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## An International Criminal Code – Now?

L. C. Green

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### *I. Introduction*

It has been suggested that the time may now be right to prepare a codification of international criminal law, either with or without a draft statute for an international criminal court. In fact, the Foundation for the Establishment of an International Criminal Court held its third Conference to this end in Bangladesh in December 1974.

It must not, however, be overlooked that recent attempts by the International Civil Aviation Organization and the United Nations to establish a working enforcement procedure to deal with aerial hijacking and other forms of terrorism failed, largely because of opposition from the Arab countries and their sympathizers. There is, therefore, a danger that any formal proposal in this field may be regarded as an attempt to achieve by roundabout methods what could not be secured more directly. Nevertheless, it may be opportune at least to examine the background of this matter and some of the proposals that have been made, and to assess whether Canada, for example, might consider taking any initiative or active role to this end.

### *II. The Pre-League Period*

It seems to be generally believed that the movement for the recognition of an international criminal code and jurisdiction is a product of the First World War and the provisions in the Treaty of Versailles for the trial of the Kaiser, and of the period of the League of Nations. It is frequently forgotten that as early as 1907 in Hague Convention XII an attempt was made to draw up a statute for an international court enjoying limited "criminal" jurisdiction. By this Convention provision was made to appeal the decisions of national

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\*L. C. Green, University Professor, University of Alberta; Academic-in-Residence, Bureau of Legal Affairs, 1974-75.

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prize courts when the order of condemnation (if it affected the property of a neutral power or individual or, in certain circumstances, related to enemy property) was alleged to be based on wrong fact or law. This Convention, however, never came into force and the matter of any form of international criminal jurisdiction remained dormant until the Allied and Associated Powers sought, in Article 227 of the Versailles Treaty, publicly to arraign Wilhelm II of Germany “for a supreme offence against international morality and the sanctity of treaties”, and envisaged the establishment of a special tribunal consisting of the five Principal Allied and Associated Powers to assure “him the guarantees essential to the right of defence.” It is interesting to note that the Treaty makes no reference to international law when discussing the jurisdictional competence of the tribunal.

The tribunal will be guided by the highest motives of international policy, with a view of vindicating the solemn obligation of international undertakings and the validity of international morality. [Moreover,] it will be its duty to fix the punishment which it considers should be imposed.

For a variety of reasons, primarily because of the Netherlands refusal to surrender the Emperor, Article 227 remained a dead letter. However, in accordance with Articles 228-230 the Allied and Associated Powers were able to ensure that proceedings were instituted before the Supreme Court at Leipzig in which charges were brought against a number of German officers for a variety of crimes against the law of war. According to the Treaty, those charged should have been surrendered for trial by the victorious Powers, with the German authorities providing such documents as were required of them. In fact, the latter refused to surrender anybody and proceeded against the accused before German municipal tribunals, and there took place what have become known as the Leipzig Trials,<sup>1</sup> of which the most famous is *The Llandovery Castle*<sup>2</sup> which formulated the modern law on the defence of superior orders.

### *III. Piracy — An International Crime?*

Even before this, however, international customary law recognized that the perpetrators of certain acts could be regarded as *hostes*

1. C. Mullins, *The Leipzig Trials* (London: Witherby, 1921).

2. (1922), 16 Am. J. Int'l L. 708.

*humani generis*, and tried by any power into whose hands they might come. Perhaps the chief of these were pirates *jure gentium*. Traditionally, piracy *jure gentium* has been regarded as an international crime. As early as 1598 in his *De Jure Belli*<sup>3</sup> Gentili wrote "Piracy is contrary to the law of nations and the league of human society. Therefore war should be made against pirates by all men, because in violation of that law we are all injured. . .". Similarly, Sir Leoline Jenkins, a seventeenth century admiralty judge, said in 1668 that "all pirates and sea rovers are outlawed, as I may say, by the law of nations, that is, out of the protection of all princes and of all laws whatsoever. Everybody is to be commissioned and is to be armed against them as against rebels and traitors, to subdue and to root them out".<sup>4</sup> While in *The Le Louis*<sup>5</sup>, Lord Stowell stated that "with professed pirates there is no state of peace. They are the enemies of every country and at all times, and therefore are universally subject to the extreme rights of war". It has, however, been contended that all international law has done with regard to pirates is concede the right to states, without imposing any concomitant duty upon them, to prosecute any pirate they may capture. On this ground it has been said that since the application of universal jurisdiction depends on the enactment of local legislation<sup>6</sup>, piracy is not a crime under international law which may, in fact, acknowledge that international law is part of the law of the land that may, as such, be enforced in the courts in the ordinary way.<sup>7</sup> This view is to be found, for example, in the Introduction to the Harvard Draft Convention and Comments on Piracy: "Properly speaking, then, piracy is not a legal crime or offence under the law of nations".<sup>8</sup>

It should be noted that this statement, with its use of the words "properly speaking", is completely in line with Austinian positivism, and is based on the absence of any international law-making body or court to try a person accused of this crime. This attitude has as recently as 1974 been used as a basis for denying the

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3. 2 A. Gentili, *De Jure Belli Libri Tres* (Oxford: Clarendon Press, 1933) at 124.

