiouni, *Appraisal*, *supra* note 8, at 408. On October 1-2, 1982, the American Law Institute and the American Bar Association sponsored a joint seminar on international criminal law in Washington, D.C., dealing with material assistance in treaty matters, jurisdiction, extradition, arrests of American nationals abroad, international tax fraud, interstate transfer of prisoners, asylum, and unlawful seizures.

¹⁵ L. OPPENHEIM, 1 INTERNATIONAL LAW 335-339, 341-350, 355-364 (H. Lauterpacht ed. 8th ed. 1955).

¹⁶ V. PELLA, *LA CRIMINALITÉ COLLECTIVE DES ÉTATS ET LE DROIT PÉNAL DE L'AVENIR* (1925). See also, M. TRAVERS, *LE DROIT PÉNAL INTERNATIONAL: ET SA MISE EN OEUVRE EN TEMPS DE PAIX ET EN TEMPS DE GUERRE* (1921); H. DONNEDIEU DE VARBES, *LES PRINCIPLES MODERNES DU DROIT PÉNAL INTERNATIONAL* (1928). The impact of Pella's work is demonstrated throughout B. FERENCZ, *AN INTERNATIONAL CRIMINAL COURT: A STEP TOWARD WORLD PEACE—A DOCUMENTARY HISTORY AND ANALYSIS* (1980).

¹⁷ See, e.g., P. DROST, 1 *THE CRIME OF STATE* (1959), and the comments of G. TUNKIN,

subsidized. It is worth noting that the International Law Commission of the United Nations, on August 29, 1979, proposed a draft code on state responsibility for international wrongful acts. However, the Commission failed to specify possible remedies or to establish any process through which redress might be obtained.¹⁸

American academic recognition for the field of international criminal law could be construed as being achieved in 1956 with the adoption of that classification by the *Index to Legal Periodicals*.¹⁹ By the mid-1970's, not only were Soviet lawyers and jurists actively participating in the various meetings of the International Association of Penal Law, but the most prominent Soviet international legal scholar, G.I. Tunkin, modified his earlier position and unequivocally recognized the concept of international crime, declaring it to constitute "the gravest violation of international law. . . ."²⁰ The United Nations International Law Commission accepted the doctrine of international criminality in Article I of its Report on the Nuremberg Principles, which was submitted to the General Assembly in 1950, but never adopted.²¹ Five years later, the United Nations sponsored its first global congress on the prevention of crime and the treatment of offenders, held in Geneva, Switzerland, and successive congresses have taken place in several different continents on a quinquennial basis.²² There is now a U.N. Crime Prevention Branch, located in Vienna, which was originally placed under the direction of a noted authority in the field of international criminal law.²³ In light of the current widespread acceptance of international law, it would be difficult to claim that international criminality is a mere legal fiction.

THEORY OF INTERNATIONAL LAW 396-404 (W. Butler trans. 1974).

¹⁸ 18 INT'L LEG. MATS. 1568 (1979). L. OFFENHEIM, *supra* note 15, at 356, notes that "[t]here are no international judicial decisions laying down and applying the principle of criminal responsibility of States." The Iranian case decided by the International Court of Justice in 1980 may provide the one exception. See Case Concerning United States Diplomatic and Consular Staff in Teheran (United States v. Iran), 1980 I.C.J. 3.

¹⁹ INDEX TO LEGAL PERIODICALS: AUGUST 1955 TO JULY 1958 at 310 (D. Flaherty & T. Pulsifer eds. 1958).

²⁰ Tunkin, *International Law: The Contemporary and Classic*, in ESSAYS ON INTERNATIONAL LAW: IN HONOUR OF K. KRISHNA RAO 55 (M. Nawaz ed. 1976). Tunkin does not offer a definition of international criminality, but he does offer two examples: aggression and colonialism. *Id.* at 50 and 52.

²¹ United Nations, Report of the International Law Commission, 5 U.N. G.A.O.R. (Supp. No. 12), at 11-14, U.N. Doc. A/1316 (1950), reprinted in 1 TREATISE, *supra* note 8, at 587-588.

