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Locating moral responsibility for war crimes : the new justiciability of 'system criminality' and its implications for the development of an international polity

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**Locating Moral Responsibility for War Crimes:
the New Justiciability of 'System Criminality' and its Implications for
the Development of an International Polity**

by

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A thesis submitted to the University of Plymouth in partial fulfilment of the degree of

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ABSTRACT

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Locating Moral Responsibility for War Crimes: the New Justiciability of 'System Criminality' and its Implications for the Development of an International Polity

This thesis examines the question of international responses to system criminality. It argues that the assignation of moral responsibility, expressed in the act of prosecuting individuals, expresses a fundamental conceptual shift towards an international polity. Although political rhetoric, the media and international legislation express the moral dimension of system criminality, the character of humanitarian law and the contingency of its operation is the most concrete indicator of such a development. The status of an embryonic international polity becomes particularly evident with 'individual responsibility' being a criminally liable offence, as set against 'collective responsibility' which entails 'civil', (non-penal) liabilities. However, the principle of individual criminal responsibility, and therefore the expression of a nascent international polity, is by no means as well developed as it may appear because the moral consensus necessary to fully support this shift is still undeveloped. A thoroughly radical re-orientation to a potential international polity had not fully arrived with the Nuremberg Principles and a paucity of individual prosecutions for system crimes indicates the limits of this development. Nevertheless, the contribution to knowledge of this thesis lies in its finding that with the radical developments of criminal tribunals and the International Criminal Court there has been a qualitative shift in the structure of international legal norms.

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ABBREVIATIONS

AI : Amnesty International

GA : General Assembly

ICC : International Criminal Court

ICJ : International Court of Justice

ICTR : International Criminal Tribunal for Rwanda.

ICTY : International Criminal Tribunal for Former Yugoslavia

ILC : International Legal Commission

IMT : International Military Tribunal (known as the Nuremberg Tribunal)

IMTFE: International Military Tribunal for the Far East (known as the Tokyo Tribunal)

SCAP : Supreme Commander for the Allied Powers

UK : United Kingdom

UN : United Nations

US : United States

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PREFACE

Whilst reviewing information on the Vietnam War, I was struck by the wealth of debate and controversy the conflict had generated within traditional moral philosophy. The principle questions these philosophers addressed was the difficulty in locating moral responsibility for the loss of life in conflict. Yet, the constitution of the ICTY/ICTR raised few questions of this kind, although many of the issues and controversies that were so heated in the 1970's were as applicable to the assignation of responsibility as they were to its non-assignation. As a result, I became interested in exploring the whole notion of how and when we assign responsibility, particularly in cases where the crime is necessarily committed by a large number of people.

This thesis is the culmination of several years postgraduate research undertaken at the University of Plymouth, generously funded by a Plymouth University studentship grant. My first debt of gratitude goes to my supervisors Dr Mike Pugh and Dr Neil Cooper who allowed me to explore whilst ensuring I did not get irretrievably lost. I would like to take this opportunity to express my large intellectual debt to both of them, for their inspiration, criticism and encouragement.

In addition, the interviewees, as listed in the bibliography, and the staff from the Human Rights Centre in the University of Essex, The ICTY and ICJ in The Hague, Bindman and Co Solicitors, and the FCO in London, were both helpful and informative. As were the staff at the SOAS library, the Imperial War Museum and the Public Records Office. Of special mention in this respect is the late Robert Lenkiewicz, who kindly allowed me access to his personal collection of material, now held by the Lenkiewicz Foundation, Plymouth. I should also like to thank the librarians at Plymouth University and the Exeter Law Library. In addition, I was grateful for the correspondence with Terry Nardin and Captain S. Daneluk, which was particularly instructive.

Thank you to my colleagues at the International Relations Study Centre for lively and stimulating debate, Lisa Ansean for helping me decode statistics where necessary, and Laurence Howard for computer support. Of course, my final thanks go to my family for their encouragement and patience, in particular, Lizzi, Mathew, Charlotte and Polly.

AUTHOR'S DECLARATION

At no time during the registration for the degree of Doctor of Philosophy has the author been registered for any other University award.

This study was financed with the aid of a studentship from the Department of Politics, University of Plymouth.

A programme of advanced study was undertaken , which included a Post-graduate Diploma in Research Methods and Skills.

Relevant seminars and conferences were attended and external institutions were visited for consultation purposes.

Signed ... *Sandra King*

Dated ... *21.07.03*

Introduction

The twentieth century has been unprecedented for the scale and efficiency with which citizens have been exterminated. An empirical attempt to assess the scale of deaths in the twentieth century estimates ‘government democide’,¹ encompassing genocides, politicides and civilian deaths from bombing, at a startling 150,944,000 people, 4.1 times the number of battle deaths.² The age of instant media communication and the accessibility of images of conflict from unofficial sources have meant that it is increasingly difficult for governments to control public knowledge of their actions. For instance, in the conflict in former Yugoslavia individuals were recording genocide on hand-held camcorders and transmitting the images to an international audience.³ From this it seems clear that the relationship of violence between state and citizens is one of the most pressing considerations of our time and likely to become ever more important on the international agenda.

The constitution of the *ad hoc* International Criminal Tribunals for former Yugoslavia and Rwanda (ICTY/ICTR) marked a watershed in the international response to violations of humanitarian law. This was the only time since the Nuremberg Tribunal, which addressed Nazi criminality post-World War II, that the principle of individual criminal responsibility for gross atrocities had been actively enforced. Yet, it seems clear that international public opinion seems likely to drive the issue further forward. Prosecutions for such criminality are, however, far more problematic than it would

¹ ‘Government democide’ refers to the deaths of civilians at the hands of a public authority either its own citizens or civilians of another state.

² H. Fein, *Genocide: A Sociological Perspective*, London: SAGE, 1993, p.xiii.

³ J. Gow, R. Paterson, A. Preston, *Bosnia by Television*, London: British Film Institute, 1996, p.7. Also, D.E. Morrison and H. Turner, *Journalists at War: The Dynamics of News Reporting during the Falklands Conflict*, London: SAGE, 1988.

seem. They exist at the juncture between state and individual, illuminating the conceptual relationship between individual and community, government and citizen, nation and national. They also reside at the intersection of the legal regimes on the laws of war and human rights, and are a clearly circumscribed representation of the collision between legal, political and moral events. As such, they represent an unparalleled opportunity to analyse and describe the rapid developments in international law as moral and conceptual, as well as political, events.

Definitions

The issues become clearer when the focus is upon crimes which are committed within a pattern of widespread or systematic practice or 'system criminality'.⁴ Using this class of crimes as the focus of this work admits consideration of the types of crime which most clearly represent a challenge to the traditional workings of the international system. System criminality can relate to both war crimes and crimes against humanity, given that its core feature is a pattern of criminality which:

encompasses large-scale crimes perpetrated ... at the request of, or with the toleration of government authorities, as opposed to individual criminality, embracing crimes committed by combatants on their own initiative and often for reasons known only to themselves.⁵

System criminality is most often a term applied to genocide and crimes against humanity but Cassese highlights the fact that:

Large scale and systematic war crimes may also form part of system criminality: consider for example the mass killing or

⁴ Prosecutor v Tadic, in the Appellate Chamber of the ICTY, VI. Separate Opinion of Judge Cassese. Available online, <http://www.un.org/icty/Tadic/appeals/judgement/tad-asojicas000126e.htm>. Accessed 13.08.00.

⁵ B.V.A. Roling in A. Cassese, (ed), *Current Problems of International Law: Essays on United Nations Law and on the Law of Armed Conflict*, Milan: Dott. A.Guiffre, 1975, p.137.

ill treatment of prisoners of war. However, the reverse is not true: crimes against humanity always constitute a form of system criminality, while war crimes may constitute, (and indeed very often do constitute) a form of 'individual criminality'.⁶

As we shall see, in cases where the issue of system crime is deliberately avoided, prosecutions for just such 'narrow' war crimes are often undertaken. It is important to draw the distinction between 'war crimes' and 'violations of the laws of war'. Although war crimes are subsumed under the laws of war, their main feature is that they always carry individual responsibility whereas some violations of the laws of war do not. War crimes then 'constitute grave offences against the laws of warfare, entailing penal responsibility of individuals'.⁷

Other aspects of the laws of war relate to provisions and repatriation of prisoners of war, for example, or the protocols on neutrality, a breach of which regulations could not properly be regarded as carrying penal responsibility. The classic definition of war crimes is given in Article 6 of the 1945 Charter of the International Military Tribunal.

They are:

Violations of the laws and customs of war. Such violations shall include, but not be limited to, murder, ill-treatment or deportation to slave labour or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity.⁸

Thus, we can see that the laws of war, encompassing war crimes, first introduced the

⁶ Prosecutor v Tadic, in the Appellate Chamber of the ICTY, VI. Separate Opinion of Judge Cassese. Available online, <http://www.un.org/icty/Tadic/appeals/judgement/tad-asojicas000126e.htm>. Accessed 13.08.00.

⁷ Y. Dinstein, and M. Tabory, (eds), *War Crimes in International Law*, The Hague: Martinus Nijhoff, 1996, p.3.

⁸ Annex to the London Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, PRO, Kew. See Chapter 3 below.

concept of individual responsibility, and first delineated the duty to protect civilians. From these basic ideas we can trace the heritage of modern humanitarian law, for the process since has been a process of enlarging the scope and application of the legislation away from the nexus of inter-state law. War crimes then, are the link between the most fundamental of inter-state relationships, conflict, and the most fundamental principles of individual responsibility. In this sense, the term 'war crime' is uniquely flexible and given that the majority of humanitarian law has arisen from the laws of war, it remains a rich source of material for analysis.

The term 'justiciability' is a useful one in that it encompasses more of the legal process than simply trials and law. It is defined as something appropriate for or subject to court trial, an event liable to be brought before a court of law. Although this thesis focuses on the issue of prosecution, it does not confine itself to trials. It also assesses calls for proceedings, the legislation itself and accusations made with reference to legislation. In many cases, the fact that these calls have not resulted in prosecution is as illustrative of the condition of individual responsibility as those resulting in criminal proceedings. The concept of justiciability also allows consideration of the process by which actions are criminalised and the debate surrounding criminalisation. As such, it broadens the scope of the thesis to include some important issues within the assignment of individual criminal responsibility.

Scope and Argument of the Thesis

This thesis reviews and examines the new willingness to prosecute system criminality in terms of what it reveals about the moral response to these crimes and, consequently,

what can be concluded in terms of the condition of moral consensus between states. Fundamentally, it seeks to assess the implications of this new regard for system crimes as moral events, rather than political events, and argues that it must imply the existence of some form of international polity, however minimal and immature it may be. This international polity is logically entailed by the assignation of individual criminal responsibility. The assignation of criminal responsibility is key to assessing the condition of moral consensus, as it is expressive of a moral judgement in a way that non-criminal remedies are not. Traditionally, the international legal order directed sanctions for violations of international law towards states, not individuals. Thus the measures imposed were not penal or retributive, but rather compensatory or 'civil'. This thesis therefore examines responses to system crime as an opposition between two principles. On the one hand, there is the imposition of 'individual responsibility' entailing criminal responsibility. This is in contradiction to the operation of the traditional international norm of 'collective responsibility' which is directed at states and entails non-penal liabilities. These could be described as 'civil' in character. Thus the principle of individual criminal responsibility represents a fundamental conceptual shift, a reorientation that resides in contradiction with the customs, traditions and focus of the international system and which challenges norms fundamental to inter-state interaction.

The criminalisation of offences, which employ the resources of the state, expresses a nascent international society. This is because, in the case of criminal offences, the victim is not in the essential sense an individual, aggregate of individuals or even a nation or ethnic group. The victim is, conceptually, a polity or social order. When individual criminal responsibility is enforced, it must imply the existence of a social order against which the crimes have been committed. Where offences are regarded as

civil in character, such as a boundary dispute for example, the dispute is between the participants only. The principle is one of equity between individual citizens. This is evident from the most basic principles of law:

Crimes are offences against the state; in this ... they differ from breaches of contract or of trust and from torts, which are all either solely or primarily wrongs to individuals. The object of criminal proceedings is to punish the offender ... the object of civil proceedings is to satisfy the claim of the party injured.⁹

And as it is logically incoherent to distribute criminal guilt across a collective, complaints against states are civil in character. This is an abiding tradition of law for:

Under the old common law, when a large number of crimes were punishable by death, it was generally accepted that corporations could not be held liable for crimes committed by their servants or agents; for as it was said, 'You cannot hang the common seal'. ...The artificial nature of corporations precludes their imprisonment just as much as the hanging of them- indeed they can only be punished by fine. Moreover it is unlikely that the intention to commit such crimes as rape or murder could ever be imputed to corporations.¹⁰

Much of the theoretical work done on corporate responsibility can usefully be applied to the state, given that it shares many of the features of corporations particularly in the case of multi-national corporations. Donaldson's work on assigning moral responsibility to corporations is especially useful in this context, given that it discusses the issues with relation to assigning moral responsibility as well as imputing legal responsibility.¹¹

Keenan, one of the Judges at the International Military Tribunal for the Far East (IMTFE) described individual responsibility as a concept which 'pierces the veil of the

⁹ P. Shears and G. Stephenson, *James' Introduction to English Law*, 13th Edition, London: Butterworths, 1996, p.157.

¹⁰ *Ibid.*, p.168.

¹¹ T. Donaldson, *Corporations and Morality*, Englewood Cliffs: Prentice-Hall Inc., 1982. Donaldson also applies his perspective specifically in T. Nardin, and D. Mapel, (eds), *Traditions of International Ethics*. Cambridge: Cambridge University Press, 1996. See also, M. Parker, (ed), *Ethics and Organisations*. London: SAGE, 1998.

corporate entity of nationality' and elsewhere refers to 'the corporate entities of nations'¹² Resolutions come in the form of reparations or sanctions and remedies that are administered on a state-to-state basis. In these cases, there is an effective denial of international polity.

Yet, the principle of individual criminal responsibility is by no means as dominant as developments such as the constitution of the International Criminal Court (ICC) and the proliferation of trials for system crime seem to suggest. The principle of individual criminal responsibility runs contrary to some of the most abiding principles of international interaction, such as the principles of sovereign immunity, non-intervention and indeed a legal and ethical tradition which regards states as 'large individuals' or the monolithic bearers of individual legal personality.¹³ On this issue Graham is of particular interest, discussing collective responsibility from the perspective of intervention.¹⁴ This is of interest because war crimes prosecutions are a form of intervention. In addition, the principle of individual criminal responsibility challenges the structure of international diplomacy, particularly at the apex of responsibility assignment where the accused is a head-of-state. This issue is especially evident in the treatment of system criminality, necessarily committed with the resources of the state. When we look at the pattern of prosecutions (and failure to prosecute), international moral consensus is still relatively weak when set against the principles of sovereign immunity and non-intervention.

¹² J.B. Keenan and B.F. Brown, *Crimes against International Law*, Washington D.C.: Public Affairs Press, 1950, p.128 and p. 123 respectively.

¹³ C. Navari, *The Condition of States*, Milton Keynes: Open University Press, 1991 makes some interesting observations about the legal personality and O. O'Neill, *Faces of Hunger: An Essay on Poverty, Justice and Development*, London: Allen and Unwin, 1986, examines the case for states to bear moral responsibility.

¹⁴ G. Graham, *Ethics and International Relations*, Oxford: Blackwell, 1997. See also, I. Forbes and M. Hoffman (eds), *Political Theory, International Relations and the Ethics of Intervention*, London: Macmillan, 1993.

Political rhetoric and the media express the moral dimension of system criminality in varying degrees but rhetoric cannot be relied upon as concrete evidence of universal moral consensus. The impossibility of drawing incontrovertible empirical conclusions on the basis of a volume of cross-cultural material is clear. The character and growth of international humanitarian law is an alternative, and useful, approach to the question of international moral consensus. But although it has continued to be refined and enlarged post-Nuremberg, the existence of international legislation has had no bearing on the actual pattern of prosecutions for system crime. To designate something 'criminal' through legislation implies a minimum level of moral consensus, whereas a system that delivers full and effective criminal liability through prosecution requires a firmer political consensus. The originality of this thesis lies in its contention that only the political willingness to commit to enforcement of the legislation is a secure indication of moral consensus. Further, the status of a potential international polity is indicated most clearly by the character and pattern of enforcement of humanitarian legislation. Yet, on examining the nature and context of prosecutions it is evident that this consensus is both narrow and restricted.

International treatment of war criminals is far removed from the implied neutrality in the *hostes sui generis* status of indicted war criminals. They are enemies of all, and therefore technically stateless as offenders, in the same way as pirates, for instance. For war crimes prosecutions to succeed they must be as unproblematic as prosecutions for piracy. Yet, it is worth noting that prosecutions for piracy are only unproblematic in narrowly defined circumstances. When the crime, pursuit and the apprehension of the criminal all occur on the high seas, without impinging on territorial waters or jurisdiction, then the prosecution of piracy is relatively straightforward. However, these conditions occur so rarely that the operation of prosecutions for piracy is often as

politically fraught as that for other inter-state disputes.¹⁵ In the same manner war crimes prosecutions only operate with any regularity in a similarly small and uncontroversial window of action. This thesis sets out to define and describe this window of action.

Abandoning the traditional principles of inter-state relations to allow full moral responsibility to individuals would imply an obviously radical change in the way states and their populations relate to one another. That this thoroughly radical re-orientation to a potential international polity did not fully arrive with the Nuremberg Principles,¹⁶ despite both the legislation and political rhetoric that might suggest otherwise, is demonstrated by the paucity of prosecutions for system crimes until the present day. With the radical developments of the International Criminal Tribunal for former Yugoslavia (ICTY), International Criminal Tribunal for Rwanda (ICTR) and the International Criminal Court (ICC), I argue that there has been a qualitative shift in the structure of international inter-action. Yet, the depth and extent to which this principle has become embedded should not be over-estimated, for despite several significant developments towards individual criminal responsibility, there have also been occasions when the collective approach has been prioritised.

Methodology

There are many potential methodological approaches to the problem of demonstrating shared cross-cultural moral values including empirical techniques, theoretical deduction

¹⁵ See M.C. Pugh, 'Piracy and Armed Robbery at Sea: Problems and Remedies', *Low Intensity Conflict and Law Enforcement*, Vol.2: No.1, (summer 1993), pp.1-18.

¹⁶ International Legal Commission, 'Principles of the Nuremberg Tribunal, 1950, No. 82.' Adopted by the ILC, 1950. Available internet, <http://deoxy.org/wc/wc-nurem.htm>. Accessed 23.10.00.

and jurisprudential scholarship.¹⁷ Each approach has both strengths and weaknesses when applied to this subject area. Perhaps the greatest difficulties surround the attempt to provide empirical proof.

The first methodological difficulty in providing empirical evidence is that found in the collation of statistical material. Using quantitative techniques is the issue often expressed as the 'small n problem' and it is particularly relevant for this thesis. It refers to the significant lack of identical cases sufficiently similar to be classed as one population. Its importance is stressed by Dougherty and Pfaltzgraff who describe a rough demarcation between the two methodologies:

The former [scientific method] prefers to isolate a few variables and analyse a large number of cases to determine the relationships among these variables. The traditionalist, in contrast, will often wish to examine all the variables which could conceivably have a bearing on the outcome of a single case.¹⁸

Thus, in order for quantitative methods to be successful it is essential to manipulate a wide range of statistical material. This has proved to be a problem for international relations theorists even in its most general form. Within the field of war crimes prosecutions this is an acute problem. Even if all cases of crimes against humanity were to be admitted for analysis, including those which occurred in massively different societal and international structures, there are still too few cases to allow any statistical significance to findings. In addition, even were an analysis attempted, many of the cases occurred too far in the past, in such a radically different world system, for findings to shed any real light on current developments.

¹⁷ P. McNeill, *Research Methods*, London: Routledge, 1990.

¹⁸ J. Dougherty and R. Pfaltzgraff, *Contending Theories of International Relations: A Comprehensive Survey*, New York: Harper & Row, 1981, p.37.

There are also problems with operationalising the emotive and intuitive subject matter involved in a study of moral discourse. It is extremely difficult to connect abstract theorising to likely observable phenomena, thus it would also be difficult to standardise the concepts to facilitate verification. In order to manipulate concepts in a quantifiable manner an 'indicator' must be selected. This should be a readily identifiable phenomenon that points conclusively to the abstract notions that are under investigation, such as 'occupation' as an indicator of 'class'. Yet it is difficult to imagine what a measurable indicator of moral autonomy, for instance, might look like.

Choosing to focus on the enforcement of system criminality brings a unique difficulty as well as a unique opportunity. The theoretical debate, covered in detail in chapter one, sets out radically opposing viewpoints on the possibility of universally held moral values. Yet, even within opposing theoretical positions on universal morality, there are few theorists prepared to allow that massive abuse should be endorsed by toleration, given the nature and sensitivity of the subject matter.¹⁹ Yet, although moral philosophers might abandon an action having proved its ultimate logical intractability, political action is necessarily more pragmatic.²⁰ For instance, whilst philosophers might not be able to agree on a definition of 'short' because of difficulties with the boundaries of the concept,²¹ a pragmatic judgement is both possible and necessary in the majority of cases. Similarly, prosecutions are undertaken regardless of the availability of a definitive solution to this difficulty.

Thus the growth of the principle of individual responsibility has the quality, classically

¹⁹ M. Walzer, *Thick and Thin*, London: Notre Dame, 1994; A. Gewirth, *Reason and Morality*, Chicago: Chicago University Press, 1978.

²⁰ I am indebted to my colleagues at the Plymouth International Studies Centre for the refinements of this idea, which a debate on this topic produced.

²¹ This is known as the 'Fallacy of the Undistributed Middle', in A. Flew, *Western Philosophy: Ideas and Argument From Plato to Popper*, London: Thames and Hudson, 1989, p.21.

amenable to historical analysis, in that it has grown within a legislation and institutions which are: 'Like coral reefs, which have been erected without conscious design and grow by slow accretions'.²² Thus, a methodological technique founded on a deep scrutiny of individual case studies is most appropriate. This comprises historical-diplomatic analysis and techniques such as interviewing to highlight the variables that may have had a bearing on each case. Primary source materials such as treaties, statutes and formal agreements were used to demonstrate the weight of the principle within legislation. UN documents from both the Security Council and General Assembly were examined and of particular use were the reports of Special Rapporteurs to the Economic and Social Council both thematic and country specific. These were useful in solving a particular potential difficulty in collecting official information and opinions in cases of non-prosecution. It could have been difficult to draw strong conclusions in the absence of action an essentially negative situation. This difficulty was also addressed by the use of some unofficial tribunal reports. These were held with respect to the massacre at the Sabra and Chatilla refugee camps, the Gulf War and the US conduct in Vietnam. These included primary source material on weaponry and civilian casualties and expert opinion on various aspects of the conflicts. In this way, material collected by the International Commission of Jurists contained detailed primary source material. Less useful were the NGO reports which tended to give summarised opinions on atrocities. Although I made use of the statistical information where it was presented, the opinion pieces have to be treated with caution given that they do not always comply with the technical legal definitions of system crime and war crimes.

