

Informe de la Comisión sobre la Jurisdicción Penal Universal

Documentos

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A. INTRODUCTION

1. At its Berlin session in 1999, the Institute established a new Commission (17th Commission) for the study of the topic:

Universal Criminal Jurisdiction With Respect to the Crime of Genocide, Crimes Against Humanity and War Crimes.

Originally, it was decided that our *confrère* Theodor Meron should assume the rapporteurship of this Commission. However, after his election as a judge of the International Criminal Tribunal for the Former Yugoslavia, for obvious reasons of incompatibility he had to renounce his function as Rapporteur. To replace him, the present Rapporteur was appointed.

2. The Institute has not yet dealt with universal jurisdiction in criminal matters to the wide extent as now suggested by the mandate imparted to the 17th Commission. In the *Manuel des lois de la guerre sur terre*, adopted at its Oxford session in 1880, it in-

cluded a special part –of a very summary nature– on «penal sanctions» (Part Three, Articles 84-86). However, only the first one of these articles lays down provisions on punishment concerning individuals, whereas the remaining two articles have as their object reprisals, in modern terminology countermeasures. In the introductory chapeau of this Part of the *Manuel*, it is stated:

Si des infractions aux règles qui précèdent ont été commises, les coupables doivent être punis, après jugement contradictoire, par celui des belligérants au pouvoir duquel ils se trouvent.

In other words, the Institute did not take into account the eventuality of criminal prosecution by third States. It regarded the punishment of perpetrators of war crimes exclusively as a matter concerning the belligerent States involved. It appears also from the Resolution adopted in Munich in 1883 on «Règles relatives aux conflits des lois pénales en matière de compétence» that before the First World War the notion of universal jurisdiction had not yet gained firm ground in lawyers' minds. In Article 10 of that Resolution, provision is made for instances where otherwise, particularly because the place of the commission of the crime cannot be identified, no prosecution could take place. A different philosophy underlies the Resolution adopted at the Cambridge session in 1931 on «Le conflit des lois pénales en matière de compétence». This Resolution provides in Article 5:

Tout Etat a le droit de punir des actes commis à l'étranger par un étranger découvert sur son territoire lorsque ces actes constituent une infraction contre des intérêts généraux protégés par le droit international (tels que la piraterie, la traite des noirs, la traite des blanches, la propagation de maladies contagieuses, l'atteinte a des moyens de communication internationaux, canaux, câbles sous-marins, la falsification des monnaies, instruments de crédit, etc.), a condition que l'extradition de l'inculpé ne soit pas demandée ou que l'offre en soit refusée par l', Etat sur le territoire duquel le délit a été commis ou dont l'inculpé est ressortissant.

This Resolution already reflects some of the concerns of the present-day world. No observer will fail to note, however, that war crimes are not mentioned there. As for crimes against hu-

manity and the crime of genocide, it seems that the world had to go through the abhorrent experiences of the Second World War in order to realize that the international community should establish some protective mechanisms against these types of offences.

3. At its Milan Session 1993, the 19th Commission presented a draft Resolution on «The extraterritorial jurisdiction of States» (Rapporteur: Maarten Bos)¹. This draft contained one provision on the principle of universality. It was worded as follows:

1. Under the principle of universality, jurisdiction may be exercised in order to protect certain interests of the international community as a whole.

2. Jurisdiction under the principle of universality extends to persons regardless of their nationality and the place where they committed their acts.

3. The principle of universality shall apply to offences as defined under conventional and customary international law, such as piracy, the hijacking of aircraft, terrorism and the trade of narcotics.

4. Jurisdiction under the previous paragraph may be exercised irrespective of signature or ratification of any international convention by the State of the nationality of the accused.

As can be seen from this text, the three classes of crimes which the 17th Commission is mandated to study were not taken into account by the 19th Commission.

4. Among the major initiatives designed to clarify the meaning and scope of universal jurisdiction, one should mention in particular three undertakings. First, Amnesty International has established a comprehensive documentation designed to prove that universal jurisdiction is a principle already widely recognized under international instruments and in the domestic practice of States.² Second, the Committee on International Human Rights Law and Practice of the International Law Association produced for its London session in 2000 a comprehensive report (written by Professor Menno

¹ *Ann. IDI*, vol. 65-II, p. 133 at p. 135 (1994).

² *Universal Jurisdiction - The Duty of States to Enact and Enforce Legislation*, latest amended version of 5 September 2002, accessible at <http://web.amnesty.org/web/web.nsf/pages/legal_memorandum>.

T. Kamminga)³, which ends with a set of conclusions and recommendations. One of these propositions (2.) states that with regard to genocide, crimes against humanity and war crimes States are entitled, under customary international law, to exercise universal jurisdiction⁴.

5. The third remarkable achievement is the drawing up of the «Princeton Principles on Universal Jurisdiction»⁵. This set of principles owes its coming into being to an initiative of the American Association for the International Commission of Jurists. Members of this Association succeeded in eliciting interest on the part of a number of leading U.S. human rights lawyers, among them Mr Cherif Bassiouni, who produced a first draft. Most reasonably, in the brochure reflecting the Principles it is openly acknowledged that some of the Principles must be located halfway between *lex lata* and *lex ferenda*⁶. In any event, as another collective undertaking the Principles convey the ideas of an active group of the interested scholarly community.

B. BASIC CONCEPTS

1) *Jurisdiction*

6. Concerning the concept of jurisdiction, there is no need to break new ground. A number of authoritative definitions exist which need neither correction nor improvement. Thus, the Restatement of the Law Third (The Foreign Relations Law of the United States) of the American Law Institute refers to jurisdiction as «the authority of States to prescribe their law, to subject persons and things to adjudication in their courts and other tribunals, and to enforce their law, both judicially and non judicially»⁷. Our late *confrère* F.A. Mann, in his Hague lectures, characterized jurisdiction as «the State's right of *regulation* ... It does not matter whether it is

³ ILA, *Report of the 69th Conference London*, London, 2000, pp. 403-431.

⁴ *Ibid.*, p. 423.

⁵ Princeton (New Jersey, 2001).

⁶ *Ibid.*, p. 39.

⁷ Vol. 1, St. Paul (Minn., 1987), p. 230.

exercised by legislative, executive or judicial measures...»⁸. In his draft Resolution submitted to the Institute at its Milan session 1993, our *confrère* Maarten Bos suggested the following definition : «Jurisdiction is to be understood as a State's authority to subject persons (natural or juridical) and things to its legal order» (Article 1)⁹. Many other formulae could be referred to. But they would not add anything of essential importance. It is the sovereignty of the State which finds its reflection in the doctrine of jurisdiction. According to the Charter of the United Nations (Article 2 (1)) and to a time-honoured rule of customary international law, sovereignty has certain limits. In the UN Charter, it appears as «sovereign equality». This two-tier definition makes abundantly clear that the sovereignty of one State is confined by the sovereignty of all other States. Indeed, it is trivial to note that absolute sovereignty without any legal restrictions would lead into chaos and anarchy. International law has as one of its primary functions to delimit the areas of competence (or jurisdiction) of all the States in order to ensure peaceful coexistence side by side under the rule of law, guaranteeing the sovereignty not only of the big and powerful, but also of the small States that lack any military might¹⁰. In this perspective, the rules on attribution of jurisdiction to every State have an important role to play.

7. What is in issue here is jurisdiction to prescribe, i.e. the authority to enact legal rules making certain conduct a punishable offence under domestic law¹¹, and jurisdiction to adjudicate, i.e. the authority to implement the applicable law in a given case. To the extent that jurisdiction to prescribe exists for offences classified as crimes against humanity, jurisdiction to adjudicate must also be deemed to exist¹². Otherwise, jurisdiction to prescribe would

⁸ «The Doctrine of Jurisdiction in International Law», *RCADI*, t. III (1964-1), p. 1 at 13, now also in *id.*, *Studies in International Law*, Oxford (1973), p. 1, at 6.

⁹ *Loc. cit.* (*supra* note 1), p. 133.

¹⁰ We agree with the President of the ICJ, Judge Guillaume, in his separate opinion in the *Arrest Warrant* case, judgement of 14 February 2002 (paragraph 15).

¹¹ See § 404 of the *Restatement* of the American Law Institute, *op. cit.* (*supra* note 7), p. 254: «A State has jurisdiction to define and prescribe punishment for certain offences recognized by the community of nations as of universal concern...».

¹² See § 423, *ibid.*, p. 318: «A State may exercise jurisdiction through its courts to enforce its criminal laws that punish universal crimes or other non-territorial offences within the State's jurisdiction to prescribe».

make no sense. On the other hand, however, it is clear that measures of physical enforcement can be taken only by the territorially competent State or by an international organization empowered to exercise executive police powers in the territory concerned.

8. The starting point of this reflection on jurisdiction of States in criminal matters must therefore be a rejection of the Lotus doctrine of the Permanent Court of International Justice (PCIJ). In this well-known judgment of 7 September 1927¹³, the crucial issue was the right of Turkey to try a French officer, whose ship, the Lotus, had collided with a Turkish ship, thereby causing the death of eight Turkish seamen. France contended that as the flag State of the ship on which the responsible officer had performed his service, it enjoyed exclusive jurisdiction. The PCIJ rejected this argument, holding that:

Far from laying down a general prohibition to the effect that States may not extend the application of their laws and the jurisdiction of their courts to persons, property and acts outside their territory it [international law] leaves them in this respect a wide measure of discretion which is only limited in certain cases by prohibitive roles; as regards other cases, every State remains free to adopt the principles which it regards as best and most suitable¹⁴.

According to this pronouncement, States would be free to adopt extraterritorial legislation and take measures with extraterritorial effect as they see fit, unless a specific prohibitive rule prevents them from acting as planned. Clearly, this proposition has been overruled during the last decades. There is broad agreement in the practice of States as well as in the legal literature that States need specific justification if they seek to extend the legal effects of their sovereign acts beyond their borders¹⁵. Thus, the order of priorities has been reversed. Whereas according to a traditional doctrine of sovereignty the powers of States were in principle unlimited, the prevailing view today requires States to show a spe-

¹³ Series A No. 10.

¹⁴ *Ibid.*, p. 19.

¹⁵ See as a representative statement of the legal position the *Restatement of the Law Third, op. cit.* (*supra* note 7), pp. 235-319, §§ 402-423.

cial interest if and when they act extraterritorially. In international criminal law, it has become *communis opinio* that acts of prosecution can be legitimated by a limited number of principles, (1) the territorial principle, (2) the active personality principle, (3) the passive personality principle (controversial), (4) the effects principle, (5) the protective principle, and (6) the principle of universal jurisdiction. States do not enjoy unfettered jurisdiction as long as no rule to the contrary can be held against them¹⁶.

2) *Universal Jurisdiction*

9. The concept of universal jurisdiction is less uncontroversial. In the first place, it should be underlined that universal jurisdiction must be distinguished from jurisdiction vested in international tribunals. Universal jurisdiction means putting domestic courts (and of course the relevant prosecuting authorities) at the service of the international community. Relying on universal jurisdiction, national courts may, without requiring any more specific authorization from an international body, initiate criminal proceedings against an alleged offender. From a systematic viewpoint, universal jurisdiction constitutes a half-hearted device in the absence of competent international institutions. In that sense, universal jurisdiction can be compared to the rights deriving from obligations *erga omnes*, a concept which permits individual States to take measures for the defense of the interests of the international community, not against individuals, but against States. With the establishment of truly international tribunals the notion of international community gains strength and coherence. The existing international criminal tribunals –the International Criminal Tribunal for the former Yugoslavia (ICTY), the International Criminal Tribunal for Rwanda (ICTR) and the International Criminal Court (ICC) under the Rome Statute of 1998 are all creations of the international community, and they act accordingly for a common purpose. In principle, there-

¹⁶ Ambiguous statements on the Lotus doctrine by Paola Gaeta, «Les règles internationales sur les critères de compétence des juges nationaux», in Antonio Cassese/Mireille Delmas-Marty (eds.), *Crimes internationaux et juridictions Internationales*, Paris, 2002, pp. 191-213 at pp. 194-198.

fore, the States which make up the international community have good reasons to believe in the trustworthiness of the judicial mechanisms which they themselves have brought into being. Although some States, in particular the United States of America (henceforth: United States), now reject the Rome Statute, it cannot be overlooked that they were all given the opportunity to participate in the negotiations and in the drafting exercise by presenting their proposals and voicing their objections. The fact that not all of the suggestions put forward by the current dissenters were accepted¹⁷, does not mean that the construction as such is faulty. In no international decision-making process can just one of the participants demand or expect that his views prevail without any exception.