4. 1 Wynne, *Life of Sir Leoline Jenkins*, 1724 at l xxxvi.

5. (1817), 2 Dods. 210 at 244; 165 E.R. 1464 at 1475.

6. *R. v. Keyn* (1876), 2 Ex. D. 63 and Territorial Waters Jurisdiction Act (1878), 41 and 42 Vict., c. 73. (Imp.).

7. See, e.g., *The Parlement Belge* (1880), 5 P.D. 197 and Constitution of the Federal Republic of Germany, Art. 25.

8. (1932), 26 Am. J. Int'l. L. (Supp.) at 759.

criminal character of piracy as a standard against which to measure the criminality of aerial hijacking.<sup>9</sup> To some extent it would seem as if the Privy Council was of similar opinion in its findings in *In re Piracy Jure Gentium*. While declaring that international law is derived from treaties, State papers, municipal statutes and judicial decisions, and from the opinions of jurisconsults, and as such rests on a process of inductive reasoning, and although the Board was concerned with piracy *jure gentium*, the Court nevertheless stated

with regard to crimes as *defined* by international law, that law has no means of trying or punishing them. The *recognition* of them as constituting crimes and the trial and punishment of the *criminals* are left to the municipal laws of each country.<sup>10</sup>

But this same statement may be applied to any municipal law, for while the statute *defines* the offence, it is the court which *recognizes* it as a crime and ordains the punishment of the criminals.

It is submitted that this is an exceedingly formalistic and pedantic approach. If the legal system defines the act as a crime, it is difficult to appreciate how it may be contended that it is not thereby a crime according to that system. Such an approach is akin to the arguments of those who define law in accordance with the mechanism by which it is created and enforced, provided that mechanism is comparable to that which exists in the municipal sphere. But does international law have to be “law properly so-called” in order to be “law”?<sup>11</sup>

Perhaps one of the reasons for the confusion concerning piracy as an international crime lies in the fact that many countries have national legislation by which offences wider than the international concept of piracy *jure gentium* are described and punished as piracy. This may be seen from Lord Stowell’s judgment in *The Le Louis*<sup>12</sup> rejecting an attempt to condemn a French slave-trader as if it was a pirate in accordance with the Slave Trade Act 1811.<sup>13</sup> By the Slave Trade Act 1824<sup>14</sup> any British subject indulging in this trade “shall be deemed and adjudged guilty of piracy, felony and

9. See N. Joyner, *Aerial Hijacking as an International Crime* (Dobbs Ferry, N.Y.: Oceana, 1974) *passim*.

10. [1934] A.C. 586 at 588 (P.C.) (Special Reference) [emphasis added].

11. See G. L. Williams, *International Law and the Controversy concerning the Word “Law”* (1945), 22 Brit. Y.B. Int’l. L. 146; L.C. Green, *Law and Society* (Leyden: Sijthoff, 1975), c. iv (“Is International Law Law?”).

12. (1817), 2 Dods. 210 at 246 and 248; 165 E.R. 1464 at 1476 and 1477.

13. 51 Geo. 3, c. 23.

14. 5 Geo. 4, c. 113, s.9.

robbery.” This should be compared with s.75 of the Canadian *Criminal Code* by which “everyone commits piracy who does any act that, by the *law of nations*, is piracy”.<sup>15</sup> No reference is made in the *Code* (or in any other statute) to the slave trade, although by s.7(2), the English criminal law in force in a province before April 1, 1955 continues unless altered or affected by the *Code*, or any other federal statute.

#### IV. Treaty-created “Crimes”

While piracy is perhaps the best-known of what are generally regarded as crimes against international law, it must not be forgotten that customary international law also recognized other acts as amenable to the jurisdiction of any state capturing the alleged offender. This was accepted by the “fathers” of international law who did not hesitate to condemn as outlaws, who might be attacked by anyone<sup>16</sup> or tried by any prince,<sup>17</sup> those who might today be charged with crimes against humanity. It was not only the writers who recognized the criminality of such actions. States too on occasion were prepared to establish tribunals (which operated under international rather than any system of municipal criminal law) for the trial of such offenders.<sup>18</sup>

By the nineteenth century treaties were being contracted which declared certain activities to be criminal and obligated the parties to amend their criminal law to any extent that might be necessary. While the Final Act of the Congress of Vienna, 1815<sup>19</sup> embodied a solemn declaration condemning the slave trade this did not make it a crime,<sup>20</sup> although the 1841 Treaty of London<sup>21</sup> declared it to be piracy. There followed a series of international conventions, culminating in the Supplementary Convention drawn up under the auspices of the United Nations in 1956.<sup>22</sup> This has been ratified by almost all members of the United Nations, but it no longer describes

15. R.S.C. 1970, c. C-34 [emphasis added].

16. See Gentili, *supra*, note 3.

17. See H. Grotius, *De Jure Belli ac Pacis Libri Tres* (Oxford: Oxford Press, 1925) Lib. II, ch. 20 at s. 40(1) and (4).