For discussions on the progress of the principle of state and individual criminal responsibility, the reports of the International Legal Commission are valuable in that

²² D. Marsh, and G. Stoker, *Theory and Methods in Political Science*, London: Macmillan Press Ltd. 1995.

they represent an official international position on legal developments. Another valuable source in this respect is the publicly available trial records for actual prosecutions, both for evidence of how the issues of intent and proof were actually applied and for the statements of points of law often contained in the appeal judgements.

In addition interviews were conducted with practitioners of international law, including experts at the FCO and the international lawyers, Nigel Rodley, Françoise Hampson and Geoffrey Bindman. In the Hague I interviewed Arthur Witteween of the International Court of Justice, and conducted numerous interviews at the ICTY, and attended the Milosevic trial. I also examined archived material at the School of Oriental and African Studies in London, which contains the only transcript in the UK of the Yamashita trial. The Public Records Office at Kew has a great deal of material on the deliberations on the treatment of Nazi criminals. The Imperial War Museum in London holds a vital transcript of the Tokyo Tribunal. The Exeter University law library was particularly useful in providing up-to-date legal materials. The Robert Lenkiewicz archive in Plymouth contained a valuable collection of newspaper articles on the Nuremberg Tribunal and its associated national prosecutions. Current newspaper articles were used where valuable to illustrate public opinion and for news updates. House of Commons Minutes and House of Lords Minutes gave insight into the UK debates on prosecutions. Internet material and secondary sources were also widely employed.

Structure of the Thesis

Underpinning this thesis is the originality of the argument that the willingness, or otherwise, to assign criminal responsibility is the only useful gauge of moral consensus. A judicial response to system crime, when exercised in the name of the international

community or as universal jurisdiction, shows real moral content. Of course, without the legislation which is a precursor to it, such moral events could not take place. But the legislation is of secondary importance to the process and context of actual punishments.

Chapter one assesses this claim by reviewing some of the perspective and approaches taken with regard to universality in moral values. The case for either universality in values or particularism is an opposition so fundamental it reappears throughout the literature.²³ Vincent tackles this issue in depth,²⁴ as does Nardin.²⁵ But within international ethics, there are three main approaches to this question. Firstly, there is the theoretical approach expressed as the debate between broadly cosmopolitan positions and communitarian theory.²⁶ Secondly, there is the use of empirical techniques to assess the potential or existence of universal moral consensus.²⁷ The third approach is the notion of law as expressive of moral values.²⁸ The central question here is whether or not individual prosecutions can be grounded in a notion of a universally accessible standard of moral judgement. If they can, this might imply that an acceleration of the principle of individual responsibility would be both possible and desirable. The key detail here is the normative aspects of these positions.

²³ Texts which assess this question are: D. Held, *Political Theory Today*, Cambridge: Polity Press, 1991; Hutchings, K., *International Political Theory*, London: SAGE, 1999; C. Brown, (ed), *Restructuring in Europe: Ethical Perspectives*, London: Routledge, 1994; R. Falk, *On Humane Governance*, Cambridge: Polity Press, 1995; R. Falk, *On Humane Governance*, Cambridge: Polity Press, 1995; C. Brown, *International Relations Theory: New Normative Approaches*, New York: Columbia University Press; Luper-S. Foy, (ed), *Problems of International Justice*, Boulder: Westview Press, 1988; T. Donaldson, in T. Nardin, and D.R. Mapel, *Traditions of International Ethics*, Cambridge: Cambridge University Press, 1992; D. Archibugi, D. Held and M. Kohler, (eds), *Re-imagining Political Community*, Cambridge: Polity Press, 1998; M. Cochran, *Normative Theory in International Relations: A Pragmatic Approach*, Cambridge: Cambridge University Press, 1999; D. Morrice, 'The Liberal-Communitarian Debate and its Significance for International Relations', *Review of International Studies*, Vol. 26: No 2, pp.233-251.

²⁴ R.J. Vincent, *Human Rights in International Relations*, Cambridge: Cambridge University Press, 1991.

²⁵ T. Nardin, and D.R. Mapel, *Traditions of International Ethics*, Cambridge: Cambridge University Press, 1992

²⁶ D. Bell, *Communitarianism and its Critics*, Oxford: Clarendon, 1993, and D. Archibugi and D. Held, (eds), *Cosmopolitan Democracy: An Agenda for a New World Order*, Cambridge: Polity Press, 1995.

²⁷ O.F. Williams, (ed), *Global Codes of Conduct*, Notre Dame: University of Notre Dame Press, 2000.

²⁸ Exemplified in M.J. Detmold, *The Unity of Law and Morality: A Refutation of Legal Positivism*, London: Routledge, 1984, and K. Haakonssen, *Natural Law and Moral Philosophy*, Cambridge: Cambridge University Press, 1996.

This thesis seeks to be analytical rather than normative. By looking at the theoretical approach to the possibility of moral consensus, we can see that neither cosmopolitanism, nor communitarianism, with their normative accounts of moral structure can securely either prove or refute the notion of shared values. In fact, even where communitarian theorists have come close to refuting intervention in these circumstances, in the case of gross system crime, accommodations are made and system criminality is excluded from the particularist debate.²⁹ Beitz, for instance describes how: Conventional opinion in both international law and morality holds that intervention in the internal affairs of another state is almost always forbidden. I say almost, there are exceptions, which mainly involve intervention to defend against aggression and to put a stop to 'crimes against humanity' such as genocide.³⁰

Yet, when morals are treated as factual propositions they fare no better. As well as the particular problems referred to in the methodology, the wider problems might seem to be insuperable. It is difficult to imagine a successful measure for cross-cultural moral values, the immensity of the project and the problems of quantifying such a fluid and emotive subject are insurmountable.³¹ A common mode of regarding system crime is the content and scope of the legislation.³² In part this is due to the influence of legal

²⁹ A. Black, 'Nation and Community in the International Order', *Review of International Studies*, Vol.19, 1993.

³⁰ C.R. Beitz in S. Luper-Foy, (ed), *Problems of International Justice*, Boulder: Westview Press, 1988, p. 185.

³¹ For instance A.D. Renteln, *International Human Rights: Universalism vs. Relativism*, London: SAGE, 1990.

³² This is an enormous field of study with a long heritage but some key texts include; G. Best, *Humanity in Warfare*, New York: Columbia University Press, 1980; P. Calvocoressi, *Nuremberg: The Facts, the Law and the Consequences*, London: Chatto and Windus, 1947; C. De Visscher, *Theory and Reality in Public International Law*, Princeton: Princeton University Press, 1959; Y. Dinstein, and M. Tabory. (eds), *War Crimes in International Law*, The Hague: Martinus Nijhoff, 1996; J.B. Keenan and B.F. Brown, *Crimes Against International Law*, Washington D.C.: Public Affairs Press, 1950; G. Lipsky, (ed), *Law and Politics in the World Community*, Berkeley: University of California Press, 1952; and S. Luper-Foy, (ed). *Problems of International Justice*, Boulder: Westview Press, 1988.

practitioners upon the discipline. Cassese,³³ Roling,³⁴ Bassiouni,³⁵ and Kalshoven³⁶ are all judges at international level and all have contributed extensively to the study of international law. In addition some judges speculate as to the condition and future of developments in war crimes prosecutions, and the work of Goldstone³⁷ and Taylor³⁸ are especially interesting in this respect. Whilst the legislation is undoubtedly a precursor for prosecutions, and therefore of crucial importance, deductions about moral values on the basis of natural law or positivist perspectives on the legislation ultimately can prove no more helpful than those of the cosmopolitan and communitarian theorists.

Ultimately, criminal responsibility assignation is the most effective gauge of moral consensus. The full realisation of the principle of individual criminal liability would allow for instant legal action against any offender in the world, enforced by an international judicial system, independent from states. This would indeed constitute a polity of some form, based upon the existence of a shared moral or social order.

Chapter two examines the notion of moral responsibility in greater detail, looking at two main issues. Firstly, whether the notion of morality has any place at all in a consideration of international politics; and secondly, why individual criminal responsibility is more significant for moral consensus than the state collective responsibility that has been traditionally applied. The issue of moral scepticism in international relations is an important one manifesting in realist theory as both descriptive realism and prescriptive realism.³⁹ It also occurs in post-modernism,

³³ A. Cassese, (ed), *Current Problems of International Law: Essays on United Nations Law and on the Law of Armed Conflict*, Milan: Dott. A. Guiffre, 1975.

³⁴ A. Cassese, and B.V.A. Roling, *The Tokyo Trial and Beyond*, Cambridge: Polity Press, 1993.

³⁵ M.C. Bassiouni, *Crimes Against Humanity in International Criminal Law*, The Hague: Martinus Nijhoff, 1992.

³⁶ F. Kalshoven, *Constraints on the Waging of War*, Geneva: ICRC, 1987.

³⁷ R. Goldstone, *Prosecuting War Criminals*, London: The David Davies Memorial Institute, 1996.

³⁸ T. Taylor, *Nuremberg and Vietnam: An American Tragedy*, New York: Bantam Books Inc., 1971.

³⁹ An example of descriptive realism is evident in E.H. Carr, *The Twenty Years Crisis*, London: Macmillan, 1946; J.H. Herz, *The Nation-State and the Crisis of World Politics*, New York: David

exemplified by the work of Vivienne Jabri.⁴⁰ Moral scepticism is also manifest in a significant trend of thought which focuses on the office of statesman and its examination of the limits and responsibilities attached to high office.⁴¹ To refute these positions there is not only the observation that states can and do engage in moral dialogue but also the question of the nature of moral accountability. An examination of the nature of moral personality demonstrates the logical consequences of attempting to assign moral responsibility to a collective such as a state. In order for responsibility to be assigned, the conditions of autonomy, agency and intention must be satisfied. These are conditions that may be partly satisfied by states but are only fully united within individuals. States, or random collectives,⁴² are in the unique position of bearing a legal personality within international law and therefore the temptation is to apply moral responsibility to them, to regard states as if they also bear a moral personality. But although collective blame can be assigned, its coherence is challenged at the moment when criminal guilt is applied. This is due to the nature of accountability, in assigning accountability; responsibility must be either distributed or divided. Divided responsibility apportions an amount of guilt according to participation whereas distributed responsibility allows the same amount of guilt to the group as a whole. The possibility of distributing guilt and its consequences are important for the issue of system crime given that it requires the resources of the whole state. Ultimately the issue

Mackay, 1976; H. Morgenthau *Politics among Nations: The Struggle for Power and Peace*, New York: Knopf, 1948.

⁴⁰ V. Jabri, 'Restyling the Subject of Responsibility in International Relations', *Millennium: Journal of International Studies*, Vol. 27, No.3, 1998, pp.591-611. (p.610). See also J. Kristeva, *Strangers to Ourselves*, New York: Columbia University Press, 1991; Z. Bauman, *Postmodern Ethics*, Oxford: Blackwell, 1994.

⁴¹ M. Frost, *Ethics in International Relations: A Constitutive Theory*, Cambridge: Cambridge University Press, 1996; M. Walzer, 'The Problem of Dirty Hands', *Philosophy and Public Affairs*, 1972-73, part 2, pp.160-180; H. Butterfield, *Christianity, Diplomacy and War*, London: Epworth. 1953.

⁴² A 'random collective' is a collection of individuals grouped together randomly. A 'collective' is a group of individuals who chose membership of the collective. Thus a state is a random collective, as its members are commonly constituted by birth, something over which they have no control. Alternatively, Hitler's SS was a collective for which members had to make a conscious commitment. For ease of reading I do not draw the distinction throughout this work, however. I specify in the particular cases when a collective is not random but chosen.

of assigning criminal responsibility for whole-state crimes exists at the intersection of individual and state.

Having shown the importance of criminal prosecutions for a study of international moral consensus, chapters three, four and five examine the traditional international response to system crime and the principles upon which humanitarian law has been founded. Chapter three looks at the historical practice of states with regard to gross abuses. As humanitarian law has largely grown from the laws of war, it examines the historical context and characteristics of the laws of war. It also discerns a tendency towards state responsibility and collective punishments for violations. The common responses to such violations have included reciprocity and reprisals, or reparations and sanctions.

Chapter four assesses the Nuremberg Tribunal and the trials of Nazi leaders. It argues that although this was a massive evolution in approach given the traditional norms of inter-state interaction, it was not a full expression of individual criminal responsibility. The accused were selected as representatives of various functions of the German war machine. In many senses, the accused were symbolically representative of the German nation as a whole.

Chapter five continues this assessment post-Nuremberg, examining the later developments in the principle of individual criminal responsibility. This is principally in the expansion and reinforcement of legal principles and the creation of new legislation. This includes the Geneva Conventions and the Genocide Convention. There is also a significant strand of thinking which advocates the principle of state criminality,⁴³ for

⁴³ For a defence of state criminal responsibility see primarily H. Kelsen, 'Collective and Individual Responsibility for Acts of State in International Law', *Jewish Yearbook of International Law*, 1948, and H. Kelsen, 'Collective and Individual Responsibility in International Law with particular Regard to the

instance the International Legal Commission has continued to debate this issue on behalf of the UN since the Nuremberg Tribunal. This is significant in that it is embedded into the structure of the state system, thus even where this principle is covert, action tends naturally to relate to states collectively rather than to individuals.

The pre-eminence of state sovereignty and the tendency to collectivise blame for system crime is indicative of a much more limited and restricted moral consensus than the scope of the legislation might suggest. In chapter six the limits of this consensus are shown by examining the record of prosecutions. The character and context of system criminality is crucial in triggering moral consensus. Whilst political context obviously impacts upon the likelihood of prosecution, it is clear that the events in former Yugoslavia were far more resonant with Nazi criminality than others post-World War II. Looking at the cases at which accusations of genocide had been levelled, although not formally charged, we can see several common characteristics. Three of the most interesting were that of the US in Vietnam, the Khmer Rouge in Cambodia and Indonesia in East Timor (during both the massacre at Santa Cruz on 12 November 1991, and the post-referendum massacres of 1999). In both East Timor and Cambodia there were junctures at which prosecution could have been possible as part of the administration of their domestic affairs but the opportunity was not taken. Similarly, in the prosecution for the My Lai massacre of 16 March 1968, in Vietnam, the issue of system crime was sidestepped in favour of courts martial for lower-ranking individuals. In all these cases the moral consensus around system crime was too limited to drive international prosecutions.

Punishment of War Criminals', *California Law Review*, Vol.31, 1943, pp.530-571. For later work see F. Malekian, *International Criminal Responsibility of States: A Study on the Evolution of State Responsibility with Particular Emphasis on the Concept of Crime and Criminal Responsibility*, Stockholm: Borgstroms Tryckeri AB, 1985. For an overview of these positions see, H.H. Weiler, *International Crimes of State: A Critical Analysis of Draft Article 19 on State Responsibility*, 1989

Therefore, the constitution of the ICTY/ICTR was all the more striking. It raised several important legal issues in terms of customary law, the blurring of internal and inter-state conflict and the development of individual criminal responsibility. In chapter 7, these developments and the indictment and arrest of Slobodan Milosevic are contrasted with the treatment of Saddam Hussein and Iraq. In particular, the implications of the sanctions regime and the implied collectivisation in responsibility assignation are reviewed. In this respect at least it would seem the developments in individual responsibility the ICTY/ICTR represent are mitigated by the tendency to collectivise blame.

This uneven progress in the development of the principle of individual criminal responsibility is reinforced in chapter eight where the developments since the constitution of the ICTY/ICTR are discussed. One development has been an increased willingness by domestic courts to enforce individual prosecutions on the basis of universal jurisdiction. The warrants issued by Belgium, including its arrest warrant of 11 April 2000 for Mr. Abdulaye Yerodia Ndobasi, Minister for Foreign Affairs of the Democratic Republic of the Congo,⁴⁴ illustrate this point, as was the extradition proceedings over Pinochet. Both of these cases, whilst they show the forward momentum of the principle of individual criminal responsibility, also demonstrate the structural constraints of the customs, traditions and protocols of inter-state interactions. This is also shown in the proliferation of truth commissions, for although there is no real reason why they could not be complementary to the notion of prosecutions; in practice they tend to replace them. The International Criminal Court displays similar

⁴⁴ The arrest warrant of 11 April 2000 was issued by Belgium through its domestic courts for Mr. Abdulaye Yerodia Ndobasi, Minister for Foreign Affairs of the Democratic Republic of the Congo, he was charged with Grave breaches of the Geneva conventions, crimes against humanity and incitement to racial hatred. Belgium had enacted domestic legislation, the war crimes law 1993, which enables anyone to bring a war crimes case against any world leader and sought to try Ndobasi, in a Belgian court for allegedly urging the slaughter of minority Tutsi's in 1998. The International Court of Justice, ICJ, handed down the decision on March 6 2002, that Ndobasi enjoyed immunity as he was the then incumbent foreign minister for the Congo. In *Findings on Arrest Warrant of 11 April 2000. (Democratic Republic of*

ambiguities, for whilst its legitimacy is based upon the notion of universal jurisdiction founded on moral consensus, its treaty-based nature indicates internationality rather than universality.

Thus, the application of the principle of individual criminal responsibility is partial, opportunistic and contingent. Where prosecutions occur they are founded on moral consensus but this consensus is episodic and limited. Individual criminal responsibility challenges the very structure and norms of international inter-action and where it occurs it is enormously significant. But the more natural focus for blame and coercion is the collective, in the form of the state and prosecutions where they occur are firmly subjugated to the notion of sovereignty. So, although the principle of individual criminal responsibility is indicative of some form of international polity based upon a shared moral order, that polity is barely in existence at present.

This thesis identifies an admittedly narrow area of international action that is uniquely indicative of shared moral values. This consensus is limited to only the most extreme atrocities, and in addition, these atrocities must be characterised by a purity of intent that distinguishes them from domestic political or military considerations. Only in this narrow window of action will international prosecutions proceed. The originality of this thesis lies in its argument that the act of prosecution, however rarely it is unproblematic, must imply a nascent moral community. This thesis also identifies system crime as exceptional in representing a collision between state and individual and crucially this collision is covert until the moment of actual individual prosecution. The central contention here is that the notion of society is inherent in the act of criminalisation and the assignation of criminal responsibility must logically entail a social order against which the crime has been committed.

PAGINATION AS IN ORIGINAL

Chapter 1

The Case for an International Moral Consensus

This thesis contends that the principle of individual criminal responsibility is both more significant and less well established than it might seem. It is significant in that the imposition of criminal responsibility implies an international moral consensus. It does this in a way that civil liabilities cannot. But it is less well established than the enthusiasm for individual prosecutions, discussed in chapters 7 and 8, might suggest, for it operates in direct contradiction to the traditional structure of state interaction. This leads ultimately to the conclusion that there is an international polity in formation based upon this shared, although basic, moral consensus. Yet the notion of universally held moral values is much disputed and although attempts have been made to identify such a development, it has never hitherto been satisfactorily demonstrated. I contend that it is only within the enforcement of humanitarian law that we can find evidence for such a position, and that it is within the new willingness to prosecute individuals for atrocities that analysis of universal moral values must be undertaken. A brief review of the theory and analysis undertaken thus far in this area serves to highlight both the importance of the subject matter and the impasse that has been reached.

The idea of common cross-cultural moral values is a contentious one addressing as it does, one of the most fundamental questions within international ethics. Whether it is possible to assert the existence of moral values that are objectively constituted and accessible to all as a common ethical framework, or whether moral values are essentially culturally specific and constituted by communities in different and particularistic ways, is the most substantial and seemingly irresolvable conflict in international moral theory. This debate is repeated in various guises both throughout

and within many academic disciplines. But at the heart of this debate is the relationship between the individual and the international system. This thesis argues that the tensions between individual and community within the workings of the international system are played out at many levels. They are manifested legally, politically and theoretically. They are evident in the direction of the assignment of blame, the legal potentialities for assigning responsibility and possibilities for political action. Fundamental to these judgements, is the question of the universality of moral judgement which conditions all other possibilities, and which is the substance of the universalism/particularism debate. Put in its simplest and most encompassing form, the major theoretical positions seek to prioritise either the individual or the community to which the individual belongs. Within domestic political theory this debate is cast as political liberalism and set against political communitarianism,¹ within moral philosophy it is universalism opposing collectivism,² and within international ethics it is debated as cosmopolitanism and communitarianism.³ It also features within social and cultural anthropology,⁴ social theory,⁵ and cross-cultural psychology.⁶ Within international law it is replayed as the distinction between positivist and natural law.⁷ The extent of this debate is mirrored in its complexity, for it can be conducted from several fronts. Theorists may construct methodological arguments focusing on the relative merits of abstracting individuals or

¹ Wherever possible I have given in example a key collection of positions, or a central text, or an accomplished overview. C.F. Delaney, (ed), *The Liberalism/Communitarianism Debate*, Maryland: Rowman and Littlefield, 1994.

² D. Rasmussen, (ed), *Universalism vs. Communitarianism: Contemporary Debates in Ethics*, London: MIT press, 1995.

³ C. Brown, *International Relations Theory: New Normative approaches*, New York: Columbia University Press, 1992.

⁴ A.D. Renteln, *International Human Rights: Universalism vs. Relativism*, London: SAGE, 1990.

⁵ S. Lukes, *Essays in Social Theory*, London: Macmillan, 1977.

⁶ U. Kim, et al., (eds.), *Individualism and Collectivism: Theory, Method and Application*, London: SAGE. 1994.

⁷ For a discussion of Natural law and its relation to international law see K. Haakonssen, *Natural Law and Moral Philosophy*, Cambridge: Cambridge University Press, 1996. For an overview of Natural Law and Positivism see M.D.A. Freeman, 6th Edition, *Lloyds Introduction to Jurisprudence*, London: Sweet and Maxwell, 1994. Chapters 3 and 4.

contextualising them.⁸ It can also be construed as an epistemological problem where foundational approaches are contrasted with anti-foundational positions.⁹ Within international ethics the focus is primarily on the normative aspects of the dispute. Centrally, does a focus on either the individual or alternatively, the community produce morally good or bad consequences?¹⁰ This dispute is particularly vibrant within theories of global redistribution,¹¹ and human rights.¹² These tensions are also evident on a practical level in discussion about the form and purpose of international financial institutions, and the role and status of state sovereignty and intervention. In this thesis, it is played out as the opposition between the principle of individual criminal responsibility and the collectivisation of blame.

I have listed these examples to illustrate one of the most striking aspects of war crimes prosecutions, namely, that these tensions and types of debate are largely absent from analysis of such prosecutions. A traditional focus is instead on such matters as the legal implications of decisions,¹³ the constitution of the legislation,¹⁴ the political context of the crimes¹⁵ and the practical difficulties of implementation¹⁶. The legal principle of individual responsibility was first established with the post-World War II International

⁸ S. Lukes, *Individualism*, Oxford: Basil Blackwell, 1973. p.73.

⁹ S. Mendus, 'Human Rights in Political Theory', *Political Studies*, Vol. XLIII, 1995, pp.10-24.

¹⁰ M. Cochran, *Normative Theory in International Relations: A Pragmatic Approach*, Cambridge: Cambridge University Press, 1999.

¹¹ O. O'Neill, *Faces of Hunger: An Essay on Poverty, Justice and Development*, London: Allen and Unwin, 1986.