²² For a description of the first four congresses, see B. ALPER & J. BOREN, CRIME: INTERNATIONAL AGENDA—CONCERN AND ACTION IN THE PREVENTION OF CRIME AND TREATMENT OF OFFENDERS, 1846-1972, at 88-99 (1972). The Fiftieth Congress was held in Caracas, Venezuela, during August, 1980.

²³ Dr. Gerhard O.W. Mueller, former professor of criminal law and criminology at New York University and currently professor of criminal justice, Rutgers University.

However, to say that something exists is neither the same as defining its elements nor describing its role. The difficulty with the theory of an international criminal law is that it represents a convergence of both public international legal norms and the international aspects of municipal criminal law.²⁴ The international criminal system, as it presently operates, is predicated upon analogies to domestic legal systems and, therefore, to domestic rules and procedures.²⁵ The problem in ascertaining the viability of such comparisons is the lack of an effective enforcement system on the international level.²⁶ Sanction mechanisms are nonexistent, except for the precatory language of some international conventions asserting the Grotian maxim of *aut dedere aut punire* (extradite or prosecute).²⁷ The quintessential issue pertaining to the multilateral treaties and conventions which have already entered into force continues to be whether any effective international enforcement mechanisms can ever be developed to maintain a minimum level of world order.

During the past century and a quarter, slightly more than 100 treaties and conventions have been promulgated dealing with almost 30 different subjects relating to criminal law in an international context.²⁸ Although at first glance this may seem to reflect a trend toward international codification, these agreements have actually come into being on an *ad hoc* basis, rather than through deliberate and systematic development. In fact, a prominent American authority frankly admits that international criminal law still "has no theoretical justification."²⁹ However, like motherhood, it is a difficult idea to oppose,³⁰ particularly in a world where individual and group violence seem to be rising at an extremely dangerous rate.³¹

²⁴ M.C. Bassiouni, "Introduction to the Philosophy of Criminal Justice in International Criminal Law" [hereinafter cited as Bassiouni, "Introduction"], Conference on Contemporary Perspectives on the Philosophy of Criminal Justice, sponsored by the Istituto Superiore Internazionale di Scienze Criminali, Siracusa, Italy, Jan. 9, 1980 [hereinafter cited as Perspectives Conference].

²⁵ Cf. Wise, *supra* note 7, at 569-572; Wright, *supra* note 8, at 562-563; Bassiouni, *Appraisal*, *supra* note 8, at 406 and 425-428.

²⁶ See Green, *Jurisdictional Issues in International Criminal Law*, CHITTY'S L.J. 355 (1979) [hereinafter cited as Green, *Jurisdictional Issues*]; Bassiouni, "Introduction," *supra* note 24; Mueller & Besharov, *The Existence of International Criminal Law and Its Evolution to the Point of Its Enforcement Crisis*, in 1 TREATISE, *supra* note 8, at 5.

²⁷ 1 TREATISE, *supra* note 8, at 9; Van Den Wijngaert, *Quelques observations relatives à la partie "mesures d'exécution" du projet de code pénal international*, 52 REVUE INTERNATIONALE DE DROIT PÉNAL 463, 468-471 (1981).

²⁸ Bassiouni, "Introduction," *supra* note 24.

²⁹ *Id.*

³⁰ Green, Book Review, 7 DALHOUSIE L.J. 199, 201 (1982).

³¹ See Friedlander, *On the Prevention of Violence*, 25 CATH. LAW. 95 (1980). Following revelation of the massacre of Palestinian refugees in Lebanon, Pope John Paul II vigorously denounced "the forces of evil and the spiral of violence that is spreading throughout the

II. HISTORY OF INTERNATIONAL CRIMINAL LAW

There is no agreement among scholars as to when international criminal law may be said to have first come into existence. Some trace it back to ancient Egypt, the Hebrew prophets, and the age of classical Greece.³² Others hint at medieval origins.³³ One commentator goes so far as to claim not only that the U.S. Constitution "assumes that international law defines certain crimes," but also that federal case law in the 1790's held that international criminal law formed part of the common law heritage.³⁴ A stronger case can be made that international criminal law emerged in the first decades of the 20th century,³⁵ especially in the wake of the First World War with the Leipzig war crimes trials and the abortive Allied attempt to prosecute the German Kaiser.³⁶