18. See “The Breisach Trial of 1474” in 2 G. Schwarzenberger, *International Law*, “The Law of Armed Conflict” (London: Stevens & Sons Ltd., 1968) c. 39.

19. 64 C. Parry, ed., *The Consolidated Treaty Series* (Dobbs Ferry, N.Y.: Oceana, 1969) at 454 [hereinafter “Consolidated Treaty Series”].

20. See *The Le Louis* (1817), 2 Dods. 210; 165 E.R. 1464.

21. (1841-42), 92 Consolidated Treaty Series 438.

22. (1957), 266 United Nations Treaty Series 3 [hereinafter “U.N.T.S.”].

the slave trade as piracy, but merely declares such trading to be a crime liable to serious penalties. It thus seems to be a retreat from a crime under international law amenable to the death penalty, into a crime defined by municipal law and punishable by whatever penalty the state may consider apt for a serious crime. Perhaps it should be noted that although Canada ratified this Convention in 1963, there is, as mentioned above, no specific reference to the slave trade in the *Criminal Code* or in any other legislation. Other attempts at defining crimes by international treaties have related to, *e.g.*, the white slave traffic, the first convention on which was signed in 1904.<sup>23</sup> While this referred to a "criminal traffic", it merely required the contracting parties to take steps for the protection of the victims, but did not specifically attempt to deal with the organizers. By 1933, however, the situation had improved from this point of view, and the International Convention for the Suppression of the Traffic in Women of Full Age<sup>24</sup> provided for the punishment of those involved in the traffic "notwithstanding that the various acts constituting the offence may have been committed in different countries", and required those parties whose law did not yet contain adequate provisions to deal with the offences to make the necessary legislative amendments. The United Nations Protocol of 1947<sup>25</sup> was more in the nature of a procedural and technical instrument than one of a substantive character.

It has not only been in the area of humanitarian law that efforts have been made to develop international criminal law by way of treaty. Thus, by the Convention for the Regulation of Whaling, 1937,<sup>26</sup> the parties have agreed to punish infractions of the regulations in question. Whether, this type of "offence" is sufficiently grave to warrant inclusion in any International Criminal Code, providing for universal jurisdiction by all parties, and perhaps envisaging the final establishment of a court which might possess exclusive, concurrent or alternative jurisdiction, is most questionable.

### *V. Un Droit Pénal International*

In so far as attempts have been made since the end of the First

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23. (1920-21), 1 League of Nations Treaty Series 83 [hereinafter "L.N.T.S."].

24. (1934), 150 L.N.T.S. 431.

25. (1950), 53 U.N.T.S. 13.

26. (1938), 190 L.N.T.S. 79.

World War to deal with international criminal law on an organized basis, the tendency has been to call for a code dealing with what might be described as criminal acts by the state itself. The literature to a great extent stems from the work done by V. Pella who, in 1925, published his *La Guerre d'agression et la constitution d'un droit répressif des Nations*, followed almost immediately by *La criminalité collective des Etats et la droit pénal de l'avenir*. These were in fact elaborations of his 1919 doctorate thesis in which he had envisaged the possibility of an inter-state criminal law with an international criminal jurisdiction competent to deal with individuals, states and moral persons disturbing international order. That is to say, he was concerned with maintaining law and order only in so far as this required the suppression of crimes against peace and security. In 1922 Donnedieu de Vabres had attempted a somewhat narrower approach that did not purport to reach out to states, but confined itself to the individual. In his *Introduction à l'étude du droit pénal international* he wrote that

Le droit pénal international est la science qui détermine la compétence des juridictions pénales de l'Etat vis-à-vis des juridictions étrangères, l'application de ses lois criminelles — lois de fond et lois de forme par rapport aux lieux et aux personnes qu'elles régissent, l'autorité, sur son territoire, des jugements répressifs étrangers.

He was therefore concerned with the mutual enforcement of municipal criminal laws, although at a later date he envisaged universal jurisdiction with regard to offences which could be regarded as directed against "le patrimoine moral de l'humanité", and which provoked a sense of universal opprobrium viz., slave trade, piracy, traffic in women and children, traffic in obscene publications and of narcotic drugs.<sup>27</sup> He was, however, fully conscious of the strength of the concept of sovereignty and the resistance that would be offered by states to the establishment of a special tribunal. He, therefore, suggested that until this situation changed, it might suffice to establish a criminal chamber of the Permanent Court of International Justice which would enjoy

un pouvoir exceptionnel de *révision* à l'égard des affaires concernant des crimes internationaux. Vis-à-vis des juridictions nationales, elle n'interviendrait alors ni comme tribunal d'appel, ni comme tribunal de cassation. Ses attributions seraient

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27. D. de Vabres, *Les Principes Modernes du Droit Penal International* (Paris: Sirey, 1928) at 144-47.