¹² R.J. Vincent, *Human Rights in International Relations*, Cambridge: Cambridge University Press, 1991.

¹³ S.R. Ratner, J.S Abrams, *Accountability for Human Atrocities in International Law: Beyond the Nuremberg Legacy*, Oxford: Clarendon Press, 1997.

¹⁴ T. Meron, *War Crimes Law Comes of Age*, Oxford: Clarendon Press, 1998.

¹⁵ G. Best, *Humanity in Warfare*, New York: Columbia University Press, 1980. and more controversially in R. Clark, *The Fire This Time: US War Crimes in the Gulf*, New York: Thunders Mouth Press, 1992.

¹⁶ A central contributor to this mode of analysis is A. Roberts in, for example, *The Laws of War: Problems of Implementation in Humanitarian Crises, How can Humanitarian Law be made more effective in armed conflicts?*, Luxembourg: Office for Official Publications of the European Communities, 1955. Also Draper, G.I.A.D., 'Implementation of International Law in Armed Conflicts'. *International Affairs*, Vol.48, No.1, Jan 1972, pp.

Military Tribunals and has intensified in both its scope and application with the constitution of the ad Hoc tribunals for former Yugoslavia and Rwanda. Yet although the Nuremberg Tribunal marked a watershed in the application of individual criminal responsibility, it did so in the face of significant opposition. In fact, it opposed, and still opposes, the whole legal edifice of the international system, founded on the Acts of State Doctrine.¹⁷ As states are evidently non-corporeal, the imputation of the action of a state's representative to his or her state allows the international system its historic function as a society of (large) legal individuals. Yet even though post-World War II has seen radical innovation in the prosecution of war crimes with the introduction of the principle of individual responsibility,¹⁸ the moral basis of prosecutions in this form is largely treated as a settled norm of international relations. Yet the claim of moral universality embedded in the legislation for war crimes prosecutions has never been demonstrated securely.¹⁹ The legislation alone, lacking enforcement mechanisms, had never been tested in this regard. Indeed, a central thrust of the argument here is that the most vital and important moral aspects of criminality lie not in the creation of legislation, or the juristic constructions of such law, but in the political process of enforcing punishment. It is only at this stage that contradictions emerge and tangible evidence is produced.

However, there have been some important attempts to address this question, although they have ultimately proved inconclusive. Within international ethics this question has

¹⁷ The Acts of State Doctrine provides that any act of the organ of a state is imputed as the act of that state. For instance, if an officially constituted minister signs a treaty, it is imputed to his or her state as if the state itself had signed. See H. Kelsen, "Collective and Individual Responsibility for Acts of State in International Law", *Jewish Yearbook of International Law*, Vol. 22, 1948. This tension figured significantly in the Pinochet extradition when the Law Lords had to decide if it was legally possible to indict a former head of state for acts committed whilst a sovereign. For more details see Chapter 8.

¹⁸ See Chapter 2.

¹⁹ Indeed Françoise Hampson, the legal representative for the ICRC, claimed that prosecutions were, in practice, always justified from the basis of a 'threat to international peace and security' rather than the alternate grounds of 'shocking to the conscience of mankind'. Appeals to a universal morality justified by

been expressed as the debate between cosmopolitanism and communitarianism, yet neither of these positions can satisfy in all contexts. There have also been attempts to conduct empirical research into cross-cultural moral values,²⁰ attempts which have foundered on methodological grounds. Even the traditional jurisprudential approaches to this question are inconclusive. This thesis argues that the only secure evidence we can present to demonstrate moral consensus lies within the willingness to enforce criminal prosecutions for gross atrocities.

Theoretical Approaches to the Possibility of Moral Consensus

As we have seen, one of the most crucial aspects of war crime prosecutions is the notion of a universal moral standard on which our judgement of what constitutes criminal behaviour is predicated. The acceptance or denial of such a common moral code is at the root of international ethics and, though clumsy, the broad theoretical opposition between universalism and particularism subsumes the work of most theorists.

Whilst cosmopolitan theories attempt to address the formulation of universal criteria of moral behaviour starting from the construction of a rational abstracted individual, communitarian theory criticises this notion of morality. For here, the imposition of a universal morality amounts to cultural imperialism. As people are constituted by their communities, their beliefs and moral codes are particularistic, uniquely constituted by the social and cultural context of each community. As communities are of such

the language of the legislation are demonstrably unsafe. Interview with Françoise Hampson, University of Essex, Colchester, 22 February 2002.

²⁰For instance, R.P. Claude, (ed), *Comparative Human Rights*, London: John Hopkins University Press, 1976, and S. Schwab, and Pollis, (eds), *Towards a Human Rights Framework*, New York: Praeger, 1982. For commentary on these attempts see A.D. Renteln, *International Human Rights: Universalism vs. Relativism*, London: SAGE, 1990, R.J. Vincent, *Human Rights in International Relations*, Cambridge: Cambridge University Press, 1991, and W.K. Frankena, *Ethics*, Englewood Cliffs, NJ: Prentice-Hall, 1973.

importance in the ethical life of the individual, individuals must have the inherent right to determine the national destination of their own community. Thus, intervention is highly illegitimate, and the principle of non-intervention and state sovereignty is enshrined. The attempt to impose universalistic moral standards is actually an attempt to impose a uniform western conception of individualistic morality on radically different communities.

As we have seen, this debate is manifested within international ethics as the debate between cosmopolitanism and communitarianism. I shall show that cosmopolitanism and communitarianism are at present in irresolvable tension, notwithstanding some attempts to overcome this opposition.

Cosmopolitanism

Cosmopolitanism in its most simple distillation is a position which, 'refuses to accept that existing political structures are the source of ultimate value.'²¹ This broad definition does not distinguish between the moral and political, but it highlights the fundamental notion within cosmopolitanism, that the individual can be abstracted from their social context which is both superficial and mutable. Hutchings, in common with others, further subdivides both cosmopolitanism and communitarianism as either 'moral' or 'political'.²² Within moral and political cosmopolitanism the emphasis is laid in different directions. Moral cosmopolitanism can be described as 'any moral theory

²¹ D. Held, *Political Theory Today*, Cambridge: Polity Press, 1991. p. 24.

²² K. Hutchings, *International Political Theory*, London: SAGE, 1999, C.R Beitz, and T.W. Pogge, also draw this distinction in C. Brown, (ed), *Restructuring in Europe: Ethical Perspectives*, London: Routledge, 1994.

which presumes universal validity and applicability of moral principles', whereas political cosmopolitanism 'prescribes types of political practice and institution that operate over, above or across the boundaries of the nation-state'.²³ Hutchings goes on to refine the latter, rather wide definition, which seems to encompass most of the subject matter of international relations. After Falk, she describes it as premised on the importance of democratising already existing covert cosmopolitan decision-making.²⁴ Naturally, a focus on the management of war crime prosecutions as an ethical activity narrows the field of enquiry towards moral cosmopolitanism and communitarianism. However, much of the literature crosses these boundaries, especially as political cosmopolitanism and communitarianism often bases its critique of international institutions on the justifications of moral cosmopolitanism and communitarianism. For instance one of the best-known examples of this is Rawlsian political liberalism which shares several features with Kantian cosmopolitanism.²⁵ Frost also bases his constitutive theory on a reading of Hegel.²⁶

The primary source of ethical justification for cosmopolitanism is Kant. His central ideas offer a universal standard for moral judgement, perhaps so durable in the West at least, because they offer an explanation that appeals to our intuitive moral sense. Kant offers the 'categorical imperative' as a guide to distinguishing duty from interest and a test of the validity of moral principles.²⁷ That the imperative is 'categorical' rather than

²³ Ibid., p.154.

²⁴ R. Falk, *On Humane Governance*, Cambridge: Polity Press, 1995. Quoted in K. Hutchings, *International Political Theory*, London: SAGE, 1999 p.154.

²⁵ The work of Rawls is a case in point as he explicitly acknowledges his debt to Kantian deontology with regard to his conception of the liberal individual as a universally rational abstracted figure.

²⁶ M. Frost, *Ethics in International Relations, A Constitutive Theory*, Cambridge: Cambridge University Press, 1996. pp.141-159.

²⁷ Kant is deontological in that he doesn't see moral values as dependant upon anything else. Thus discerning the moral course of action in a situation is not related to consequences or costs/benefits. For Kant duty is integrally connected to morality as an aspect of this deontological approach. It is worth noting that this concept of duty as fundamental to moral consideration is absent in the work of many later theorists notably J. Rawls, *A Theory of Justice*, Oxford: Oxford University Press, 1971, p.342. An

'hypothetical' indicates an exclusion of the consideration of consequences. It is an absolute injunction to act in a particular way, whereas a hypothetical imperative would simply say 'Do this if you want to achieve that'.²⁸ Kant sustains this imperative by offering two main formulations laid out in the *Fundamental Principles of the Metaphysics of Ethics*. [Also referred to as the 'Groundwork'.]²⁹ Firstly, he holds that maxims should be universalisable, or that one should 'Act only on that maxim whereby thou canst at the same time will that it should become universal law'.³⁰ Secondly, he argues that human beings should always be treated as ends-in-themselves, as in 'Act in such a way that you always treat humanity [...] never simply as a means, but always at the same time as an end.'³¹ The most important feature of these formulations for our purposes is that they are essentially and inevitably dependent upon a construction of a rational individual who can be clearly separated from the community to which he or she belongs. This is evident by examining the basis from which universalisability is advocated. For it is not simply advisable to formulate maxims which can be universalised, it is logically impossible to do otherwise with any coherence. For instance, it could not be logical to argue that promises can be broken, because if this was a universal law the institution of promising would cease to exist.³² There are, however, some serious difficulties inherent in this version of universality. Primarily it requires particular assumptions about the nature of the individual. For instance, it requires that the character of the individual is cautious. It has been pointed out that rational individuals may well endorse a system in which there is great inequality on the

exception to this is the work of O. O'Neill, *Faces of Hunger: An Essay on Poverty, Justice and Development*, London: Allen and Unwin, 1986, who revives the notion of duty in relation to issues of global redistribution.

²⁸ C. Brown, Op Cit. n.3, p. 30.

²⁹ I. Kant, *Fundamental Principles of the Metaphysics of Ethics*, trans. Abbott, T.K., London: Longmans, 1959.

³⁰ Ibid., p. 46.

³¹ H.J. Paton, *The Moral Law: Kant's Groundwork of the Metaphysics of Morals*, London: Hutchinson, 1948, p.91.

grounds that if one rules out rewards for others they are also ruled out for oneself. As

Ward puts it:

Although one would not like to be cheated and lied to, one may still be prepared to opt for a system in which someone had to be lied to and cheated to make great personal rewards possible for some; and to gamble on one's chance of being successful in that system.³³

But this example also shows that maxim-universalisability, as well as assuming particular individual characteristics, may also be criticised on the grounds that it may endorse counter-intuitive moral positions. This apparent difficulty is connected with the level of specificity of maxims, should they be framed in extremely general or narrowly specific terms? Thus 'repay any debt' is too general, whereas 'John Smith may borrow without intending to repay' is too specific. It has led some theorists such as Luper-Foy to argue that Kant is inconsistent at the international level as using a maxim which is universalisable, the people of poorer nations may favour a change in the distribution of wealth whereas those in richer nations may not.³⁴ Yet Kant resolves this apparent tension by specifying that everyone should be able to follow the maxim under morally relevant similar conditions.³⁵ For Kant the relevantly similar is never more specific than the rational being. This may allow the flexibility to make sophisticated moral judgements, such as 'it may be permissible not to repay a debt if you will starve if you do repay it' but it also requires an assumption of the rationality of individuals akin to the assumptions inherent in liberalism and manifested most clearly in western political thought. Thus there is still reason to question cosmopolitanism's claim to universality.

³² K. Ward, *The Development of Kant's View of Ethics*, Oxford: Basil Blackwell, 1972, p.107.

³³ *Ibid.*, p. 116.

³⁴ S. Luper-Foy, (ed), *Problems of International Justice*, Boulder: Westview Press, 1988, p.11.

³⁵ T. Donaldson. in T. Nardin, and D.R. Mapel *Traditions of International Ethics*. Cambridge: Cambridge University Press, 1992, p.140.

However, the second formulation of the imperative holds more weight for a consideration of war crimes prosecutions and in tandem with the first has provided much of the justification for the protection of human rights and the acceleration of the principle of individual responsibility. Beetham argues that human rights are more consistently universalist and more readily identifiable with global politics, and hence cosmopolitanism, because they proceed from the international to national and local levels rather than vice versa and ascribe to human beings everywhere.³⁶ The notion of human worth and dignity is key to Kant's moral scheme as it is this that provides content to the first formulation as well as giving Kant's theory its distinctive rule-based approach to morality. It is this notion, so similar to the content of natural law, that informs much humanitarian law. Again this formulation is closely linked to the assumption of rationality and also to the idea that happiness is one of the essential ends of humanity. It would be irrational to deprive any human of the autonomy and freedom necessary to seek their own ends, because as Ward puts it

To take 'humanity' as an end, in a positive sense, is to cultivate one's natural perfection, as a pre-condition of all autonomous willing, and of fully rational action.³⁷

However, this justification of moral content only stands if we are willing to accept Kant's portrait of the rational abstracted individual, and it is to this vision of the abstracted individual that communitarianism objects.

Of course, cosmopolitan theory has not stopped with Kant and some useful attempts to build on this basic justification for universality in ethics have been made. One of the more famous of these is Rawls' *Theory of Justice*.³⁸ Rawls proposes a conceptual

³⁶ D. Beetham, in D. Archibugi, D. Held, and M. Kohler, (eds), *Re-imagining Political Community*, Cambridge: Polity Press, 1998, p.59.

³⁷ Ward, *Op Cit.* n.32, p.120.

³⁸ Rawls, J., *A Theory of Justice*, Oxford: Oxford University Press, 1971.

device known as the ‘original position’, for adjudicating between moral claims and particularly for assessing the inherent justice of different institutions.³⁹ This argues that when individuals are assessing the fairness of institutions they should do so as if they had no knowledge of their own position in relation to the institution. The individual is required to set aside considerations of what would be personally beneficial and by removing awareness of personal roles either within or in relation to the relevant institution. By using this rational device, termed the ‘veil of ignorance’, Rawls claims that individuals will always choose systems based on a basic personal liberty and toleration.⁴⁰ The parallels with Kant are obvious and Rawls has explicitly acknowledged his debt here, however, his later work acknowledges the difficulties inherent in claims about the rational unsituated nature of the individual.⁴¹ Thus much of Rawls’ later work has withdrawn its claims for universalisability and narrows its focus to liberal democratic systems only.⁴² But later theorists have sought to defend his original insights. In addition there have been attempts to ground universal morality in notions of obligations rather than rights.⁴³ Beitz adds to Hutching’s version of moral cosmopolitanism by extending Rawlsian liberalism to the international sphere. He includes the idea that choice of institutions and policies should be based on an ‘impartial consideration of the claims of each person who would be affected by our choices’.⁴⁴ This normative account of moral cosmopolitanism is a direct descendant of Rawlsian political liberalism in its inclusion of ‘impartial’.

³⁹ Ibid.

⁴⁰ Rawls, *Op Cit.* n.37.

⁴¹ Cochran, *Op Cit.* n.10, p.30.

⁴² Rawls, *Op Cit.* n.42.

⁴³ Cochran, *Op Cit.* n.10.

⁴⁴ Brown, *Op Cit.* n.22, p. 124.

This tendency toward universalism is also shared by utilitarianism. Although a less important tradition it shares a focus upon the individual as a source of ultimate value and a view of the state as contingent, temporary and of value only insofar as it furthers the aggregated aims of individuals.

Communitarianism:

The failure of cosmopolitanism to demonstrate its claims to universality in moral judgement with any security is due in part to the convincing critique that has been directed at it by communitarian writers. I have set these positions in opposition through a consideration of war crimes prosecutions based on the observation that communitarian theory must inevitably lead to a relativistic tolerance of gross abuses provided they are perpetrated intra-state. It is through a consideration of war crimes prosecutions that this becomes apparent. I deviate from the intuitive use of the term 'war crime' here but take it to include such instances on the grounds that action by the international community is based on the legal precedents and customs originating in the body of law that addresses violations of the laws of war.⁴⁵ It is of course the cases concerning intra-state conduct and the form of intervention they represent, that are interesting from a theoretical viewpoint. These cases are 'pure' in the sense that they cannot be justified by reference to other principles. In contrast, prohibitions on the motivations and conduct of war between states can be justified in terms of security, economics and convenience as well as by reference to moral principles. This is not to say that other bodies of legislation are devoid of moral content, for instance there is a clear moral dimension to other aspects of the laws of war, most notably Grotius.⁴⁶ Whilst we should not exclude morality as an

⁴⁵ A prime example of this extension of the laws on war crimes is that of the creation of the Genocide Convention 1948 and the willingness to regard widespread atrocities as a form of armed conflict covered by the protocols to the Geneva Conventions. The latter is evidenced in the ICTR's mandate to prosecute just such crimes against humanity in the context of conflict within Rwanda.

⁴⁶ H. Bull, B. Kingsbury, and A. Roberts, *Hugo Grotius and International Relations*, Oxford: Clarendon, 1990, and D. Luban, 'Just War and Human Rights'. *Philosophy and Public Affairs*, Vol.9: No.2. 1980. pp.160-181.

aspect of such legislation, we cannot rely on it either. Thus it is within the 'pure' interventions for crimes against humanity that the impasse between cosmopolitanism and communitarianism is revealed, and in turn this impasse, once demonstrated, provides an explanation for the hesitant and contradictory manner in which prosecutions have been made.

Of course, communitarian theorists are as reluctant to accept this charge, as cosmopolitanism theorists are reluctant to accept the charge of cultural imperialism and at both ends of the spectrum, accommodations have been made. But just as cosmopolitan theorists are ultimately unable to sustain a rigorous universalism without falling prey to the charge of cultural imperialism, ultimately the several key observations which taken together constitute communitarianism, justify the characterisation of communitarian thought as ultimately particularist. Frazer identifies three key aspects of communitarianism comprising an ontological thesis, an ethical thesis and a methodological thesis. Ontologically, communitarianism argues for the non-reducibility and significance of collectives. Ethically communitarians place the locus of value upon the social individual or the individual's society itself. Methodologically, there is a rejection of the project of attempting to secure moral certainty by the deduction of universally valid fundamental principles.⁴⁷ The fundamental structures of communitarian thought rest upon the twin pillars of social constructivism and particularism.⁴⁸ What is the significance of these characteristics for war crimes prosecutions?

⁴⁷ E. Frazer, *The Problems of Communitarian Politics: Unity and Conflict*, Oxford: Oxford University Press, 1999, p.21.

⁴⁸ *Ibid.*, p. 19.

Primarily, the social constructivist element of communitarianism stresses the significance of the fact that humans live in communities not only as an empirical observation, but also as a normative proposition. Morrice describes this as the idea that humans achieve fulfilment of their nature only in the context of social and political life.⁴⁹ The genus of this approach is commonly credited to Hegel, due to his focus on political community.⁵⁰ In opposition to Kant, who sees the individual as a moral agent existing prior to society and driven by the categorical imperative, Hegel denies that it is possible to envisage individuals in isolation from the community which shapes them and constitutes them as individuals.⁵¹ The impossibility for the communitarian of separating the individual from their society is illustrated by Moody who compares this enterprise to the attempt to separate fish from water.⁵² A natural corollary to this way of thinking is a defence of the legitimacy and moral significance of the nation/state; examples of this are Miller and Walzer.⁵³ Miller deals with ethical nationalism and Walzer with non-intervention and Just War theory.⁵⁴ This leads to a form of particularism in that values must be inculcated and are therefore peculiar to each community. There is no neutral ground from which to make objective moral judgements. When the intervention is grounded in morality, as are prosecutions for crimes against humanity, we run the risk of ethical imperialism. Yet in avoiding this,

⁴⁹ D. Morrice, 'The Liberal-Communitarian Debate and its Significance for International Relations', *Review of International Studies*, Vol. 26: No 2, pp.233-251, p.240.

⁵⁰ See for example: R. Plant, *Hegel: An Introduction*, (2nd Ed), Oxford: Blackwell, 1983. Z. Pelczynski, *Hegel's Political Writings*, Oxford: Oxford University Press, 1964.

⁵¹ Brown, Op Cit. n.3, p. 62.

⁵² T. Moody, 'Liberalism and an Eccentric Communitarianism', in C.F. Delaney, (ed), *The Liberalism-Communitarianism Debate*, Boston: Rowman and Littlefield, 1994, p.98.

⁵³ Morrice, Op Cit. n.49., p. 238.

⁵⁴ D. Miller, *On Nationality*, Oxford: Oxford University Press. 1995. and M. Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations*, New York: Basic Books, 2nd ed, 1977. M. Walzer, *Spheres of Justice: A Defense of Pluralism and Equality*, New York: Basic Books Inc, 1983.

communitarianism cannot guarantee and may even threaten, individual rights and liberties and also poses the problem of relativism.⁵⁵

In terms of ontology, the most successful communitarians argue for the significance and non-reducibility of the nation-state, although this mode of analysis is not strictly necessary to communitarian thought.⁵⁶ However, failure to focus on a particular unit as representative of 'community' leads to difficulties in analysis. For instance, if the idea of community is left as a mutable one it is difficult to see from where analysis can proceed. Individuals exist in a multiplicity of social relations comprising family, work, religious, local, ethnic and national communities. It is difficult to see which communities could be significant in which circumstances whilst still saying something useful about moral principles. Walzer avoids these criticisms by focusing upon the nation-state as the bearer of community rights. As such he reconstitutes the legalist paradigm to extend the rights of self-protection and survival of nation-states.⁵⁷ It is worth noting at this juncture that this argument is distinct from the realist approach to state centrality in international relations because Walzer constructs a moral/ethical defence of the nation-state, unlike the prudential anti-moral arguments of realist writers.⁵⁸ In addition he accepts the potential for pre-nascent communities to exist within states. However, this approach leaves us with some difficult moral problems particularly in the prosecution of war crimes. The tendency to view the nation-state in such a monolithic way can tend towards a covert ascription of collective guilt. As we will see in chapter two, such an ascription is not logically sustainable. By justifying non-intervention he unconsciously diverts responsibility from individuals towards

⁵⁵ Morrice, *Op Cit.* n.49, p. 246.

⁵⁶ Morrice, *Op Cit.* n.49.

⁵⁷ Hutchings, *Op Cit.* n.22., p. 45.

⁵⁸ See Chapter 2.

collectives.⁵⁹ It also diverts from the idea that within ‘crimes against humanity’ prosecutions there are not only aggressors but also individual victims.