10. The higher degree of trustworthiness to be granted to international criminal tribunals than to national courts of States is reflected, e.g., in the Resolution adopted by the Institute at its Vancouver Session where it suggested (Article 2) that a Head of State should enjoy, in criminal matters,

immunity from jurisdiction before the courts of a foreign State for any crime he or she may have committed, regardless of its gravity.

On purpose, this rule was not extended to proceedings before any of the existing international criminal tribunals (Article 11 (1)), where equality before the law applies without any exception. Already in the Charter of the International Military Tribunal at Nuremberg¹⁸ a provision (Article 7) made it clear that:

the official position of defendants, whether as Heads of State or responsible officials in Government Departments, shall not be considered as freeing them from responsibility or mitigating punishment.

¹⁷ Yet, many were accepted, see statement by U.S. Ambassador D. Scheffer, reproduced by Hans-Peter Kaul, «The Continuing Struggle on the Jurisdiction of the International Criminal Court», in Horst Fischer *et al.* (eds.), *International and National Prosecution Of Crimes Under International Law*, Berlin (2001), p. 21 at p. 23.

¹⁸ Reprinted in Ingo von Münch, *Dokumente des geteilten Deutschland*, Stuttgart (1968), p. 45.

There is no need to elaborate on the continuance in force of this rule, which now appears in Article 27 of the Rome Statute.

11. Some authors have taken the view that the concept of universal jurisdiction should not be used in instances where prosecution presupposes a territorial link of the suspect with the forum State. On that ground, they seek to distinguish situations falling within the scope of one of the many try-or-extradite clauses in international treaties from universal jurisdiction proper. Thus, our *consoeur* Dame Rosalyn Higgins has defended the view that «universal jurisdiction, properly called, allows *any* State to assert jurisdiction over an offence»¹⁹.

M. Cherif Bassiouni has taken a similar stance²⁰ Of course, every writer is free to coin the concepts he/she is handling according to his/her preferences as long as there exist no authoritative definitions. However, it does not appear that cases judicially dealt with under the rule «to try or to extradite» should be excluded from the scope of the concept of universal jurisdiction. What must be explained and justified is the fact that under that specific title of jurisdiction the judiciary of a given State is empowered to seize itself of an offence with which it has no genuine link. Persons may be tried regardless of the location of the place where the offence was committed, regardless of the nationality of the suspect or the victim, and even regardless of an actual, palpable interest of the prosecuting State. Under normal circumstances, such operations would amount to interference in the domestic affairs of the third State(s) concerned. As a rule, occurrences in a given State that have no direct transboundary effect do not fall within the competence of other States. Just the presence of an

¹⁹ «International Law and the Avoidance, Containment and Resolution of Disputes. General Course on Public International Law», *RCAD*, t. 230 (1991-V), p. 9 at p.99. See also the joint separate opinion of Judges Higgins, Kooijmans and Buergenthal in the *Arrest Warrant case judgment* of the ICJ of 14 February 2002, para. 41 : «By the loose use of language the latter [scil. to try or to extradite] has come to be referred to as ‘universal jurisdiction’, though this is really an obligatory territorial jurisdiction over persons, albeit in relation to acts committed elsewhere».

²⁰ «Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice», 42 *Virgo JIL* (2001) pp. 81-162 at p. 107, p. 118.

alleged offender in the territory of a State does not establish, as such, a genuine link of that State to the crime in issue.

12. It is true, however, that universal jurisdiction has a different meaning according to whether States may be considered free to prosecute anyone anywhere just on the basis of his/her alleged conduct or whether at least the presence of the alleged offender in their territory is required (*forum deprehensionis*). This was one of the issues raised by the *Arrest Warrant* case before the ICJ²¹, but which was not touched upon by the ICJ itself. Only in the separate opinions of Judges Guillaume, Ranjeva and Rezek and the joint separate opinion of Judges Higgins, Kooijmans and Buergenthal does one find lengthy considerations on the scope *ratione materiae* of universal jurisdiction. Universal jurisdiction in the broad sense is termed «compétence universelle par défaut» by Judge Guillaume²², «universal jurisdiction *in absentia*» or «compétence universelle *in absentia*» by Judges Higgins, Kooijmans and Buergenthal²³, and by Judge Ranjeva²⁴, and «absolute universal jurisdiction» by Antonio Cassese in a comment on the judgment²⁵. According to the interpretation adopted by the Belgian investigating judge who issued the controversial arrest warrant against the former Congolese Foreign Minister Yerodia Ndombasi, Belgian legislation conferred indeed jurisdiction on the judiciary to institute criminal proceedings against persons charged with war crimes, genocide or crimes against humanity irrespective of their place of sojourn although the text of the relevant provision of domestic law did not say so specifically²⁶. In recent deci-

²¹ Judgment of 14 February 2002.

²² *Ibid.*, separate opinion, paras. 9,16,17.

²³ *Ibid.*, joint separate opinion, para. 59.

²⁴ *Ibid.*, declaration, para. 5.

²⁵ «When may Senior State Officials Be Tried for International Crimes? - Some Comments on The Congo v. Belgium Case», <http://www.ejil.org/journal/curdevs.html>. The more limited form of universal jurisdiction is called «conditional jurisdiction» by Cassese. See also his considerations in «Y a-t-il un conflit insurmontable entre souveraineté des Etats et justice pénale internationale?», in *Crimes internationaux et juridictions internationale?*, *op. cit.* (*supra* note 16), pp. 13-29 at 22-26.

²⁶ Loi relative a la répression des infractions graves aux conventions internationales de Geneve du 12 août 1949 et aux protocoles I et II du 8 juin 1977, additionnels à ces conventions, of 16 June 1993, amended by: Loi

sions, however, this interpretation has been rejected. The Belgian judiciary now takes the view that the prosecuted persons must be present in the Belgian territory²⁷.

13. In Germany, too, the highest judicial body in criminal matters, the Federal Court (*Bundesgerichtshof*), held in its judgment of 30 April 1999²⁸ that notwithstanding the invocability of universal jurisdiction in cases of genocide a special link with Germany was required, which it found in the fact that the accused had lived in Germany for long periods of time²⁹. It argued that without any such link the principle of non-intervention would be breached. This decision was criticized in legal doctrine³⁰, and indeed the same chamber of the Federal Court opined in a judgment of 21 February 2001³¹ that no special link might be necessary where Germany was obligated under an international treaty like the four Geneva Conventions of 1949 to initiate criminal proceedings. It remains, however, that with regard to all other instances, in particular with regard to genocide, the German jurisprudence has opted against an understanding of universal jurisdiction in the broad sense as originally advocated in Belgium.

14. The try-or-extradite clauses, which establish the jurisdiction of the State of sojourn or custody as a duty which must be

relative à la répression des violations graves du droit international humanitaire, of 10 February 1999. Article 7 (1) of that Law provides: «Les juridictions belges sont compétentes pour connaître des infractions prévues à la présente loi, indépendamment du lieu où celles-ci auront été commises».

²⁷ Judgment of the Cour d'appel de Bruxelles, Chambre des mises en accusation, 26 June 2002, in the *Sharon and Yaron* case. See also below in the annex a short overview of the legal position in Belgium.

²⁸ BGHSt 45, 64, at 66 ; *Neue Juristische Wochenschrift* (2000), p. 2517.

²⁹ The German Constitutional Court, decision of 12 December 2000, *Euroäische Grundrechte Zeitschrift* (2000), p. 76 at p. 82 (section III. 6), avoided to make a determination on the issue.

³⁰ Kai Ambos/Steffen Wirth, «Genocide and War Crimes in the Former Yugoslavia Before German Criminal Courts», in Fischer *et al.* (eds.), *International and National Prosecution of Crimes ...*, *op. cit.* (*supra* note 17), p. 769 at pp. 778-783; Gerhard Werle, case comment, *Juristenzeitung* (1999), p. 1181 at pp. 1182-1183; «Völkerstrafrecht und geltendes deutsches Strafrecht», *Juristenzeitung* (2000), p. 755 at p. 759.

³¹ *Neue Juristische Wochenschrift* (2001), p. 2728 at p. 2732, *Sokolovic* case.

complied with, do not clearly answer the question since they do not say anything about the rights of third States which are not even related to the crime by the tenuous link of the presence of the alleged offender in their territory. Therefore, on the basis of conventional law it remains open whether any third State could in such instances start proceedings and request the extradition of the suspect. It seems reasonable to require that at some point in time the prosecuting State must establish close contact with the defendant. Generally, trials *in absentia* cannot be deemed to yield just results. The «try-or-extradite clauses» have precisely for their aim to reconcile the principle of universal jurisdiction with the legitimate rights of an alleged offender³². In any event, judicial practice does not seem to support an unrestricted right of any third State unrelated to the crime to initiate proceedings against an alleged offender³³.

15. In the legal literature, there is broad agreement as to the legitimation of universal jurisdiction. Crimes that may be prosecuted by relying on universal jurisdiction, in particular the «core crimes» dealt with in this report, affect the foundations of a civilized state of affairs in the international community. Therefore, it can rightly be said that the pivotal element of universal jurisdiction is nothing else than the nature of the crime³⁴. Proceeding from the premise

³² Underlined by the Cour d' appel de Bruxelles, Chambre des mises en accusation, 26 June 2002, in the *Sharon and Yaron* case (*supra* note 27), point 9. On this issue, we cannot share the views expressed by Judges Higgins, Kooijmans and Buergenthal in their joint separate opinion in the *Arrest Warrant* case (*supra* note 19), para. 56.

³³ This is also the prevailing opinion in the legal literature, see Bassiouni, *loco cit.* (*supra* note 20), p.81 at p.139; Wolfgang Weib, «Wikerstrafrecht zwischen Weltprinzip und Immunität», *Juristenzeitung* (2002), p. 696 at pp. 699-701. The judges of the ICJ who touched upon the issue in their individual opinions were divided. Whereas Judges Higgins, Kooijmans and Buergenthal, paras. 54-59, advocate universal jurisdiction in the absolute sense, Judges Ranjeva (para. 5) and Rezek (paras. 8-9) require the presence of the accused in the territory of the prosecuting State. Antonio Cassese, *International Law*, Oxford (2001) p. 261-262, tried to find a balanced midway solution and has remained faithful to this line in Cassese/Marty, *loco cit.* (*supra* note 16).

³⁴ See, for instance, *The Princeton Principles on Universal Jurisdiction* (*supra* note 5), Principle 1 (1); Kenneth C. Randall, «Universal Jurisdiction Under International Law», 66 *Texas LR* (1988), p. 785 at p. 788.

that there exists an international community, conceived of primarily as a community of common values, it is assumed that, in principle, every State has an interest in taking measures to repress offences which threaten the maintenance of basic rights for all human beings. To restrict jurisdiction to States authorized to act under any of the classical principles governing jurisdiction and to States in whose territory the accused is present may be considered as a compromise which reconciles the interests of the international community with the legitimate interests of any alleged offender.

3) *Criminal Jurisdiction*

16. At first glance, it seems easy to define the word «criminal». According to habitual linguistic usage, that word, in connection with the concept of jurisdiction, denotes the prosecution of offences by the judiciary of a given State. In criminal proceedings, it is the power of the State which asserts its sovereign right to secure law and order. Consequently, a criminal trial ends up not just with a decision ordering the defendant to do this or that, but imposing on the defendant, if he/she is not acquitted, a fine or sentencing to him to a penalty of deprivation of liberty. But recent practice has produced hybrid forms of judicial actions the classification of which gives rise to doubts. The most prominent example of such a hybrid form of judicial action is authorized by the United States Alien Tort Claims Act (ATCA), a statute enacted in 1789³⁵ which was re-discovered in 1980 in the *Filártiga v. Peña Irala* case³⁶. On the basis of the ATCA, an alien can bring a tort action against a respondent by alleging that the respondent has breached obligations incumbent upon him/herself under the law of nations. Textually, the ATCA provides: «The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States». There can be no doubt that intrinsically cases brought under the ATCA are civil and not criminal cases. What the claimant seeks is

³⁵ Codified as 28 U.S.C. § 1350.

³⁶ 630 F.2d 876 (2d Cir. 1980) ; 19 *ILM* (1980), p. 966.

reparation for the wrongs he has suffered, not punishment of the respondent. Nevertheless, such cases are characterized by a strong element of retribution. The United States puts its tribunals at the disposal of aliens with a view to facilitating effective sanctioning of the alleged offences.