analogues à celles qu'exerce exceptionnellement, comme juge du fait, dans les relations internes, notre Cour suprême. Lorsqu'un jugement relatif à un crime commis en territoire occupé, à la falsification d'une monnaie étrangère, au meurtre d'un homme d'état étranger etc., aurait provoqué une émotion susceptible de troubler les relations internationales [It is interesting to notice this last comment in view of the attitude of the United Nations towards apartheid which has been condemned as a crime against humanity<sup>28</sup>], ce jugement s'il est devenu définitif serait, d'accord entre les Etats intéressés, soumis à l'appréciation de la juridiction supérieure.<sup>29</sup>

#### VI. *The ICJ and a Permanent Criminal Court*

Since the Nuremberg and Tokyo trials when it became clear that act of state would not be acceptable as a defence to a charge for international crimes, and that the status of the persons accused would no longer serve as a ground for immunity, pressure began again in favour of a permanent criminal tribunal, rather than the *ad hoc* bodies established to try the major war criminals, and which might be considered as treaty-created national tribunals<sup>30</sup>. Moreover, it was felt that a permanent body would remove some of the criticism directed against these two tribunals and the national military tribunals which had conducted proceedings against lesser war criminals, and all of which had been criticised as one-sided *post hoc* affairs. At the same time, it was recognized that little would be gained by proceeding against any state as such, while the movement in favour of the international recognition and protection of human rights lent support to those who believed that any permanent tribunal should be given a jurisdiction wider than that concerned purely with inter-state crimes like aggression or offences against international security. This tendency to seek the criminal liability of the individual before a permanent international tribunal was to a great extent a departure from the attitude of the League of Nations era, when, moreover, most of the literature in favour of such a jurisdiction came from European writers, although immediately after the war Bellott and Phillimore had supported such an idea in English journals.<sup>31</sup>

28. G. A. Res. 3068 (XXVIII) (1973).

29. de Vabres, *supra*, note 27 at 417.

30. Schwarzenberger, *supra*, note 18 at 467-68.

31. A. A. Sottile, *The Problem of a Permanent International Criminal Court* (Geneva: reprint, 1951) at 6 *et seq.*

It is unnecessary, in view, for example, of the summary provided by Sottile to go into detail of the developments and proposals made by various bodies or individuals between 1919 and the adoption of the Genocide Convention by the General Assembly in 1948<sup>32</sup>, which clearly recognized the desirability of a permanent impartial international tribunal to deal with international crimes of this character. It must be remembered that until such a tribunal is established, genocide is punishable by the state in whose territory the crime has been committed. Since genocide is hardly likely to be the consequence of private enterprise, but needs state compliance or complicity, this is hardly likely to prove effective or practical. While the Convention requires the parties to enact legislation to give effect to the Convention, it does not create universal jurisdiction such as attaches to piracy, and which would enable a state in whose territory one accused of genocide is found to charge that individual before its own tribunals.

Soon after the adoption of the Genocide Convention, the Sixth Committee of the General Assembly considered the problem of the international tribunal envisaged in that document, and the Assembly invited the International Law Commission "to study the desirability and possibility of establishing an international judicial organ for the trial of persons charged with genocide or other crimes which jurisdiction will be conferred upon that organ by international convention". By the same Resolution, the Commission was asked "to pay attention to the possibility of establishing a Criminal Chamber of the International Court of Justice".<sup>33</sup> The Commission dealt with this matter at its Second Session in the light of Reports prepared by Professors Alfaro and Sandstrom and concluded that such a judicial tribunal was desirable and that its establishment was possible.<sup>34</sup> At the same time, it adopted a statement of Principles of International Law recognized in the Charter of the Nuremberg Tribunal and in the Judgment,<sup>35</sup> which may be regarded as a statement of part at least of the competence of any international criminal tribunal that might be created. Despite these activities of the Commission, and its associated studies in connection with the Draft Code of Offences against the Peace and Security of

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32. G.A. Res. 260 B (III) (1948).

33. For background, see U.N., "Historical Survey of the Question of International Criminal Jurisdiction", Doc. A/CN. 4/71 Rev. 1.

34. 2 U.N. *International Law Commission Yearbook*, 1950, at 1, 18, 379, resp.

35. *Id.* at 374.

Mankind,<sup>36</sup> the General Assembly resolved to postpone consideration of this Code and of the proposal to establish an international criminal jurisdiction until it had dealt with the issue of aggression,<sup>37</sup> thus indicating its view that offences connected with inter-state relations affecting the peace were of more significance than crimes like those traditionally regarded as contrary to international law (*e.g.*, piracy and the slave trade,) which merely affected the rights of the individual and were committed by individuals, normally acting on their own initiative and for private as distinct from state ends. However, neither the Commission nor the Assembly has concerned itself with a Criminal Code in the widest sense of the word. While any suggestion to establish an international tribunal on a permanent basis radically diminishes state sovereignty and has usually been the basis for opposing such a tribunal, the Assembly did appoint a committee which was able to draw up a satisfactory statute for a court.<sup>38</sup> Even in its Report, however, this Committee evaded the fundamental issue of the scope of jurisdiction. It merely provided:

Article 1: There is established an International Criminal Court to try natural persons accused of crimes generally recognized under international law.