Communitarianism has difficulty justifying the protection of individuals, Rawls argues that ‘it leads to the systematic denial of basic liberties and may allow the oppressive use of the government’s monopoly of (legal) force’.⁶⁰ Black addresses this difficulty by admitting that cultures where civil rights were not respected pose a ‘special problem’.⁶¹ Thus communitarians are criticised for being conservative and failing to offer grounds to challenge the values of society.⁶²

War crimes prosecutions are regarded as a ‘hard case’ in that they pose special moral dilemmas. The extreme nature of war crimes violations, particularly systematic violations, makes them an issue which requires special consideration. To prioritise the rights and responsibilities of individuals is to universalise both crimes and criminals, thereby removing the state from consideration. Where the criminal is an organ of state and the crime requires state resources in its commission there are conceptual as well as practical difficulties with this course. The reverse approach holds that the rights of communities should be respected and state-sovereignty should be held as a supreme principle, on the grounds that morality is particular to communities rather than universal, or it is held that communities have a moral right to self-determination in order to ensure the ethical growth of its members. Yet in circumstances of gross atrocities it is evidently difficult to endorse this position and accommodations have been made.⁶³

Walzer, for instance, endorses a notion of ‘thick’ and ‘thin’ versions of human rights,

⁵⁹ See Chapter 2.

⁶⁰ J. Rawls, *Political Liberalism*, New York: Bantam Books, 1993, p.146.

⁶¹ A. Black, ‘Nation and Community in the International Order’, *Review of International Studies*, Vol.19, 1993.

⁶² S. Avineri, and A. De-Shalit, (eds), *Communitarianism and Individualism*, Oxford: Oxford University Press, 1992, p.10.

⁶³ A. Gewirth, *Reason and Morality*, London: Chicago University Press, 1978.

with the thin, minimalist morality being found in all societies.⁶⁴ The difficulty with this assertion is that it looks very much like an empirical assertion of fact. Yet even if such an assertion were to be investigated empirically, there are grave doubts as to whether this could conclusively demonstrate shared moral values.

Morals as Factual Propositions

There are several substantive methodological issues when it comes to verifying empirically the existence of a moral code, however basic, that is valid throughout all cultures and for all times. There are both practical obstacles and theoretical objections to this approach that are of such magnitude that within ethical theory to require empirical justification for a position is to abandon the position. However, the most concerted and thorough attempts to provide comparative data have been made by social and cultural anthropologists, and this is a project that has proved to be of great interest to human rights theorists.⁶⁵

The first problem with an empirical approach is a methodological one. How far might it be possible to establish quantifiably such emotive and embedded values? Who might decide which are the appropriate values to investigate and should such a massive project be carried out simultaneously in every culture of the world, how long might we presume the data would be valid? This problem is complicated by the observation that practices within cultures may be disputed and it may be that a minority share a moral outlook that is similar to that of different cultures. There is therefore a basic fallacy in assuming that consensus indicates truth. We cannot rule out the possibility that a large number of

⁶⁴ M. Walzer, *Thick and Thin*, London: Notre Dame, 1994.

⁶⁵ Such as A.D. Renteln, *International Human Rights: Universalism vs. Relativism*, London: SAGE, 1990, and R.J. Vincent, *Human Rights in International Relations*, Cambridge: Cambridge University Press, 1991.

people may be incorrect in their beliefs. Renteln attempts to solve this problem by centralising the idea of 'enculturation', coupled with a transitory portrait of moral beliefs.⁶⁶ Whatever is believed to be true is true for the purpose of establishing common moral criteria. The difficulty is that this gives little opportunity for criticism of different moral beliefs. Renteln notes the divergence between descriptive and normative ethics but does not solve it. Instead she suggests that it cannot be that other cultures lack moral insight and 'if it turns out that most other cultures do not believe in a moral principle which the western world embraces, it might be that they are right'.⁶⁷ Yet this does not address the problem of finding a secure foundation for ethical judgement. When faced with the baseline ethical judgements involved in war crimes prosecutions she must still simply hope that a majority might share the same moral instinct. If they do not she cannot impose an alternative moral vision upon them.

Isaacs addresses this problem in a manner particularly relevant for war crimes prosecutions, by focusing on the ascription of responsibility in a society where wrongs 'fit into schemes of culturally accepted practice, especially those practices that keep some groups in disadvantaged positions'.⁶⁸ She argues that allowing cultural context to operate as a mitigating factor fails to make sense of the mechanisms of progress whereby moral beliefs are modified by conflict, as in the abolition of slavery.⁶⁹ Isaacs suggests that individuals are still responsible for their actions even if their wrongdoing is approved of by the majority. Although Isaacs does not address the issue of demonstrating moral truth, her argument that opposing moral positions are always represented in any given society and therefore that each individual has the opportunity

⁶⁶ Renteln, Op Cit. n.4., p. 74.

⁶⁷ Ibid., p. 90.

⁶⁸ T. Isaacs, 'Cultural Context and Moral Responsibility', *Ethics: An International Journal of Social, Political and Legal Philosophy*, Vol. 107, No. 4, July 1997, pp.670-684. p.670.

⁶⁹ Ibid., p. 671

for moral autonomy is a valuable one. It provides a pathway for justifying the ascription of individual criminal responsibility even in circumstances where cultural practices sanction the atrocity.

The idea that rights vary according to culture is ‘an anthropological commonplace’ indeed this assumption comprises the business of anthropology.⁷⁰ But in its most extreme variant it is described as ethical relativism.⁷¹ Although in its most consensual form it is difficult to argue with the notion that values vary according to culture, there have nevertheless been some serious attempts to seek ‘cross-cultural universals’, values and moral beliefs which transcend the boundaries of community or culture.⁷² However, it is not enough to claim that because such broad principles might be universally acceptable, consensus on all ethical issues is implied. By universality in ethics we must mean agreement on the practical implications that holding such principles implies. To allow that murder is forbidden in all cultures, and then to describe how some practices, such as infanticide or patricide for example, are acceptable in different cultures is to have said nothing concrete about a moral consensus on the ethics of killing. The word murder suggests wrongfulness.⁷³ Such cross-cultural comparisons can reduce ultimately to the observation that wrongfulness is regarded as bad in all cultures, and this is just a truism. This has led theorists such as Vincent to describe such modes of enquiry as being possessed of a ‘wishful character’.⁷⁴ So far such enquiries have failed to offer

⁷⁰ Vincent, Op Cit. n.12., p. 48.

⁷¹ However, it is discussion of the topic within social theory which contains the most extreme statement of relativist thought. It is here the notion that even criteria of rationality are relative to culture is found. An example of this is the debate between Lyotard and Habermas. Representative samples of their work are J.F. Lyotard, *The Postmodern Condition: A Report on Knowledge*, Manchester: Manchester University Press, 1984. And J. Habermas, *The Philosophical Discourse of Modernity*, Cambridge: Polity Press, 1987.

⁷² For instance, Claude, Op Cit. n.20. and Schwab, Op Cit. n.20.

⁷³ Frankena, Op Cit. n.20, p. 55.

⁷⁴ Vincent, Op Cit. n.12, p.49.

either definitive proof of cross-cultural universals, or to resolve their inherent methodological problems.

International Law as an Expression of Morality

To rely simply on the existence of international legislation as evidence of universal moral codes and norms would offer both clarity and comfort to the pragmatist who wished to show that a universal moral consensus existed. If the international laws of war proscribe particular behaviours, and this proscription is justified by customary practice,⁷⁵ the matter might seem to be resolved. However, there are several fundamental objections to such a simplistic formulation. Firstly, the relationship between law and morality is the subject of intense debate primarily between positivist and natural law theorists.

A significant strain of thought regards the very existence of law as indicative of shared moral values, commonly known as natural law. Yet there are reasons for doubting that this position rests securely given that it is opposed by a dominant tradition in law, positivism. These arguments are even more contentious when applied to international law, given its lack of independent coercive capacity and the immaturity of its legislative functions. In its simplest distillation natural law represents the notion that there are objective universal standards of morality which law should seek to express. Originally based upon religious ideals, it asserts the interrelationship between law and morality. Conversely, positivism regards law as a self-contained system of rules; as such there are no objective standards by which to dispute the legitimacy of particular laws.⁷⁶

⁷⁵ See Chapter two.

⁷⁶ For a detailed discussion of these positions see M.D.A. Freeman, 6th Edition, *Lloyds Introduction to Jurisprudence*, London: Sweet and Maxwell, 1994. n.7

According to this view law is not subject to moral evaluation, rather morality and law are logically discrete disciplines. These arguments raise sufficient problems to doubt both the clarity and the comfort of the pragmatist.

Also, there are difficulties in asserting that international law is truly universally representative, either because it is negotiated and agreed upon by states which we cannot securely demonstrate are representative of their own populations; or it could be argued that, rather than representing morality, the function of such prosecutions is to legitimise traditionally accepted forms of warfare, by delegitimising particular parts of it. International law could also be portrayed as occurring within a western structure of legal discourse and priorities. Undoubtedly, much humanitarian law reflects the strong influence of western states and scholars upon its development.⁷⁷ Yet to dismiss it on these grounds is to ignore both its coverage and recognition. As we shall see, since the Nuremberg Tribunal there has been an enormous amount of substantive humanitarian legislation concluded, but more importantly some of this law has achieved near universal recognition. For instance, by 1991, 137 states had ratified the Genocide Convention,⁷⁸ these included states from every continent and cultural group in the world. However, even this does not indicate full moral consensus because there are no enforcement organs provided for in the offence. We cannot exclude the possibility that states may have ratified such agreements whether they endorsed the moral sentiments it expressed or not. A simple reliance on the existence of legislation cannot conclusively demonstrate moral consensus, thus the only dependable indication of moral consensus must be willingness to enforce this legislation. This forms the central observation of this

⁷⁷ Ratner, *Op Cit.* n.13, p. 22.

⁷⁸ A. Roberts, and R. Guelff, *Documents on the Laws of War*, 3rd Ed. Oxford: Oxford University Press. 2000, pp.184-188.

thesis, and also raises the problem explored throughout, that prosecutions have a unique moral bearing on the condition of universally held moral values.

Conclusion

There have been many attempts to explore and ground the notion of universality in moral discourse, either theoretically, through empirical research or through jurisprudential enquiry, but all have ultimately proved inconclusive with regard to gross atrocities. These represent what is known as a 'hard case' in ethical discourse for regardless of the possibility of demonstrating analytical security; we are intuitively uncomfortable with the conclusion that they should not be addressed. Thus within communitarianism, there have been accommodations made to exclude them from the particularistic description of normal moral discourse. Yet it is impossible to show through empirical research that different cultures share common moral values with regard to even the most basic of moral values. International legislation is a good starting point for demonstrating the coverage and recognition of humanitarian principles but ultimately it is only from the criminalisation of these offences that shared moral values can be inferred. Yet this does not imply that this process is complete for this would be overstating the case. Rather, the imposition of individual criminal responsibility and, more importantly, the beginning of penal sanctions for this offence represents the very first steps in this direction. Even the constitution of the ICTY may not be a full expression of this principle for it was convened under Security Council Resolution.⁷⁹

Thus the tribunal exercises its jurisdiction as Fenrick points out, on the basis of

⁷⁹ The competence of the Tribunal is set out in Article 1 of the Tribunal Statute; 'The International Tribunal shall have the power to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991 in accordance with the provisions of the present statute.' Thus the content of humanitarian law is indicated by customary practice but its jurisdiction is constituted only by the statute, established by Resolution 808.

‘internationality and not universality’.⁸⁰ This marks another distinction between the content and the enforcement of international humanitarian law. Customary practice, as a well-established guiding principle to the content of humanitarian law, does not extend to jurisdiction. This must be established by the international community.

The simplest theoretical solution to this difficulty of moral particularism would be abandonment of the principle of individual responsibility and punishment of the whole state for systematic, or wide, war crimes (although not, of course, for crimes against its own citizens) yet this breaches the fundamental precepts of moral responsibility, (within legal discourse as well as moral discourse). To criminalise these offences without applying individual responsibility for them would bring us no closer to showing moral consensus. For the assumption of moral universality is embedded within the legislative principle of individual responsibility. As we shall see in chapter two, when responsibility is assigned to collectives, such as states, it is inevitably divorced from the end-step of ascribing guilt; it can go no further than the encouragement of collective shame. In the prosecutions of war crimes this has serious implications for the application of criminal sanctions. When responsibility has been applied to whole states it has been, and must be, civil in its character. The fact that international humanitarian law has progressively become focused towards individual criminal responsibility, culminating in prosecutions in the name of the international community, must imply awareness of the violation of some form of moral order.

When assessing the potentials for, and maturity of, a nascent shared morality, it is essential to contextualise such a development. When setting the development of individual criminal responsibility against the traditional patterns of state interaction it

⁸⁰ W.J. Fenrick, ‘Some International Law Problems Related to Prosecutions Before the International Criminal Tribunal for Former Yugoslavia’, *Duke Journal of Comparative and International Law*, Vol. 6:

becomes evident just how radical is its imposition. The principle resides in contradiction to the whole edifice of the state system and the traditional structures of interaction conditioned by protocol, custom and diplomatic convention.

Chapter 2

Moral Principles in International Relations

The last chapter has shown the difficulty in assessing claims to moral universality. As we shall see in the next three chapters there is an overwhelming historical dominance of states and the structures which condition their interaction. Set against this backdrop the truly radical nature of the Nuremberg Tribunal and its imposition of individual criminal responsibility can be fully appreciated. Further to this, a substantive body of humanitarian law has been created outlining the form and nature of the state's responsibility to its citizens (see chapter 5). More pertinently, the abrogation of these responsibilities is a criminal offence, carrying penal sanctions, however unevenly, or reluctantly, they have been enforced. Yet, the legislation providing for individual criminal responsibility continues to be challenged not only by the difficulty of its imposition in the face of traditional structures but also by the theoretical positions that justify those structures. The most dominant of those positions is the realist argument that there should be no moral dimension to international legislation, that such considerations are illogical, impractical or inappropriate.

But there are also alternative conceptions of accountability which allow that these offences should be criminalised, but which target accountability at the state rather than the individual. This strand of thinking is expressed legislatively as state criminal responsibility. At first sight, a simple focus upon the state or collective, particularly where the offence is system crime, would seem to solve many of the difficulties with the application of individual criminal responsibility. Yet, close examination of the nature of moral accountability reveals irresolvable problems with this approach. The full

and legitimate ascription of criminal responsibility requires satisfaction of several conditions, conditions which collectives cannot meet.

An investigation of prosecutions for system criminality as a moral activity demonstrating shared international values implies several assumptions about the nature of international society, which ultimately underpin this thesis. Accordingly, it is necessary to examine and defend several of the most important. The first is that moral theory holds relevance for the study of International Relations contra classical and modern realism and other structural accounts of international relations. Also, we will examine assumptions about the nature of ascribing moral blame and the suppositions about intention, agency and autonomy which underlie common moral judgements. From this, I shall propose a moral individualism, expressed as individual criminal responsibility, as being the only theoretically coherent position.

Study of the classic texts of political philosophy and the thinkers who generated the insights they reveal inevitably raise problematic issues when applied to the modern international political landscape. However, this should not disguise the benefits of such texts and the importance of the thinkers behind them, in their role as landmarks in the conceptual understanding of modern political problems. Although the categories of Hobbesian or Kantian, for instance, are inevitably not inclusive, such modes of thinking about the international system all contain valid insights into the mode of relationship between state and individuals, and of states with each other. Furthermore, such texts have become integral aspects of specific conceptions of international politics within which they are relied upon as legitimation for current analyses and prescription for future developments.

This thesis applies traditional modes of analysis to a particular problem of the modern age, the notion of ascribing responsibility for state-sponsored crimes to individuals through the application of criminal penal sanctions. This is a specific aspect of international humanitarian law which has been largely neglected within the study of moral responsibility, often quite deliberately.¹ This problem has been chosen because it represents the interface of the relationship between the individual and state, and I argue that this interface is most clearly evident at the point of punishment. As such it is illustrative of the 'hard cases' of moral philosophy and offers the potential to explore the main categories of political thought in both their normative and prescriptive aspects, and in their substantive, practical applications. This thesis offers, however, less of a normative position on the prosecution and punishment of violations of humanitarian law, than a descriptive assessment of the actual trends evident in the confrontation of such crimes.

Moral Scepticism and Normative Theory

International ethics manifest that rare characteristic of being one of the few branches of ethical enquiry that contain a radical anti-ethical position. This anti-ethic is found primarily within the work of classical and modern realism. Modern structuralist positions reject the project of normative theory altogether whilst classical theorists engage closely with moral philosophy, producing theoretical explanations of why ethics should not intrude into International Relations. So the spectrum of realist approaches embody not only a descriptive critique of International Relations that notes that morality in practice does not intrude upon relations between states, but also a normative approach

¹ See for instance P.A. French, *Individual and Collective Responsibility*, 2nd Ed, Rochester Vermont: Schenkman Books, 1972. Who argues that 'It must be remembered that moral blame is to hold responsible, to deem blameworthy. It is not to punish.' p. 29.

which argues that it ought not to do so. Were we to accept either of these arguments the question of how and when responsibility for war crimes is assigned would be a redundant one. Instead the focus would be upon how such ascriptions impact upon the national interest of the states concerned. Yet this would leave the whole dimension of the nature of the relationship between individual and state unexplored, reducing the ambit of any enquiry to a positivist approach to the legal framework coupled with political context. It is precisely this which engenders confusion and incoherence within the application of the law. The realist/structural insistence on excluding morality denies an integral aspect of inter-state relations and ignores more questions than it solves.

From the perspective of the ethicist, it is possible to characterise the exclusion of normative theory by structural theorists as something of a counsel of despair. For on this view, the nature of international interaction is determined by the structural conditions within which states operate, and as a corollary to this, people's perceptions of these interactions are also structurally determined by the social and political reality within which they find themselves. Thus moral theory is, at best, redundant. This is combined with an underlying notion that the political structures are autonomous in some sense.² Normative theorising is pejoratively dismissed as either utopian or idealism.³ Instead, central to structural (or neo) realist analysis is the pursuit and use of power. Herz describes realism as 'A recognition of the inevitabilities of power politics in an age of sovereign states'.⁴ The classic definition of realism was formulated by Morgenthau in his work *Politics among Nations*, and describes the dynamic of state behaviour in terms of the protection of national interests, manifested by a disregard for either declared

² M. Frost, *Ethics in International Relations: A Constitutive Theory*, Cambridge: Cambridge University Press, 1996, pp. 52-55.

³ An example of this type of distinction is evident in E.H. Carr, *The Twenty Years Crisis*, London: Macmillan, 1946.

⁴ J.H. Herz, *The Nation-State and the Crisis of World Politics*, New York: David Mackay, 1976, p.79.

moral sentiments, or the moral sentiments of its own and other citizens.⁵ Here prescriptive moral theorising is not just disregarded but specifically excluded from consideration (unless it is by default). Ultimately realism, purporting to reveal the true and actual character of state interaction is instinctively allied to scientific practices. Normative theory, by contrast is linked to the tradition of moral philosophy and as such assumes both independent human volition in the structure of international institutions, and also that such structures can be changed. This assumption must be made or normative theory, with its focus on prescriptive conceptions of international relations, would have no purpose. Although realists may escape such theorising in less emotive areas of international relations, to deny the normative dimension of war crimes prosecutions is patently unsatisfactory.

However, whilst political realism focuses on the structure of political power, other structural accounts of international relations also deny the applicability of morality. Interdependence theorists present the international economic system as the basis of world politics whilst Marxists, of course, focus on class as the determinate feature.⁶ All of these positions share a common assumption that an objective social reality shapes and determines the nature of interactions, independent of normative propositions about what the world ought to be like.⁷ However, I follow Frost in disputing such a rigid emphasis on structural constraints. The obvious objection is that human beings are

⁵ H. Morgenthau, *Politics among Nations: The Struggle for Power and Peace*, New York :Knopf , 1948, p.5.

⁶ M. Frost, *Ethics in International Relations: A Constitutive Theory*, Cambridge: Cambridge University Press, 1996, p.53.

⁷ E.H. Carr, *The Twenty Years Crisis*, London: Macmillan, 1946; R. Niebuhr, *Moral Man and Immoral Society: A Study in Ethics and Politics*, New York: Charles Scribner's Sons, 1932; and H. Morgenthau, *Politics Among Nations: The Struggle for Power and Peace*, 2nd ed, New York: Knopf, 1954, are the three main proponents of modern realism. However, an important neo-realist is K.N. Waltz, *Theory of International Politics*, New York: Random House, 1979. For a good summary of the realist position see T. Nardin and D. Mapel, (eds), *Traditions of International Ethics*, Cambridge: Cambridge University Press, 1996 or for a discussion of Waltz see R.O. Keohane, *Neo-Realism and Its Critics*, New York: Columbia University Press, 1986.

reflexive and adaptive in their nature and change evidently can and does occur. To deny that this is the task of individuals is to endorse the *status quo*. But leaving such a simplistic criticism to one side, Frost points out that:

Wherever reference is made to a structure ... which is said to force people to act and think in certain ways, this structure cannot be identified without reference to some social practice which consists of people bound together by some set of constitutive ideas which guides the actions of those participating in it.⁸

States then are constituted by people who recognise each other as bound by certain sets of rules. Even if they would rather choose not to play the game, given that they must play, the rules of that game are recognised by those participants. If normative theory is evaluation of those rules it is then, not only possible, but also essential. This perspective however, mounts something of a challenge to the portrait of international relations as the relations between states. In its emphasis on the practitioners and policy-makers of the international system, and also the populations that such people represent, Frost's position could be interpreted as an individualistic one. This sort of orientation marks a major difference in orientation between realists and communitarians on one hand, and moral individualism and cosmopolitanism on the other.⁹ The conception of the state as an organic unit with volition, desires and agendas unrelated to the desires of the individual participants in that system makes a serious assumption about the nature of collective morality, an assumption which is too far-reaching in its implications to simply allow. Whilst communitarians at least mount a serious theoretical defence of this orientation, all too often in realist perspectives it is taken as a given.

⁸ Frost, *Op Cit.* n.2., p. 59.

⁹ This dichotomy subsumes many categories of thought many of which, such as realism and communitarianism, have little else in common. This thesis will highlight this opposition as being of

Of course, the label 'realist' disguises many differences even as it highlights similarities. It is perhaps best understood as a continuum from radical realism to a variant that is extensively qualified,¹⁰ and this is particularly true of debate about the role of morality within international affairs. Yet, there is a fundamental agreement, for even 'weak' conceptions of realism embody some notion of a constraining structure.¹¹ However, here normative conceptions of morality are admitted into the discourse, even if the purpose is thereby to dispute their applicability to the international scene.

There are several objections to morality in international affairs. Firstly, there is the practitioner-theorist approach, which argues that morality should not enter into international discourse, although it is possible for it to do so. This ties in with the second approach, broadly construed as classical, which denies the possibility of moral considerations in an anarchical system. Finally, there is the notion of morality as a private not public concern, inappropriate as a policy option for holders of office. These can be broadly classified as either descriptive or prescriptive accounts of the absence of morality in international relations.¹²

Descriptive Realism

The descriptive objections to morality rest on a conception of the nature of international interaction. These arguments are fairly well trodden, so only their broad shape is indicated here, in order to demonstrate that these perspectives fail to allow an

crucial importance for any conception of international moral justice, a preposition we will examine via the assignment of moral blame in situations of state violence.