Recently, for instance, claims have been introduced before United States tribunals which seek billions of dollars of reparation for the alleged involvement of European undertakings in the South African economy during the time of the *apartheid* regime.

17. Many writers refer indeed to the ATCA in connection with universal jurisdiction in criminal matters. Thus, Antonio Cassese recently wrote that the United States was the country whose national courts have taken the most vigorous action against crimes committed abroad.

They have taken from the shelf and skilfully dusted off a statute passed in 1789³⁷.

In other words, he conceives of the ATCA as an instrument designed to permit the imposition of sanctions on account of international crimes³⁸. In a more general fashion, United Nations High Commissioner for Human Rights Mary Robinson expressed her concern over the negotiations in the framework of the Hague Conference on Private International Law on a new Convention on International Jurisdiction and Foreign Judgments in Civil and Commercial Matters. According to the clauses of that draft instrument, which is currently under consideration, in tort cases no action could be brought in the courts of a third State unrelated to the factual events having caused the damage (Article 10). To the High Commissioner, the regime governing civil actions that claim reparation in instances of international crimes pertains to the overall legal framework serving to combat such crimes³⁹. Along similar

³⁷ «International Criminal Justice: Is it Needed in the Present World Community», in Gerard Kreijen (ed.), *State, Sovereignty, and International Governance*, Oxford (2002), pp. 239-258 at p. 242.

³⁸ In a recent article, he speaks of «humanitarisme impérialiste», *loc. cit.* (*supra* note 25), p. 25.

³⁹ See her foreword to the *Princeton Principles*, *op. cit.* (*supra* note 5), p. 16.

lines, lawyers actively promoting remedies against perpetrators of serious crimes are trying to convince their audiences that the demarcation line between civil and criminal remedies cannot be maintained since according to the legislation of many countries both remedies go hand in hand when a tort has been committed⁴⁰. Indeed, the ATCA seems to constitute a direct offspring of the doctrine of international crimes. Only by clinging thereto can the United States possibly justify its claim to jurisdiction⁴¹.

4) Jus Cogens and Universal Jurisdiction

18. However, it would be much too simplistic to argue that all offences that may legitimately be classified as international crimes are subject to universal jurisdiction. Yet, many writers follow that logic, which is indeed extremely tempting. Christopher Joyner is one of those who support the notion that universal jurisdiction flows automatically from the violation of norms which have a *jus cogens* or *erga omnes* character⁴². Mr Cherif Bassiouni has forcefully advocated the same idea⁴³. In the *Pinochet* case, Lord Browne-Wilkinson⁴⁴, Lord Hutton⁴⁵ and Lord Millet⁴⁶ joined that current of opinion, and recently Antonio Cassese has advocated extending universal jurisdiction to all international crimes⁴⁷. It must be admitted that these authors have identified a legitimate starting

⁴⁰ See, in particular, Beth Stephens, «Translating Filártiga: A Comparative and International Law Analysis of Domestic Remedies for International Human Rights Violations», 27 *Yale JIL* (2002), pp. 1-57.

⁴¹ Explicitly, in their joint separate opinion in the *Arrest Warrant* case (*supra* note 19), Judges Higgins, Kooijmans and Buergenthal note that the exercise by American federal courts of the powers granted to them by the ATCA «has not attracted the approbation of States generally» (para. 48).

⁴² «Arresting Impunity : The Case for Universal Jurisdiction in Bringing War Criminal to Accountability», 59 *Law and Contemporary Problems* (1996), pp. 153 at p. 169.

⁴³ *Loc. cit.* (*supra* note 20), pp. 148-152.

⁴⁴ See his opinion in the second judgment of 24 March 1999, 38 *ILM* (1999), p. 582 at p. 589.

⁴⁵ *Ibid.*, p. 627 at pp. 636-637.

⁴⁶ *Ibid.*, p. 643 at pp. 649-650.

⁴⁷ In *Crimes internationaux et juridictions internationales*, *loc. cit.* (*supra* note 25), p. 19.

point. On the other hand, however, acceptance or rejection of universal jurisdiction cannot be based solely on the interests of the international community in forestalling and repressing grave crimes that threaten full enjoyment of human rights by the victims. A well-pondered answer must also take into account the interests of the potential defendants and of the States which may be indirectly charged if and when proceedings are instituted against one of their representatives. Joy over the progress which has been attained by acknowledging universal jurisdiction within a relatively broad scope *ratione materiae* should not detract from the simple realization that universal jurisdiction can easily be abused. Only in few countries is the judiciary genuinely independent from the executive branch of government. And even where this is the case, it should not be overlooked that judges are more often than not biased in favour of their own country. This has nothing to do with miscarriage of justice. However, it is a fact of life, empirically corroborated, that judges normally have greater understanding for the viewpoint and the interests of their own country than for the views articulated by someone belonging to a different political system. Rightly, in our view, in the *Pinochet* case Lord Slynn of Hadley cautioned against equating crimes under international law with universal jurisdiction:

That international law crimes should be tried before international tribunals or in the perpetrator's own state is one thing ; that they should be impleaded without regard to a long-established customary international law rule in the Courts of other States is another ... The fact even that an act is recognised as a crime under international law does not mean that the Courts of all States have jurisdiction to try it ... There is no universality of jurisdiction for crimes against international law...⁴⁸.

19. Almost without any exception, when dealing with these issues, writers talk about the necessity to combat international crime and the corresponding perpetrators as effectively as possible. But it should not be overlooked that during the decisive first

⁴⁸ First judgment of the House of Lords, 25 November 1998, 37 *ILM* (1998), p. 1302 at pp. 1312-1313 [recalled by Judge Guillaume in his separate opinion in the *Arrest Warrant* case, *supra* note 10, para. 12].

stages of a criminal proceeding any person can invoke the presumption of innocence. An indictment is based on allegations which are not yet proven. And yet, measures may then be taken which severely interfere with the rights of an alleged offender. In particular, he/she can be arrested or extradited to a foreign country, far away from his homeland where legal defense may be difficult to obtain and costly⁴⁹. The legal system of Ruritania does not provide the same guarantees as the legal systems of France, Germany or the United Kingdom⁵⁰. To date, scenarios have generally been developed according to which courts of Western States prosecute offences committed elsewhere on the globe, especially in Third World countries. The proceeding between the Congo and Belgium in the *Arrest Warrant* case, which ended with the judgment of the International Court of Justice of 14 February 2002, constitutes the prototype of that configuration, which smacks slightly of neo-colonialism. But the procedural relationship could also be reversed, Belgian citizens being arrested and brought to trial in the Congo, to give just an example which is suggested by the proceeding before the ICJ⁵¹.

5) Possible Abuse of Universal Jurisdiction?

20. Fears that abuse may mar the exercise of universal jurisdiction have no tangible bases regarding the crime of genocide. Genocide has relatively clear-cut contours, above all after the first judgments of the ICTY and the ICTR. It would be difficult to manipulate a charge of genocide in any plausible fashion. Regarding war crimes and crimes against humanity, however, no such straightforward statement can be made. In the Rome Statute,

⁴⁹ For a head-on attack on universal jurisdiction, see Henry Kissinger, «The Pitfalls of Universal Jurisdiction», *Foreign Affairs* (July/August 2001), pp. 86-96.

⁵⁰ In this regard, the joint separate opinion of Judges Higgins, Kooijmans and Buergenthal in the *Arrest Warrant* case (para. 59) seems to be somewhat *ingénue* in positing that such extraterritorial charges «may only be laid by a prosecutor or *juge d'instruction* who acts in full independence, without links to or control by the government of that State».

⁵¹ See individual opinion by Judge Rezek in the *Arrest Warrant* case, para. 8.

crimes against humanity (Article 7) and particularly war crimes (Article 8) have grown to such an extent that even for a trained lawyer it is now difficult to correctly assess the scope *ratione materiae* of these offences. Given the fact, above all, that the Rome Statute acknowledges also command responsibility (Article 28) and complicity in the most various forms (Article 23 (3)) and that this extension of criminal responsibility will also –unavoidably– spill over into general international law, it is not difficult to construct a case against a political leader who has never had any direct contact with the relevant atrocities.

21. Concerning crimes against peace or aggression, which figured prominently in the Charter of the Nuremberg International Military Tribunal⁵², these considerations have been deemed to be so weighty that it has never been suggested that they should be subject to universal jurisdiction. When the International Law Commission (ILC) adopted on first reading (1991) the draft Code of Crimes against the Peace and Security of Mankind, it acknowledged that aggression could not be dealt with in the same manner as the other crimes identified by it. Explicitly, the relevant provision (Article 15) stated in para. 5, which was bracketed due to disagreement within the ILC that «any determination by the Security Council as to the existence of an act of aggression is binding on national courts»⁵³. Notwithstanding the lack of clarity affecting this formula, the sole fact that a special provision was considered necessary evinced that the suggested obligation to try or to extradite (Article 6) was not to apply unreservedly in instances of allegations of aggression⁵⁴. The reluctance to align aggression with the other crimes under the projected Code became even more visible in the final version of the draft Code, which was adopted in 1996⁵⁵. Whereas Article 8 contained an obligation on States to establish their jurisdiction over genocide, crimes against humanity,

⁵² Reprinted in von Münch (ed.), *Dokumente...*, *op. cit.* (*supra* note 18), p. 45; Article 6 of the Charter is also reproduced in Adam Roberts/Richard Guelf (eds.), *Documents of the Laws of War*, 3rd ed., Oxford (2000), p. 177.

⁵³ *Yearbook of the ILC* 1991, Vol. II, Part Two, p. 96.

⁵⁴ For the commentary on that bracketed provision see *Yearbook of the ILC* 1988, Vol. II, Part Two, p. 73 para. 6.

⁵⁵ See *Yearbook of the ILC* 1996, Vol. II, Part Two, pp. 17 *ff.*

crimes against United Nations and associated personnel, and war crimes, it reserved the case of aggression by specifying that insofar jurisdiction «shall rest with an international criminal court». Quite obviously, it was the fear of political manipulation which led the ILC to taking this decision. No other reason can be found behind the determination by the Rome Conference in 1998 to lay to rest aggression until some remote day when a substantive definition might have been found (Article 5 (2)). It is this separate treatment of the crime against peace *par excellence* which amply demonstrates that suggesting any proposition on the relationship between *jus cogens* or *erga omnes* obligations and universal jurisdiction requires a most careful balancing of the interests in issue.

C. THE DIFFERENT INTERNATIONAL CRIMES

22. After these preliminary observations, the three classes of international crimes committed to the attention of the Commission require to be studied in detail. Although genocide, crimes against humanity and war crimes are often dealt with as a unity («core crimes»), it would be wrong to follow those steps. Each one of the three crimes, which in reality are clusters of crimes, is subject to a specific regime. General international law and conventional law are bound up with one another in widely varying ways.

1) Genocide

23. It is a matter of common knowledge that genocide did not yet appear as a separate class of crime in the Charter of the Nuremberg International Military Tribunal. All the relevant acts, which today would be evaluated as genocide, were dealt with under the heading of crimes against humanity. Genocide received its specific conceptual identity by virtue of the Convention on the Prevention and Punishment of the Crime of Genocide, which the UN General Assembly adopted on 9 December 1948⁵⁶. No trace can

⁵⁶ Resolution 260 A (III).

be found in the text of the Convention of universal jurisdiction. Article VI was framed with remarkable caution. It reads:

Persons charged with genocide or any of the other acts enumerated in Article III shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction.

This provision can be construed differently. A literal reading might suggest that Article VI was framed with a view to restricting jurisdiction in instances of genocide to the territorial State and to an international penal tribunal. Following this approach, Article VI would have to be understood as a prohibition addressed to any other third State to claim jurisdiction. This is indeed a view which seems to reflect the intentions which were pursued during the drafting process. In a recent monograph, William Schabas has attempted to buttress that restrictive interpretation by sifting the *travaux préparatoires*⁵⁷.

24. However, the *Eichmann* case made clear that Article VI must be assigned another meaning. Eichmann, a Nazi activist who saw his personal fulfilment in bringing about the «final solution» of the Jewish question, was made accountable before Israeli tribunals after having been brought surreptitiously from Argentina to Israel. Understandably, Eichmann defended himself by contesting the jurisdiction of the courts which tried him. This defense failed. Both the courts of first⁵⁸ and second instance (the Supreme Court of Israel)⁵⁹ invoked universal jurisdiction, arguing that Article VI was confined to setting forth a duty to prosecute, which was incumbent upon the territorial State, but no other (third) State. This interpretation has been widely accepted, although some voices rightly draw attention to the fact that Israel's prosecution of Eichmann could have been easily justified by the passive personality principle or the protective principle⁶⁰. Whatever opinion one may have regarding

⁵⁷ W.A. Schabas, *Genocide in International Law*, Cambridge (2000), pp. 355 ff.

