

International Criminal Justice: Is it Really so Needed in the Present World Community?

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1 Introduction: my main argument

For the sake of clarity, I shall set forth my principal argument at the outset. My argument is as follows: in the world today we witness, on the one hand, the spread of violence and gross violations of human rights, and, on the other hand, a deep crisis in the international means of effectively reacting to those gross violations. Enforcement by the UN Security Council and other UN bodies is in deep trouble, and States hesitate to take unilateral peaceful sanctions against the offenders, unless they are motivated by some ulterior motive such as self-interest. This legal vacuum is being filled by resorting to a number of fall-back mechanisms and devices. However, the one that has proved to be by far the most effective 'sanction' is the prosecution and punishment by national and international courts of those accused of perpetrating gross violations.

2 The general background

To grasp the profound significance that criminal justice, and in particular that dispensed by international courts, has in the present world community, it is necessary to place it in its general context. You will therefore allow me to outline briefly some essential conditions of the international community, which to my mind constitute the context in which criminal justice must be appraised.

A The failure of international sanctions against serious State delinquencies

One of the striking features of the current international community is the failure of the collective bodies that are charged with enforcing international law to discharge this function. In recent years, the United Nations Security Council has proved to be unable to solve major international crises. It has become a truism that, after the demise of Cold War nationalism, religious fundamentalism and ethnic and religious hatred have spawned violence, ethnic cleansing and bloodshed. Internal conflicts have mushroomed. The Security Council has

been unable to keep up with the staggering increase in violence. No one can contest its inability to react promptly and effectively to, and to put a stop to, massacres amounting to serious threats to the peace or breaches of the peace in Somalia, the former Yugoslavia including Kosovo, Sierra Leone, Ethiopia and Eritrea, Indonesia, the Middle East, and so on.

The failure to enforce international law not only relates to the resort to force proper. It also concerns the adoption of *economic sanctions*, often a fall-back for the Security Council or other international organs when they are unable to enforce international law. Normally, these sanctions prove ineffective, or carry little weight. Frequently, they are unfair and counterproductive, for they do not target the State officials responsible for the international delinquencies, but the civilian population or other innocent persons.

One should add that under the UN Charter the Security Council is only competent to deal with international crises that are likely to jeopardize, or actually endanger, international peace and security. The Security Council is not expected to handle relatively minor frictions or conflicts, which consequently fall within the province of the States concerned. In other words, the settlement of such disputes is left to the State directly affected by the friction or conflict. As a consequence, the more powerful States eventually impose their own solution.

In addition, individual States have had scant, if any, resort to one particular legal weapon available to them as a response to gross violations of human rights and other atrocities, namely, *peaceful reprisals*, currently termed *countermeasures*. Countermeasures include such measures as the suspension or termination of commercial treaties, the suspension of treaties granting special rights to nationals of the offending State, expulsion of those nationals, trade embargoes, the freezing or seizure of assets belonging to the foreign State or to its nationals, and so on.

Why do States refrain from taking countermeasures against gross violations of international law such as massacres, ethnic violence, large-scale breaches of human rights, torture, and so on? The reason is simple: States tend to resort to countermeasures when their own interests are at stake and other States have infringed upon those interests by breaching international law. In other words, States tend to react by peaceful means to the breach of *reciprocal* obligations by other States. In contrast, they incline to turn a deaf ear to breaches of *international* obligations protecting basic values, such as the obligations not to threaten or breach the peace, not to engage in genocide, not to torture, not to discriminate racially, and so on. These are what I would call *community obligations*. They exhibit two basic features: first, they are incumbent upon each and every member of the world community towards all

other members; and, secondly, any other member of that community has a correlative right to demand fulfilment of these obligations and, in case of breach, has the right to resort to countermeasures. Plainly, the gross breaches of international law we are discussing are normally breaches of precisely such community obligations. A strong reaction by States to these breaches presupposes the existence of a community interest to put a stop to such breaches. However, the community interest in their fulfilment is still more potential than real. States are still dominated by self-interest; they still pursue short-term national interests rather than care about global human values. Hence the disinclination of States to intervene to stop blatant infringements of community values enshrined in legal rules imposing community obligations.