¹⁰ In fact, most theorists offer qualifications of some kind. Both Walzer (1977) and Donnelly (1996) point to Thucydides' account of the Athenian attack of Melos as an example of radical or pure realism. Whereas G. Schwarzenberger, *Power Politics: A Study of International Society*. New York: Frederic A. Praeger, 1951, p.158; and J.H. Herz, *Political Realism and Political Idealism: A Study in Theories and Realities*, 1976, p.11; as well as Carr have to a greater or lesser extent qualified their versions of realism.

¹¹ J. Donnelly, in T. Nardin, and D. Mapel, (eds), *Traditions of International Ethics*, Cambridge: Cambridge University Press, 1996, p87.

intellectual space to consider real phenomena, variations in the ascription of criminal accountability for actions which violate a moral consensus. The classic descriptive account of international interaction is at root a Hobbesian one, based upon his conception of a state of nature, later applied to the international sphere by Bull who characterised it as 'an anarchical society'.¹³ However, the notion of an anarchical system has also been recast as a question, not of abstract principles of relations between states, but as a question of methodology. International relations deals with a peculiar area of politics. Determining how to analyse morality in international relations requires consideration of that peculiarity. Hollis and Smith outline it thus:

whereas domestic politics occur within a political system which includes a government to make and enforce laws, the international system is anarchic. By this we mean not that it is chaotic but simply that there is no government above the states which comprise it.¹⁴

The "level of analysis" problem deals with the relationship between units and system.¹⁵

To produce any coherent account of international affairs it is necessary to draw the distinction between elements that belong to the overarching "system" and the units that comprise them. For the international theorist this task is fundamentally complicated by the disagreement over the relationship between the national and international. For realists, analysis should take place on a state-to-state level, for, methodologically speaking, states are the individuals of the international system. Systemic investigations are confined to the international community and the units of analysis are states. But for

¹² G. Graham, *Ethics and International Relations*, Oxford: Blackwell, 1997, Chapter 2.

¹³ H. Bull, *The Anarchical Society: a study of order in world politics*, Basingstoke: Macmillan, 2nd edn. 1995

¹⁴ M. Hollis and S. Smith, *Explaining and Understanding International Relations*, New York: Oxford University Press, 1991, p. 7.

¹⁵ J.D. Singer, 'The level of Analysis Problem in International Relations', in K.E. Knorr and S. Verba (eds.) *The International System: Theoretical Essays*, Princeton: Princeton University Press, 1961, pp. 77-92.

the individualist the problem is more complex, for a theoretical perspective to take account of the wishes or motivations of the citizens of those states a different level of analysis must be used, and that may well encapsulate intermediate levels such as bureaucratic. From both perspectives the dilemma is clear: do we account for the behaviour of states in terms of the system or is the system conditioned by the wishes of states and the individuals who comprise them?¹⁶ Also, if states do condition the international system, is their contribution an individual one based on a unique combination of interests? If, as the realists claim, it is, then how do the constituent parts of that state affect its participation in international society? Given that individual responsibility is ascribed for war crimes and that it is the international community which decides how and when action is taken, it is immediately apparent that state level analysis will prove inadequate. This is obviously a new category of relationship between individual and state, and the consequent interactions demand a conceptual framework that can accommodate them.

Let us return to the theoretical roots of such a question and re-examine the issues it raises in the light of Hobbesian theory. Hobbes' description of a society without sovereign authority is at the root of the realist conception of international relations, for:

During the time men live without a common Power to keep them all in awe, they are in that condition which is called Warre; and such a warre, as is of every man, against every man.¹⁷

¹⁶ B. Buzan, 'The Level of Analysis problem in International Relations Reconsidered' in K. Booth and S. Smith, (eds), *International Relations Theory Today*, Cambridge: Polity Press, 1995, pp. 198-216.

¹⁷ T. Hobbes, *Leviathan*, London: Penguin, 1988, p.185.

Under such conditions, with states coexisting in what Slomp terms 'equality of dangerousness', civilisation, and therefore morality cannot flourish.¹⁸ From a Hobbesian perspective, the issue is not with the structure of morality,¹⁹ but instead with the conditions under which morality is likely to apply.²⁰ Yet there are several difficulties with this reading of Hobbes, for Hobbes was exclusively concerned with the atomistic asocial individual. In common with many theorists,²¹ his 'state of nature' is a philosophic device which allows us to consider individuals decontextualised from their social surroundings. Hobbes then, could be read as the ultimate moral subjectivist.²² Ultimately, characterisation of the international realm as a state of nature rests upon an analogy which treats states as large individuals. I argue that this way of regarding states is fundamentally flawed, as it is only individuals who have a unified moral personality. Treating states as large individuals is a conceptual device that is revealed as inadequate only when we examine the process of ascribing responsibility. But it is by no means clear that this analogy could hold under other circumstances. For instance, it cannot

¹⁸ G. Slomp, 'Hobbes and the equality of Women', *Political Studies*, Vol. 42: No 3, 1994, p.445. Although Slomp is not referring to inter-state relations here.

¹⁹ Although Hobbes' nominalism does have profound implications for his conception of morality, as for him moral codes have no objective reality, instead they are a function of our communal understandings of terms like 'good' and 'evil'. (see Ch. 5, *Leviathan*). However, it could be argued that the right Hobbes provides to resist a sovereign who threatens a subject's life could be seen as a basic defence of human rights. This interesting point is made by M.C. Murphy, 'Was Hobbes a Legal Positivist?', *Ethics: An International Journal of Social, Political and Legal Philosophy*, Vol. 105, No.4, July 1995, pp. 846-873.

²⁰ M. Cohen, 'Moral Scepticism and International Relations', *Philosophy and Public Affairs*, Vol. 13, 1984, pp. 299-346.

²¹ Rawls uses this device with his 'veil of ignorance', Hume and J.S. Mill also employ a 'state of nature', to explore a mythic pre-social individual.

²² Hobbes' focus upon scientific method conditioned the nature of his thought producing a highly individualistic account of human nature and interaction. He adopted the 'resolutive-compositive' method of Gallileo. The resolutive element of Gallileo's method consisted of an exercise in intuition as the theorist searched for factors which would logically combine to produce an explanation of the observed phenomena. This phenomena, in Hobbes case, was of course society. Once found, these factors, or postulates, could then be shown to lead inevitably to the initial observed phenomena. The main feature of such postulates is that they are immediately evident to any reasonable enquirer, or that they should be so simple as to be indisputable. It is from this point, the compositive stage, that Hobbes begins to set out his argument. Naturally, the most simple or self-evident factors determining society were to be found in the nature of the individual. This has lead to some of the most serious flaws in Hobbes' thought for he fails to account for collectives within society such as social classes, or for the impact of social context and how it may determine the nature of the individual. Given these problems on the societal scale it is difficult to see how they can be avoided in the international arena. New research on cultural context might suggest that such difficulties would be worsened.

accommodate domestic pressure put upon states by their national populations and the impact this may have on foreign policy. It is also arguable whether states can be accorded the same motivational bases as individuals, or whether they suffer the same degree of peril in the international system as a true state of nature might offer the individual.²³ For Cohen, these sorts of doubts are enough to dismiss any claim that states are freed from moral restraint, for unless conditions of the same severity as those which apply to the individual in a state of nature are demonstrated, then states have room to pursue a moral course of action.²⁴

Prescriptive Realism

In contrast, prescriptive debarments of morality in international relations approach the problem from a different angle. States could incorporate moral positions but normal moral codes should not be applied, either because the inter-state system is an unsuitable arena for morality, or because statesmen have no right to apply it. On these views, war crimes prosecutions, seen as moral actions undertaken by states, are illegitimate and an area in which the international community should not intrude. The first line of argument casts doubt on our ability to formulate universally applicable moral truths is

²³ Hobbes' hypothesis about motion provides the basis for his suppositions about human nature and motivation. This is clearly shown in Chapter 6 of the *Leviathan* in which he describes "the interior Beginnings of Voluntary Motions, commonly called the Passions". These motions can be classed as appetite and aversion and are endeavours either away from, or towards that which caused them. The movement towards something is experienced as pleasure, and away from something as pain, thus we desire that which we move towards and hate that which threatens us. Hobbes takes an nominalist position, the concepts of 'good' and 'evil' are merely names which pluralise several instances'. These names refer only to something which particular entities have in common, that is, whether they inspire appetite or aversion. So for Hobbes, natural man is neither good nor evil, he cannot avoid repelling death, therefore his attempts to do so are a natural right. Is this analogous to the state? Certainly states do not survive in constant fear of total violent destruction or 'death' for they cannot be vulnerable to destruction in the same way as a lone individual in an anarchic situation. Also, it is hard to make the case that all states are equally vulnerable in the same way as individuals. They do not sleep and they cannot get old or diseased, therefore it is hard to accord them the same motivational bases of appetite and aversion as individuals, and consequently hard to allow them the same pre-emptive rights as Hobbesian man.

²⁴ M. Cohen, *Op Cit.* n.20, p. 326.

questionable and that attempts to do so are a form of 'cultural imperialism'.²⁵

Although, the most extreme result of such arguments is the charge of relativism,²⁶ this is avoidable when refined by qualifications.²⁷ Broadly, these theorists can be classed as communitarians, and there is a strong concern with national identity and sovereignty. Such a line of argument is not easily dismissed as we have seen in the last chapter when the contrast between cosmopolitan claims to universal conceptions of morality, an essential precondition when attempting to impose moral standards through legal action, were set against communitarian arguments. A more extreme critique along communitarian lines is that of post-modernism. Halliday sums up this position most succinctly, albeit rather sarcastically:

According to this approach, we must reject the pretensions of the enlightenment, towards any rational or universalizable codes or grand narratives, and accept an inevitable profusion of values, meanings, codes, a discursive plurality that is both inevitable and desirable.²⁸

Postmodernism posits a relationship between power and knowledge with consequences for the exclusion or marginalisation of the 'other' in social life. As Steve Smith points out:

²⁵ Fred Halliday addresses this argument in B. McSweeney, *Moral Issues in International Affairs*, Basingstoke: Macmillan, 1998, although this is certainly not his view.

²⁶ See Nardin for an in depth discussion of the impact of relativism on ethics. Nardin takes a sophisticated and unusual position in that he is not unsympathetic to some form of relativist thought. T. Nardin, 'The Problem of Relativism in International Ethics', *Millennium Journal of International Studies*, Vol. 18, No.2, Summer 1989, pp. 149-161.

²⁷ Such as, for instance, Walzer's conception of 'thick' and 'thin' versions of human rights. M. Walzer, *Thick and Thin*, London: University of Notre Dame Press, 1994.

²⁸ F. Halliday, in B. McSweeney, *Moral Issues in International Affairs*, Basingstoke: Macmillan, 1998, p. 27. Again this is not Halliday's view.

The key process at work is that of domination. In this sense history is a series of dominations, and discourses a central mechanism of these dominations.²⁹

Thus, the focus of any research procedure is to reveal the hidden relationships of domination and exclusion within social life. This occurs through a historical survey (genealogy), textual analysis (discourse analysis) and uncovering logo-centric pairings (deconstruction). However, a key assumption here is the perspectival nature of claims to truth. Such claims do not correspond to objective reality; rather they are generated by powerful societal forces in an attempt to impose domination. From this alone it is clear that this critique rejects the project of imposing, or even encouraging, respect for ethical principles and it is at this point that post-modernism becomes counter-intuitive. An example of this is the work done by theorists such as Kristeva and Jabri on the development of the individuated self. Calling for a recognition of how subjectivity conditions the exclusionary practices that create the need for ethical discourse, Jabri for instance, ultimately admits that when question is posed as to how such a critique translates into politics and institution-building, 'the answer ... must by necessity, remain inconclusive'.³⁰ However convincing such a critique may be when it comes to art or culture, when applied to the international scene it inevitably ends in an intellectual 'cul-de-sac' such as this, as a result it fails to satisfy either as a portrait of moral values or as a framework for considering international war crimes prosecutions.

A further objection to the consideration of morality within international relations is that most commonly raised by practitioners. Broadly, statesmen have a duty to avoid

²⁹ K. Booth and S. Smith, (eds), *International Relations Theory Today*, Cambridge: Polity Press, 1995, p. 5.

³⁰ V. Jabri, 'Restyling the Subject of Responsibility in International Relations', *Millennium: Journal of International Studies*, Vol. 27, No.3, 1998, pp.591-611 (p.610). See also J. Kristeva, *Strangers to Ourselves*, New York: Columbia University Press, 1991, and Z. Bauman, *Postmodern Ethics*, Oxford: Blackwell, 1994.

incorporating a moral dimension to foreign policy for either of two reasons. Either because, somewhat circularly, it is their moral duty to seek the national interest of the state they represent to the exclusion of all else, or because morality is essentially a personal matter and the introduction of a moral dimension to policy is therefore akin to introducing a personal financial interest to policy discussion. The first point represents a tradition of thought about the nature of political life that stretches back to Machiavelli. Croce encapsulates this way of thinking when he says that in the realm of international politics, murders are not murders, nor lies lies.³¹

When we consider the crimes under review in this thesis, it is evidently unacceptable to regard them as part of the normal business of self-interested states. For instance, in the case of the Holocaust it is evident that Germany diverted considerable resources away from the practice of ensuring international security in order to pursue the extermination of Jews and other minorities. Kennan and Kissinger, both practitioner-theorists who represented the US internationally, personify this tradition. Kennan draws a distinction between interest and ‘sensibilities’ and argues that there is:

No room in such a policy for international benevolence, for lofty pretensions, or for the assumption of any attitude either of moral superiority or moral inferiority to any other nation.³²

For Kennan the role of foreign policy is essentially constrained by the primary requirement to protect the physical intactness of national life and the interests of citizens insofar as they spill over borders. Kissinger also subordinates morality to national interest. This was evident when he praised the Carter administration’s human rights policy for its effect on Americans because it gave a ‘renewed sense of the basic decency

³¹ B. Croce, *Politics and Morals*, trans. S.J. Castilione, New York: Philosophical Library, 1945. p.3.

³² G.F. Kennan, *Realities of American Foreign Policy*, London: Oxford University Press, 1954. p.12.

of this country, so that they may continue to have the pride and self-confidence to remain actively involved in the world.³³ This is a classically realist view of the role of morality, but a somewhat ironic defence of it. However, none of these arguments demonstrate that morality should be excluded; only that national interests should take logical priority.

The special office of the statesman is also cited as evidence that morality should not intrude upon international relations. On this view the statesman must act immorally if s/he is to participate in international affairs, there is an inevitable tension between politics and morality.³⁴ Walzer put this most clearly as 'The Problem of Dirty Hands'.³⁵ Walzer's conclusion is that it is impossible for statesmen to govern innocently, but that that does not stop them being subject to some moral restraint and guilty of immoral conduct, although this may be mitigated by the circumstances of the decisions they have made. This is technically an accomplished point, for Walzer avoids the fallacy that there is a type of 'international morality' based on different criteria of judgement. For if we allow a morality based not on common moral principles but on the exigencies of power relations, this is as good as abandoning morality altogether, 'international morality' is simply a linguistic fiat. Walzer's account, though pessimistic, at least employs a sense of moral tragedy. In terms of war crimes prosecutions, Walzer's account also opens the door to some form of accountability, although it is not clear what form this could take. In other works, however, Walzer specifically excludes the possibility of legal action.³⁶

³³ H.A. Kissinger, cited in A.A Said, (ed), *Human Rights and World Order*, New York: Praeder, 1978, p.160.

³⁴ M. Frost, Op Cit. n.2, p. 71.

³⁵ M. Walzer, 'The Problem of Dirty Hands', *Philosophy and Public Affairs*, 1972-73, part 2, pp.160-180.

³⁶ M. Walzer, *Just and Unjust Wars: a Moral Argument with Historical Illustrations*, New York: Basic Books, 1977, p.121.

Finally, the ‘office of statesman’ line of argument can include the critique that as morality is an individual affair; the statesman has no right to impose his or her views on the policy process. This is minor in terms of the criticisms we have been viewing, but it is especially relevant for the line I take in terms of moral individualism. If, as we shall see, only individuals have the capacity to be morally responsible, how can we expect moral consideration from states? Butterfield conducts his argument from this logical basis when he argues that:

If an individual consents to make self-sacrifice – even to face martyrdom before a foreign invader – it is not clear that he has a socially recognizable right to offer the same sacrifice on behalf of all his fellow-citizens or to impose such self-abnegation on the rest of his society.³⁷

Donnelly disputes this on essentially practical grounds when he asks what right statesmen have to demand sacrifice on any basis if this is the case; the same is true of economic objectives.³⁸ Cohen also disputes it on the grounds that a democratic people may wish its affairs to be conducted in a morally acceptable fashion.³⁹

This can be disputed on different grounds. Although I am about to make the case that moral blame can only be ascribed to individuals this does not preclude moral judgement on the conduct of states. Just as the legal personality of states allows them to act as if they were fully autonomous, and in this sense they can conclude treaties or make promises, the conception of a society of states allows us to judge them as if they were morally autonomous, for instance in giving aid or imposing sanctions. The point is not that this is difficult, but rather that it is too easy; it is only at the point when ‘as if’ no

³⁷ H. Butterfield, *Christianity, Diplomacy and War*, London: Epworth. 1953, p.11.

³⁸ C. Donnelly in T. Nardin, and D. Mapel, (eds.), *Traditions of International Ethics*, Cambridge: Cambridge University Press, 1996, p.105.

³⁹ M. Cohen, *Op Cit.* n.20, p. 300.

longer applies, that is the point of punishment and blame, that incoherence and contradiction emerge. If, as argued here, applying judgement to the moral conduct of states is simply a function of each and every individual's personal moral judgement, criticisms and comments on state behaviour would be essentially lacking in moral potency, they would become only an exercise in finger-pointing and comment. It could be argued that this is precisely the case within the international human rights movement. The United Nations Commission on Human Rights, for instance, can only name and shame. This serves an important function in that it may delegitimise the regimes of those states, but this is most effective within the eyes of the citizens of that and other states. Other than this it has little bearing on the state concerned. Yet this in no way implies that judgements on morality cannot be applied to the international system as if they were morally capable, for such judgements are perfectly intelligible even if they cannot be literally true. It is enough to point out that the ascription of blame in these circumstances is radically different to applying blame to individuals, in its nature and outcomes. The precise nature of this difference and the impact this has on the ascription of responsibility is the core argument of this thesis. It is important to add along these lines, that whilst only individuals have the necessary capacity of moral responsibility, they have a duty to that sense of responsibility not to undertake immoral actions. For instance, although I have a moral duty to help my child at school, this does not extend to a duty to exterminate any likely opposition to him in a school test. This example may be far-fetched but it is analogous to the practitioner who is charged with the duty of protecting national interests. Such a duty does not sanction complete lack of restraint. Just as my child has no right to expect me to exterminate his opposition, so the citizens of a state have no right to expect their representatives to follow an immoral course of action. Ultimately, it is individuals who participate in the international system, and

where morality is engaged they may not defray their individual responsibility. Let us examine this notion of moral personality in greater depth.

The Nature of Moral Personality

The argument to address in the light of war crimes prosecutions is whether moral responsibility should be assigned to individuals or to nation-states. This problem is particularly acute in the case of systematic humanitarian crimes such as genocide. By definition, no single individual can carry out genocide, it requires that the resources of the whole state be mobilised. So would the inconsistencies and failures in approaching such atrocities be avoided by simply addressing responsibility to the states concerned? Indeed, is it possible to speak of a 'criminal' state? This dilemma is best expressed within moral philosophy as the debate about collective responsibility. Can collective entities be held morally responsible?⁴⁰ It is evident within domestic law that they cannot, the penal sanctions attached to criminal conduct mitigate against prosecution for anyone except individuals. Yet the tendency towards the treatment of states as moral entities is evident through the application of collective measures against them. For instance, at the Treaty of Versailles 1919, reparations exacted from Germany were the true retributive measures whilst the mooted war crimes trials for individuals collapsed in indifference and non-cooperation.⁴¹ It is the traditional manner of viewing states as monoliths, with a fully constituted legal personality which can lead to the misapprehension of states as having an equally unambiguous moral personality. In fact, when we inspect collective entities more closely, we can see that the type of responsibility assignation made to collectives is significantly different from that made to individuals. Were this not the

⁴⁰ The central elements of this debate are summarised in the debate between Cooper and Downie.

⁴¹ See Chapter 3.

case, the grounds for claiming that the introduction of individual criminal responsibility is a radical and deeply momentous development would be negated.

To assign moral or criminal responsibility to an entity with any validity, certain criteria must be met. The entity must have a moral personality comprising the minimum conditions of autonomy, intention and agency. Several issues arise from this, as well as considering whether collectives can satisfy these criteria, we must also assess whether the nation-state can be considered a collective, and if so what type of collective it is.

The difficulty with categorising the state in this way is that it is peculiar as a random collective as it necessarily maintains a decision-making structure. Yet, it cannot be considered an ordinary collective either, as its members do not voluntarily participate in it. Thus it requires a special category of analysis, that of an institution.

As a result, this thesis takes a particular line of argument with respect to moral responsibility, that of a qualified moral individualism. From this position, it will be shown that in terms of war crimes prosecutions, especially with regard to systematic humanitarian abuses, the application of individual criminal responsibility is the only coherent perspective in relation to blame and its necessary corollary, punishment.

However, the international community is further behind in adopting this approach than the legal framework, and new developments in the constitution of the International Criminal Court and the use of *ad Hoc* tribunals might suggest.

In order to assess the validity of this claim I shall examine the components of moral accountability, here defined as autonomy and agency. The relevant components of autonomy, such that an entity may be described as a moral agent are, ability to act, intention and voluntariness. In addition to these minimum conditions common to all

conceptions of agency there are various additional requirements according to the perspective adopted. Amongst others, Donaldson requires that morally autonomous entities have the capacity to alter their conception and practice of morality⁴², Santiago Nino demands self-consciousness and self-regard⁴³ and Kant offers rationality⁴⁴.

Autonomy

Some conception of autonomy is crucial to any theory of morality or moral principles and it is especially crucial for any investigation into the significance of war crimes prosecutions. Indeed, the extent of a state's or an individual's autonomy has a crucial bearing on how and when responsibility can be assigned to either. However, the range of thinking on the nature of autonomous behaviour varies from one perspective to another. Most crucially for this argument is, firstly, the question of whether autonomy is an attribute that properly applies to states, and secondly, if it does, whether it is different in character. Answers to this question are best represented as a spectrum. This ranges from Santiago Nino's positivistic description as an entity with 'an independent, developed nervous system' which thereby excludes states, as well as any collectives and incidentally, inanimate objects,⁴⁵ through to the realist position we have already covered which sees states in the international system as fully autonomous entities with distinct volitions and interests.

What these positions have in common is a recognition that autonomy in some form is crucial for participation in the world of moral discourse, and in particular for the ascription of moral accountability. Its minimum requirement is that the entity be self-

⁴² T. Donaldson, *Corporations and Morality*, Englewood Cliffs: Prentice-Hall, 1982.

⁴³ C. Santiago Nino, *The Ethics of Human Rights*, Oxford: Clarendon, 1991.

⁴⁴ I. Kant, *Fundamental Principles of the Metaphysics of Ethics*, London: Longmans, 1959.