A recent analyst has claimed that, "ideas and attitudes do not derive from society in the straightforward way that chapters line up in books and that lectures follow one another in history courses. . . ."³⁷ Whether ideas engender action or respond to events is a matter of philosophical conjecture rather than demonstrable evidence. Whatever the inspiration, on March 24, 1924, the International Association of Penal Law (A.D.I.P.) was established in Paris. It constituted a revival of the defunct International Union of Penal Law, created in 1889, which had been a casualty of First World War politics.³⁸

The goals of the A.D.I.P., as defined in its charter, were primarily criminological in nature, but this also included a generalized statement of special interest in international penal law.³⁹ Within two years, at its first congress held in Brussels, the Association went on record as favoring a

world." The Courier (Findlay, Ohio), Sept. 20, 1982, at B 14, col. 1.

³² Cf. H. DONNEDIEU DE VARBES, INTRODUCTION À L'ÉTUDE DU DROIT PÉNAL INTERNATIONAL 10-40 (1922); Bassiouni, *Appraisal*, *supra* note 8, at 411. Yet, the Persian Emperor Xerxes, despite the murder of his envoys by the Athenians and Spartans, refused to retaliate against them, citing the law of mankind. C. FENWICK, *supra* note 5, at 8.

³³ Green, *International Crimes and the Legal Process*, 29 INT'L & COMP. L.Q. 567, 570-571 (1980) [hereinafter cited as Green, *International Crimes*]; Green, *Jurisdictional Issues*, *supra* note 26, at 346; Bassiouni, *Appraisal*, *supra* note 8, at 414; Bierzanek, *War Crimes: History and Definition*, in 1 TREATISE, *supra* note 8, at 559-560.

³⁴ Wright, *supra* note 8, at 565.

³⁵ Mueller & Bresarov, *supra* note 26, at 5; Green, *New Trends*, *supra* note 8, at 13-14.

³⁶ *Id.* at 14-17; Bassiouni, *Appraisal*, *supra* note 8, at 415, 417-418; Bierzanek, *supra* note 33, at 562-569; 1 B. FERENCZ, *supra* note 16, at 27-33. Writing in the flush of optimism occurring in the immediate aftermath of the First World War, DONNEDIEU DE VARBES, *supra* note 32, at 461, concluded: "The authors of the Treaty of Versailles . . . have instituted a penal sanction; they have foreseen a superior jurisdiction to States."

³⁷ Daranton, Book Review, The New York Review of Books, May 13, 1982, at 12.

³⁸ Cornil, *Reflexions sur le cinquantenaire de l'Association Internationale de Droit Pénal*, 46 REVUE INTERNATIONALE DE DROIT PÉNAL 388, 389 (1975).

³⁹ *Id.* at 392.

criminal jurisdiction for the Permanent Court of International Justice.⁴⁰ A few years after this meeting, the A.D.I.P. commissioned Vespasian Pella, who was later to become president of the organization, to draft an international penal code, ultimately published in 1935.⁴¹ A similar project was undertaken by the Association's Secretary-General, Professor M. Cherif Bassiouni, nearly two generations later.⁴²

Further impetus toward the development of an international penal jurisdiction was provided by the so-called Latin American Bustamente Code of 1928, which has been in force since 1936 in 15 Central and South American countries.⁴³ The high point of the developing trend toward an international criminal law was a 1937 conference held in Geneva, Switzerland, sponsored by the League of Nations, occasioned by the dual assassination of the Yugoslavian king and the French foreign minister in Marseilles three years before.⁴⁴ After that conference, the resulting Conventions for the Prevention and Punishment of Terrorism⁴⁵ and for the Creation of an International Criminal Court were promulgated and adopted by resolution of the League Council, May 27, 1937. Controversy over the nature of their provisions and the onset of the Second World War rendered both Conventions a dead-letter, with the former document obtaining only one ratification (India), and the latter receiving none at all.⁴⁶