Article 2: The Court shall apply international law, including international criminal law, and where appropriate, national law.

. . .

Article 25: The Court shall be competent to judge natural persons whether they are constitutionally responsible rulers, public officials or private individuals.

Article 26 (1): Jurisdiction of the Court is not to be presumed.

(2): A State may confer jurisdiction upon the Court by convention, by special agreement or by unilateral declaration.

(3): Conferment of jurisdiction signifies the right to seize the Court, and the duty to accept its jurisdiction subject to such provisions as the State or States have specified.

(4): Unless otherwise provided for in the instrument conferring jurisdiction upon the Court, the laws of a State determining national jurisdiction shall not be affected.

Article 27: No person shall be tried before the Court unless jurisdiction has been conferred upon the Court by the State or

36. 2 *U.N. International Law Commission Yearbook*, 1954, at 149.

37. G.A. Res. 897, 898 (IX) (1954).

38. "Report of the 1953 Committee on International Criminal Jurisdiction", G.A., Official Records, 9th Sess., Supp. No. 12, Doc. A/2645.

States of which he is a national and by the State or States in which the crime is alleged to have been committed [There is thus no attempt to incorporate any principle of universal jurisdiction in the sense that any State concerned with the suppression of crimes under international law should have the right to institute proceedings, but see Article 29].

Article 28: A State may withdraw its conferment of jurisdiction [effective after one year's notice].

Article 29: Proceedings before the Court may be instituted by a State which has conferred jurisdiction upon the Court over such offences as are involved in those proceedings [provided, in the light of Article 27, that the State of nationality and of the *locus actus* have also conferred jurisdiction].

There was also the suggestion that the following additional provision might be attached to Article 29:

In the interest of the maintenance of peace, a United Nations organ to be designated by the United Nations may stop the presentation or prosecution of a particular case before the Court.

This provision is reminiscent of Article 94(2) of the Charter whereby the Security Council is able, for political or other reasons, to prevent a successful party to an action before the World Court from enforcing its judgment. It also introduces the possibility of political factors interfering with the normal processes of a judicial tribunal.

Now that the General Assembly has adopted a definition of aggression<sup>39</sup> it may well be opportune to remind that body of Resolutions 897 and 898<sup>40</sup> and suggest that the question of an international criminal jurisdiction be revived.

### *VII. The Nature of the Jurisdiction*

Since the provisions of a statute for an International Criminal Court are for the most part somewhat technical and even straightforward in character, and since draft statutes already exist,<sup>41</sup> there is little need to go into details on this matter. In any case, it may be presumed that if real agreement were reached on the establishment of a tribunal, technicalities as to composition, procedure, and

39. G. A. Res. 3314 (XXIX).

40. *Supra*, note 37.

41. See, e.g., *supra*, note 38; I M.C. Bassiouni and V.P Nanda, *A Treatise on International Criminal Law* (Springfield: Thomas, 1973) esp. Part V; Report on 1st and 2nd International Criminal Law Conferences published by Foundation for the Establishment of an International Criminal Court, 1973.

possibly even jurisdiction, might be relatively easy to solve. However, it might be suggested that the jurisdiction of this Court be wide enough to operate on its own at the instance of its own prosecutor; that any party to the Statute might have the right to initiate proceedings, regardless of whether the country of nationality or *actus reus* recognized the Court's competence; that the Court might enjoy jurisdiction *in absentia*, which would partly avoid the problem of an international police force, might evade issues relating to claims of political asylum, and might also introduce the concept of a declaratory judgment whereby the Court could declare a particular fugitive *hostis humani generis* on the basis of a proper judgment; that all parties to the Statute should, as with the European Court, be obliged to carry out the judgments of the Court; and that the Court might possibly be given authority over some selected place which would serve as an internationally recognized incarceration centre, thus avoiding some of the problems which have arisen concerning Hess and Spandau and might also reduce the risk of hostage-terrorism, *etc.* On the other hand, the Statute should probably avoid including as one of the "sources" of the law to be applied "the principles of penal law generally recognized by civilized nations", even though the general principles of law recognized by civilized nations are included in Article 38 of the Statute of the World Court. The principles of penal law were included by the United Nations War Crimes Commission in its draft Convention for the Establishment of a United Nations Joint Court, but this related to a court for the trial of war crimes and crimes against humanity. Where a general international criminal court is concerned, such a principle might lead to assertions that the Court enjoyed jurisdiction over such offences as murder, for culpable homicide is criminal according to "the principles of penal law generally recognized by civilized nations".<sup>42</sup>

It perhaps might be mentioned here that though Canada was not represented on the War Crimes Commission it informed that body in December 1944 that it "was interested in the establishment of a UN War Crimes Court", and the High Commissioner's Aide-Memoire of December 9, 1944, stated that