⁴⁵ C. Santiago Nino, *Op Cit.* n.44, p. 156.

determining, without this capacity it is reasonable to assume that no ethical choice could be made. There must also be a capacity to act and any action must be undertaken in a condition of voluntariness. Voluntariness is here a technical term with a usage distinct from the common understanding of voluntary. An act is voluntary if it originates with the agent, even when performed under conditions of duress.⁴⁶ So to employ Aristotle's famous example, 'when a man throws his goods overboard to stop the ship sinking, there is nothing there involuntary but the hardness of the choice'.⁴⁷ However, voluntariness has an important dimension. Bound up with the notion of freely willed action is the notion of informed action. If an agent is mistaken as to the facts or outcomes of his/her action, he/she cannot be said to have willed it, in this sense 'voluntarily' refers to 'knowingly'.⁴⁸ This also embodies a firm conception of the agent as a rational being as it assumes a deliberative process in moral choice.

So far in this argument there is nothing to disbar a collective or state from full possession of autonomy. These simple conditions which include self-determination, the capacity to act and voluntariness are readily observable in entities which have no corporeal existence but still have decision-making structures and legal personalities. In fact it is at this point that we might criticise individuals for failing to fully meet these criteria. How far do individuals have freedom to make fully autonomous moral choices? Could it not be argued that in fact individuals are constrained by their experience, culture and context? This line of argument is broadly termed determinism and in its

⁴⁶ A. Donagan, *The Theory of Morality*, Chicago: University of Chicago Press, 1977, p.115.

⁴⁷ K. Thomas, *Seventeenth-Century England : A Changing Culture*, London: Ward Lock Educational, 1988, p. 209.

⁴⁸ Thus defence against moral blame could be because the action was done either 'in ignorance' or because 'of ignorance'. The first is when the agent was unaware of the true nature of his action the second when the agent is unaware of the moral prohibition on that action. A. Donagan, *The Theory of Morality*, Chicago: University of Chicago Press, 1977, p. 128. This corresponds with the defences under international law for war crimes, possible defences include 'mistake as to fact', and 'mistake as to law'. Both of these were cited by defendants at Nuremberg although only the first was accepted. Thus the

purest distillation it might suggest that individuals lack the most basic free will.⁴⁹ Is it then unjust to impose penal sanctions on individuals when they are actually the product of their state? If we wish to avoid such an implausible conclusion, implausible because of course we could say this of any crime, it is clear that the concept of autonomy needs some refinements.

Agency and Intention

The other crucial component of moral accountability relevant to war crimes prosecutions is for the entity in question to have the capacity of moral agency. Whether an organisation, institution, community or group, referred to here as collectives⁵⁰, have the capacity for moral behaviour is dependant on its satisfying the conditions for moral agency, through the capacity to act and the manifestation of intentional behaviour in its actions.

At root is a dispute about the nature of moral personality. For individualists, the only relevant moral units in the discussion of interests, satisfaction and intention are human beings.⁵¹ This assumes a co-extensivity between the class of human beings and the class of moral persons. As there is little doubt that individuals are the bearers of moral personhood, individualism is characterised by an essentially negative approach in that it is evident in an exclusion of any other categories such as collectives, states and social

concept of voluntariness as a condition of moral responsibility is represented within the framework of international law.

⁴⁹ A comprehensive discussion of this topic is found in K. Lehrer, (ed), *Freedom and Determinism*, New York: Random House, 1966.

⁵⁰ I am aware that this term is used far more narrowly within the literature to refer to particular communities classified according to their decision-making procedures. However, I will use it when a general term is required for anything other than individuals, other than when specific forms of organisation are referred to.

⁵¹ This is the approach most commonly found within the literature on human rights.

classes.⁵² A slightly less inflexible approach is more useful here as states certainly behave in ways which have a moral character of some kind, they make promises and use moral justifications for their actions. For the moment a more useful observation is that the only morally relevant entities are moral agents, leaving open to argument for the time being, what constitutes moral personality and to what extent states can be characterised in this manner.

The most extreme repudiation of the idea that anything other than individual can be the bearer of moral rights is found in the work of Russell, who was particularly interested in war crimes,⁵³ when he argues with great clarity,

When it is said that a nation is an organism, an analogy is being used which may be dangerous if its limitations are not recognised. Men and the higher animals are organisms in a strict sense: whatever good or evil befalls a man befalls him as a single person, not this or that part of him [...] To believe there can be good or evil in a collection of human beings, over and above the good or evil in various individuals, is an error.⁵⁴

This highlights the key assertion of individualism, the fact that any collectivity is always reducible to individuals who compose it. In addition it claims that collectives are resistant to any ascriptions of responsibility we might try to make. This idea is fully expressed in what French describes as ‘the Lewis conception of morality’:

Every ascription of collective responsibility either reduces to the claim that each member of the group is

⁵² C. Santiago Nino, *Op Cit.* n.44, p.153.

⁵³ Russell headed a shadow war crimes tribunal convened to examine US crimes in Vietnam. See P. Limqueco, and P. Weiss, *Prevent the Crime of Silence: Reports from the sessions of the International War Crimes Tribunal, founded by Bertrand Russell*, London: Bertrand Russell Peace Foundation Ltd., 1971. See chapter 6.

⁵⁴ B. Russell, *Authority and the Individual*, London: Unwin, 1977, p89.

individually responsible or that the very notion of collective responsibility actually evades moral descriptions of responsibility.⁵⁵

Of course, this has important implications for the suggestion that states might be blamed for systematic or whole-state humanitarian violations. When actions such as sanctions, military action, aerial bombardment or even nuclear attack are forms of collective punishment, they are difficult to defend if they are carried out in response to some immoral behaviour by the state itself, behaviour such as the waging of aggressive war or the creation of refugees. These types of actions taken against states treat the state as a morally responsible collective and this is deeply contradictory.

As it is self-evident that individuals are moral agents (at least of some time), let us start with the argument that collectives can also be moral agents. Should this view be correct, the acceleration of the principle of individual responsibility would be a mistake rather than a necessity, for states could be morally accountable for their actions on a collective level and appropriate action could be taken without reference to individuals? Initially there seem to be some convincing reasons for regarding collectives as moral agents, with regard to the state it is almost odd to pose such a question when both ordinary discourse and the legal tradition seem to grant such status already.⁵⁶ States are agents in the legal sense of the term; for instance they can conclude treaties and make promises. However, a legal personality is not enough to establish a moral agency. The legalist paradigm allows us a perfectly coherent way of accommodating states and other institutions as agents in the sense of concrete action whilst maintaining such a view of the state as a fictional construct. Within this paradigm states are 'all sovereign, independent agents capable of directing action so endorsed. Even if they are not, they

⁵⁵ P.A. French, *Op Cit.* n.1, p. 8

⁵⁶ T. Donaldson, *Op Cit.* n.43, p.19. Donaldson makes this point in regard to corporations but its sense is not changed when applied to states.

have to act as if they were'.⁵⁷ Yet for moral person theory, which regards the collective as a moral entity; to be an agent whether legal or otherwise, is to be a moral agent, provided a key condition for moral agency is met, that of intentionality.⁵⁸

But how do we define and more importantly identify intentional behaviour? We can see that the addition of this criterion problematises collective agency in a way the requirements of autonomy and its related conditions of self-determination, simple agency and voluntariness do not. A common yet narrow, conception of intentional action describes simply what an agent intends to do. Yet this is unsatisfying, some entities behave intentionally but are not moral agents, such as an advanced computer or a mouse avoiding a cat. Intentional behaviour distinguishes the physical from the mental realm by embodying notions of beliefs, desires and rationality into the actions of agents.⁵⁹ How can this apply to states? To ascribe responsibility to a supra-individual whole we would have to insist that the collective entity itself had intention, regardless of the intentions of the individuals which comprise it. It is difficult to see how this could apply. For instance, in terms of states let us suppose that military security is identifiable as a goal or an intention of nation-states, but this does not demonstrate that states act according to desires and beliefs, instead it could indicate that they operate according to a predetermined structural logic in which decision-making apparatus are set in place to pursue this goal. This operation according to pre-determined rules is more akin to the behaviour of a giant machine than a giant individual.⁶⁰ However, this presupposes a somewhat realist/structuralist view of relations between states, perhaps we could

⁵⁷ I. Forbes, and M. Hoffman, (eds), *Political Theory, International Relations, and the Ethics of Intervention*, London: Macmillan, 1993, p.50.

⁵⁸ T. Donaldson, Op Cit. n.43. Donaldson uses this illustration in his discussion of corporate moral agency.

⁵⁹ D.C. Dennett, 'Intentional Systems', *Journal of Philosophy*, Vol. LXVIII, No 4., Feb 1971, pp. 87-106. Kenny, A., also makes this point from a legal perspective in 'Intention and Purpose', *Journal of Philosophy*, Vol. 63, 1966, p. 642-651.

⁶⁰ T. Donaldson, Op Cit. n.43, p. 20.

broaden our claims to include the notion that if individuals within a nation-state change their goals, such as the refusal to tolerate slavery, states are then forced to pursue goals within a new logical framework. These examples together raise two related possibilities, that states are constrained structurally by their own decision-making procedures (because they cannot change their own goals within that framework) and that those procedures rest on the beliefs and desires of individuals not the beliefs and desires of institutional apparatus. Thus the state cannot be considered an intentional entity because it cannot change its goals according to its beliefs and desires. But, although I have defended the idea that states are not strictly intentional and although their behaviour fits a narrow conception of intentionality, perhaps they could still be morally accountable under revised conditions of moral agency.

Moral Accountability

If we look more closely at the issue of accountability it is clear that the issues in relation to corporations, collectives, states, communities and individuals are going to display significant differences. My argument is that we cannot ascribe moral responsibility, and therefore sanctions, to collective entities. For even when a version of collective responsibility is produced, it must be so qualified as to be ultimately meaningless. Consequently, the application of individual criminal responsibility is a manifestation of a shared moral order in a way that collective responsibility, or state criminal responsibility, is not.

Distributed Responsibility

If we return to the definition of individualism, we can see that it includes the argument that 'the very notion of collective responsibility actually evades moral descriptions of

responsibility'. This is an interesting point for the notion that collectives can be described as blameworthy or be ascribed moral responsibility independently from the individuals who compose them, is widely explored throughout the literature.⁶¹ The portrait of responsibility as apportioned amongst individual members of a collective is particularly important in terms of discussion about the target of war crimes prosecutions. Obviously we cannot literally punish the states themselves, such a suggestion falls into what Goldman describes as 'the fallacy of personifying states'⁶² for any punishment would be suffered by citizens, but could we legitimately regard all the citizens of the offending state as morally blameworthy simply by virtue of their membership of that state? If we cannot, and states cannot be morally accountable, we cannot logically impose punishment upon them. If we can, then measures against the offending state, such as sanctions or reparations would be the more legitimate route for punishment.

This problem is more acute when we consider the nature of system war crimes. For instance, by definition, genocide cannot be committed by a single individual nor can the waging of aggressive war. However, O'Neill suggests that because some acts cannot be accomplished without collective action, then moral action must be mediated through collectives.

No individual can devalue a currency or irrigate a desert or have a debate on the best criteria for a soft

⁶¹ V. Held, 'Can a Random Collection of Individuals be morally responsible?' *Journal of Philosophy*, Vol. 67, No.14, 1970, pp. 471-481; O. O'Neill, *Faces of Hunger: An Essay on Poverty, Justice and Development*, London: Allen and Unwin, 1986; A. Donagan, *The Theory of Morality*, Chicago: University of Chicago Press, 1977. P. French, *Individual and Collective Responsibility*, Vermont: Schenkman Books, 1998; P.A. French, T.E. Uehling, and H.K. Wettstein, *Midwest Studies in Philosophy VII, 1982: Social and Political Philosophy*, Minneapolis: University of Minnesota Press, 1982; and D. Cooper, 'Collective Responsibility', *Philosophy*, Vol. 43, No 165, 1968, pp.258-268. and 'Collective Responsibility Again', *Philosophy*, Vol. 44, No 168, 1969, pp.153-155. argue in this light. The debate between Cooper and Downie, R.S. Downie, 'Collective Responsibility', *Philosophy*, Vol.44, No 167, 1969, pp.66-69. is particularly instructive in this regard.

⁶² A. Goldman, in S. Luper-Foy, *Problems of International Justice*, Boulder: Westview Press, 1988, p.198.

loan policy. Individuals can only take a part in such activities in appropriate social contexts.⁶³

The example of genocide could just as easily be substituted here. If genocide must be undertaken collectively then it might be argued that sanctions for it could be collective. However, this line of argument disguises the fact that an institution or community also cannot do any of these things without the actions of the individuals who comprise it. In order to ascribe blameworthiness, the adoption of individual criminal responsibility must reduce the collective crime of genocide to a series of simultaneous actions, with blameworthiness rising according to power wielded. This form of responsibility is termed 'divided responsibility'.⁶⁴ Although O'Neill specifically distinguishes between the problem of war crimes and other types of moral or immoral behaviour, she seems to give no clear reasons to do so other than preference.⁶⁵ O'Neill however, does highlight a crucial distinguishing feature of the practice of ascribing individual criminal responsibility; it is formed around a 'nucleus of accepted standards' by which individuals may be judged.⁶⁶ It would seem that she argues that institutions, on moral issues such as global redistribution, are subject to moral evaluation as moral agents, although when not supported by consensus this can never include individual responsibility.⁶⁷ Thus, O'Neill's position on collective morality seems to exclude any

⁶³ O. O'Neill, *Faces of Hunger: An Essay on Poverty, Justice and Development*, London: Allen and Unwin, 1986, p.38.

⁶⁴ M. Walzer, *Just and Unjust Wars: a Moral Argument with Historical Illustrations*, New York: Basic Books, 1977, p.309. Cooper and Downie refer to divided responsibility as 'divisible', and distributed responsibility as 'indivisible' which is somewhat clearer than the more common phrases 'divided' and distributed.

⁶⁵ O'Neill also criticises individual responsibility as being extremely selective, I assume she opposes this to an inclusive prosecution of all offenders. However, Post WWII prosecutions stretched far beyond Nuremberg to minor officials in national prosecutions. The ICTY also includes in its indictments categories of criminal which go down to jailers.

⁶⁶ O. O'Neill, *Faces of Hunger: An Essay on Poverty, Justice and Development*, London: Allen and Unwin, 1986, p. 44.

⁶⁷ The individuals concerned are obviously not responsible until they have the necessary capacity of voluntariness, that is until they are aware of the immoral character of their act, and can then be blameworthy. This requires the consensus of the individuals who comprise states, as it is upon them that sanctions fall.

kind of accountability but only until moral consensus is reached, when the conduct of individuals may be judged against those standards. It could be argued that O'Neill has made a virtue of the very thing she intended to dispute, namely, that ultimately only individuals can be the target of moral discourse. This is a good example of how, essentially, descriptions of a potential collective morality evade moral descriptions of responsibility. When such descriptions are made accountability or punishment must be excluded, when they are included it is because individuals recognise a reductional moral offence.

Distributed Responsibility

The type of responsibility that I have covered so far is divided responsibility, when each individual's responsibility is apportioned according to their degree of culpability.

However, it could be argued that moral responsibility can be distributed, that is when more than one person is blamed without splitting up the blame, as well as divided. This would imply that some form of distributed collective responsibility could apply provided that that collective satisfies the relevant conditions. Distributed responsibility is also a feature of criminal responsibility, in the same way as divided responsibility although in this sense its parameters are strictly defined.⁶⁸ If, however, we allow distributive responsibility across a collective, we may return to the question of whether it is acceptable to target citizens of a state as responsible for the actions of the whole state.

French describes three main questions that need to be addressed to answer the question of whether we can lay moral blame for the acts of collectives on whole populations:

⁶⁸ M. Walzer, *Just and Unjust Wars: a Moral Argument with Historical Illustrations*, New York: Basic Books, 1977, p. 309. Cooper and Downie refer to divided responsibility as 'divisible', and distributed responsibility as 'indivisible' which is somewhat clearer than the more common phrases 'divided' and distributed.

1. Can one be morally to blame for the acts of another?
2. Can a collectivity such as the American People be the bearer of moral blame? And 3. Is vicarious collective moral blame reducible to individual vicarious liabilities?⁶⁹

French, of course concludes that it is possible to hold members of a collective morally responsible, but I dispute his reasoning on several grounds. With reference to the first point, French argues that it is possible to be to blame for the actions of another, although he qualifies this by distinguishing blame from guilt.⁷⁰ Thus a parent may be held to blame for the dishonesty of their child, although they would not be guilty of the dishonest behaviour themselves. However, French seems to regard moral guilt as akin to legal guilt. When he defines guilt he argues that the 'paradigmatic use of the word is its legalistic use', it is the ascription of a deed.⁷¹ This distinction between guilt and blame is essential for his argument that it is possible to morally blame those who have not been involved in the guilty deed. Yet, this version of blame is qualified to such an extent that ultimately it is meaningless. By divorcing guilt from blame, French hopes to expand the notion of collective responsibility, but such a qualified version of blame fails to expand collective responsibility. French argues that some collective moral violations are not reducible to the actions of individuals without losing some of the nature of the act. Consequently only a collective can be blamed for actions that only a collective can perform. Responsibility is distributive in that it is shared simultaneously amongst all members of the group. Yet ultimately, this line of argument must imply that there are some moral transgressions for which no individual is responsible. Genocide could be seen on this view as a collective act. For patterns of killing must be, amongst other things, widespread and systematic, and certainly more than could be accomplished by

⁶⁹ P.A. French, *Op Cit.* n.1, p. 22.

⁷⁰ *Ibid.*

⁷¹ *Ibid.*, p. 23.

one individual. But it is possible to divide responsibility individually for that act, even though it is logically impossible for any individual to carry it out alone. However, by implying that the collective itself has committed genocide, the scope for responsibility assignation has lessened rather than widened. In fact, unlike French, Lewis claims that such blame must inevitably be non-moral blame,⁷² and considering the conditions for moral agency this would seem a difficult conclusion to avoid. It is logically impossible for someone to shoulder moral guilt for someone else's action, for it would imply that someone was blameworthy with neither intention, action or autonomy with regard to the situation. Thus, neither moral accountability nor legal sanction can fall upon all members without discrimination. As a result, the notion of collective guilt can at the most extend to a qualified notion of general blame divorced from accountability. Although other writers have sought to address this shortcoming, it has always remained a stubborn feature of collective responsibility.

Virginia Held seeks to enforce a notion of distributive responsibility in random collectives in circumstances when it is obvious to a 'reasonable man' that action should and can be taken by the group.⁷³ However, she too concedes that from the attribution of moral responsibility to a collective it can be derived that members of that collective are morally responsible. Bates makes a clear criticism of this when he argues that this implies that none of the individual members might be morally responsible for an event for which the collective is morally responsible. Bates argues that this is an impossibility, for some individuals must have actually performed at least a part of the collective act. As a corollary to this, Bates continues by pointing out that in cases where responsibility is distributive, this occurs because the features which define group membership are the

⁷² H.D. Lewis, 'Collective Responsibility', *Philosophy*, Vol. 23, No. 84, 1948, pp. 3-47.

⁷³ V. Held, 'Can a Random Collection of Individuals be Morally Responsible', *Journal of Philosophy*, Vol. 67, No. 14, 1970, pp. 471-481.

ones by which moral responsibility is assigned.⁷⁴ For instance, in Nazi Germany, the state was Nazi and therefore its citizens were Nazis. But if we try to assign moral responsibility to individuals in a distributive way, for instance by holding each and every member of that state morally accountable for its policies, we find ourselves redefining 'Nazi', until only those who actively and demonstrably contributed to that collective are included within it. Thus the collective 'Nazi' is redefined until the collective is sufficiently small to allow distributed responsibility. In these circumstances we can also say that the membership of such a collective is voluntary, given that active participation is required, Downie argues in response to Cooper,⁷⁵ that the individual has shown by membership an acceptance of the goals and morals of that collective.⁷⁶ Yet this is a very different situation to that of a nation, membership is an accident of birth, and even if it is possible with difficulty to leave, it is impossible to live without residence in some state. Walzer inadvertently reduces the collective when he talks about the indiscriminate bombing of Germany during WWII. Walzer suggests that we feel it to be more acceptable to bomb an aggressive nation like Germany, than an occupied one on the grounds that there are likely to be more guilty people there. The illustration he offers is of a town full of adults only, who had supported the Nazi party. He argues that even though such bombing would still be a crime, we are intuitively more comfortable with it than if there were innocent people among the inhabitants.⁷⁷ We can see from this example that the collective 'Germany' when closely inspected, is actually the collective 'guilty Germans'.

⁷⁴ S. Bates, 'Responsibility of Random Collections', *Ethics*, Vol. 81, 1971, pp. 343-349.

⁷⁵ D.E. Cooper, 'Collective Responsibility', *Philosophy*, Vol. 43, No 165, 1968, pp. 258-268.

⁷⁶ R.S. Downie, 'Collective Responsibility', *Philosophy*, Vol. 44, No 167, 1969, pp.66-69.

⁷⁷ M. Walzer, *War and Moral Responsibility*, Princeton: Princeton University Press, 1974, p.102.

Conclusion

There are several ways to circumvent analysis of the moral interplay between individual and state in the commission of war crimes. Perhaps the easiest, but the least interesting, is the realist refusal to engage with any consideration of morality in the international system. When it is evident that states can and do participate in moral discourse by for instance promise-keeping, claiming injustice and giving aid, then such denials look suspiciously like prejudice, for it is evident that the issue of state moral agency needs to be addressed. Refusals to consider morality based on descriptive analysis omits too much of how individuals impact upon and interact with the morality of state policy.

However, the observation that states appear to act morally does not entail a certainty that states are possessed of a full moral agency. If it did this thesis flounder on that account, for the discussion of the correct view of the individual when embedded in state crime could be circumvented by a refusal to consider individual accountability and a move towards collective punishment. Such an acceptance of the state as a full moral agent is unfeasible, given the minimum requirements of autonomy and intention. I have shown that however the state is conceptualised as a collective entity, the possibility of tying structures of accountability to the state is logically impossible to achieve with any coherence. The observation that collectives are regularly credited with moral guilt illustrates this rather than disproves this. For such ascriptions when closely examined, are revealed as a shorthand for a far more complex displacement of individual moral responsibility. If allowed to go unchallenged they produce precisely the sort of incoherence and inconsistency that can be regularly observed in discussions of state moral accountability.

Chapter 3

Traditions in the Assignment of Responsibility

The new willingness to confront gross human rights abuses through international legal institutions is gathering pace. As well as the establishment of the *ad Hoc* tribunals for former Yugoslavia and Rwanda (ICTY and ICTR), there is also the new International Criminal Court (ICC). These developments might suggest that the principle of individual criminal responsibility is well entrenched. Yet, in fact, the assignment of criminal responsibility to individuals is in opposition to the traditional structure of state interactions and in tension with the historical practice of states. The body of international law guides the practice of states but has not been law in the true sense of the term for it has had none of the enforcement and coercive resources of domestic law. A review of the historical growth and development of international law reveals how embedded is the customary manner of interaction between states. It is impossible to analyse the impact of new developments in responsibility assignment without some sense of how radical they are in the context of traditional interactions. An analysis of the main features of the conventional practice of international law also highlights the potential for tension between the new move to individual criminal responsibility seen first at the Nuremberg Tribunal (IMT) and the historical practice of international law.