Perhaps the most important historical contribution of these two Conventions, aside from indicating that the problem of international terrorism is not merely a contemporary phenomenon,⁴⁷ was their common origin. Their joint promulgation validated American Secretary of State Robert Lansing's advice to the annual meeting of the American Bar Association 20 years earlier: that without an International Criminal Court, there could be no Criminal Code; and without an International Criminal Code, there could be no Court.⁴⁸

⁴⁰ Jescheck, *Development, Present State and Future Prospects of International Criminal Law*, 52 *REVUE INTERNATIONALE DE DROIT PÉNAL* 337 (1981) [hereinafter cited as Jescheck, *International Criminal Law*].

⁴¹ *Id.* at 338.

⁴² See DRAFT CODE, *supra* note 8.

⁴³ Jescheck, *International Criminal Law: Its Object and Recent Developments*, in 1 *TREATISE*, *supra* note 8, at 53.

⁴⁴ Cf. A. ROBERTS, *THE TURNING POINT: THE ASSASSINATION OF LOUIS BARTHOU AND KING ALEXANDER I OF YUGOSLAVIA* (1970); Korvig, *Mediation by Obfuscation: The Resolution of the Marseille Crises, October 1934 to May 1935*, 19 *HIST. J.* 191 (1976).

⁴⁵ See 1 B. FERENCZ, *supra* note 16, at 269-398.

⁴⁶ *Id.* at 54.

⁴⁷ On this subject, see 1 R. FRIEDLANDER, *TERRORISM: DOCUMENTS OF INTERNATIONAL AND LOCAL CONTROL* 1-39 (1979).

⁴⁸ 1 B. FERENCZ, *supra* note 16, at 33.

III. MODERN DEVELOPMENTS

The real point of departure for modern international criminal law can be found in the Nuremberg and Tokyo Tribunals and their respective judgments. The Nuremberg and Tokyo proceedings clearly demonstrated a need for some sort of international criminal standards and procedures,⁴⁹ and they were originally considered to be landmark precedents highlighting the responsibility of the individual under international law.⁵⁰ In fact, former U.S. Attorney General Francis Biddle, as a result of the Nuremberg verdicts, recommended to president Harry S. Truman in his report on the trial that codifications of international criminal law be formally undertaken.⁵¹ The new U.N. Secretary-General Trygve Lie, also an advocate of codification of international law,⁵² published a historical study of the need for an international criminal jurisdiction in 1949,⁵³ but nothing came of these efforts. In his first Annual Report to the United Nations, Secretary Lie urged incorporating the Nuremberg Trial principles into a general code of international law.⁵⁴

After vigorous debate and disagreement,⁵⁵ a list of Nuremberg Principles was drawn up by the International Law Commission and submitted to the U.N. General Assembly in 1950, but the outbreak of the Korean War and deepening political divisions within the world community caused the Commission's recommendations to be still-born.⁵⁶ Although legal academics have long considered the Nuremberg Judgment and the Nuremberg Principles to represent a prototypical international retributive model, the hard fact and cold reality is that they are now—and have been for more than a generation—in cold storage, though always subject to the possibility of revival.⁵⁷ Or to put it even more emphatically, no compre-

⁴⁹ D. LLOYD, *THE IDEA OF LAW* 338 (Rev. ed. 1979).

⁵⁰ See, e.g., Jescheck, *International Criminal Law*, *supra* note 40, at 340-349; Green, *New Trends*, *supra* note 8, at 18-24; Dinstein, *supra* note 8, at 56-60, 78-87; Bassiouni, *Appraisal*, *supra* note 8, at 415-420 and 432; Wright, *The Law of the Nuremberg Trial*, 41 *AM. J. INT'L L.* 38 (1947), *reprinted in* *INTERNATIONAL CRIMINAL LAW*, *supra* note 1, at 239 and 278; and, generally, 1 *TREATISE*, *supra* note 8. For a *contra* view, see Shick, *International Criminal Law—Facts and Illusions*, 11 *MOD. L. REV.* 290, 303 (1948).