⁵⁸ District Court of Jerusalem, judgment of 12 December 1961, 36 *ILR*, at p. 39 p. 25.

⁵⁹ Judgment of 29 May 1962, *ibid.*, pp. 303-304.

⁶⁰ See Bassiouni, *loc. cit.* (*supra* note 20), p. 137; *Princeton Principles*, *op. cit.* (*supra* note 5), p. 42.

the foundations of the Eichmann trial, it would appear to be crystal clear that the Genocide Convention did not wish to take away options for action which are available under general international law. It would indeed be rather strange if Article VI had to be construed as banning, with regard to genocide cases, the passive personality principle and the protective principle. The elaboration of the Convention was meant as a step to strengthen the fight against genocide. If one followed the restrictive interpretation, however, States parties would be worse off than third States not having ratified the Convention. The absurdity of this result speaks against it.

25. Rejection of a restrictive reading of Article VI does not answer the question, however, if genocide is a crime placed under universal jurisdiction. As pointed out above, universal jurisdiction is a power, a *faculté*, which States are free to exercise or not to exercise, unless there exists a conventional duty to the contrary. In the absence of a clear indication in the Convention itself, the answer must be sought in general international law. Following the traditional method of identifying rules of customary international law, the student is called upon to review, in the first place, the relevant practice of States. In that regard, the record was extremely poor for long decades. Reference could be made, in the first place, to the *Eichmann* case. In a second case, the 1985 case of *Demjanjuk*, United States tribunals granted a request by Israel for the extradition of a person who was suspected of having committed indescribable atrocities in a concentration camp during the Second World War⁶¹. In recent years, however, the picture has changed. In Germany, in at least four cases perpetrators of genocide were sentenced to life imprisonment or long years of deprivation of liberty. Invariably, the Supreme Federal Court, which discharges the functions of a *Cour de cassation*, confirmed the convictions and sentencing⁶². In pronouncing upon a constitutional

⁶¹ 776 F.2d 571, 582-583 (6th Cir. 1985), *cert. denied*, 475 U.S. 1016 (1986).

⁶² For a summary, see the *ILA Report*, *supra* note 3, pp. 428-429 : case of *Nikola Jorgic*, Supreme Federal Court, 30 April 1999, *Entscheidungen des Bundesgerichtshofs in Strafsachen (BGHSt)* 45, 64 *Neue Juristische Wochenschrift* (2000), p. 2517 ; case of *Maksim Sokolovic*, Supreme Federal Court, 21 February 2001, *ibid.* (2001), p. 2728; case of *Djuradi Kusljic*, Supreme Federal Court, 21 February 2001, *ibid.* (2001), p. 2732.

complaint by one of the convicted perpetrators (*Nikola Jorgic*), the Federal Constitutional Court explicitly supported the applicability of universal jurisdiction to genocide.⁶³ Austrian⁶⁴ tribunals, too, have unequivocally affirmed their right to exercise universal jurisdiction with regard to instances of alleged genocide although in the case that has been reported the accused was acquitted. In a French case of 1998, the *Cour de cassation* confined itself to stating that the Genocide Convention does not provide for universal jurisdiction, but refrained from examining whether French jurisdiction may exist under general international law⁶⁵.

26. The list of relevant judgments may not be long, but none of the pronouncements has been seriously objected to, except by the defendants in the cases at hand. Thus, there exists a consistent practice which seems to be buttressed by an *opinio juris* that stands almost unchallenged.

27. Lastly, it should be noted that the legal position has changed under the impact of the Rome Statute. There is no denying the fact that the International Criminal Court itself does not enjoy universal jurisdiction, not even with regard to genocide. Its jurisdiction depends on the territorial State (the State where the crime was committed) or the State of nationality of the suspect having accepted the commitments under the Statute, except for situations which have been referred to it by the Security Council (Article 13 (b))⁶⁶. But if this is the case it can request the surrender of the suspect from any State party to the Statute. This system works only if third States, which have no special link with the crime but are involved solely through the presence of the suspect in their territory, are authorized to take action against the suspect by ar-

⁶³ Decision of 12 December 2000, *Europäische Grundrechte Zeitschrift* (2001), p. 76 at p.81.

⁶⁴ Case of *Dusko Cvjetkovic*, see *ILA Report 2000, loc. cit. (supra note 3)*, p. 426.

⁶⁵ Case of *Wenceslas Munyeshyaka*, *Cour de cassation*, 6 January 1998, 102 *RGDIP* (1998), p. 825 at p. 827.

⁶⁶ During the preparatory work on the Rome Statute, Germany proposed that the ICC be vested with universal jurisdiction without any preconditions (see UN doc. *AIAC.249/1998/DP.2*, 23 March 1998). This proposal, however, was defeated.

resting him/her in the first place, before possibly granting the request addressed to them. In other words, universal jurisdiction of national courts is a logical premise of the worldwide mechanism brought into being by the Rome Statute. In fact, the Statute recalls in its preamble that «it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes». This is certainly a wrong statement. There exists no duty of States generally to prosecute international crimes. To rebut this assertion, it suffices to refer to the Genocide Convention which explicitly confines the duty of prosecution to the territorial State, the State where acts of genocide were committed. Wherever universal jurisdiction is accompanied by a duty to exercise it in any given case, the drafters of the relevant conventions specifically said so. Even these clauses have often been ignored. All observers agree that the system of universal jurisdiction has not been too effective in the past⁶⁷. Consequently, it would be vain to look for a practice which might sustain a rule of customary law of which the statement in the preamble of the Rome Statute could be the reflection. All this, however, does not detract from the conclusion that the system of international criminal justice as envisaged by the drafters of the Rome Statute would not be satisfactorily workable if States did not enjoy universal jurisdiction with regard to all the crimes listed in the Statute.

28. It stands to reason that the above considerations apply only to States parties to the Rome Statute. All other States may invoke the traditional rule according to which *pacta tertiis nec nocent nec prosunt* (Article 34 Vienna Convention on the Law of Treaties). The absence of a considerable number of States must be taken all the more seriously since what we are facing is not a matter of passivity or oblivion, but a dispute touching upon issues of principle. The United States and some other States disagree fundamentally with the policy line embarked upon with the Rome Statute. Furthermore, universal jurisdiction as an auxiliary function in the service of the ICC cannot be equated with universal jurisdiction *tout court*.

⁶⁷ See, in particular, Rafaëlle Maison, «Les premiers cas d'application des dispositions pénales des Conventions de Genève par les juridictions internes», 6 *EJIL* (1995), p. 260 at p. 263.

29. On the other hand, it should also be noted that the rejection of the Rome Statute by the United States does not affect the principle of universality with regard to genocide. Although the American Restatement of the Law⁶⁸ is not a governmental act, it widely reflects positions held by the United States Government. In this regard, it is significant that § 404 of the Restatement mentions genocide as one of the offences for which universal jurisdiction exists. Furthermore, reference should be made again to the case of *Demjanjuk*⁶⁹, where a United States court, i.e. an official institution of the governmental apparatus, explicitly acknowledged that any nation may seek to punish the perpetrators of that crime. There are no clues indicating that the United States has changed its position. Nor are there any indications suggesting that other States have taken a restrictive stance concerning genocide.

30. In concluding this section, reference should finally be made to the simple fact that genocide is the most horrendous of all crimes under international law. As the ICJ pointed out in its legal opinion of 28 May 1951, genocide «shocks the conscience of mankind» and is «contrary to moral law and to the spirit and aims of the United Nations». From these propositions, the ICJ drew the conclusion that «the principles underlying the Convention are principles which are recognized by civilized nations as binding on States, even without any conventional obligation»⁷⁰. Given the weight of this statement, added to the existing practice, it can be safely said that universal jurisdiction for the crime of genocide can be affirmed as a rule of positive international law.

31. It remains open, though, whether prosecution requires as a minimum contact the presence of the alleged offender in the territory of the prosecuting State. If no such link is deemed to be required, issues of conflicting jurisdiction may arise. According to a

⁶⁸ *Op. cit.* (*supra* note 7), p. 254.

⁶⁹ *Supra*, note 61.

⁷⁰ Reservations to the Convention on Genocide, ICJ Reports (1951) p. 15 at 23. It is well known that the Court has reaffirmed this proposition in recent years, see Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Provisional Measures, Order of 8 April 1993, ICJ Reports (1993), p. 3 at p. 23 para. 49.

judgment of the Spanish *Audiencia Nacional* of 13 December 2000 in the Guatemalan genocide case, a State not directly related to an alleged crime of genocide is debarred by the principle of subsidiarity from commencing criminal proceedings if the matter is being actively pursued in the territorial State concerned⁷¹. This principle was derived by the Court from Article VI of the Genocide Convention in conjunction with the provision of the Rome Statute (Article 17) on the principle of complementarity. While Article VI of the Genocide Convention certainly cannot be relied upon to support a rule of subsidiarity, since it deals with a different issue, namely a possible duty to prosecute, the reference made to Article 17 of the Rome Statute is more pertinent. It could indeed be maintained that States that hold jurisdiction according to the classic principles of jurisdiction (territoriality, nationality etc.) should enjoy priority for the investigation and prosecution of the relevant facts. It does not seem to be unreasonable to grant a privileged position to States which have suffered direct injury. On the other hand, such arrangement should not favour impunity. Not infrequently, the authorities of the State having the closest links to the offence refrain from seriously committing themselves to searching for the truth and discharging their duties. The charges brought in Spain against the major Guatemalan war criminals provide an example in point. To date, more than three and a half years after the publication of the report of the Commission for Historical Clarification, no action has been taken in Guatemala against the alleged perpetrators of genocide.

2) *Crimes Against Humanity*

32. What has been said concerning genocide must not necessarily apply to crimes against humanity as well. It is a notorious fact that the class of «crimes against humanity» appeared for the first time in the Charter of the International Military Tribunal at

⁷¹ Case 331/99. See on that judgment Michael Cottier, «What Relationship Between the Exercise of Universal and Territorial Jurisdiction ?» The Decision of 13 December 2000 of the Spanish National Court Shelving the Proceedings Against Guatemalan Nationals Accused of Genocide», in Fischer *et al.* (eds.), *International and National Prosecution... op. cit.* (*supra* note 17), p. 843.

Nuremberg (Article 6 (2) c)). At that time, the list of such crimes was relatively short. It read:

Crimes against humanity: namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war ; or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of domestic law of the country where perpetrated.

Shortly afterwards, the Allied Control Council in Germany, however, extended the list of the Nuremberg Charter. It enacted Law No. 10⁷² with a view to creating a legal basis for the prosecution in the respective zones of occupation of «war criminals and other similar offenders». In Article II (1) (c) of the Law, crimes against humanity were defined as follows:

Atrocities and offenses, including but not limited to murder, extermination, enslavement, deportation, imprisonment, torture, rape, or other inhumane acts committed against any civilian population, or persecutions on political, racial or religious grounds whether or not in violation of the domestic laws of the country where perpetrated.

It appears at first glance that three offences were added, namely imprisonment, torture and rape. Substantively, these additions were not understood as an enlargement of the scope of crimes against humanity, but rather as an illustration of «other inhumane acts». Likewise, one cannot fail to note that the link with war crimes or crimes against peace was severed.

33. Originally, the changes brought about by Control Council Law No. 10 went largely unnoticed. It is the Nuremberg definition of crimes against humanity which received the blessing of the UN General Assembly by Resolution 95 (1) of 11 December 1946. Likewise, the ILC did not propose any material changes when, mandated by the General Assembly to prepare a codification of the Nuremberg principles, it submitted the text of such a codification⁷³.

⁷² Of 20 December 1945.

⁷³ See Principles of International Law Recognized in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal, Principle VI (c), reprinted in

It remained faithful to this cautious approach when in 1954 it presented the first version of its Code of Crimes against the Peace and Security of Mankind (Article 2 (11))⁷⁴.