B How to put a stop to so many atrocities? Trends in current international practice

Faced with the problem of how to stem rampant violence in the world community, and given the failure of international collective or individual sanctions, a trend has gradually emerged to resort to a variety of fall-back solutions. Various mechanisms or devices can be discerned.

(i) National courts take upon themselves the task of dealing with atrocities perpetrated abroad

First of all, in some countries national courts take over, in a way, the functions of governments (which, all too often, seem unmoved by grave violations) and substitute themselves for the international enforcement agencies that either do not exist or have proved extremely ineffectual.

Thus, since no international body had passed judgment on the lawfulness of the atomic bombing of Hiroshima and Nagasaki, and in addition the Japanese Government had eventually changed its mind on the matter, in 1963, in the famous *Shimoda* case, a group of survivors sued the Japanese Government before the Tokyo District Court. They claimed compensation, arguing that by the peace treaty of 1952 the Government had unlawfully waived its rights and claims and those of its nationals against the US Government, including claims for compensation for the illegal atomic bombing. The Court pronounced the bombing illegal, although in the final analysis it held against the complainants. In other cases, domestic courts have passed criminal judgment on individuals whom the territorial State failed to prosecute. The most important case in this respect is the famous *Eichmann* case. In its judgment of 29 May 1962, the Supreme Court of Israel dismissed all the submissions of the appellant, Eichmann, who claimed that Israeli courts lacked jurisdiction over his alleged

crimes because there was no territorial or personal link between those crimes and Israel. In its final remarks, the Court held as follows:

Not only do all the crimes attributed to the appellant bear an international character, but their harmful and murderous effects were so embracing and widespread as to shake the international community to its very foundations. The State of Israel therefore was entitled, pursuant to the principle of universal jurisdiction and in the capacity of a guardian of international law and an agent for its enforcement, to try the appellant. That being the case, no importance attaches to the fact that the State of Israel did not exist when the offences were committed.

This judgment was in a way taken up by a US court in the *Yunis* case. Yunis, a resident and citizen of Lebanon accused of participating in the hijacking of a Jordanian airliner which resulted in the holding hostage of the passengers (including several Americans), was brought to trial in the US after being arrested by US authorities on the high seas. Yunis challenged the US courts' jurisdiction, arguing that there was no nexus between the hijacking and US territory (the aircraft never flew over US airspace and had no contact with US territory). In its judgment of 12 February 1988, the US District Court of the District of Columbia dismissed the defendant's motion and affirmed the jurisdiction of US courts. It held:

Not only is the United States acting on behalf of the world community to punish alleged offenders of crimes that threatened the very foundations of world order, but the United States has its own interest in protecting its nationals.¹

It is in fact the United States whose national courts have taken the most vigorous action against crimes committed abroad. The courts there have taken down from the shelf and skilfully dusted off an old statute passed in 1789. This is the Alien Torts Claim Act, under which 'The [US] 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.' The US courts have applied this statute to gross violations of human rights perpetrated abroad by State officials (or individuals acting in a private capacity) against foreigners, thus obliging the culprits to pay compensation for those violations. Since 1980, US courts have in this way

¹ See 681 F. Supp. 896 (DDC), at 903.

pronounced on torture in Paraguay (in the celebrated *Filartiga* case), political assassination ordered by Chilean authorities (the *Letelier* case), torture and racial discrimination for economic gain in Argentina (the *Siderman* case), torture, arbitrary arrest and forced disappearance in Argentina (the *Suarez-Mason* case), arbitrary killing in East Timor (the *Murdani* case), torture, summary execution and forced disappearances in the Philippines (the *Marcos* case), atrocities in Bosnia and Herzegovina (the *Karadzic* case), torture and arbitrary detention in Haiti (the *Avril* case), torture in Guatemala (the *Gramajo* case), torture in Ethiopia (the *Negewo* case) and the terrorist bombing of a Pan Am aircraft over Lockerbie in Scotland (the *Al-Megrahi and Fhimah* case).