[t]he Canadian authorities are anxious that the proposal for the mixed military tribunals should be such that the trial of war criminals may begin immediately Germany collapses . . . . It

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42. The draft statute of this court is reproduced, *supra*, note 33, App'x. 10.

may not, in the view of the Canadian Government, be desirable that these tribunals should be too hedged around with legal restrictions and it might be useful to give them a wider discretion in order that justice may be meted out without delay.<sup>43</sup>

### *VIII. The Nature of the Code*

Whether a court be established or not, there still remains the problem of drafting an international criminal code. The discussion earlier in this paper concerning the nature of international crimes and the concept of piracy should be enough to indicate that a statement as broad and as simple as Article 1 referred to above is inadequate, and fails to answer any of the problems or reservations mentioned, and still leaves open the question of what in fact are crimes under international law. Moreover, as became clear at the second International Criminal Law Conference of the Foundation, modern criminology is opposed to any codification that is in general terms and does not specify the crimes in question by name. Opposition was even expressed against the inclusion of a "saving clause" to the effect that any court should also possess jurisdiction over "such offences as may be named as international crimes subsequently to the creation of the Court".<sup>44</sup>

With the pressures for the protection of human rights, which have since been politicised by the new majority in the United Nations into rights of man in his corporate personality as part of a "people", there has been an increase in the number of potential crimes under international law. At times, however, the insistence upon treating a particular activity as a crime appears more political-ideological than real, and the decision to adopt such a terminology has often resulted from the fact that the automatic majority has been aware that many of the developed countries are, for political reasons, unable to vote against the condemnation of a particular practice (the resolution defining aggression was adopted without a vote), or only a very small number of them are prepared to do so or are willing to be seen in the company of those whose conduct is being condemned (*e.g.*, the Convention condemning apartheid was opposed only by the

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43. *History of the United Nations War Crimes Commission* (London: H.M. Stationery Office, 1948) at 453.

44. Such opposition was expressed strongly by Professor Gerhard Mueller, Director, Criminal Law Education and Research Centre, New York University, co-author with E. Wise of *International Criminal Law* (South Hackensack, N.J.: Rothman, 1965).

United Kingdom, the United States, South Africa and Portugal). The tendency to be concerned with individuals and offences against them, whether in isolation or as members of a group, also indicates a shift from earlier practices. Thus, by the Convention for the Protection of Submarine Cables, 1884<sup>45</sup>, which became binding for Canada in 1888, the parties undertook to make the severance of such cables an offence; then, in 1929 there was the Convention on the Suppression of Counterfeiting Currency<sup>46</sup> which made certain acts “ordinary crimes”, and provided that these offences should be treated as extraditable crimes, and that “foreigners who have committed abroad any offence referred to in the Convention, and are in the territory of a country whose internal legislation recognises as a general rule the principle of the prosecution of offences committed abroad, should be punishable in the same way as if the offence had been committed in the territory of that country”, provided extradition cannot be granted for reasons not associated with the offence. As to the type of offence that is now being talked about as potentially a crime under international law warranting jurisdiction on a universal basis, the League of Nations adopted in 1937, after the assassination of Alexander of Yugoslavia and Paul Barthou, the Convention for the Prevention and Punishment of Terrorism<sup>47</sup> which sought to deal with physical attacks upon heads of states and political office-holders, but was ratified by India alone. The concomitant Convention for the Creation of an International Criminal Act intended to try offences under the terrorism Convention did not receive even this ratification.<sup>48</sup> Apart from this, multilateral conventions in the field of international criminal law concerned with the individual tended to be confined to slavery and the white slave traffic, although trading in obscene literature had been dealt with as early as 1910<sup>49</sup> and Canada has ratified the 1923 League Convention on the same subject,<sup>50</sup> and the trade in narcotics at periodic intervals since 1912.<sup>51</sup>

Whatever be the position under specific conventions calling for the ban and punishment of particular acts under the municipal law of

45. 75 B.F.S.P. 356.

46. (1930-31), 112 L.N.T.S. 371.

47. L. M. O. Hudson, ed., *International Legislation* (Washington: Carnegie Endowment for International Peace, 1941) at 862.

48. *Id.* at 878.

49. 103 B.F.S.P. 251.

50. 27 L.N.T.S. 217.

51. 108 B.F.S.P. 230.

the parties, it should be remembered that not every infraction, even though criminal, is grave enough to constitute an offence that should be subject to the criminal processes of all parties in accordance with the principles of universal jurisdiction, nor be amenable to an international criminal tribunal should that be established. Such jurisdiction should be confined to those acts which are of sufficient gravity to warrant being treated as offences against the general interests of mankind, either by way of his patrimony or such principles of humanitarian law as may be considered valid *erga omnes*. Since it would appear that the present membership of the United Nations is rather more concerned with acts like aggression or apartheid, which are acts committed by the state itself, it must be remembered that states reach their decisions and subsequently carry them out through the medium of individual human beings, so that any process of criminal justice must be exercised against the individual, as distinct from the juridical personality known as the state. This means that the individual who is charged must not be able to plead in his defence either "act of state" or "superior orders". This is not the place to discuss these pleas in any detail. It suffices merely to draw attention to them.