34. In contradistinction to genocide, the definition of which has remained stable over the years, due to its being rooted in the Genocide Convention, the definition of crimes against humanity has seen a dynamic development during the last decade. The ILC departed from its original concept when in 1991, in a second attempt to bring a Code of Crimes against the Peace and Security of Mankind into being, it adopted a draft on first reading. This draft mentioned murder, torture, establishing or maintaining over persons a status of slavery, servitude or forced labour, persecution on social, political, racial, religious or cultural grounds –if such crimes were committed in a systematic manner or on a mass scale– and deportation or forcible transfer of population (Article 21)⁷⁵. The next step was the adoption of the Statute of the International Criminal Tribunal for the former Yugoslavia,⁷⁶ which added to the original list of 1945 imprisonment, torture and rape (Article 5), thereby reflecting the new elements introduced by Control Council Law No. 10 in 1945. Understandably, the list in the Statute of the International Criminal Tribunal for Rwanda had to be textually identical (Article 3)⁷⁷. After the concept of crimes against humanity had thus found renewed official recognition and had been put into practice, the ILC also had to acknowledge that in the perception of the international community the scope of the offence had extended much beyond the limits as they were delineated in the Nuremberg Charter. Consequently, distancing itself from what it had suggested in 1991, and taking into account the atrocious experiences of the wars in the former Yugoslavia, it now came up with a much longer list of criminal acts to be classified as crimes against humanity. One finds as new entries in this list in particular *apartheid* –defined as «institutionalised discrimination

UN (ed.), *The Work of the International Law Commission*, 5th ed., New York (1996), p. 167.

⁷⁴ Reprinted *ibid.*, p. 168.

⁷⁵ *Yearbook of the ILC* 1991, Vol. II Part Two, p. 96.

⁷⁶ Security Council Resolution 827 (1993), 27 May 1993.

⁷⁷ Security Council Resolution 955 (1994), 8 November 1994.

on racial, ethnic or religions grounds»– as well as forced disappearance and enforced prostitution and other forms of sexual abuse (Article 18)⁷⁸.

35. The latest definition of crimes against humanity can be found in the Rome Statute (Article 7). Again the list has been extended. It now comprises, in addition to what was already included in the ILC Code of Crimes, forced pregnancy and enforced sterilization, in particular. Instead of accepting the felicitous concept of «institutionalised discrimination», the Rome Statute has returned to the backward-oriented blunt term of *apartheid* which, however, is defined as an «institutionalised regime of systematic oppression and domination by one racial group over any other racial group or groups and committed with the intention of maintaining that regime» (Article 7 (2) h)).

36. At Nuremberg, crimes against humanity were not an autonomous class of crimes. The Charter of the International Military Tribunal related them to war crimes or crimes against peace. This legal connection was maintained in the Statute of the ICTY. But one year later, when the Statute of the ICTR had to be prepared, it was decided to sever this link which was deemed not to correspond any more to the prevailing legal convictions. And in fact, the jurisprudence of the ICTY has followed this interpretation⁷⁹ which, furthermore, has now solid foundations. In the Rome

⁷⁸ «A crime against humanity means any of the following acts, when committed in a systematic manner or on a large scale and instigated or directed by a Government or by any organization or group: (a) Murder; (b) Extermination; (c) Torture; (d) Enslavement; (e) Persecution on political, racial, religious or ethnic grounds; (f) Institutionalised discrimination on racial, ethnic or religious grounds involving the violation of fundamental human rights and freedoms and resulting in seriously disadvantaging a part of the population; (g) Arbitrary deportation or forcible transfer of population; (h) Arbitrary imprisonment; (i) Forced disappearance of persons; (G) Rape, enforced prostitution and other forms of sexual abuse; (k) Other inhumane acts which severely damage physical or mental integrity, health or human dignity, such as mutilation and severe bodily harm» (see *Yearbook of the ILC* 1996, Vol. 11, Part Two, p. 47).

⁷⁹ See the *Tadic* judgment of the Appeals Chamber of the ICTY, 2 October 1995, 35 *ILM* (1996), p. 32 at p. 72 para. 141 ; see also judgment of the Appeals Chamber, 14 January 2000, in *Prosecutor v. Kupreskic et al.*, para. 545.

Statute, crimes against humanity stand on a par with genocide and war crimes. In the legal literature, all voices agree to that «promotion» of crimes against humanity.

37. Two different problems arise in connection with crimes against humanity. The first question is whether individual criminal responsibility does in fact exist for all the crimes encompassed in the latest lists, the list enunciated in the Code of Crimes and the list to be found in the Rome Statute. Whereas the acts and activities covered by the Nuremberg Charter do not seem open to any doubt, all the later additions have to be scrutinized one by one as to whether they form part of the body of general international law. Apartheid, to take the most controversial offence, was not recognized in the past as a crime against humanity by Western nations. The International Convention on the Suppression and Punishment of the Crime of Apartheid⁸⁰ has not received a single ratification from the States of the Western group of States.

38. Even if it can be shown that a specific offence deserves to be characterized as a crime against humanity, it is by no means sure that it falls within the scope *ratione materiae* of universal jurisdiction. No comprehensive answer can be given. As it emerges from what was pointed out in the beginning of this note, the fact that jurisdiction *ratione materiae* over these crimes is enjoyed by the ICC is not tantamount to acknowledging universal jurisdiction. What nations may safely entrust to an international tribunal is not necessarily in good hands with domestic courts and tribunals. However, regarding States parties to the Rome Statute the considerations expounded in respect of genocide would appear to apply : the principle of complementarity inherent in the Statute presupposes that the tribunals of all States parties are in a position, as agents of the system ushered in by the Statute, to take measures of prosecution against anyone charged with having committed crimes against humanity. This inference from the Rome Statute is not opposable, however, to non-parties to the Statute. The existence of a general rule of international law would have to be proven

⁸⁰ Adopted by UN General Assembly Resolution 3068 (XXVIII), 30 November 1973.

on the basis of general practice. While frequently *UN* General Assembly Resolution 3074 (XXVIII) of 3 December 1973 is relied upon as evidence supporting universal jurisdiction, careful perusal of the Resolution rather seems to confirm the contrary conclusion. In fact, the Resolution emphasizes the active personality principle (op. para. 2) and recommends the territorial principle (op. para. 5). If the drafters had been convinced of the applicability of the principle of universal jurisdiction, they would not have stressed these bases of jurisdiction which are more limited in scope than universal jurisdiction.

39. Lastly, it should be noted that not every act that breaches rules of conduct established by international law for individual s constitutes a crime against humanity. Only clusters of crimes are prosecutable as crimes under international law⁸¹. This is indicated in the Statute of the ICTY (Article 5) somewhat discretely by the words «directed against any civilian population» and is emphasized more visibly in the Statute of the ICTR by the phrase «when committed as part of a widespread or systematic attack against any civilian population» (Article 3). The 1996 final version of the Code of Crimes against the Peace and Security of Mankind follows this line by underlining that an offence qualifies as a crime against humanity only if it has been committed «in a systematic manner or on a large scale». Apparently, the Rome Statute has drawn its inspiration from this formula by stating that an offence rises to the level of a crime against humanity if it has been perpetrated «as part of a widespread or systematic attack directed against any civilian population». It stands to reason why the international community leaves it to individual States to prosecute isolated crimes. Its interests are affected only if a pattern of breaches of the law can be identified which amounts to an *en-bloc* rejection of standards of civilized behaviour.

⁸¹ See, in particular, the authoritative statement by 21 renowned human rights lawyers in their «Memorandum of Law in Support of Concluding that *Apartheid* is a Crime against Humanity under International Law», 20 *Mich. JIL* (1999), p. 271 at pp. 283-284. For a different view see Flavia Lattanzi, »Crimes Against Humanity in the Jurisprudence of the International Criminal Tribunals», in Fischer *et al.* (eds), *International and National Prosecution...*, op. cit. (*supra* note 17), p. 473 at pp. 478-482.

40. For the purposes of enquiring whether the latest lists of crimes against humanity are all based on general international law, it would seem to be appropriate to distinguish between the different elements of these lists. First of all, there are the crimes already considered to be indictable at the Nuremberg trial. The practice of the International Military Tribunal at Nuremberg has received worldwide support. Nobody contends any more that the convictions pronounced in Nuremberg were not based on solid legal grounds. The precedent of Nuremberg was confirmed by the establishment of the two international criminal tribunals for the former Yugoslavia and for Rwanda, and most recently by the establishment of the International Criminal Court. All the crimes enunciated in the Charter of the Nuremberg Tribunal appear also in the statutes of the present-day international criminal tribunals. Consequently, no reason can be perceived that would militate against recognizing these core crimes as establishing individual criminal responsibility as a matter of general international law.

41. The second group of offences comprises those which were added in the Statutes of the two international tribunals established by the Security Council (ICTY and ICTR). Imprisonment, torture and rape make up this second group. There can be no doubt that it was the experiences of the wars in the former Yugoslavia which prompted the UN Secretary-General, whose legal service drafted the Statute, to make these additions. His report explicitly says so⁸². As can be seen from that same report, the Secretary-General was of the view that all the offences which he suggested should be included in the Statute of the Tribunal for the former Yugoslavia were punishable under general international law⁸³. Visibly, he was of the view that «inhumane acts of extreme gravity» were all covered by the somewhat general formula «other inhumane acts» in the Charter of the Nuremberg Tribunal. This inference seems entirely justified. Rightly, the ICTY and the ICTR have never had any doubts that indeed all the acts falling within their jurisdiction are based on general international law. The Security Council never intended to create new criminal law. This would have exceeded

⁸² UN doc. S/25704, 3 May 1993, para. 48.

⁸³ *Ibid.*, para. 29.

its powers *ratione materiae*. Second, any attempt to act as a legislative body with a view to enacting new criminal law would necessarily have failed since rules establishing specific acts as a crime cannot have any retrospective effect. Any *ex post facto* law would violate the guarantee of *nullum crimen sine lege*.

42. Concerning torture, in the *Pinochet* case none of the judges rejected the proposition that torture was an international crime. But there were differences of opinion regarding some important details. Lord Goff of Chieveley pointed out that in any event until 1989 the crime of torture was related to war crimes and did not, as such, qualify as a crime against humanity⁸⁴. But he does not seem to deny the fact that a development has taken place since that time, changing the legal position and freeing crimes against humanity generally from the formerly requisite link with war crimes. Thus, the current legal position may be well captured in the words of Lord Millet according to whom «the systematic use of torture on a large scale and as an instrument of State policy» amounts to a crime against humanity⁸⁵. As far as individual, isolated acts of torture are concerned, they are certainly covered by the UN Torture Convention but do not come within the purview of crimes against humanity under general international law.

43. Yet, the simple formula which equates the breach of *a jus cogens norm* with universal jurisdiction⁸⁶ was forcefully contested by Lord Phillips of Worth Matravers, who argued that universal jurisdiction was generally introduced on the basis of specific conventions, but not in a general fashion for broad categories of crimes such as war crimes or crimes against humanity⁸⁷. In such instances, he said, States rather tend to agree, or to attempt to agree, on the creation of international tribunals to try crimes which threaten the foundations of the international community. The same position was defended by a decision of the *Tribunal de grande instance de Paris* of 6 May 1994⁸⁸. This word of caution stands against a

⁸⁴ *ILM* 38 (1999), p. 595 at p. 599.

⁸⁵ *Ibid.*, p. 643 at p. 650.

⁸⁶ See *supra* para. 18.

⁸⁷ *Ibid.*, p. 652 at p. 660.

⁸⁸ Cited by Brigitte Stem, «La compétence universelle en France : le cas des crimes commis en ex-Yougoslavie et au Rwanda». 40 *GYIL* (1997), p. 280 at p. 291.

chorus of voices which all take it that universal jurisdiction exists for all crimes against humanity, including torture⁸⁹. In particular, the International Law Association⁹⁰ as well as the Princeton Principles⁹¹ affirm the applicability of universal jurisdiction to crimes against humanity, including torture.