No one can deny the great significance of these US court decisions. In all these cases, US courts filled the gap existing both at the international level (no international collective body took action, nor did other States intervene against the State to which the offending State officials belonged) and at the domestic level (no authority of the territorial State stepped in). Those courts therefore acted on behalf of the international community at large, to vindicate rights pertaining to human dignity. In so doing, they proclaimed in judicial decisions some fundamental human values.

However, one should not be unmindful of the limits of this approach. First, these are civil cases, when the alleged perpetrator of serious crimes is only ordered to pay *compensation*; no *conviction* is issued at the criminal level. In addition, the defendant is often abroad when the decision is issued and can therefore easily avoid paying the compensation. The decision thus ends up having an exclusively symbolic value. Secondly, as these are cases involving civil litigation only, and as the defendant is normally absent, no in-depth examination of the evidence takes place. Thirdly, this judicial trend has occurred in one country only. There is a danger that the courts of this country will set themselves up as universal judges of atrocities committed abroad. This sort of humanitarian imperialism may give rise to concerns. By itself, this might not be a problem, if it did not go hand in hand with the tendency of the US Government to take upon itself the task of policing the world.

(ii) Conclusion of international treaties providing for universal jurisdiction of courts of the contracting States

Another way of filling the gap left by international collective bodies and States has been the drafting of multilateral treaties concerning such matters as torture and terrorism, which impose an obligation on the courts of the contracting States to exercise universal jurisdiction over such crimes. The 1984 UN Convention Against Torture and various conventions on

terrorism come to mind. They provide that the courts of each contracting State can and indeed *must* exercise jurisdiction over crimes perpetrated on their territory or abroad, when the alleged offender is on their territory (so-called *forum deprehensionis*). If they do not exercise this jurisdiction, they have to surrender the alleged offender to another State concerned (*aut judicare aut dedere* principle).

It is on the strength of one of these treaties, the Torture Convention, that the House of Lords held that UK courts had jurisdiction over the crimes of torture allegedly committed by Pinochet and could therefore extradite him to Spain. It is also by virtue of this Convention that the former Chadian dictator Hissène Habré was arrested in and brought to trial in Senegal for the alleged torture of Chadians (although he was subsequently released, probably on political grounds), and a Moroccan police officer was prosecuted in France for the alleged torture of his fellow nationals in Morocco.

Unfortunately, the application of these treaties by national courts is still sporadic and sometimes subject to the vagaries of political interests.

(iii) The establishment of international criminal tribunals

Another way of substituting for international enforcement is the establishment of international criminal tribunals entrusted with the task of prosecuting and punishing those responsible for serious atrocities and other international crimes. In 1993, the UN Security Council, being unable to stop the war in the former Yugoslavia, decided among other things to set up the International Criminal Tribunal for Former Yugoslavia. The following year it established the International Criminal Tribunal for Rwanda. In 1998, the Statute of the International Criminal Court was adopted in Rome, and this year the Special Court for Sierra Leone was created, to be followed soon, it is hoped, by a quasi-international court for Cambodia.

We will look later at the advantages and disadvantages of these international courts.

(iv) The revitalization of the clauses on universal jurisdiction of the 1949 Geneva Conventions on war victims

For a long time, the clauses of the 1949 Geneva Conventions on war victims concerning the universal jurisdiction of any State party over grave breaches of the Conventions have remained unapplied. Fortunately, after some 40 years of disuse, national courts have started applying them, in the aftermath of the establishment of the International Criminal Tribunal for

Former Yugoslavia. Thus, German, Danish and Swiss courts have made use of this universal jurisdiction by prosecuting and trying persons who had allegedly perpetrated grave breaches in the former Yugoslavia.

(v) The broad interpretation by national courts of the notion of universal jurisdiction

Another interesting development is the attempt by some national judges to place a broad interpretation on the notion of universal jurisdiction laid down in the Geneva Conventions and the First Additional Protocol of 1977. This was tried, unsuccessfully, by a French investigating judge in 1995 (he intended to institute proceedings against Bosnian Serbs who had allegedly committed grave breaches of the Geneva Conventions and who found themselves on the territory of Bosnia and Herzegovina).