⁵¹ Wright, *supra* note 50, at 72.

⁵² T. LIE, *IN THE CAUSE OF PEACE: SEVEN YEARS WITH THE UNITED NATIONS* 282 (1954).

⁵³ *HISTORICAL SURVEY OF THE QUESTION OF INTERNATIONAL CRIMINAL JURISDICTION*, Submitted by the Secretary General, 4 U.N. G.A.O.R. U.N. Doc. A/CN.4/7/Rev. 1 (1949), *reprinted in part by* 1 B. FERENCZ, *supra* note 16, at 399-413.

⁵⁴ 2 B. FERENCZ, *supra* note 16, at 5.

⁵⁵ *INTERNATIONAL CRIMINAL LAW*, *supra* note 1, at 279-289.

⁵⁶ Report of the International Law Commission, 5 U.N. G.A.O.R. Supp. (No. 12) U.N. Doc. A/136, (1950), *reprinted in* 1 *TREATISE*, *supra* note 8, at 587-588.

⁵⁷ Mueller, "Comments," paper presented at the Perspectives Conference, *supra* note 24. See also Shick, *supra* note 50, at 301. The latter claims that "[t]he Statute of the International Court of Justice clearly rejects the doctrines of an international criminal law

hensive treaty or convention presently exists dealing with international criminal law as a legal entity.⁵⁸

Despite the infamous Eichmann case, or perhaps because of it, the United Nations General Assembly, in its 1968 Convention on the Non-Applicability of Statutory Limitations to War Crimes, favored the principle of national jurisdiction in accordance with domestic constitutional processes.⁵⁹ The Assembly then declined to include international criminal jurisdiction as an agenda item for its 23rd session, and nothing has occurred along that line since.⁶⁰

The Israeli Supreme Court, in sustaining Eichmann's conviction in May 1962, had actually anticipated the Pontius Pilate approach of the United Nations to war criminality. Asserting that international criminal law was still in a "primitive" stage of development, and noting the lack of either an international criminal court or any effective international penal instrumentalities, the Israeli Supreme Court claimed that by virtue of the Eichmann prosecution, Israel had assumed the role of "keeper" of international law.⁶¹ Eichmann was convicted of genocide committed in time of war, rendering him liable for war crimes under prevailing standards of public international law (including the Nuremberg Judgment), rather than subjecting him to the Genocide Convention which, with respect to his notorious activities, was an *ex post facto document* adhering to the territoriality principle of criminality rather than the universality approach.⁶² In point of history and fact, the Eichmann case was the last twitch of Nuremberg's dying conscience.⁶³

It was, of course, the human rights momentum generated by the Nuremberg and Tokyo trials that provided the impetus for the U.N.-sponsored Genocide Convention of 1948. The latter entered into force in 1961 and has now been signed by 86 states.⁶⁴ While genocide in theory has come to be labeled an international criminal act, it really is only a princi-

such as was conceived at Nuremberg" in that the Court only allows states to be parties before it. *Id.*, at 304.

⁵⁸ Jescheck, *supra* note 43, at 53.

⁵⁹ Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, G.A. Res. 2391, 23 U.N. G.A.O.R. Supp. (No. 18) U.N. Doc. A/7218, (1968), *reprinted in* 1 R. FRIEDLANDER, *supra* note 47, at 459-460.

⁶⁰ R. FISHER, *IMPROVING COMPLIANCE WITH INTERNATIONAL LAW* 76 fn. 7 (1981).

⁶¹ Dinstein, *supra* note 8, at 73.

⁶² *Id.* at 62.

⁶³ On the legal significance of the Eichmann case, see P. PAPADATOS, *THE EICHMANN TRIAL* (1964); G. HAUSNER, *JUSTICE IN JERUSALEM* (4th ed. 1968); H. SILVING, *SOURCES OF LAW* 317-373 (1968); Green, *Legal Aspects of the Eichmann Trial*, 37 *TUL. L. REV.* 641 (1963).