Whilst the legislation and practice surrounding humanitarian law is in its infancy, the attempt to avoid needless cruelty and destruction during the conduct of war is almost as old as civilisation itself. The earliest systematic and coherent study of the relationships between states was conducted by Grotius who first formulated the *Law of War and Peace / De Jure Belli et Pacis* (1625). It was this tradition, with its concern to mitigate the ravages of war according to humanitarian principles but primarily in defence of trade, that informs most modern humanitarian law. This thesis argues that the

Nuremberg Tribunal marked a watershed in the application of penal sanctions for war crimes, and that it did so by introducing criminal responsibility that was both novel in character and individual in its target. Firstly, we will look at the history and the principles of legislation prior to the Nuremberg Tribunal with a view to revealing the magnitude of the changes it heralded. Then we will examine some of the main features of international law, including the principle of military necessity as based on expediency and its relation to international morality, showing that the Nuremberg Tribunal marked a departure from this perspective towards humanitarianism. Finally, we will examine the traditional focus of response to violations of the law of war including reprisals and reciprocity, reparations, national prosecutions / court martials, and trial by victors post-conflict. These are overwhelmingly state focused and collective in their application. Thus, Nuremberg also marked a departure from the collective responsibility assigned to states expressed through traditional responses to violations of the laws of war.

Historical Context

Much of the changes in emphasis and direction of the laws of war are conditioned by the changing nature of warfare itself. In the Middle Ages, war was a way of life rather than a calculated instrument of policy. Battles were small in scale and, in effect, extensions of personal disputes. Characterised by chivalric values of personal honour, glory and vengeance, it resulted in an attitude to war that emphasised the rules of fair contest and ceremonial constraints¹ Taylor also identifies this early form of development as flowing from the notion of knightly chivalry, surviving today in rules prohibiting various forms of deception such as the launching of war without fair

¹ R.E. Osgood, *Force, Order and Justice*, Baltimore: John Hopkins, 1967, p.43.

warning by formal declaration or the use of enemy uniforms or battle insignia.² There are two aspects to constraints on the waging of war. They may be focussed on the restrictions on weaponry and methods of warfare, or they may focus on the targets of military action. Although in practice the two kinds of constraints often overlap, it is the second category that is illuminating in terms of this thesis because constraints on the targets of military action embody a fundamental moral concern for ‘innocent’ participants³ or ‘worthy’ victims contrasting with the ‘unworthy’.⁴

The rationale for such limitations was primarily expedient, from about the middle of the Seventeenth Century, civilian lives and property were protected from destruction largely because of the economic advantages this entailed, and because widespread destruction threatened the foundations of established power. As the laws of war evolved the considerations of expediency were formalised into the concepts of ‘military necessity’ and ‘proportionality’. Gratuitous violence and excessive force were ruled out.⁵ With the emergence of nation-building in earnest and the development of standing armies, the regulation of armed combat became more formal as military courts were established to try offences by soldiers.⁶ The Eighteenth Century was essentially characterised by limited wars, technological, economic and social conditions engendered constraint, and warfare of this period was relatively moderate. Although military casualties were high,

² T. Taylor, *Nuremberg and Vietnam: An American Tragedy*, New York: Bantam Books Inc., 1971.

³ T. Nardin, *Law, Morality and the Relations of States*, Princeton: Princeton University Press, 1983, p. 289.

⁴ This trend to discriminate between worthy and unworthy victims is exemplified by the approach of the international coalition to conflict in Afghanistan. ‘Worthy and Unworthy Victims’, *The Guardian*, 5 Nov 2001.

⁵ T. Nardin, *Op Cit.* n.3, p. 290.

⁶ For detailed accounts of Medieval warfare see W.C. Oman, *A History of the Art of War: The Middle Ages from the 4th to the 14th Century*. 2 Vols., 2nd Edition, London: Methuen, 1924; and *A History of the Art of War in the Sixteenth Century*, New York: Dutton and Co, 1937; See also T.F. Tout, *Medieval and Modern Warfare*, Manchester: Longmans, 1919; Best, G., *Humanity in Warfare*, New York: Columbia University Press, 1980.

there were significantly lower levels of destruction of civilian life and property.⁷

However, by the mid Nineteenth Century, the humanitarian movement had gathered force and the idea that some weaponry and military tactics might be bad in themselves, regardless of their utility, and their use should be prohibited, had come into play.⁸ The impact of 'diverse social, moral, political, scientific, military and economic factors' had strengthened the humanitarian movement.⁹

However, it was not until 1856, with the Paris Declaration on Maritime War, that the first binding multilateral agreement on the conduct of armed conflict was reached.

However it was the US that took the lead in producing laws of war that were both systematic and written, in the War Instructions produced by Lieber under the direction of President Lincoln in 1863.¹⁰ The modern development of the law of war began with the Hague Conferences of 1899 and 1907. These were essentially limited, exactly how limited was to become evident with the advent of the First World War, yet they established some fundamental precepts within the law of war. Not only did they establish that the right of parties to a conflict to inflict damage on the enemy is not unlimited but also drew a basic distinction between civilian populations and combatants.¹¹ As such, they inform the content of war crimes legislation as well as evidencing customary practice.

Yet, Meurant points out that:

⁷ With the exception of the devastating Seven Years War in Prussia. Osgood, Op Cit. n.1, p. 47.

⁸ Nardin, Op Cit. n.3, p. 291.

⁹ G.I.A.D. Draper, 'The Ethical and Juridical Status of Constraints in War', *Military Law Review*, Vol. 55, 1972, pp.169-185, p.170.

¹⁰ R. Goldstone, *Prosecuting War Criminals*, London: The David Davies Memorial Institute, 1996, p.1.

¹¹ J. Meurant, 'Inter Arma Caritas: Evolution and Nature of International Humanitarian Law', *Journal of Peace Research*, Vol 24. No. 3, 1987, P24.

This international regulation of means of combat served in the interests of States. Most of the rules were vague and directly inspired by the Rousseauist conception according to which wars are interstate conflicts. No rule had been adopted as to the conduct of hostilities in civil wars.¹²

The target and focus of this legislation is still the state and based on the principles of inter-state warfare. Yet nonetheless, these developments marked the beginning of the regulation of hostilities through the application of international humanitarian law. The emphasis however, was clearly upon the needs and interests of states during conflict, rather than the needs and interests of individuals whether in peace or war and this has been an orientation that has proved difficult to alter. Even in the innovative application of humanitarian law seen in the International Criminal Tribunal for Former Yugoslavia (ICTY), the Security Council erred on the side of caution. In its definition of crimes against humanity set out in the Statute of the Yugoslav Tribunal, Article 5 requires that all crimes against humanity must have a causal nexus with an armed conflict.¹³ The innovation in this circumstance was the definition of 'armed conflict'. Whereas at Nuremberg the definition was strictly linked to inter-state conflict, the ICTY proved willing to accept a far looser definition of conflict.¹⁴ This had the effect of extending the protection of international law across a wider range of victims. Further to this, the ICC has made considerable gains in approaching internal conflict.¹⁵

Whilst the preceding half-century had internationalised and formalised the conduct of war, it was not until the bloodshed of the First World War that a substantive body of practice and precedent to deal with the escalation of destruction in modern warfare began to be produced. By the First World War, there was still no provision at all in

¹² Ibid., p. 241.

¹³ Goldstone, Op Cit. n.10, p.8.

¹⁴ See Chapter 7

international law that made either states or individuals criminally liable for either declaring or the manner of waging, war.¹⁶ Taylor describes how:

The Hague Conventions, and other treaties and conclaves in the preceding half-century, had internationalised the whole subject of limits on warfare and laid the basis for an extraordinary expansion of public and political concern with “war crimes” throughout the course and aftermath of World War I.¹⁷

The result was a series of international agreements on the conduct of war which eventually formed the basis for the charges that were to be laid at the Nuremberg Military Tribunal. These included the Hague rules of Aerial Bombardment, 1923 which Roberts specifically relates to the indiscriminate bombing of non-combatant civilians in the First World War.¹⁸ Similarly, the Geneva Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases and of Bacteriological Methods of Warfare, 1925, was also directly related to the experience of the First World War.¹⁹ As was the London Proc s-Verbal Relating to the Rules of Submarine Warfare.²⁰ Thus, although the term ‘crime against humanity’ had created a new legislative charge, it was not so much the content of the charges at Nuremberg that was novel; instead, it was the target of those charges, individuals.

¹⁵ See Chapter 8

¹⁶ T. Taylor, *The Anatomy of the Nuremberg Trials : A Personal Memoir*, London: Bloomsbury Publishing Ltd., 1993, p.16.

¹⁷ *Ibid.*, p.11.

¹⁸ A. Roberts, and R. Guelff, *Documents on the Laws of War*, 3rd Ed, Oxford: Oxford University Press, 2000, p. 139.

¹⁹ *Ibid.*, p. 155.

²⁰ This was set forth in Part IV of the Treaty of London, 22 April 1930.

Characteristics of the Laws of War

The Necessity Principle

As we have seen, the laws of war, although the subject of long-established practice, are at their core essentially unstable. Enforcement is erratic and uneven and the extent to which they are observed is conditional upon the circumstances and techniques of warfare. As Taylor argues:

In part, this is due to the customary nature of the laws of war, and the lack of any authoritative source or means of systematic enforcement. For want of an international legislature, there is no single, authoritative text of the rules, and there are no prescribed penalties for their violation In such an embryonic legislative and judicial context, it is hardly surprising that the effective content of the laws of war should fluctuate.²¹

Yet the difficulties encountered in regulating armed conflict are also more profound than this, indeed they are integral to war itself. Clausewitz most famously formulated this difficulty in *On War* when he argued that “there is no logical end to the use of force”²² War is intrinsically desperate and violent and just as individuals will break the law in self-defence, so national governments will unhesitatingly break laws if their national security is perceived to rest upon so doing. Within modern warfare, the rapidity of technological evolution and its concomitant secrecy, mean that effective defence may not be compatible with the observance of rules that were previously respected.²³

²¹ T. Taylor, *Nuremberg and Vietnam: An American Tragedy*, New York: Bantam Books Inc., 1971.

²² C. Clausewitz, *On War*, Ware: Wordsworth, 1997.

²³ Taylor, *Op Cit.* n. 16, p.11

However, the concept of necessity is not unbounded, and it is the responsibility of states to demonstrate that a failure to observe humanitarian law was essential to successful prosecution of the conflict. The limit to the principle of necessity has been defined as:

Only that degree or kind of force, not otherwise prohibited by the law of armed conflict, required for the partial or complete submission of the enemy with a minimum expenditure of time, life, and physical resources, may be applied.²⁴

It must be demonstrably essential to successful military action; a provision that's history of application in humanitarian law is centuries long. Even Napoleon applied this doctrine when he said:

My great maxim has always been, in politics and war alike, that every injury done to the enemy, even though permitted by the rules [i.e. customary international law], is excusable only as far as it is absolutely necessary; everything beyond that is criminal²⁵

Allied to this concept however, are the twin notions of distinction and proportionality, recently reaffirmed in the 1977 protocol to the Geneva Convention. Louise Doswald-Beck describes distinction thus:

The principle of 'distinction' means that valid targets are those of military importance, i.e. the armed forces and those installations the destruction of which provides a definite military advantage e.g. military depots, means of communication for the armed forces etc.²⁶

Nowadays essential economic targets, such as power stations or communication networks, are also seem acceptable. They were certainly justified as necessary by the

²⁴ United States, Dept. of the Navy, *The Commander's Handbook on the Law of Naval Operations*, NWP 1-14 M, Oct 1995, p.1-5.

²⁵ Cited in Best, Op Cit. n.6, p. 49

²⁶ L. Doswald-Beck, 'The Civilian in the Crossfire', *Journal of Peace Research*, Vol. 24: No. 3, 1987, p. 253.

Allies in the Gulf Conflict. If the killing of civilians provides no military advantage then they should be spared. Proportionality refers to the incidental loss of life that accompanies a strike on a target and provides that it should not be excessive in relation to the importance of the objective. The method of attack should also be chosen so as to avoid as much incidental damage as possible.²⁷ However, there are some applicable provisions of the law which cannot be evaded by using the justification of military necessity because such laws have been drafted with prior consideration for the concept.²⁸ For instance the 1923 Geneva Protocol expressly forbids the use of chemical or bacteriological methods of warfare.²⁹ Also, there is an express injunction against ‘dishonourable (treacherous) means, dishonourable expedients, and dishonourable conduct during armed conflict...’³⁰ Fundamentally, the twin concepts of distinction and proportionality are the governing principles of military necessity.

The body of international humanitarian law is conditioned and determined by the paradox at its heart, the prohibition of suffering combined with the recognition of the principle of necessity. As Meurant argues:

Humanitarian law, as a compromise between the principle of humanity and military necessity is a mixture of both idealism and realism. It is constantly struggling for survival between these two extreme views, trying to avoid useless suffering if not violence itself. It is a policy of lesser evil.³¹

As with most humanitarian law, there is a substantial body of practice which is clearly defined and indisputably either correct or incorrect. For instance, although some of the strongest prohibitions in the laws of war concern the treatment and protection of

²⁷ Ibid., p.253.

²⁸ Roberts and Guelff, Op Cit. n.18, p.10.

²⁹ Ibid., p.4

³⁰ United States, Dept. of the Navy, *The Commander's Handbook on the Law of Naval Operations*, NWP 1-14 M, Oct 1995, p.1-5.

prisoners of war, there are commonly accepted situations in which the demands of necessity override these prohibitions. For instance, Taylor cites the example of a small detachment which may have taken prisoners under conditions where it is impossible to either guard them or send them to the rear without endangering the safety of the unit. Under such conditions, prisoners are executed by operation of the principle of military necessity. Taylor goes on to add that to his knowledge no military or other court has been called on to declare killings in such circumstances a war crime.³²

Some of the greatest difficulties with this principle, however, occur at the boundaries of its application. Guerrilla warfare throws the problem of non-combatant protection into sharp relief, given that it is often legitimised with reference to the principle of necessity. Although often a feature of internal conflict and therefore not automatically within the scope of current humanitarian law, an example of guerrilla tactics in an international war was the position in Vietnam. Guerrilla strategy dictates that it is impossible to fight traditionally when one has such inadequate means at ones' disposal compared to a much larger power. For successful guerrilla warfare, it is then a matter of military necessity that guerrilla combatants should be indistinguishable from civilian non-combatants. The objective for guerrillas is not to harm civilians *per se*, but to encourage the enemy to do so, thereby undermining their legitimacy and decreasing their ground level support. This was the strategy of the Vietcong in Vietnam where during the course of the conflict between 365,000 and 587,000 civilians in both the North and South were killed by all forces. The Vietcong strategy made these civilians vulnerable by turning their villages into "defended places" and using villagers to launch attacks. The Vietcong consistently claimed that this strategy was the only one available to a force facing an enemy so much more powerful than they. For their part, the US have consistently

³¹ Meurant, Op Cit. n.11, p. 245.

³² Taylor, 1971, Op Cit. n.21, p.34

claimed that measures taken against civilians were not specifically aimed at them, but were part of a general “counter-insurgency programme” the operation of which was also conditioned by military necessity.³³ This was ultimately a remarkably effective strategy on the part of the Vietcong leading to what Fein describes as: ‘The legally-rationalised erosion of protective norms by the United States in the face of military frustration.’³⁴ This prosecution of unidentifiable combatants escalated, as did the Vietnam War itself. By 1970, Cambodia’s border with Vietnam was breaking down. Cambodia’s rice crop drained into Vietnam sustaining opposition to the US, while both Khymer and Vietnamese fled into Cambodia, pursued by the US military and Air Force. In the course of the US action against Cambodia 540,000 tons of bombs were dropped on civilian settlements. Kiernan describes how:

Richard Nixon’s May 1970 invasion of Cambodia created 130,000 new Khymer refugees according to the Pentagon. By 1971, 60 per cent of refugees surveyed in Cambodia’s towns gave US bombing as the main cause of their displacement.³⁵

It is difficult to deny then that, within counter-insurgency operations, in at least some senses, the civilian is a target. Rôling refers to this as ‘coercive warfare’ and unambiguously labels it as ‘criminal according to traditional standards of warfare’.³⁶ In common with most of the literature around this field, the implicit assumption underlying our discussion of the development of humanitarian law is that it is unquestionably a positive and welcomed development. Yet, there are some who do question the inherent benefit or efficacy of such developments, such dissent comes from

³³ H. Fein, ‘Discriminating Genocide From War Crimes’, *Denver Journal of International Law and Policy*, Vol. 22: Fall, 1993, pp. 29-62. p.42

³⁴ Ibid. p. 46.

³⁵ B. Kiernan, *The Pol Pot Regime: Race, Power and genocide in Cambodia under the Khymer Rouge 1975-79*, New Haven: Yale University Press, 1996, p.19

³⁶ B.V.A. Rôling, ‘The Significance of the Laws of War’, in A. Cassese, (ed), *Current Problems of International Law: Essays on United Nations Law and on the Law of Armed Conflict*, Milan: Dott. A.Guiffre, 1975. p.141.

a variety of different quarters, but for the purposes of clarity I shall classify them variously as legal, moral and political objections.

Objections

Legal objections take a variety of forms, one of the most common being that once war became an illegal activity it could not logically be addressed by law. It is paradoxical to argue that the rule of law be applied to a fundamentally illegal activity, just as the weights and measures act does not apply to the black market, neither can humanitarian law apply to an illegal war. For, so the argument runs, if participants are not prepared to settle disputes through legal channels, it is futile then to ask them to submit to legal regulation of the conflict. For these writers, the essence of war is that it replaces law with force. A far greater number of theorists and statesmen have supported this theory than the extent of the literature on it would lead one to believe. From Clausewitz to Goering who claimed at the Nuremberg Tribunal that in a total war the tenets of international law are broken down, the implication is that it is part of the inherent nature of war to be uncivilised.³⁷ A minor strain of such viewpoints also argues that the more brutal a war, the quicker it is finished and consequently the more humane it is. This line of argument rests on the optimistic hope that the more destructive a war, the less likely participants are to repeat it, a hope not born out by the lessons of history. Instead, international humanitarian law aims not to prevent war, but to mitigate its effects when all other attempts to prevent it have failed, thus logically it is not incompatible with efforts to avoid conflict. As Meurant points out:

Humanitarian law is characterised by its pragmatic approach which recognises the realities of our time of violence, without purporting to furnish an explanation of its causes³⁸

³⁷ Meurant, *Op Cit.* n.11, p. 237.

³⁸ *Ibid.*, p. 238.

Furthermore, at the present stage of development, the outlawing of war is neither complete nor universal, not all wars are illegal, and some are waged in defence of international peace and security for instance. Meurant makes another interesting point in this vein; international law is expanding to cover more and more non-international conflicts, conflicts which are certainly illegal according to domestic law, yet humanitarian law can still make a positive contribution to the course of such conflict.³⁹

Wholehearted condemnation of the 'counsels of desperation' which advocate abandoning humanitarian law is also the part of Telford Taylor who points to two main reasons why the laws of war should continue to be developed. His first point is quite simply that they work.

Violated or ignored as they often are, enough of the rules are observed enough of the time so that mankind is considerably better off with them than without them if it were not regarded as wrong to bomb military hospitals, they would be bombed all of the time instead of some of the time.⁴⁰

State Responsibility and Collective Punishment

As the notion of enforcement is central to this thesis, constraining as it does the assignation of responsibility, we shall now turn to traditional remedies for violations of the laws of war. It is clear that prior to the Nuremberg Tribunal, responsibility was directed at states. Liability, such as it was, was a collective liability. Although we shall see a few attempts at individual prosecutions, they were neither effective nor

³⁹ Ibid.

⁴⁰ Taylor, 1971, Op Cit. n.21, p. 40.

constitutive of a precedent for the Nuremberg Tribunal. Thus an examination of the history of enforcement for the violations of the laws of war demonstrates a focus on collective punishment and contextualises the radical nature of the Nuremberg Tribunal in its refocusing on the individual as a target for liability. The main routes of punishments for states have been reprisals, reparations and sanctions, and reciprocity, together with the principle of *tu Quoque*.⁴¹ Attempts to apply liability to states have also been conducted through the ICJ. There had been notable attempts to apply individual responsibility prior to the Nuremberg Tribunal, noticeably the Leipzig trials and the condemnation of the Armenian genocide.

Reciprocity and Reprisals

Reciprocity is perhaps the crudest form of collective responsibility and simply refers to the principle that should a party to a conflict violate the rule in question, then the opposing party can declare itself no longer bound by the rule. In this case, the principle is that of 'negative reciprocity'. A good example of this is the threat by the US to use nuclear weapons against Iraq should it use chemical weapons against its troops in the Gulf War. This was a threat of negative reciprocity and it illustrates most forcefully the key norm of inter-state warfare, that adherence by a belligerent to even the most fundamental legal instruments, cannot be sustained when the opposing force threatens to gain military advantage by non-adherence to the law.⁴² Yet negative reciprocity is both crude and liable to escalate brutality, given that it signals the abandonment of restraint.

By contrast, reprisals are retributive practices aimed at collectives and as such, they are crucial in determining the trends and traditions in responsibility assignments. The most

⁴¹ The implications of this defence are discussed in Chap 4 – on the Nuremberg Tribunal .

⁴² F. Kalshoven, *Constraints On The Waging Of War*, The Hague: Martinus Nijhoff, 1987, p.65

extreme of methods employed to enforce international law, their use is now of limited defensibility.⁴³ Yet, historically they have been a determining feature of customary law and there is evidence that some elements of the practice of reprisals persist in a new and mutated form. In terms of responsibility assignation, they are the polar opposite of individual responsibility and an examination of their main features illustrates the long historical tradition in which they are embedded. Reprisals are then, the most traditional method of enforcement⁴⁴ and the method most hostile to the protection of non-combatants in conflict scenarios. They are governed by a sophisticated and detailed set of conventions, the sixth most central are i) No resort to reprisals without a previous illegality by the opponent; ii) no resort if the adversary desists from such illegality without the actual employment of reprisals; iii) notice to resort to reprisals, with a reasonable period allowed the adversary for a return to legality; iv) proportionality in volume and a limited control as to genus; v) no resort to reprisals except on the instructions of a government; vi) immediate cessation of reprisals as soon as the adversary desists from the illegality in question.⁴⁵ By referring to these rules we can clearly see the difference between reciprocity and reprisals and although nuclear exchange is often described as governed by the customary law of reprisals, it clearly fail to satisfy on that score.⁴⁶

⁴³ The Geneva Conventions 1949, have eliminated the device of reprisals although Combat Law retains it as a central method of enforcement. G.I.A.D. Draper, 'The Ethical and Juridical Status of Constraints in War', *Military Law Review*, Vol. 55, 1972, pp.169-185, p.182. For more information on the Geneva Conventions see Chapter 3.

⁴⁴ G.I.A.D. Draper, 'The Ethical and Juridical Status of Constraints in War', *Military Law Review*, Vol. 55, 1972, pp.169-185, p.182.