More recently, a Belgian examining judge at the Brussels *Tribunal de Première Instance* has issued an international arrest warrant against the acting foreign minister of the Democratic Republic of Congo for grave breaches of the Geneva Conventions and the two Additional Protocols, as well as for crimes against humanity. It would seem that the crimes of which the Congolese foreign minister is accused were allegedly committed by him on Congolese territory against Congolese nationals, and the accused was not on Belgian territory when the arrest warrant was issued. Thus Belgium would not be the *forum deprehensionis*. As is well known, the Congo has filed an application with the International Court of Justice, claiming that the arrest warrant runs counter to the principle of sovereign equality of States and the rules on diplomatic immunity attached to such a State official. The case will be heard by the International Court of Justice next week, on 20 November.

(vi) The upholding by international courts and human rights monitoring bodies of extraterritorial jurisdiction, i.e. of jurisdiction over crimes perpetrated abroad by officials of one of the contracting parties

States, when they undertake obligations in the area of human rights, tend to conceive of such obligations as applying to the individuals subject to their jurisdiction in their own territory. In other words, they construe these obligations as having a strictly *territorial* scope. This, for instance, was the interpretation they inclined to place on Article 2 of the UN Covenant on Civil and Political Rights, whereby 'Each State Party ... undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant ...'.

However, international bodies responsible for scrutinizing compliance with human rights standards have increasingly interpreted those obligations as also having an *extraterritorial* scope. Thus, for instance, in 1995 the UN Human Rights Committee, in commenting on the report submitted by the US, noted that it could not share the view of the US Government that the UN Covenant on Civil and Political Rights lacked extraterritorial reach under all circumstances. Such a view — it went on to point out — is ‘contrary to the consistent interpretation of the Committee on this subject that, in special circumstances, persons may fall under the subject matter jurisdiction of a State party even when outside that State territory’.² More specifically, in *Delia Saldias de Lopez v. Uruguay*, the Committee had already ruled that Uruguay had violated the Covenant when its security forces had abducted and tortured in Argentina a Uruguayan citizen living there. It noted that:

The reference in Article 1 of the Optional Protocol to ‘individuals subject to its jurisdiction’ does not affect the above conclusion [that the Covenant also covered crimes perpetrated by Uruguayans acting on foreign soil] because the reference in that Article is not to the place where the violations occurred, but rather to the relationship between the individuals and the State in relation to a violation of any of the rights set forth in the Covenant, wherever they occurred. Article 2.1 of the Covenant places an obligation upon a State party to respect and to ensure rights ‘to all individuals within its territory and subject to its jurisdiction’, but it does not imply that the State party concerned cannot be held accountable for violations of rights under the Covenant which its agents commit upon the territory of another State, whether with the acquiescence of the Government of that State or in opposition to it ... In line with this, it would be unconscionable to so interpret the responsibility under Article 2 of the Covenant as to permit a State party to perpetrate violations of the Covenant on the territory of another State, which violations it could not perpetrate on its own territory.³

In an important case, *Loizidou v. Turkey*, the European Court of Human Rights carried this doctrine even further. The question had arisen of whether the denial by Turkish armed

² UN Doc. CCPR/C/79/Add 50 (1995), para. 19.

³ Decision of 29 July 1981 (Communication No. 52/1979), in Human Rights Committee, *Selected Decisions (Second to Sixteenth Sessions)* (1985) 91, paras 12.2–12.3.

forces stationed in Northern Cyprus of access by the applicant (a Cypriot) to her property in Northern Cyprus, if imputable to Turkey, fell under Turkey's jurisdiction pursuant to Article 1 of the European Convention on Human Rights. The Court gave an affirmative answer. In its decision on preliminary objections, it held that a State may be held responsible for violations of human rights committed by its officials abroad. It noted the following:

[T]he Court recalls that, although Article 1 sets limits on the reach of the Convention, the concept of 'jurisdiction' under this provision is not restricted to the national territory of the High Contracting Parties. According to its established case law, for example, the Court has held that the extradition or expulsion of a person by a Contracting State may give rise to an issue under Article 3, and hence engage the responsibility of that State under the Convention ... In addition, the responsibility of Contracting Parties can be involved because of acts of their authorities, whether performed within or outside national boundaries, which produce effects outside their own territory ...