44. As far as rape, sexual slavery, enforced prostitution, forced pregnancy and enforced sterilization are concerned, no discussion should be necessary. These crimes violate the most intimate sphere of human integrity. There cannot be any doubt that they were covered already by the Nuremberg Charter through the formula «other inhumane acts». All these sexual abuses are designed to deprive human beings of their dignity, to humiliate them and to destroy their psychic balance, jeopardizing their survival as self-reliant human persons. To make use of such strategies to fight, subdue and possibly exterminate a specific group discredits a political regime and its leaders as an illegitimate gang deserving neither respect nor clemency. The international community has a vivid interest in preventing offences of such brutality by establishing an effective system of repression. In that regard, differences of opinion concerning political, social or economic issues play no role whatsoever. In any community which aspires to be admitted to a world of peace and human rights, such crimes are proscribed and perpetrators are threatened with severe penalties. No cultural divide could ever explain or justify such egregious misdeeds. Therefore, by accepting the assaults on the sexual integrity of human persons listed in the Rome Statute as crimes against humanity

⁸⁹ See Bassiouni, *loc. cit.* (*supra* note 20), p. 119; Antonio Cassese, *International Law, op cit.* (*supra* note 33), p. 263; Joyner, *loc. cit.* (*supra* note 42), p. 160; Kamminga, *loc. cit.* (*supra* note 3), p. 946; Robert Kolb, «Universal Criminal Jurisdiction in Matters of International Terrorism: Some Reflections on Status and Trends in Contemporary International Law», 50 *Rev. hell. DI* (1997), p. 43 at p. 58; Judge Koroma, separate opinion in ICJ, *Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v. Belgium)*, para. 9; Garth Meintjes/Juan E. Méndez, «Reconciling Amnesties with Universal Jurisdiction», 2 *International Law Forum* (2000), p. 76 at p. 80; Johan D. van der Vyver, «Personal and Territorial Jurisdiction of the International Criminal Court», 14 *Emory ILR* (2000), p. 1 at p. 2.

⁹⁰ *Loc. cit.* (*supra* note 3), Conclusions and recommendations, 2, p. 423.

⁹¹ *Op. cit.* (*supra* note 5), Principle 2 (1), p. 29, explanations p. 47.

entailing universal jurisdiction the international community does not in any way open the doors to political manipulation.

45. Concerning forcible transfer of population, which is mentioned both in the ILC's Code of Crimes (Article 18 (g))⁹² and the Rome Statute (Article 7 (1) d))⁹³, the international community has for long periods taken an ambiguous stand. At the time when the Nuremberg trial took place and indictments were formulated against the leading Nazi war criminals on account of «deportation», the German population –millions of people– in the German territories east of the Oder-Neisse line and in the Czechoslovak region of the Sudeten as well as in other States of eastern Europe were expelled. This action of ethnic cleansing, which received its formal justification from the Potsdam Agreement of the four victorious powers⁹⁴, was widely considered as a legitimate act of retribution against the German people. The foundation of the State of Israel was accompanied by the flight and expulsion of huge numbers of Palestinians from their ancestral lands. Here, the international community reacted by asserting a right of return of the displaced population⁹⁵, but without making any demands that criminal prosecution be set in motion. The matter was viewed as a purely humanitarian problem. Again, when Turkey expelled the Greek population from the northern part of the island of Cyprus after the invasion of its troops in 1974, the General Assembly claimed a right of return⁹⁶, but refrained from declaring that Tur-

⁹² For the commentary of the ILC on this provision see *Year book of the ILC* 1996, Vol. 11, Part Two, p. 49 para. 13. Its substance is extremely poor.

⁹³ For the definition according to the elements of crime see Wiebke Rückert/Georg Witschel, «Genocide and Crimes Against Humanity in the Elements of Crime», in Fischer *et al.* (eds.), *International and National Prosecution...*, *op. cit.* (*supra* note 17), p. 59 at p. 77.

⁹⁴ Reprinted in Ingo von Münch, *Dokumente ...*, *op. cit.* (*supra* note 18), p. 32 at p. 42: «Part XIII. Orderly Transfers of German Population... The three Governments, having considered the question in all its aspects, recognise that the transfer to Germany of German populations, or elements thereof, remaining in Poland, Czechoslovakia and Hungary, will have to be undertaken. They agree that any transfers that take place should be effected in an orderly and humane manner».

⁹⁵ General Assembly Resolution 194 (III), 11 December 1948.

⁹⁶ General Assembly Resolution 3212 (XXIX), 1 November 1974, *op. para.* 5; Resolution 3395 (XXX), 20 November 1975, *op. para.* 6.

key's actions were punishable under general international law. Hopefully, the prevailing *opinio juris* has changed. The events in Yugoslavia have taught the world a bitter lesson. The expulsion of ethnic Albanians from their homes in Kosovo prompted NATO and its member States to launch a humanitarian intervention. All this has now found its reflection in binding legal texts. The perfect harmony between the Rome Statute and the ILC's Code of Crimes seems to confirm that ethnic cleansing is now regarded as a crime which may not be justified under any circumstances. However, no convictions have ever taken place under that heading⁹⁷. It is clear that any massive «resettlement» operation will have strong political overtones. One may therefore doubt whether it is already possible to speak of a consolidated rule of positive international law, no matter how important a prohibition to displace a population from its ancestral lands may appear in fact. In any event, what may be suitable for an indictment brought before the ICC is not necessarily suitable for prosecution by domestic tribunals under the principle of universal jurisdiction.

46. Enforced disappearance is also a newcomer to the list of crimes against humanity. The strategy of disappearances was invented in Latin America during the fratricidal conflicts in the sixties and seventies of the last century. Dictatorial regimes often abducted their political opponents, mostly killing them after a short stage of applying torture to them, without however assuming responsibility for these measures. At the universal level, the General Assembly stated in Resolution 47/133 of 18 December 1992 that the systematic practice of enforced disappearance «is of the nature of a crime against humanity» (preamble, para. 4). Likewise, the Inter-American Convention on the Forced Disappearance of Persons of 6 September 1994 sets forth in its preamble (para. 6) that «the systematic practice of the forced disappearance of persons constitutes a crime against humanity». Given the fact that forced disappearance has become a synonym for indiscriminate killing, being distinguished from other forms of systematic murder

⁹⁷ In the practice of the ICTY, ethnic cleansing has generally been equated with genocide, see John R.W.D. Jones, *The Practice of the International Criminal Tribunals for the Former Yugoslavia and Rwanda*, New York (2000), pp. 99-101.

only by the veil of secrecy surrounding the crime, there can be no doubt that forced disappearance was substantively covered already by the Nuremberg Charter. The existence of the prohibition as a rule entailing international criminal responsibility is therefore beyond any doubt.

47. *Apartheid* raises more difficult problems. There is no denying the fact that the practice of *apartheid* in South Africa under the white minority regime infringed basic human rights standards. In its advisory opinion of 1971, the International Court of Justice stated :

To establish... and to enforce, distinctions, exclusions, restrictions and limitations exclusively based on grounds of race, colour, descent or national or ethnic origin which constitute a denial of fundamental human rights is a flagrant violation of the purposes and principles of the Charter⁹⁸.

But what is at stake here is not the lawfulness under international law of a system of apartheid, but the issue of individual criminal responsibility for participation in such a system. To proscribe *apartheid* as a criminal practice was a step taken by the International Convention on the Suppression and Punishment of the Crime of Apartheid, adopted by the UN General Assembly as Resolution 3068 (XXVIII) of 30 November 1973. In Article 1 of that Convention it is explicitly stated that «*apartheid* is a crime against humanity». Furthermore, the Convention sets forth that persons charged with committing the crime of *apartheid* «may be tried by a competent tribunal of any State Party to the Convention» (Article V). However, the Convention, the adoption of which occurred by a vote of 91 to 4, with 26 abstentions, was not well received within the entire international community. As foreshadowed by the opposition of a large sector of States at the time of its adoption, it was not able to attract any ratification from Western countries. To date, among the 106 States parties (August 2002), not a single State from Western Europe or North America can be

⁹⁸ Legal consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), ICJ Reports (1971), p. 16 at p. 57 para. 131.

found. This unwillingness to cooperate in a major project is not to be explained by a tacit approval of the *apartheid* policies of the then Government of South Africa. Such contention would fundamentally misjudge the real situation. The true reason is a different one. The clause on participation and complicity (Article III) was framed so broadly that almost no white South African could escape its reach and that even persons or undertakings just confining themselves to maintaining commercial relations with South Africa could be charged with committing the crime of apartheid. Indeed, attempts were made to enforce the alleged responsibility of multinational enterprises which continued either their physical presence in South Africa or their commercial ties with the country⁹⁹, and the suits recently brought in the United States under the ATCA against such undertakings again testify to the wide scope of the Convention.

48. Given these circumstances, it is surprising to note that *apartheid* now figures in Article 6 (1) G) of the Rome Statute. To be sure, there may be substantive differences between *apartheid* as described in Article 11 of the *Apartheid Convention* and *apartheid* as it is now defined in Article 7 (2) (h) of the Rome Statute. In both instances, the establishment of a system of racial discrimination is not sufficient; a broader context of serious human rights violations is required. But there may be shades and nuances that cannot be perceived at first glance. In any event, to accept *apartheid* as a crime against humanity does not correspond to the legal position constantly defended by Western States. Of course, the racial problems of South Africa have been settled. But it is precisely South Africa which shows that to change a regime that claims racial superiority requires a tremendous amount of efforts and patience. South Africa could be brought back onto the way of respecting human dignity and equality of all its citizens by a two-track strategy applied by the international community of diplomatic negotiations, on the one hand, and economic pressure, on the other. As it appears, not a single South African of the white minority

⁹⁹ In Resolution 1986/7, the UN Commission on Human Rights drew «the attention of all States» to the opinion expressed by a group of experts («Group of Three») that «transnational corporations operating in South Africa or Namibia must be considered accomplices in the crime of *apartheid*» (*op. cit.* para. 8).

Government was ever put on trial in other countries during the *apartheid* period. On the contrary, the frontline States maintained intensive economic relations with the *apartheid* regime, which was indispensable for their own economic well-being. Judicial prosecutions would not have promoted the goal of bringing down the regime. And after the fall of the *apartheid* regime, the mandate of the Truth and Reconciliation Commission was not to investigate *apartheid* as such, but to clarify the crimes that had been committed under the defunct regime. Therefore, on the basis of the available practice, it would be hard to conclude that a rule exists under general international law which establishes *apartheid* as a crime against humanity¹⁰⁰. Consequently, there can be no question of universal jurisdiction¹⁰¹. Of course, this appraisal of the legal position is not tantamount to denying the criminal character of all the features of an *apartheid* regime. Many of the elements of the system as it was practiced in South Africa may well amount to crimes against humanity.

49. Many authors hint that terrorism may be another crime against humanity. But terrorism appears nowhere in the statutes of the international criminal tribunals, nor has the last version of the Code of Crimes against the Peace and Security of Mankind included the crime of terrorism. To be sure, the 1991 draft of such

¹⁰⁰ Because of serious doubts regarding the status of *apartheid* under general international law, Germany, in its Code of Crimes against International Law (see *infra*, note 145), enacted it as a qualification of other –recognized– crimes against humanity. In other words, the crime consists of committing a crime against humanity with the intention of maintaining an institutionalised system of oppression and racial domination [Article 7 (5)].

¹⁰¹ Conclusion supported by Higgins, *op. cit.* (*supra* note 19), p. 97 ; Christian Tomuschat, «Crimes against the Peace and Security of Mankind and the Recalcitrant Third State», in Yoram Dinstein/Mala Tabory (eds.), *War Crimes in International Law*, The Hague *et al.* (1996) p. 41 at p. 56. Some voices, however, recognize *apartheid* as a crime against humanity, see Bassiouni, *Crimes against Humanity in International Criminal Law*, Dordrecht *et al.* (1992), pp. 334-337; *id.*, *loc. cit.* (*supra* note 20), pp. 122-123 (but referring exclusively to the *Apartheid* Convention, without seeking to prove that *apartheid* is a crime under general international law); Randall, *loc. cit.* (*supra* note 34), p. 821 ; Memorandum of 21 human rights lawyers, *loc. cit.* (*supra* note 81). Significantly enough, the Princeton Principles (*supra* note 5) characterize *apartheid* solely as a «candidate for inclusion» (p. 48).

a Code listed terrorism in Article 24¹⁰², but due to general uneasiness with this proposal it was dropped. The reasons for the reluctance to acknowledge terrorism as a crime against humanity are easy to understand. To date, the international community has been unable to produce a general treaty setting forth a definition of terrorism and providing for measures to combat it. Instead, a piecemeal approach was followed, States agreeing by treaty on specific forms of conduct which they all consider as harming the general interest, like hijacking of aircraft¹⁰³ and ships¹⁰⁴, the taking of hostages¹⁰⁵, the placing of bombs¹⁰⁶ or even the financing of terrorism¹⁰⁷. By contrast, endeavours to bring about a general condemnation of terrorism as a punishable crime have been unsuccessful as yet¹⁰⁸. Given the absence of a clear definition of terrorism¹⁰⁹, it would be unreasonably bold to assert that terrorism constitutes a crime against humanity under general international law.