### *IX. The Contents of the Code*

It has been suggested above that not all those acts which are described by specific conventions as being contrary to international law, such as interference with submarine cables or the dissemination of obscene literature, are sufficiently grave in the present ethical context of mankind to be regarded as crimes that warrant control on the basis of universal jurisdiction, even though specific conventions might require their suppression and punishment on a municipal level. If this be so, there is even less justification for subjecting such activities to any international jurisdiction that might be created. For this reason, any international penal code that might be drafted should, at least in the first instance, be confined to such offences as genocide, slave-trading, piracy, and the like, which are contrary to the basic concepts of humanitarian law. Again, for the purposes of this paper which is concerned with the nature and desirability of such a penal code, there is no need to go into the technical details of drafting, as has been done, for example, by the Foundation for the Establishment of an International Criminal Court, nor is there any need to consider possible defences or



whether a common penalty should be prescribed or the death penalty preserved, or the like. For this reason it is felt that there is no need to analyse such details as would necessitate the inclusion of conspiracy to commit, incitement, planning, *etc.*. All that is suggested here is a statement of those offences which are considered sufficiently grave from the international and humanitarian point of view that, pending the creation of an international criminal court, states should have the right — and perhaps even be under a duty — to prosecute them, regardless of where they have been committed, or the nationality of the actor or of his victim. In other words, confining the proposals to those matters which it might be contended all states, since they are assumed to be concerned, as members of the United Nations, with upholding and vindicating the rule of law, should be competent to try in order that they may contribute to upholding that rule of law. From a practical point of view, however, it may be necessary to recognize that some states will regard some of the offences listed as less serious than others, and, therefore, the code might need to include a provision permitting choice as to the offences which they are prepared to try. It may also be advisable to provide that some offences are so grave that no reservation of this kind is tolerable in respect thereto.

Any code of this character should provide a general introductory clause along the following lines:

The Parties to this Convention are agreed that they will try any person within their jurisdiction against whom there is a *prima facie* case that he has committed an offence, regardless of the location of the offence or the nationality of the offender or the victim, contrary to international customary law or any convention declaring the particular act to be a crime.

Then there should be a further provision imposing an obligation upon all Parties to this Convention to amend their own municipal criminal codes to give effect to the above requirement, including the introduction where necessary of the right to exercise jurisdiction over any offender found within the territory, regardless of the *locus actus* or his nationality or that of his victim.

In addition, the Code should specify the following acts as being among those over which universal jurisdiction extends:

1. Piracy *jure gentium* — this is to indicate that if any state has passed legislation extending the definition of piracy beyond that found in international customary or treaty law, there is no obligation upon any alien or other state as a result.

2. Slave-trading — it is difficult to appreciate how slavery itself is made a crime, although it may be forbidden in the sense that any attempt purporting to make a person a slave is null. It would be possible to make the owner of a slave liable to criminal prosecution.
3. War Crimes — contrary to the laws and customs of war and of those Conventions laying down rules for the conduct and humanization of war.
4. Crimes against humanity as defined by the Nuremberg Principles<sup>52</sup>, and including every act of homicide, likely to cause death, committed in peace or war, against individuals or groups of persons by reason of race, nationality, language, religion, or opinion — this is based on the definition to be found in the Code suggested by the 8th (Brussels) Conference for the Unification of Penal Law, 1947.
5. Genocide — contrary to the Genocide Convention; this is narrower than 4 above, since it deals with acts directed against groups with the intention of destroying them *as groups*.
6. Trade in Narcotics — in view of the change in attitude towards “soft drugs” it would probably be necessary to choose a definition of the type of narcotics concerned to indicate that only “hard” drugs are referred to.
7. Traffic in Women and Children — while it is true that the Canadian *Criminal Code* (s.194) refers to “any person” and is therefore not sex-oriented, it is unlikely that others would now be willing to accept such a wide view of white slaving.
8. Transmission of explosive and noxious materials through the post contrary to the Universal Postal Convention.
9. Counterfeiting of currency with the intention of depreciating the currency of a state or harming its economy — it is felt that counterfeiting or forging for purely private ends does not warrant treatment as an international crime.
10. Acts of violence against heads of state or other persons enjoying international protection — it is not considered that it is necessary to refer to the Convention on this subject<sup>53</sup> in order to avoid any suggestion that this offence is limited so as to offer protection only to diplomats whose states have ratified the Convention; further, it is not intended that attacks on heads of state or diplomats for purely private reasons should be considered international crimes.

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52. G. A. Res 95(I).

53. U.N. Convention on Prevention and Punishment of Crimes against International Protected Persons, G.A. Res. 3166 (XXVIII).