Bearing in mind the object and purpose of the Convention, the responsibility of a Contracting Party may also arise when as a consequence of military action — whether lawful or unlawful — it exercises effective control of an area outside its national territory. The obligation to secure, in such an area, the rights and freedoms set out in the Convention derives from the fact of such control whether it be exercised directly, through its armed forces, or through a subordinate local administration.

In this connection the respondent Government have acknowledged that the applicant's loss of control of her property stems from the occupation of the northern part of Cyprus by Turkish troops and the establishment there of the [Turkish Republic of Northern Cyprus]. Furthermore, it has not been disputed that the applicant was prevented by Turkish troops from gaining access to her property.

It follows that such acts are capable of falling within Turkish 'jurisdiction' within the meaning of Article 1 of the Convention.

In its decision on the merits, the Court then ruled that what mattered for establishing whether Turkey was responsible was the question of whether Turkey had effective or overall control over the armed forces stationed in an area outside its national territory.⁴

⁴ ECHR (1995) Series A, No. 310, at para. 62; *Merits*, ECHR, 18 December 1996,

The Inter-American Commission of Human Rights spelled out this doctrine even more forcefully in *Coard v. US*. The question at issue was whether the US could be held responsible for violating the 1948 American Declaration on the Rights and Duties of Man for allegedly holding incommunicado and mistreating 17 Grenadian nationals in Grenada in October 1983, when US and Caribbean armed forces invaded the island, deposing the 'revolutionary government'. In its report of 29 September 1999, the Commission replied in the affirmative, noting that:

Given that individual rights inhere simply by virtue of a person's humanity, each American State is obliged to uphold the protected rights of any person subject to its jurisdiction. While this most commonly refers to persons within a State's territory, it may, under given circumstances, refer to conduct with an extraterritorial locus where the person concerned is present in the territory of one State, but subject to the control of another State — usually through the acts of the latter's agents abroad. In principle, the inquiry turns not on the presumed victim's nationality or presence within a particular geographic area, but on whether, under the specific circumstances, the State observed the rights of a person subject to its authority and control.⁵

It should be noted that this case law is consistent with the object and purpose of human rights obligations: they aim at protecting individuals against arbitrariness, abuse and violence, regardless of where the State's actions were carried out.

It follows from the above that States are to respect human rights obligations not only on their own territory but also abroad, when they exercise there some kind of authority or power, whether the individuals subject to this authority or power have the State's nationality or are foreigners. In addition, by 'exercise of authority', one means not only the display of sovereign or other powers (law-making, law-enforcement, administrative powers, and so on), but *any* exercise of power, however limited in time (for instance, the use of belligerent force in an armed conflict).

(vii) The lifting by national courts of the immunity from prosecution normally granted to senior

Reports (1996-VI) 2230, at para. 57.

⁵ Case No. 10.951, Report No. 109/99, 29 September 1999, para. 37.

State officials

Since time immemorial, senior State officials have enjoyed immunity from prosecution under international law, for acts performed in the discharge of their official duties. If, in performing their functions, they acted against international law, they were not personally liable. Only the State for which they were acting could incur international responsibility. This rule was significantly undermined after World War II, when international treaties and judicial decisions upheld the principle whereby such immunity no longer protected senior State officials accused of war crimes, crimes against peace or crimes against humanity. More recently, this principle has been extended to torture.

First the English House of Lords and then the Court of Appeal of Santiago and the Chilean Constitutional Court have confirmed that a former head of State cannot invoke immunity for ordering or planning torture. Similarly, in October of this year, a French Court of Appeal held that Ghadafy could be prosecuted in France for acts of terrorism ordered in Libya.

However, there is still resistance to this trend. For example, in March of this year, the US State Department let an alleged Peruvian torturer go free on the grounds that he enjoyed diplomatic immunity. Let me say a few words about this case, which is indicative of the reluctance of States to embrace a new and forward-looking approach to international crimes. They prefer instead to cling to old values such as respect for State sovereignty and its corollary of the immunity of State officials or diplomatic immunity.