¹⁰² *Yearbook of the ILC* 1991, Vol. 11, Part Two, p. 97: «An individual who as an agent or representative of a State commits or orders the commission of any of the following acts: undertaking, organizing, assisting, financing, encouraging or tolerating acts against another State directed at persons or property and of such a nature as to create a state of terror in the minds of public figures, groups of persons or the general public, shall, on conviction thereof, be sentenced...».

¹⁰³ Convention for the Suppression of Unlawful Seizure of Aircraft, 16 December 1970, 10 *ILM* (1971), 133; Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, 23 September 1971, 10 *ILM* (1971), 1151.

¹⁰⁴ Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, 10 March 1988, 27 *ILM* (1988), 668.

¹⁰⁵ International Convention against the Taking of Hostages, adopted by General Assembly Resolution 34/146, 17 December 1979.

¹⁰⁶ International Convention for the Suppression of Terrorist Bombings, adopted by General Assembly Resolution 52/164, 15 December 1997.

¹⁰⁷ International Convention for the Suppression of the Financing of Terrorism, adopted by General Assembly Resolution 54/109, 9 December 1999.

¹⁰⁸ See General Assembly Resolution 56/88, Measures to eliminate international terrorism, 12 December 2001, op. para. 7.

¹⁰⁹ The best definition results from a combination of the International Convention for the Suppression of the Financing of Terrorism (*supra* note 107), Article 2 (1) (b): «Any... act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act», and Gene-

50. The conclusion to be drawn from the above considerations is that some differentiation would appear to be necessary. It is difficult to argue convincingly that all the offences now listed in Article 7 of the Rome Statute give rise to universal jurisdiction. Direct attacks on the life, the physical integrity and the dignity of human beings can be classified more easily as crimes requiring a response by every member of the international community than comprehensive governmental policies that also affect the individual, but not in the same direct way. It is obvious, too, that any appraisal of the legal position involves a strong element of legal policy, given the fact, in particular, that positive law is in a dynamic process of development under the impact of the case law of the ICTY and the ICTR.

3) *War Crimes*

51. Universal jurisdiction for war crimes is firmly established in the four Geneva Conventions of 1949 for «grave breaches». According to the common clause of all four treaties (Articles 49, 50, 129, 146), States do not only have a right, but also a duty to prosecute such breaches. Textually, the relevant clause reads as follows:

Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts. It may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a *prima facie* case.

ral Assembly Resolution 49/60, 9 December 1994, Declaration on measures to eliminate international terrorism, para. 3: «Criminal acts intended or calculated to provoke a state of terror in the general public, a group of persons or particular persons for political purposes are in any circumstance unjustifiable, whatever the considerations of a political, philosophical, ideological, racial, ethnic, religious or other nature that may be invoked to justify them». This latter definition has been kept in all later Resolutions on measures to eliminate terrorism.

Given that the four Geneva Conventions have been ratified by almost all States of the world, it would seem a natural conclusion that universal jurisdiction constitutes at the same time a rule of general international law. However, it is a matter of common knowledge that before the outbreak of the armed conflict in the territory of the former Yugoslavia, States made almost no use of those clauses. No interest was shown in prosecuting crimes committed abroad in conflicts between third States¹¹⁰. It is only since the early nineties that tribunals of Western European States have from time to time instituted proceedings against alleged perpetrators of war crimes.

52. The scope *ratione materiae* of the grave-breaches clauses of the four Geneva Conventions has been extended by Article 85 of Additional Protocol I of 1977. In that regard, one must take note of the fact that, although the Protocol counts now not less than 159 States parties and although the United Kingdom and France have submitted their instruments of ratification (21 January 1998 and 11 April 2001 respectively), there still remains an important bloc of outsiders. On the one hand, the United States remains aloof from the new commitments introduced by Additional Protocol I, on the other hand there is a group of important States from the Asian region which quite deliberately avoid to tie their hands: India, Indonesia, Iran, Iraq, Israel and Pakistan. It can hardly be said that the absence of these countries does not affect the evaluation of the position under general international law.

53. On the other hand, it should also be noted that in the same way as the grave-breaches clauses of the four Conventions, Article 85 goes beyond a pure recognition of universal jurisdiction by setting forth a duty of prosecution. Hence, absence from the circle of States parties to Additional Protocol I does not necessarily amount to rejection of universal jurisdiction for the grave breaches listed in Article 85. The observer cannot fail to note, though, that

¹¹⁰ See Cassese, *loc. cit.* (*supra* note 37), p. 245, 250; separate opinion of Judges Higgins, Kooijmans and Buergenthal in *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo V. Belgium)*, para. 32; Géraud de La Pradelle, «La compétence universelle», in Hervé Ascensio *et al.* (eds.), Paris (2000), p. 905 at p. 917 para. 43; Maison, *loc. cit.* (*supra* note 67).

Article 85 encompasses two of the crimes the status of which is controversial also under the rubric of crimes against humanity, namely forced population movements by an occupying power (paragraph 4 (a)) as well as practices of *apartheid* (paragraph 4 (c)).

54. Lastly, as far as general international law is concerned, the question must be put what could be the precise connotation of universal jurisdiction for war crimes. This is largely a matter of definition. Breaches of humanitarian law can be perpetrated at four different levels of intensity. The lowest level is constituted by violations of the rules of humanitarian law which do not qualify as grave breaches («non-grave breaches»). At a second level, grave breaches are to be assessed. At the third level, the additional criteria of Article 8 of the Rome Statute could be applied, namely war crimes «committed as part of a plan or policy or as part of a large-scale commission of such crimes». In the Statute of the ICTY, Article 3 introduces a fourth category of war crimes without any qualification. As a close reading of the different propositions of this Article reveals, they have as their common background the 1907 Regulations Respecting the Laws and Customs of War on Land (Articles 23-28). Apparently, all of these offences are deemed to bear the hallmark of particular seriousness. More often than not, discourse on the principle of universal jurisdiction confines itself to referring to «war crimes» without specifying what is meant by that term¹¹¹. However, one cannot avoid taking a clear stand on this issue.

55. Given the fact that as a rule customary law remains below the level of conventional law, it would seem to be fitting to exclude the first category from the reach of universal jurisdiction. In fact, by establishing the special class of «grave breaches», the international community has made clear what the offences are in the prosecution of which all States have a legitimate interest. «Simple» violations do not affect the bases of the international legal order. It can and should be left to the States directly involved to

¹¹¹ See, for instance, Guy S. Goodwin-Gill, «Crime in International Law: Obligations *Erga Omnes* and the Duty to Prosecute», in *id.* Stefan Talmon (eds.), *The Reality of International Law. Essays in Honour of Ian Brownlie*, Oxford (1999), p. 199 at p. 206, p. 213.

take the necessary measures of repression. There is no practice that would point to a different assessment of the legal position.

56. Regarding the clauses concerning grave breaches listed in the four Geneva Conventions of 1949, the question whether they qualify at the same time as roles of general international law is fairly academic. As pointed out above, there exist good reasons leading to doubts as to their customary crystallization. But the conventional entitlement exists in any event. Although little attention has been paid by States to their duty of prosecution, it has never been alleged that on that ground *desuetudo* has come about. Thus, the conclusion is straight : universal jurisdiction exists for all of the offences enumerated in the gravebreaches clauses of these Conventions, of course in the form provided for in the relevant texts, i.e. that a territorial nexus (presence of the suspect in the national territory) is required (*jorum deprehensionis*). As already pointed out, some States, led by Belgium, have purported to exercise universal jurisdiction even without any territorial link to the alleged offender. The lawfulness of that approach is debatable, given the scarcity of practice in other countries.

57. Concerning the long lists of additional war crimes enunciated in Article 8 (2) (b) of the Rome Statute («Other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law, namely, any of the following acts»), no clear answer could be given. All of these crimes are under the jurisdiction of the ICC. They have been drawn mainly from, on the one hand, Article 85 of Protocol I, and, on the other hand, the 1907 Hague Regulations Respecting the Laws and Customs of War on Land. Obviously, the provisions on «attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations» (Article 8 (2) (b) (iii)) does not have such a time-honoured pedigree. The inclusion of this provision in the Rome Statute occurred under the impact of the 1994 UN Convention on the Safety of United Nations and Associated Personnel¹¹², a treaty

¹¹² Adopted by UN General Assembly Resolution 49/59, 9 December 1994.

which to date has received only few ratifications. Here, no rule of customary law can be deemed to exist. Comprehensively, it must be repeated what was said in the beginning of this note, namely that the jurisdiction of an international criminal tribunal must be distinguished from universal jurisdiction. To be sure, as far as States parties to the Rome Statute are concerned, it must be assumed that they implicitly accepted universal jurisdiction as a corollary of the centralized system of prosecution ushered in by the Statute. Without the competence of domestic courts to take measures which pave the way for the exercise by the ICC of its powers, the system would be unworkable. But this applies only to States parties to the Rome Statute and only for the purpose of facilitating the discharge of its functions by the ICC. No third State is bound by a convention to which it has not given its consent.

58. Lastly, the question arises whether universal jurisdiction exists also for offences committed during internal armed conflict. In 1949 and even in 1977, a clear distinction was drawn between international armed conflict and internal armed conflict. While common Article 3 of the four Geneva Conventions contains a set of minimum guarantees applicable in internal armed conflict, it refrains from setting forth that breaches of these minimum standards would entail criminal responsibility. Likewise, Additional Protocol II of 1977, which amplified the protection provided to persons involved in non-international conflicts, abstains from pronouncing on the possible criminal consequences of breaches that may be committed. It is well known that in this regard a quantum leap forward occurred through the jurisprudence of the ICTY and the Statute of the ICTR. Since, in particular, the conflict in Rwanda was a conflict between two groups of the Rwandan population without any direct external influence, it was important to establish that breaches of the applicable rules committed during that confrontation were punishable war crimes. The Statute of the ICTR made that determination. It provides in Article 4 that a number of acts shall be punishable, namely all of the acts provided for in Common Article 3 of the four Geneva Conventions and in Article 4 (2) (a) of Additional Protocol II. This origin is also made clear in the title of the relevant provision (Article 4).

59. Since, it should be recalled, the Security Council was not empowered to enact new roles establishing international crimes, the logical premise of Article 4 of the ICTR Statute was the recognition of violations of roles governing non international armed conflict as punishable crimes under international law. The ICTR was faced with this issue in its *Akayesu* judgment of 2 September 1998¹¹³. It held that indeed the acts falling within its jurisdiction according to its Statute had a customary basis¹¹⁴. As for the reasons supporting that conclusion, the judgment is not very rich in substance.

60. However, the road to this conclusion had been paved three years earlier by the judgment of the Appeals Chamber of the ICTY in the *Tadic* case¹¹⁵. Referring to a large amount of international practice, the Chamber pointed out that humanitarian law had not only evolved to cover internal conflicts, but that the international community did indeed consider any breaches of these rules as entailing individual criminal responsibility¹¹⁶. This may have been a somewhat surprising judicial finding at the time when it was made. In the meantime, however, it has guided the practice of the two international criminal tribunals, it has been widely acclaimed by the legal literature¹¹⁷ and it has also shaped the jurisdictional provisions of the Rome Statute, where extensive lists of crimes susceptible of being committed in non-international conflicts (Article 8 (2) (c) and (e)) follow the lists established for crimes occurring in international conflicts (Article 8 (2) (a) and (b)). It may therefore safely be assumed that grave violations of the rules governing internal armed conflict constitute crimes under international law the prosecution of which is in keeping with the rule of law.

¹¹³ Summary of the judgment in 37 *ILM* (1998), p. 1399; full text available at www.icttr.org/.

¹¹⁴ For extracts from the relevant passages (paras. 610-617) see Jones, *op. cit.* (*supra* note 97), pp. 496-497.

¹¹⁵ Judgment of 2 October 1995, 35 *ILM* (1996), p. 32.

¹¹⁶ *Ibid.*, pp. 70-71, paras. 128-136.

¹¹⁷ One of the leading advocates in this respect was Theodor Meron, «International Criminalization of Internal Atrocities», 89 *AJIL* (1995), pp. 554 ff., in particular 559-568. See now the weighty Memorandum of 21 renowned scholars, *loc. cit.* (*supra* note 81), p. 275, pp. 286-288.