⁶⁴ Convention on the Prevention and Punishment of the Crime of Genocide, *opened for signature*, December 9, 1948, *entered into force*, January 12, 1951, 78 U.N.T.S. 277. The U.S. signed, but has yet to ratify.

ple of public international law and not a mandatory prohibition of positive law or part of the *jus cogens*.⁶⁵ The violations, derogations, and outright flaunting of the genocide proscription by such humanicidal regimes as that of Idi Amin in Uganda, Pol Pot in Kampuchea (still recognized by the United States and the United Nations), Alfredo Stroessner in Paraguay, and General Ali Murtopo in East Timor, constitute only a few drops in the global tides of blood which have continued to flow since the collapse of Nazi Germany in 1945. ⁶⁶ Indeed, genocide has been attempted or practiced so often in so many places during the past half-century that some critics maintain that international barbarism, in point of fact, has replaced the legal fiction of a world community bound by law.⁶⁷

IV. THE INFLUENCE OF HUMAN RIGHTS AND RACIAL DISCRIMINATION

One major difficulty confronting present-day advocates of an international criminal law is the tenuous relationship between human rights and the international criminal process. The theory of international criminality concentrates on human wrongs, while the international protection of human rights focuses on guarantees and statutory protection afforded by treaty and convention. The analytical focus is often blurred, and the admixture of rights and wrongs has had a confusing effect on the post-Charter evolution of public international law.⁶⁸ For example, terrorism has been almost universally condemned as an unconscionable violation of human rights, but acts of terror-violence are common crimes which have

⁶⁵ A *contra* view is put forward by Edwards, *Contribution of the Genocide Convention to the Development of International Law*, 8 OHIO N.U.L. REV. 300 (1981), who asserts that "the prohibition of genocide is now a general rule of international law independent of the treaty. . . ." *Id.*, at 309. Schwarzenberger, *Neo-Barbarism and International Law*, 22 Y.B. WORLD AFF. 191, 197 (1968), [hereinafter cited as Schwarzenberger *Neo-Barbarism*] maintains that in the absence of an international penal tribunal, signatory states have the legal duty of enacting domestic legislation "to make genocide a crime under the municipal laws of the contracting parties. . . ."

⁶⁶ See generally Leiser, *Victims of Genocide*, 8 OHIO N.U.L. REV. 315 (1981); Clark, *Does the Genocide Convention Go Far Enough? Some Thoughts on the Nature of Criminal Genocide in the context of Indonesia's Invasion of East Timor*, 8 OHIO N.U.L. REV. 321-324 (1981); Maneli, *Some Reflections on the Maxim Fiat Institia, Pereat Mundus*, 15 INT'L PROBS. 13 (1976).

⁶⁷ Cf. Leiser, *supra* note 66, at 320; Maneli, *supra* note 66, at 19-23; Schwarzenberger, *Neo-Barbarism*, *supra* note 65, at 191, 213.

⁶⁸ Cf. G. SCHWARZENBERGER, *POWER POLITICS: A STUDY OF WORLD SOCIETY* 458-466 (3rd ed. 1964); J. STONE, *OF LAW AND NATIONS: BETWEEN POWER POLITICS AND HUMAN HOPES* 303-310 (1974); Friedlander, *Human Rights Theory and NGO Practice: Where Do We Go From Here?*, in *GLOBAL HUMAN RIGHTS: PUBLIC POLICIES, COMPARATIVE MEASURES, AND NGO STRATEGIES* 219-221 (V. Nanda, J. Scarritt, & G. Shepherd, Jr., eds. 1981).

been proscribed by every civilized society throughout the world.⁶⁹ Criminal provisions for the protection of human rights on the international level have, unfortunately, confused and confounded the attempt by scholars and jurists to bring about an operative international criminal law.⁷⁰