Major Tomas Ricardo Anderson Kohatsu, a retired official of Peru's notorious Army Intelligence Service, who in 1997, according to the US State Department, had allegedly perpetrated 'horrendous crimes', was sent by Peru in early March to appear before a hearing of the Inter-American Commission on Human Rights in Washington. The Commission was hearing allegations of Peru's involvement in torture and wire-tapping. Anderson was sent by the Peruvian authorities to defend their human rights record. When he was about to leave the US, he was detained by FBI agents, pursuant to the 1984 UN Convention Against Torture, duly ratified by the US and implemented in the US through the 1992 Torture Victim and Protection Act. However, a few hours later he was released following a decision of Under-Secretary of State, Thomas Pickering. According to Pickering, the Peruvian official was entitled to diplomatic immunity, for he had been granted a G-2 visa, which applies to accredited members of the staff of the Peruvian Mission to the Organization of American States. Consequently, he could not be arrested or prosecuted.

It has been pointed out by Michael Ratner, a leading lawyer of the US Center for Constitutional Rights, that Anderson had not in fact been accredited to the Peruvian Mission. At any rate, what is even more important is, first, that the Torture Convention does not permit a diplomatic immunity exemption, and, secondly, it was for the US *courts* to make a determination on the matter. As Ratner pointed out, in the case of Anderson, unlike Pinochet, 'despite serious doubts as to Anderson's claimed immunity, the decision to allow him to return to Peru was made by the State Department and not the courts'.

3 Advantages of criminal justice over other responses to atrocities

A few words are fitting on the merits of the judicial response to the commission of serious violations of international law.

Prosecution and punishment are better than resort to *peaceful reprisals*, or *countermeasures*, because, first, they constitute a civilized response to crimes, whereas reprisals are barbarous; secondly, they target the culprits, and not innocent persons, as in the case of reprisals; and, thirdly, they do not lend themselves to abuse, as reprisals do. Admittedly, reprisals may constitute an immediate and effective means of stopping violations, whereas criminal justice normally works *ex post facto* and much later, when the conflict is over.

To bring the alleged criminal to trial is also a much better means than relying on such monitoring entities as, for example, so-called 'protecting powers' or the ICRC, in the field of international humanitarian law, because all too often such means are, for a number of reasons, ineffective.

In addition, justice is better than other reactions to the perpetration of crimes. Justice is better than *revenge*. Revenge is undoubtedly a primitive form of justice, a private system of law enforcement. It has, however, an altogether different foundation from justice: an implacable logic of hatred and retaliation. Revenge can only be the last resort for persons who have been denied due process, as is shown by what occurred after World War I in the case of the Armenians (they took justice into their own hands to punish those whom they regarded as responsible for the genocide of Armenians that had occurred in 1915).

Justice is better than *forgetting* through the granting of amnesties or simply letting crimes fall into oblivion. Forgetting beguiles future dictators or authoritarian leaders into relying on impunity. Hitler is reported to have said, when debating whether to proceed with his

genocidal policies against the Jews: 'Who after all, speaks today of the annihilation of the Armenians?' In addition, forgetting entails that the victims are murdered twice: first, when they are physically exterminated, and thereafter when they are forgotten. Furthermore, the memory of massacres and other atrocities is never really buried along with the victims. It always lingers and, if nothing is done to remedy the injustice, festers.

Instead, to bring alleged culprits to trial has at least these merits. First, trials establish individual responsibility over the collective assignment of guilt. Secondly, trials dissipate the call for revenge, because, when the courts mete out the right punishment to the perpetrator, the victim's call for retribution is met. Thirdly, by dint of dispensation of justice, victims are prepared to be reconciled with their erstwhile tormentors, because they know that the latter have now paid for their misdeeds. And, fourthly, a fully reliable record of atrocities is established, so that future generations can remember and be made fully cognizant of what happened.