61. This conclusion is not tantamount to saying that universal jurisdiction exists with regard to such crimes. Whenever an armed conflict has torn the social fabric of a given human community, strenuous efforts must be undertaken with a view to re-establishing a sense of national unity and solidarity. Primarily, the burden of national reconciliation rests on the shoulders of the affected population itself. While genocide and crimes against humanity entail criminal responsibility coupled with universal jurisdiction without any regard for the place of their commission or the nationality of the victims, the law of armed conflict has always insisted on the necessity of distinguishing between internal and international conflicts. Even if this distinction has now become moot on the level of substantive law, one should hesitate before casting it aside on the procedural level. Several reasons militate against equating crimes committed in internal conflict with crimes committed in international conflict. First, international practice does not confirm that equation. There is no evidence demonstrating that States have shown the same interest in prosecuting grave breaches of the rules governing internal conflict as grave breaches of the regime of international armed conflict. Second, as pointed out above, nations themselves must be granted a decisive voice in determining how to deal with a national cataclysm. Many States have set up special mechanisms, in particular truth commissions, because it would exceed their moral and physical capacity to prosecute all of the crimes which were perpetrated during such a period of lawlessness. Not infrequently, amnesties are granted. Thus, processes of national healing are promoted by measures of forgiveness. To enable any tribunal of any third State to intervene in this process would have extremely harmful effects. Given the fact that any judgment on the existence of universal jurisdiction presupposes a careful balancing of the interests at stake, the conclusion seems unavoidable that universal jurisdiction should be denied. The principle of national self-determination prevails. Nations themselves should decide how best to deal with their past as far as war crimes committed in internal conflict are concerned¹¹⁸.

¹¹⁸ For a different assessment see Meron, *loc. cit.* (*supra* note 117), p. 569.

62. This conclusion is also corroborated by Article 6 (5) of Protocol II which provides:

At the end of hostilities, the authorities in power shall endeavour to grant the broadest possible amnesty to persons who have participated in the armed conflict, or those deprived of their liberty for reasons related to the armed conflict, whether they are interned or detained.

It may well be that the original purpose of this provision is a fairly limited one. It has been suggested that it is a recommendation to governments not to punish anyone solely because of his participation in a civil war («combatant immunity»), and that the «amnesty» explicitly mentioned does not refer to crimes committed during the conflict¹¹⁹. Nevertheless, Article 6 (5) reflects the need to rebuild a society ravaged by civil war. It shows that the drafters were sensible to the needs of a nation seeking to find a new mutuality of understanding after a temporary break-up of internal cohesion. Thus, Article 6 (5) lends support to the proposition that third countries should not interfere with internal processes of societal accommodation.

D. AMNESTIES AND STATUTORY LIMITATIONS

63. The above considerations raise the general issue of amnesties, not only in the context of war crimes, but generally with regard to international crimes. It is easy to take a rigid view of the effect of amnesties, arguing that since international crimes are detrimental to the interests of mankind as a whole, amnesties granted single-handedly by one nation are irrelevant and cannot stop prosecution by the tribunals of another State. From a purely dogmatic viewpoint, this inference sounds convincing and irrefutable. In practice, however, the legal position seems to be somewhat more complex.

64. First of all, a distinction should be drawn between instances, on the one hand, where crimes were committed exclusively within

¹¹⁹ See N. Roht-Arriaza/L. Gibson, «The Developing Jurisprudence on Amnesty», 20 *Human Rights Quarterly* (1998), p. 843 at p. 865.

a national framework, in the national territory, all of the victims being nationals of the country concerned, and instances, on the other hand, where third States were substantively affected, either because the crime or its effects occurred/were felt within their territories, or because the crime caused injury to their nationals. It would seem to be obvious that no State can unilaterally deprive other States of a jurisdictional right which they hold under general international law to institute criminal proceedings against a given individual alleged to have committed an international crime. Under such circumstances, third States do not act as guardians of international legality, but as defenders of their own individual interests.

65. The situation is totally different when universal jurisdiction serves as an instrument for the protection of the foundations of the international legal order, which is the typical configuration for its exercise. Here, the interests of the national community directly concerned should be respected as a paramount consideration. Through an amnesty, a people may express its will to settle the consequences of a criminal past in a specific manner, in any event not by criminal prosecution. However, this wish must be genuine. If a dictatorial regime just before renouncing power and re-admitting democratic elections fabricates an amnesty for its representatives, there is no ground for other nations or for the institutions of the international community to comply with such an act imposed on the population concerned. On the other hand, if, like in South Africa, a comprehensive system is established for dealing with the past, under which an amnesty presupposes open admission of the offences committed in the past, which means that the perpetrators will in the future suffer social reprimand and isolation, third States should have no right to overturn this system by initiating criminal proceedings against the offenders on the basis of their admissions. The debate is not closed on this issue¹²⁰. A particu-

¹²⁰ Advocating the relevance of amnesties: John Dugard, «Dealing with Crimes of a Past Regime. Is Amnesty Still an Option?», 12 *Leiden JIL* (1999), p. 1001 at p. 1009; Christian Tomuschat, «The Duty to Prosecute International Crimes Committed by Individuals», in *Tradition und Weltoffenheit des Rechts. Festschrift für Helmut Steinberger*, Berlin et al. (2002), p. 315 at p. 347; Ruth Wedgwood, «The International Criminal Court : An American View», 10 *EJIL* (1999), p. 93 at p. 96.

larly elegant solution was found in Guatemala in 1996. By virtue of the Law on National Reconciliation, an amnesty was granted for all offences committed during the armed confrontation, except for offences in violation of rules of international law. Because of the weakness of the entire judicial system, however, this rule providing for the prosecution of breaches of international law, in particular genocide, has remained a dead letter. No durable peace between Israel and Palestine will be possible without generous amnesty clauses in a future peace settlement. Both sides could almost *ad infinitum* argue that war crimes were committed by certain elements of the other side. Leaving prosecution to the authorities of the alleged offender concerned would certainly be the best solution. The exercise of universal jurisdiction by the tribunals of third States, on the other hand, could wreak havoc to the peace process.

66. An amnesty shielding an individual from prosecution by the tribunals of another State is not the same as an amnesty designed to prevent prosecution by an international tribunal. For this reason, the findings of the ICTY in the case of *Furundzija*¹²¹ as well as the findings of the Inter-American Court of Human Rights in *Barrios Altos*¹²² to the effect that amnesties in instances of torture are invalid cannot be applied directly to the *problématique* discussed here. Both tribunals made their rulings from the viewpoint of the organized international community, and what they said about the effect of an amnesty on the jurisdiction of the domestic courts of other States must be viewed as *obiter dictum*.

66. Statutes of limitation are closely connected with the issue of amnesties. The Rome Statute has taken a rigid stance by providing that the crimes within the jurisdiction of the ICC shall not be subject to any such limitation (Article 29). Again, one may doubt whether this stance corresponds to the lessons to be drawn from a review of international practice. Henry Kissinger, in his attack on the principle of universal jurisdiction, reminded his readers that Spain, which was so adamant in urging the United Kingdom to extradite ex-President Pinochet of Chile, had deliberately abstained

¹²¹ Judgment of 10 December 1998, 38 *ILM* (1999), p. 317 at p. 349, para. 155.

¹²² Judgment of 14 March 2001, paras. 41-44.

from conducting any trials on account of the atrocities committed during its civil war¹²³. Obviously, the Spanish authorities acted according to the leitmotif: Let bygones be bygones. At Nuremberg, the issue of a possible statute of limitations played no role. All of the crimes constituting the object of the indictments were still fresh. The later instruments abstained from making any determination on the issue. In 1968, however, the UN General Assembly adopted a Convention on the Non Applicability of Statutory Limitations to War Crimes and Crimes against Humanity¹²⁴. This Convention has not been too well received by the international community. On 31 August 2002, after almost 34 years of existence, it counted no more than 45 States parties, among which not a single one belonged to the (former) Western group. One of the main grounds for the widespread opposition against the instrument was its retroactive character¹²⁵. But also a parallel European treaty, the European Convention on the Non Applicability of Statutory Limitation to Crimes against Humanity and War Crimes of 1974, which has eschewed the defect of retrospectivity, has been absolutely unsuccessful. More than 28 years after its opening for signature, it has received just two ratifications (Netherlands, Romania) and has not entered into force. This is a clear vote against the idea of a never-ending right of prosecution. Furthermore, judicial practice is extremely rare. Reference can be made only to the decision of the French *Cour de cassation* which, in the *Barbie* case, held that crimes against humanity are «imprescriptibles»¹²⁶. Given the inconsistent practice, it must be concluded that no firm rule exists¹²⁷. A young author, Micaela Frulli, has recently suggested that «une regle de droit international général sur l’imprescriptibilité... est en train de formation ou de consolidation»¹²⁸, but her conclusions

¹²³ *Loc. cit.* (*supra* note 49), 91.

¹²⁴ Resolution 2391 (XXIII), 26 November 1968.

¹²⁵ Article 1: «No statutory limitation shall apply to the following crimes, irrespective of the date of their commission».

¹²⁶ 90 *RGDIP* (1986), p. 1023 at p. 1024.

¹²⁷ The explanations to the Princeton Principles (*supra* note 5), p. 51, are misleading in that they refer to the two conventions considered above without mentioning that they have clearly been rejected by the vast majority of their addressees.

¹²⁸ «Le droit international et les obstacles à la mise en oeuvre de la responsabilité pénale pour crimes internationaux», in *Crimes internationaux et juridictions nationale*, *op. cit.* (*supra* note 16), p. 215 at p. 240.

are largely based on Article 29 of the Rome Statute and hence do not point to a general *opinio juris* or a general practice, given the fierce resistance which currently the Rome Statute encounters. As long as it cannot be proven that the exclusion of statutory limitation is grounded on a rule of general international law, third States would have to respect the application of such limitations by the States having a direct link to the crimes concerned according to one of the traditional principles of jurisdiction.

67. Although the Genocide Convention remains silent on the issue of statutory limitation, it is fairly certain that the abhorrence of the international community regarding genocide is such that an alleged suspect would never be heard with the argument that his/her prosecution cannot take place any longer according to law. The same might be true of instances of allegations that crimes against humanity have been committed. Concerning war crimes, the picture might be a different one, contrary to the determination of the Rome Statute that genocide, crimes against humanity and war crimes should all be treated in the same fashion. Especially in respect of situations of armed conflict, the evidentiary problems will normally rise to unmanageable dimensions already after a few years' time. Just for reasons of legal security, it would certainly be wise to recognize a time limit of a maximum of 30 years. It seems unfortunate that at the Rome Conference of 1998 the good intentions pushed away any other consideration. Currently, in any event, reflection on the pros and cons of Article 29 of the Rome Statute remains a matter of speculation since the true test for the rule enunciated therein will come not earlier than 30 years from now.

68. Universal jurisdiction can lead to many conflicts between and among States wishing to prosecute an alleged offender. To the extent that absolute universal jurisdiction is recognized as admissible under general international law, some coordination would be necessary. In particular, the question whether the State of the commission of the crime or the State of nationality of the suspect enjoys some kind of priority would have to be dealt with (first right of prosecution)¹²⁹. In any event, the State of custody or of sojourn

¹²⁹ In its judgment of 13 December 2000 in the Guatemalan genocide case the Spanish *Audiencia Nacional* held that indeed, according to Article VI of the

of the alleged offender may receive requests for extradition from different States. In such circumstances, it must give precedence to one of the requesting States. It does not seem possible to establish, in an abstract fashion *a priori*, a hierarchy of general applicability. Conflicts will have to be settled *ad hoc*. Of course, the State of custody must act in good faith in appraising the different claims it has to face. But it does not appear that it must meet any further requirements.

E. PROVISIONAL CONCLUSION

69. It has been attempted to submit basic elements of information in order to stimulate debate in the Commission. On many issues, choices will have to be made. The Commission will have to decide whether it wishes to codify the existing law or whether it wishes to make a contribution to the (progressive) development of the law. By opting for the first alternative, it may risk to be quickly overtaken by events, in particular through the case law of the existing international criminal tribunals. On the other hand, by moving ahead too rapidly, the Commission might create grave dangers for legal certainty and security. Both the needs of the international community in combating crimes under international law and the legitimate needs of the same international community for respect of sovereign equality of States and protection of the rights of alleged offenders must be assessed and brought into a fair balance. It is therefore extremely difficult to distinguish between the *ius conditum* and the *ius condendum*. Once the ICC will have taken up its activity, many issues will appear in a new light. This should not, however, deter the Institute from expressing its views on what the essential features of an equitable regime should be.

Genocide Convention, the territorial State holds a preferential title to prosecution, see below text accompanying note 153.