Aside from treaties, conventions, and U.N. declarations, there has been no general agreement among legalists as to what actually constitutes an international crime. Other than interference with air transport, narcotics, piracy, aggression, genocide, apartheid, and war crimes, as they are spelled out in the 1949 Geneva Conventions and the two 1977 Protocols Additional (largely dealing with exceptions to the Geneva standards), international criminality is a catch-as-catch can proposition, with a broad variety of approaches based upon the respective proponents' national legal systems.⁷¹ Most of the above categories are adequately covered by existing norms and recognized sanctions of public international law, but as a Dutch expert has noted, "international criminal law is not a suitable instrument for conducting international politics, and certainly not for settling international political disputes."⁷² Yet, the "crime" of apartheid⁷³ was specifically promulgated for use as a political weapon against the government of South Africa.⁷⁴

Although the basic motivation underlying the prohibition of racial discrimination⁷⁵ rests upon unexceptionable moral, ethical, and humanitarian foundations, racial intolerance and discriminatory practices are so widespread and pervasive that absent outrageous human rights violations, apartheid as an international crime is impossible to enforce. Not only is racial discrimination subject to a bewildering variety of social and judicial interpretations, but many municipal legal systems already attach civil liability to violations of racial equality and to tortious acts associated with them. This does not even take into account the further difficulty raised by the proscription of outside intervention in the domestic affairs of a

⁶⁹ See R. FRIEDLANDER, *TERROR-VIOLENCE: ASPECTS OF SOCIAL CONTROL* (1983).

⁷⁰ For the intertwining of both concepts, see Ackerman, *Torture and Other Forms of Cruel and Unusual Punishment in International Law*, 11 VAND. J. TRANSNAT'L L. 653, 688-673, and 690 (1978). For the general role of human rights, cf. Jescheck, *Recent Developments*, *supra* note 43, at 61-68; Paust & Blaustein, *War Crimes Jurisdiction and Due Process: The Bangladesh Experience*, 11 VAND. J. TRANSNAT'L L. 1, 15-20 (1978).

⁷¹ Cf., e.g. DRAFT CODE, *supra* note 8, at 49-106; Dinstein, *supra* note 8, at 56-57.

⁷² Schutte, *supra* note 13, at 422.

⁷³ International Convention on the Suppression and Punishment of the Crime of Apartheid, *entered into force*, July 18, 1976, G.A. Res. 3068, 28 U.N. G.A.O.R., Supp. (No. 30), U.N. Doc. A/9030 (1974).

⁷⁴ Dinstein, *supra* note 8, at 64.

⁷⁵ See also International Convention on the Elimination of All Forms of Racial Discrimination, *entered into force* Jan. 4, 1969, G.A. Res. 2160A, 20 U.N. G.A.O.R., Supp. (No. 14) U.N. Doc. A/6014 (1966).

member state as found in Article 2(7) of the U.N. Charter.⁷⁶ Realistically, the best that one might hope for would be to penalize egregious violations of racial discrimination when they take on the color of genocide or war criminality.

V. CONCLUSION

What is criminal and what is permissible may depend upon the mind of the beholder, with ideology playing an important role in determining wrongful conduct. Considering the impact of ideology upon current world politics, the attempt to infuse socio-political doctrines into an international crime model may have disastrous results for the world community.⁷⁷ Then, there is the added complication of harmonizing competing domestic legal systems, such as those based upon the Anglo-American common law and the European civil law. Differences in substantive theory, as well as in procedure and methodology, may at present create obstacles too great to overcome.⁷⁸

What of corporate corrupt practices on a transnational scale? What of international bribery and extortion not covered by municipal legislation? What about criminal pollution wherein a polluting enterprise resides in one national jurisdiction but the harmful effects are found in another?⁷⁹ What about the sales of defective products by a transnational corporate enterprise to underdeveloped countries, when those products possess dangerous side effects? The role of corporate responsibility has been given only minor consideration by advocates of a substantive international criminal law.⁸⁰

Since the prognosis for establishment of an international criminal court is rather bleak, to say the least,⁸¹ what, if anything, is to be done? The answer, perhaps, lies in an observation made by a controversial

⁷⁶ See Watson, *Autointerpretation, Competence, and the Continuing Validity of Article 2(7) of the U.N. Charter*, 71 AM. J. INT'L L. 60 (1977).