4 Trends in the practice of national courts

The penal repression of violations of the laws of war (and, more generally, of international crimes) by national courts should be assessed on its merits and shortcomings in the light of the fundamental distinction drawn by the great Dutch international lawyer, B.V.A. Röling, between 'individual' and 'system' criminality. The former encompasses crimes committed by combatants on their own initiative and for 'selfish' reasons (rape, looting, murder, and so on). The latter refers to crimes perpetrated on a large scale, chiefly to advance the war effort, at the request of, or at least with the encouragement or toleration of, the government authorities (the killing of civilians to spread terror, the refusing of quarter, the use of prohibited weapons, the torture of captured enemies to obtain information, and so on). Normally, 'individual criminality' is repressed by the culprit's national authorities (army commanders do not like this sort of misbehaviour, for it is bad for the morale of the troops and makes for a hostile enemy population). By contrast, 'system criminality' is normally repressed only by international tribunals or by the national jurisdiction of the adversary. There are, of course, exceptions, such as the *Calley* case, 'a typical example of system criminality' (Röling), urged upon the US authorities by American and foreign public opinion.

By and large, repression of 'individual criminality' is a more frequent occurrence than that of 'system criminality', for the simple reason that the latter involves an appraisal and condemnation of a whole system of government, of misbehaviour involving the highest authorities of a country.

In addition, as I have already pointed out, States have confined themselves to the more traditional criteria, and in practice have instituted criminal proceedings only against alleged authors of crimes committed on their territory or against persons living on their territory and having acquired their nationality.

5 The merits of international criminal justice

International tribunals enjoy a number of advantages over domestic courts, particularly those sitting in the territory of the State where atrocities have been committed.

First of all, it is a fact that national courts are not inclined to institute proceedings for crimes that lack any territorial or national link with the State. Until 1994, when the establishment of the International Criminal Tribunal for Former Yugoslavia gave a great impulse to the prosecution and punishment of alleged war criminals, the criminal provisions of the 1949 Geneva Conventions had never been applied. National courts are still State-oriented and are loath to search for, prosecute and try foreigners who have committed crimes abroad against other foreigners. For them, the short-term objectives of national concerns seem still to prevail. This is also due in part to the failure of national parliaments to pass the necessary legislation granting courts universal jurisdiction over international crimes.

Secondly, the crimes at issue being international, that is, serious breaches of international law, international courts are the most appropriate bodies to pronounce on them. They are in a better position to know and apply international law.

Thirdly, international judges may be in a better position to be fully impartial, or at any rate more even-handed than the national judges who were caught up in the milieu in which the crime in question was perpetrated. The punishment of the alleged authors of international crimes by international tribunals normally meets with less resistance than national punishment, as it hurts national feelings much less.

Fourthly, international courts can investigate crimes with ramifications in many countries more easily than national judges. Often the witnesses reside in different countries, other evidence needs to be collected thanks to the cooperation of several States, and in addition special expertise is needed to handle the often tricky legal issues raised in the various national legislations involved.

Fifthly, trials by international courts may ensure some sort of uniformity in the application of international law, whereas proceedings conducted before national courts may lead to a great disparity both in the application of that law and the penalties given to those found guilty.

Finally, the holding of international trials signals the will of the international community to break with the past, by punishing those who have deviated from acceptable standards of human behaviour. In delivering punishment, the international community's purpose is not so much retribution as stigmatization of the deviant behaviour, in the hope that this will have a deterrent effect.

6 The main problems besetting international criminal proceedings

The crucial problem international criminal courts must face is the lack of enforcement agencies directly available to those courts, for the purpose of collecting evidence, seizing important documents, executing arrest warrants and other judicial orders, and so on. As a consequence, international courts rely heavily on the cooperation of States. As long as States refuse outright to assist those courts in collecting evidence or arresting the indictees, or do not provide sufficient assistance, international criminal justice can hardly fulfil its role. This of course also applies to those cases, such as that of the International Criminal Tribunal for Former Yugoslavia, where assistance can be provided by a multilateral force established under the aegis of the UN (here I refer of course to the NATO forces operating in Bosnia and Herzegovina and, more recently, in Kosovo).

In addition, there exists a need for international criminal courts to amalgamate the various judges, each with a different cultural and legal background.

A serious problem is the length of international criminal proceedings. This length primarily results from the adoption of the adversarial system, which requires that all the evidence be orally scrutinized through examination and cross-examination (whereas in the inquisitorial system the evidence is previously selected by the investigating judge). In addition, the protracted nature of proceedings is often accentuated by the need to prove some ingredients of the crime (for instance, the existence of a widespread or systematic practice, in the case of crimes against humanity) or by the need to look into the historical or social context of the crime. It should also be noted that the adversarial system was conceived of and adopted in most common law countries as a fairly exceptional alternative to the principal policy choice, namely avoidance of trial proceedings through plea-bargaining. In fact, on account of this feature, the adversarial model works sufficiently well in most common law countries.