11. Acts of terror<sup>54</sup> directed against innocent third parties or committed in the territory of or against the property of any state not directly involved in the alleged controversy which is the occasion for such act — this would exclude the internationalization of terrorist acts which arise from purely internal conflicts, as in Northern Ireland, or which relate solely to the parties in an international conflict, as between Israel and her enemies, whether a state or an organization like the PLO, although such acts might in some instances amount to war crimes in which case jurisdiction would lie under 3 above.
12. Deviation of aircraft involving risk to life — subject perhaps to the reservations in 11 above.
13. Aggression contrary to the United Nations Definition of Aggression — although it might be argued that this is adequately dealt with in 3 above.
14. Apartheid contrary to the International Convention on the Suppression and Punishment of the Crime of Apartheid — since the Convention describes apartheid as a crime against humanity, it might be possible, especially as so many countries, including Canada, abstained from voting, that the definition in 4 could be widened and made more general.
15. Acts affecting the environment which can be shown to have a permanent deleterious effect.

It is possible that 11 to 15 might be considered as “optional” grounds for the exercise of jurisdiction.

It may of course be argued that some of the offences mentioned here are “political” in nature and as such, in accordance with what is often described as the general principle against the handing over of political offenders, should only be tried by the state whose law has been infringed, without any assistance from any other source. However, it is submitted that this is to confuse extradition for offences against a particular municipal system of criminal law with jurisdiction over crimes against fundamental principles of the international rule of law. In fact, the member countries of the Council of Europe have already agreed to refuse asylum to terrorists guilty of kidnapping and death threats and to extradite them to their country of origin.<sup>55</sup> This appears to be partial application of the principle *aut punire aut dedere*, for there is no suggestion that the

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54. See, e.g., L.C. Green, *The Nature and Control of International Terrorism* (1974), 4 Israel Y. B. on Human Rights 134.

55. *The Times* (London), May 24, 1975.

country in which the terrorist is seeking asylum is to institute criminal proceedings against him in respect of that offence. It should also be borne in mind that some countries are already entering into bilateral extradition arrangements whereby they deny any possibility for a hijacker to claim that he is exempt from extradition since his act was politically motivated. This is to be seen in the treaty between Canada and Cuba<sup>56</sup>, although this permits the parties

... to take into consideration extenuating or mitigating circumstances in which the persons responsible for the acts were being sought for strictly political reasons *and* were in real and imminent danger of death without a viable alternative for leaving the country, *provided* there was no financial extortion or physical injury to the members of the crew, passengers or other persons in connection with the hijacking.

Similarly, the new extradition agreement between Canada and the United States<sup>57</sup>, which came into force in March 1975, denies the character of political offence from attaching to aerial hijackings or physical offences against persons entitled to special protection under international law. This may well presage, at least in the case of Canada, an intention to deny this defence in the case of offences defined by international law.

In view of the political difficulties that are bound to present themselves if any attempt is made to secure a code that is acceptable to all (unless there are so many permitted exceptions that virtually nothing of substance will be achieved in practice) there is little doubt that from a practical and realistic point of view there is no reason why Canada — or for that matter any other country — should be prepared to take any initiative in the United Nations or elsewhere at this moment. On the other hand, it may be worth while from a jurisprudential or perhaps long-term point of view to seek to place upon the Sixth (Legal) Committee of the General Assembly, or the International Law Commission, the burden of trying to define what is meant by an international crime, although there may well be more important issues to which these bodies should turn their attention. On a less than universal scale, it might be opportune for Canada to amend the *Criminal Code* in so far as this may be necessary to ensure that those crimes created by conventions to

56. Canada, Treaty Series, no. 11, 1973 [emphasis added].

57. 11 International Legal Materials, no. 1 (Washington, D.C.: American Society of International Law, 1972) at 22.

which she is a party figure in that *Code*. To the extent that she believes other acts are so opposed to principles of world order that they should be suppressed, there is perhaps no reason, other than a historical jurisprudential philosophy, to prevent Canada enacting legislation whereby any person *prima facie* responsible for such acts would be liable to prosecution if found in Canada. This is not to ignore the danger that other countries, with somewhat different ideas as to what constitutes a fundamental principle of world order, might pursue a somewhat similar line in a fashion that Canada would find unacceptable and perhaps even revolting. Further, it might be possible for Canada to discuss with like-minded and friendly states (for at times some states might, for ideological reasons, appear to be sympathetic to Canadian proposals, while having no real intention to carry them into effect) the extent to which they might be able to proceed on a joint basis, as is already being done as we have seen in the Council of Europe. In fact, there might be room for a number of such groupings to develop simultaneously and eventually there might be co-operation or even consolidation as between them. Moreover, there is no reason why the two processes could not proceed at the same time, with Canada moving actively on the regional or group basis while at the same time being sympathetic to proposals that might eventually bring fruition on the universal level.

While it may be unfortunate, we must probably recognize as a matter of practical reality that we appear to be moving towards two international laws — one for the world which exists on paper, and one for those who are really prepared to live up to and carry out the obligations they undertake, which will be narrower and far more selective. Unattractive though this may sound, it may in fact be inevitable in the relatively near future and it would be unwise to close our eyes to this possibility.