⁷⁷ Green, *New Trends*, *supra* note 8, at 32-33. For the effect of ideology on dealing with international terrorism, see the comments of Green, *International Crimes*, *supra* note 33, at 576-577.

⁷⁸ Cf. Weigend, *Comments on a Draft International Criminal Code, General Part*, 52 REVUE INTERNATIONALE DE DROIT PÉNAL 497, 501-502 (1981); Jescheck, *Recent Developments*, *supra* note 43, at 52-53.

⁷⁹ On the latter issue, see Lombois, *supra* note 12, at 64-65; XII^e Congrès International de Droit Pénal, *Resolutions on the Protection of the Environment through Pénal Law* (Sept. 1979), 50 REVUE INTERNATIONALE DE DROIT PÉNAL 231 (1980); Rosencranz, *The International Law and Politics of Acid Rain*, 10 DEN. J. INT'L L. & POL. 511 (1981).

⁸⁰ See Spreutels, *Vers un droit pénal international des affaires?*, 53 REVUE INTERNATIONALE DE DROIT PÉNAL 173 (1982).

⁸¹ See generally 2 B. FERENCZ, *supra* note 16; R. FISHER, *supra* note 60, at 76 fn. 7; and J. STONE, *supra* note 68, at 323-329, who ends in a mode of cautious optimism.

American publicist more than a generation ago, which has now been given its first recognition in American case law. In the absence of supranational institutions involved with questions of individual criminality on an international level, Richard Falk suggested leaving to domestic courts both the obligation and the duty to recognize and impose international legal standards.⁸² This is exactly what occurred in the 1980 U.S. federal appellate case of *Filartiga v. Pena-Irala*.⁸³ Judge Irving Kaufman, in a unanimous opinion, reversed the district court dismissal of a suit filed by plaintiff Paraguayan citizens against defendant Paraguayan national, who had been Inspector General of police in 1979, and who, in Paraguay had allegedly tortured to death a member of the plaintiff's immediate family. According to the Second Circuit's ruling, "For purposes of civil liability, the torturer has become—like the pirate and slave trader before him—*hostis humani generis*, an enemy of all mankind."⁸⁴ Whether this means an ultimate expansion of international law into American municipal jurisprudence is open to question,⁸⁵ but it does provide a domestic enforcement alternative to the conundrum surrounding the lack of criminal enforcement procedures in the prevailing international legal system.

The final response to Professor Schwarzenberger's controversial challenge⁸⁶ has not yet been formulated, for the theoretical concept of international criminal law is still being debated and has been, at best, barely legitimated. But if, as almost all commentators agree, the individual is not only the object but also the subject of present-day international law,⁸⁷ then the problem remains that in the post-Charter decades human rights have been exalted over human responsibilities, even though those responsibilities provide the sinews of criminal jurisprudence. So far, there has been only minimal agreement as to what constitutes an international crime, let alone any consensus about how to deal with an international criminal act. If one concedes that the foundations have at least been laid for the construction of a viable international criminal law system, much more preparation will be required before an acceptable structure finally appears.

⁸² Note, *The Act of State Doctrine: International Consensus and Public Policy Considerations*, 8 N.Y.U. J. INT'L L. & POL. 283-290 (1975).

⁸³ 630 F.2d 876 (2d Cir. 1980).

⁸⁴ *Id.* at 890. Professor Falk submitted an *amicus curiae* brief on behalf of the plaintiffs. See Rohlik, *Filartiga v. Pena-Irala: International Justice in a Modern American Court?*, 11 GA. J. INT'L & COMP. L. 325, 331 (1981).

⁸⁵ See Sohn, *Torture as a Violation of the Law of Nations*, 11 GA. J. INT'L & COMP. L. 307 (1981).

⁸⁶ See *supra* note 3.

⁸⁷ See, e.g., 1 L. OPPENHEIM, *supra* note 15, at 20-21, 636-642.