However, in international criminal proceedings defendants tend not to plead guilty, because of, among other things, the serious stigma attaching to international crimes. They therefore prefer to stand trial, in spite of the length inherent in the examination and cross-examination of witnesses. This is rendered, at the international level, more intractable by language problems: while at the national level all proceedings are normally conducted in only one language, before international courts at least two, and possibly three or more, languages are used, with the consequence that all documents and exhibits need to be translated into those languages. This factor, coupled with the need — as I have already emphasized — of upholding a typical feature of the inquisitorial system, namely to keep the accused in custody both in the pre-trial phase and during trial and appeal, makes for a state of affairs that is hardly consistent with the right to a 'fair and expeditious trial' and the presumption of innocence accruing to any defendant.

Fortunately, international courts are aware of these and other practical problems, and are already putting in hand the necessary remedial measures.

7 The need for complementarity: in what cases is the primacy of international courts necessary?

Clearly, international courts cannot pronounce on all crimes against humanity or gross breaches of human rights or humanitarian law occurring daily in so many parts of the world. They may have no jurisdiction over some of these crimes. Or, if they do have jurisdiction, prosecution and trial proceedings may turn out to be very protracted, if only because of the difficulty in collecting the necessary evidence. By and large, the principle of complementarity enshrined in the Rome Statute of the International Criminal Court seems sound: as a rule it is for national courts to adjudicate international crimes. To this end, national legislatures should provide those courts with the necessary legal wherewithal enabling them to exercise criminal jurisdiction on the strength of the universality principle.

However, when national judicial authorities are either unable or unwilling to prosecute the crimes at issue, or are considered not to be conducting thorough prosecutions or fair trials, international courts should take over and deal with those crimes.

8 The need to expand the role of national courts

The idea behind *universal criminal jurisdiction over gross violations* is that one of the best means of putting a stop to, or at least significantly limiting, gross violations of human rights

lies in bringing to trial those responsible for such violations. At present, most States lack national legislation authorizing or obliging national courts to exercise universal jurisdiction based on the *forum deprehensionis* principle. Only a few States have such legislation, while all States parties to such treaties as the 1984 UN Convention Against Torture, by implementing the provisions of these treaties, are authorized to exercise the jurisdiction at issue in the limited area covered by the relevant treaty. A case in point is the two recent decisions of Australian courts on the alleged acts of genocide against Australian aborigines ordered or connived at by Australian State officials.

Human rights have by now become a *bonum commune humanitatis*, a core of values of great significance for the whole of humankind. It is only logical and consistent to grant the courts of all States the power and also the duty to prosecute, to bring to trial and to punish persons alleged to be responsible for unbearable breaches of those values. By so doing, courts would eventually act as 'organs of the world community'. In other words, they would operate not on behalf of their own authorities, but in the name and on behalf of the whole international community. Thus, at long last the theoretical construct put forward in the 1930s by the great French international lawyer Georges Scelle, the construct he termed *dédoublement fonctionnel* (role-splitting), for long a utopian doctrine, would be brought to fruition and translated into reality. Scelle emphasized that, since the international legal order lacks legislative, judicial and enforcement organs acting on behalf of the whole community, national organs perforce fulfil a dual role: they act as State organs whenever they operate within the national legal system; and they act *qua* international agents when they operate within the international legal system. In a way, for Scelle, national officials operate in a Dr Jekyll and Mr Hyde manner, exhibiting a split personality. In other words, although from the point of view of their legal status they are and remain State organs, they can function either as national or as international agents.

As a result of the present state of affairs and the trends emerging in the world community, Scelle's doctrine has come to acquire an enhanced vitality, at least as far as the social function of *law enforcement* is concerned.

Let us hope that national as well as international courts will step up their enforcement action in the area of gross violation of human rights, thus gradually prompting States eventually to make use of the wealth of legal means and instrumentalities they have available but tend to neglect out of a myopic pursuit of short-term self-interests.