⁴⁵ Draper, G.I.A.D. 'Implementation of International Law in Armed Conflicts', *International Affairs*, Vol. 48: No. 1, 1972, p. 49.

⁴⁶ For example Draper claims that, 'The operation of the legal device of reprisals, an accepted method of enforcement of the law of war, certainly comes into play in the event of an armed conflict between nuclear belligerents'. G.I.A.D. Draper, 'The Ethical and Juridical Status of Constraints in War', *Military Law Review*, Vol. 55, 1972. pp.169-185. p.175.

Reprisals arose under customary international law and then the regulation of armed conflicts as a response to the enforcement deficiencies of the laws of war.⁴⁷ The breadth of reprisal broadened, beginning to include non-violent reactions involving economic, diplomatic or cultural relations.⁴⁸ When we move to consider the character of reprisals as forms of collective punishment, it seems clear there are implications in modern diplomatic practices for the assignation of responsibility.

It was not until the 19th century that reprisals were used to enforce the regulation of armed conflict and the concept of belligerent reprisals emerged and was formalised.⁴⁹ It seems that reprisals are still a part of the enforcement of the laws of war although several developments have limited the circumstances in which they may apply.⁵⁰ For Oppenheim claims that:

Reprisals between belligerents cannot be dispensed with, for the effect of their use and of the fear of their being used cannot be denied. Every belligerent, and every member of his forces, knows for certain that reprisals are to be expected in case they violate the rules of legitimate warfare.⁵¹

The concept of reprisals was specifically attended to in 1863 in Art.27 of the Lieber Code which states 'the law of war can no more wholly dispense with retaliation than could the law of nations, of which it is a branch'. All this goes to show the entrenched nature of a collectivised approach to punishment, the very structure of international law embeds it.

⁴⁷ M.C. Bassiouni, *Crimes Against Humanity in International Criminal Law*, The Hague: Martinus Nijhoff, 1992. p. 449.

⁴⁸ *Ibid.*, p. 450.

⁴⁹ *Ibid.*

⁵⁰ See Chapter 3

⁵¹ H. Lauterpacht, (ed), *Oppenheims International Law*, 7th ed., 1948, p. 560.

Reprisals, however, are antagonistic to the most fundamental distinction between combatant and non-combatant populations, which elsewhere I have identified as a moral distinction.⁵² They are antagonistic to the equitable assignation of moral responsibility because they are at their core a collective punishment.⁵³ Reprisals exhibit a true non-discriminatory collective punishment because they are most commonly directed at population groups who have no bearing on the conflict. A prime example of this was in the unrestricted campaign of aerial bombardment waged by both sides in WWII.

Bassiouni gives an illustrative example:

The German and Allied practice of indiscriminately bombing civilian populations during WWII were numerous. After the mistaken bombing of London by the German Luftwaffe in Sept 1940, England bombed Berlin as an act of reprisal. Germany responded by excessive bombing of London and other cities of England and explained it as acts of legitimate reprisals. Then the Allies firebombed the city of Dresden as an act of reprisal for the bombing of Coventry leaving ...30,000 to 100,000 casualties...⁵⁴

Aerial bombardment clearly offers some direct moral difficulties in terms of distinction and proportionality, the moral signifiers for assessing conduct in conflict. When we contextualise this mode of warfare within the tradition of reprisals, we have an outstandingly clear example of what is nothing short of collectivised punishment. This is clearly stated by Kelsen 'Reprisals and war are directed against the state as such, and that means against the subjects of the state... This means collective responsibility'.⁵⁵ Walzer inadvertently reduces to the collective when he talks about the indiscriminate bombing of Germany during WWII. Walzer suggests that we feel it to be more

⁵² See Chapter 5

⁵³ See Ch 5 on 'Principles of Moral Responsibility' for the rationale behind the abandonment of collective punishments.

⁵⁴ Bassiouni, *Op Cit.* n.47, p. 454.

⁵⁵ H. Kelsen, "Collective and Individual Responsibility in International Law with Particular Regard to the Punishment of War Criminals", Vol. 31, *California Law Review*, 1943, pp. 530-534.

acceptable to bomb an aggressive nation like Germany, than an occupied one, such as France on the grounds that there are likely to be more guilty people there. He argues that even were there to be significant strategic gains to be made by heavy bombardment of an occupied state, public opinion could not support such a move. The illustration he offers is of a town full of adults only, who had supported the Nazi party. He argues that even though such bombing would still be a crime, we are intuitively more comfortable with it than if there were innocent people among the inhabitants.⁵⁶ We can see from this example that the collective 'Germany' when closely inspected, is actually the collective 'guilty Germans'. Thus, there is not only the collectivisation of punishment implied by reprisals, but also the collectivisation of moral responsibility. This monolithic approach to other states marked the traditional structure of state interaction. I see the rise of individual criminal responsibility as mirroring the decline in acceptability of such a collectivised approach. Indeed, these concepts are in a zero-sum relationship and I contend that it is impossible for both approaches to co-exist with any degree of coherence. However, the application of collective responsibility has a long and entrenched position which is grounded in the very practice and structure of inter-state relations. Indeed the international system cannot exist in its present form without this assumption, for states must be treated as monoliths, the legal order demands that states are treated as unified sovereign entities. Whilst the principle of individual criminal responsibility continues to gain ground, both principles will exist in an uneasy relationship with one another. For instance, whilst aerial bombardment, despite its doubtful moral grounding, continues to be essential to modern warfare, states are increasingly required to demonstrate distinction in its use, a task which the very nature of the weaponry makes difficult. Distinctions between combatant and non-combatant sections of a population must not only be made, but also in recent years,

⁵⁶ M. Walzer, *War and Moral Responsibility*, Princeton: Princeton University Press, 1974, p. 102. Walzer is not arguing the case for collective guilt, I simply found the example an instructive one.

publicly justified. This is despite the fact that the structural dynamics of the military have generated armaments, such as nuclear weapons, that are less and less discriminatory. The heavy aerial bombardment of Iraq during the Gulf War has been heavily criticised, but more interestingly, the US military responded to this criticism by continually defending its record on directional bombing and justifying civilian casualties.⁵⁷ For instance, it was claimed that ‘great effort is taken, sometimes at great personal cost to American pilots that civilian targets are not hit’, yet across the total of 110,000 US aerial sorties across Iraq only 7% of the ordinance used had directional control systems and up to 50,000 Iraqi civilians were killed.⁵⁸ This sort of uneasy compromise between military logic and moral concern is a result of the conceptual shift away from collectivised punishment and towards individual criminal responsibility.

Reparations and sanctions.

Of course, an alternative to *de facto* collective punishment through the extremities of military action, is the application of sanctions and demands for reparations from ‘guilty’ states. The concept of reparations implies a duty to ‘make good’ when an international obligation has been violated. Malekian describes how ‘This concept has been accepted since the existence of societies, as a consequence of a wrongful action’.⁵⁹ This concept is a broad one and appropriate compensatory measures can take a variety of forms given that the Permanent Court of Justice in its judgement asserted that:

Reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation

⁵⁷ R. Clark, *The Fire This Time: US War Crimes in the Gulf*, New York: Thunders Mouth Press, 1992 . There was also an unofficial tribunal held to examine the role of the US in the conflict. *Final Judgement of the International War Crimes Tribunal*, New York, February 29 1992.

⁵⁸ *Ibid.*, p. 130.

⁵⁹ F. Malekian, *International Criminal Responsibility of States: A Study on the Evolution of State Responsibility with Particular Emphasis on the Concept of Crime and Criminal Responsibility*, Stockholm: Borgstroms Tryckeri, AB, 1985, p. 11.

which would, in all probability, have existed if that act had not been committed. Restitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear; the award, if need be, of damage for loss sustained which would not be covered by restitution in kind or payment in place of it.⁶⁰

This is certainly a responsibility assignation of some kind towards states but it is not interchangeable with the individual criminal responsibility for injurious acts that was applied for the first time at the Nuremberg Tribunal. In fact, a clear example of the tension between collective and individual responsibility assignation was seen with the treatment of Germany after World War I. The heavy reparations exacted from Germany⁶¹ represented a collective approach to applying responsibility. However, in tandem with this, articles 227-230 recognised the responsibility of individuals for war crimes and demanded they should be handed over for prosecution.⁶² In 1921 the German Supreme court at Leipzig, in the case of the hospital ship named Llandovery Castle, which involved the shooting of survivors in lifeboats, ruled that criminal international law was applicable to individuals. The defendants were found guilty of the violation of that law and accordingly punished.⁶³ However, the Leipzig Trials could not be marked a success, only five defendants were convicted and these were all released by their jailers. No high-ranking defendants were convicted and the allies did not pursue the extradition or prosecution of Kaiser Wilhelm who was specifically listed for prosecution. It is clear both that the traditional approach to state responsibility was dominant and that the consensus around individual responsibility, when examined through the actual prosecution rates, was undeveloped.

⁶⁰ Ibid., p. 12.

⁶¹ Shirer, W.L., *The Rise and Fall of the Third Reich: A History of Nazi Germany*, London: Book Club Associates, 1978, p. 51.

⁶² J.B. Keenan and B.F. Brown, *Crimes against International Law*, Washington D.C.: Public Affairs Press, 1950, p.124.

⁶³ Ibid.

The notion of reparations is characterised by compensation rather than retribution; technically there are no punitive damages, and liability is therefore civil in character rather than criminal. However, it is clear that such collective responsibility assignments are wielded retributively on occasion. Yet when measures such as reparations and sanctions are applied retributively the result must be unjust. As we have seen in chapter two the attempt to apply criminal responsibility to collectives inevitably collapses into logical incoherency. Malekian falls foul of this incoherency in his claim that there are grounds to criminalise states. As legal entities it is no doubt possible to attribute legal responsibility, as Malekian claims, yet when attempting to envisage the form a criminal punishment might take he reaches an insurmountable difficulty in that states are incorporeal criminals. Ultimately, he must rely on the fact that ‘official responsible individuals can make up the natural body of the state, if physical punishment should be required.’⁶⁴ It is difficult to see how this differs from individual criminal responsibility.⁶⁵

Sanctions could almost be characterised as the modern equivalent of economic reprisals.

They are provided for within the UN Charter, according to Article 41, Chapter VII:

The Security Council may decide what measures involving the use of armed force are to be employed [...] These may include the complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations.⁶⁶

⁶⁴ Ibid., P. 170.

⁶⁵ This issue is explored further in Chapter 5

⁶⁶ Department of Public Information, *Charter of the United Nations and Statute of the International Court of Justice*, New York: United Nations, Article 41, Chapter VII, p. 23.

These powers were intended to allow for mandatory imposition, although they have rarely been used coercively.⁶⁷ The use of sanctions has gained more currency post-world war two and has been systematically linked to the protection of a wider range of human rights than the gross system criminality to which this thesis confines itself. For instance, the Lomé Convention marked a serious attempt by the European Union to address apartheid in South Africa. However, the conflict in former Yugoslavia saw sanctions used to support the negotiated peace settlement for the region, and an outstanding application of sanctions has been seen in relation to Iraq. Both of these examples and the implications of the sanctions regime are discussed in depth in Chapter seven.

Conclusion

The history of international interaction has been the history of state interaction; the individual has had no voice, no role and no legal personality. States have been monolithic entities, with a discrete legal personality and an intricate network of obligations and duties, norms, protocols and customs. Given the way states have traditionally related to one another, it is easy to see how the international system is structured towards maintaining and fine-tuning these relationships and they are nowhere more evident, or more frail, than within international humanitarian law.

The two main strands of humanitarian law were focussed on either the restriction of weaponry or the designation of appropriate targets, otherwise known as the principle of discrimination. I argue that the history of the concept of discrimination is the history of the most easily discernible moves towards a shared morality of states. In a legal regime

⁶⁷ See Chapter 7 for detailed discussion on the use of sanctions.

that is marked by pragmatism and utility, the existence of these provisions, although largely unobserved, is indicative of the existence of a core shared morality. Yet, when we compare the concept of discrimination with that of the concept of military necessity, we can see that the traditional state system has rigorously prioritised necessity. The prioritisation of the necessity principle is a function of a state system in which the defence of sovereignty must be the absolute goal of its members. Given these priorities it is not surprising that the notion of justice has been so firmly subordinated to that of power, the structural logic of the state system has demanded it.

The growth of international law has therefore been driven by pragmatism, utility and custom. The laws of war have been based more upon principles of 'fair play' than justice. This can be seen by the civil, compensatory nature of remedies against violators of what could be more effectively described as international custom than international law in the true sense of law. There are few punitive measures against states; in fact, the only remedy available for serious violations of law has been war. As Holland describes, 'war is the litigation of states'.⁶⁸ The civil law, compensatory nature of remedies for violations of the laws of war as they have traditionally been applied, demonstrate that international law has been structured around utility rather than morality. To criminalise an offence is to designate it an offence against a polity, thus in domestic law the victim cannot waive the right to prosecution for a criminal offence. Prosecution proceeds regardless of the wishes of the victim because such offences are deemed offences against the social order. The criminalisation of genocide for instance, was to imply that there was a moral order shared and upheld by all peoples, further to this it must imply a common polity against which the offences had been committed. This thesis examines the modern examples of what might be termed 'system crime' and the legislation which accompanies them with regard to whether there has been an orientation towards

collectivising the blame or individualising it. Examining the new moves towards individual responsibility from this perspective is illuminating in that it demonstrates the difficulty in fully realising this principle in the face of the limitations imposed by the history and practice of international inter-action. Much of the inconsistency and apparent timidity of the moves to enforce individual criminal liability can be explained by contextualising them in the historical practices of states. The move from collectivised to individualised responsibility is more than some new legislation to which states waver in their commitment, it is a challenge to the very structural conditions under which states operate. An awareness of the magnitude of this challenge explains much of the partiality of its success.

⁶⁸ Malekian, *Op Cit.* n.57, p. 170.

Chapter 4

Nuremberg: A Tentative Revolution

Even the most cursory glance at the literature on war crimes prosecutions reveals the centrality of the Nuremberg Tribunals. For they serve as a fixed point of reference and a unique standard, in their precedent, implications and the radical change of direction they represented. This chapter addresses two central questions in the context of responsibility assignment. How much of a departure from the traditional collective response to war crimes did the application of individual criminal responsibility represent, and what could explain the necessity for such a departure?

This chapter argues that it represented a departure in several crucial respects; significantly it marked a shift away from the collectivisation or distribution of blame and towards its division through the application of individual responsibility. As we have seen in the last chapter, traditional punishments for infringements of the laws of war were directed at the state concerned and included such measures as reprisals, negative reciprocity and reparations. Yet from Nuremberg onwards, the individuals guiding state policy would be, technically at least, criminally liable for their actions. However, crucially, all of these developments indicated a more fundamental change in inter-state relations. Applying Kuhn's arguments that trends which are minor and latent in one generation, yet become dominant in another constitute a real paradigmatic shift¹ and further, we contend that such a shift occurred with the Nuremberg Charter. Such a change in orientation signalled a major departure from the guiding principles of international law and provided a conceptual space to consider the notion of a human community. The core of the revolution that occurred at Nuremberg was the

¹ T.S. Kuhn, *The Structure of Scientific Revolution*, Chicago: Chicago University Press, 1962, pp. 44-7.

criminalisation of the orchestration of system crime. It is this that has had the most profound ramifications for international society itself. The root of this insight lies in the fundamental difference in the structure of civil and criminal law. Civil law is designed to settle disputes between individuals, compensating one individual for the misdoings of another. Before Nuremberg this was precisely the position of international law.

Reparations, sanctions and even reprisals are a method of 'compensating' one state for the actions of another state. By contrast, criminal offences are not crimes solely against victims, instead they are crimes against the polity. Thus I may not waive the right to prosecution in cases of murder, murder is a crime against the order of the polity. When offences against racial groups were criminalised by the Nuremberg charter, something far more fundamental than individual prosecutions was occurring, the international community was declaring itself as a polity against whom the offences had been committed. The designation 'crimes against humanity' was a fundamental declaration of the existence of a human polity. Hence the Nuremberg Tribunals are not only of interest in the narrow framework of war crimes they are also central to the evolution of international juridification.

International law is fundamentally dissimilar from domestic law, in that the creation and definition of a crime is distinct from its justiciability. Hence a novelty of Nuremberg lay in the creation of a judicial body, an international military tribunal, rather than in the laying down of new offences. Most of the crimes addressed had already been part of customary law, and it is clear that it was with these crimes that the tribunal was most comfortable. However, the notable exception to this was the creation of the category of 'crimes against humanity'. It is within the redefinition of this group of crimes, coupled with the introduction of individual responsibility, that we see the greatest shift in perceptions and the biggest innovation in the treatment of war crimes. However, the decision to create such a court, which was such a departure from traditional norms of

response, rested firmly within the political arena and its effects have reverberated throughout the political community. It is thus the political context of the Nuremberg Tribunal which is both instructive and illuminating.

Thus the most visible achievements of the Nuremberg tribunal were the creation of 'crimes against humanity' and the application of individual responsibility. The introduction of individual responsibility represented such an advance in war crimes prosecutions because it contradicted one of the guiding principle of international interaction, epitomised by the Acts of State doctrine, as formulated and expressed by Kelsen.² In tandem with this, the court made innovations in the treatment of command responsibility and narrowly collective liability.

So why was it necessary to make such a response to the atrocities of the Second World War? The obvious answer is simply because of the scale of criminality, and it is customary to focus on the crimes of Nazi Germany in this respect. But in fact, technological advances in warfare had by this time changed the character of warfare to such an extent that all sides were guilty of what had already been designated as 'criminal' behaviour. The *tu Quoque* argument could be applied to all participants, the only crimes which German officials had committed exclusively were those aimed at deliberate extermination of a racial group. We can argue that the creation of the category of 'crimes against humanity' was an essential response to the extreme nature of German criminality and the response generated by a genuine international moral consensus. However, these were the group of crimes least supported by precedent and customary practice, and consequently those that the tribunal participants were least intuitively comfortable with. This led to a focus on 'traditional' crimes which it could

² H. Kelsen, 'Collective and Individual Responsibility in International Law with particular Regard to the Punishment of War Criminals', *California Law Review*, Vol. 31, 1943, pp.530-571.

be argued were committed by all parties to the conflict.³ This has skewed the impression left by the tribunal, as simply a stage for ‘victor’s justice’.

Thus we could argue that the Nuremberg Tribunal occupied a unique position in international law as the early manifestation of morality in the international community. As Judge Rôling, an expert in international law and a Tokyo Tribunal judge commented:

Branding something an international crime has not only the purpose of prosecuting and punishing. It is also an expression of the unworthiness of certain acts. By criminalising the act you give expression to the intensity of your disapproval.⁴

Other, non-judicial, parts of the international scene, though they may be judged moral or immoral, are discussed mainly in prudential terms. Thus for example, the debate surrounding the Bretton Woods institutions may have been conducted in the framework of obligation and morality, but the institutions themselves are framed in notions of utility, notions such as stability, security, benefits and effects. Thus later war crimes legislation is a pure expression of international morality, rather than, for instance, an ethical stance that also has the effect of evening commercial or strategic advantage such as child labour laws or the anti-landmine campaign of the 1990s. If a state behaves in a moral way, for instance in enforcing prohibitions on the use of child labour, there is a commercial advantage in encouraging similar behaviour in other states- there may be a moral impulse involved in such regulation but it is, logically speaking, less than pure. However, the category of ‘crimes against humanity’ contrasts with these types of ethical legislation, as there is little prudential benefit to states in attempting to regulate another state’s treatment of its own citizens, and often a great deal of difficulty. This expression

³ Although the sternest punishments were meted out to those to had committed crimes against humanity.

⁴ A. Cassese, and B.V.A. Roling, *The Tokyo Trial and Beyond*, Cambridge: Polity Press, 1993, p.94.

of international morality only became overt in the constitution of the Nuremberg Tribunal when, for the first time, the laws of war became less a matter of chivalrous adherence to sporting rules and more a matter of the determination and punishment of gross immorality.

Nuremberg's legacy was not solely in its legal innovation, but in the revolution it brought about in the public mind, through consciousness of what has become known as the 'Nuremberg Principles'.⁵ Newspapers of the time reflected the magnitude of this development. The *New York Times* referred to the London Charter as 'a new code of international morals'.⁶ And Taylor, one of the prosecutors at the tribunal notes that:

Beneath ... the Nuremberg precedent there is a common denominator: that there are some universal standards of human behaviour that transcend the duty of obedience to national laws.⁷

The Nuremberg Tribunal laid the foundation for our current comprehension of what constitutes a war crime and how and when they are prosecuted, not only in a strict legal sense but also, arguably, in terms of how we view the morality of these crimes. As we have seen, prior to Nuremberg, war crimes prosecutions were contained within the legalist approach. The laws of war were subject to the same notions of utility as the Bretton Woods institutions mentioned earlier. However, the Nuremberg Tribunals were couched in the terms of reference we accord to moral discourse. Nuremberg did more than codify the laws of war; it codified, for the first time, the moral duties of states.

⁵ T. Taylor, *Nuremberg and Vietnam: An American Tragedy*, New York: Bantam Books, 1971, p.12.

⁶ Leader, *New York Times* quoted in A. Tusa and J. Tusa, *The Nuremberg Trial*, London: BBC Books, 1995, p.89.

⁷ Taylor, *Op Cit.* n.5, p.16.

Circumstance and Content of the Nuremberg Charter.

On the 8 August 1945 the London Declaration was signed by the governments of the United Kingdom, France, the Soviet Union and the United States. This formally provided for the prosecution of major war criminals, producing the Statute for the Nuremberg International Military Tribunal and the guiding principles of the trial. It also signalled a small revolution in the international legal system and a definitive codification of a nascent international morality. The trial began in Nuremberg on 20 November 1945 and judgement was rendered on 30 September and 1 October 1946, there were twenty-two defendants of whom all were found guilty, except three.⁸ Twelve were sentenced to death and seven received prison sentences.⁹ It provided for the prosecution of ‘major criminals whose offences have no particular geographic location and who will be punished by the joint decision of the Governments of the Allies’.¹⁰ Prior to this agreement it seems clear that there was a definite intention on the part of the allies to punish war criminals.

Selection of Accused

Under the terms of the Nuremberg Charter, the tribunal was to try a cross-section of German statesmen, bankers, administrators, industrialists, military leaders, educators and propagandists.¹¹ In addition, representatives of particular organisations and collectives were to be tried. This form of collective responsibility is not conceptually difficult as the organisations were to be limited to ‘direct-action units’, requiring

⁸ The discrepancy in the figures is accounted for by deaths in custody.

⁹ A. Roberts, and R. Guelff, *Documents on the Laws of War, 3rd Edition*, Oxford: Oxford University Press, 2000, p.175.

¹⁰ *War Crimes: Report of the War Crimes Inquiry*, Members- Sir Thomas Hetherington, William Chalmers, July 1989, HMSO Cm744. p.47.

¹¹ R.K. Woetzel, *Nuremberg Trials in International Law*, London: Stevens and Sons Ltd., 1960, p.6.

intentional commitment and joined through autonomous choice.¹² This was illustrated by the French submission on the issue which argued that the task of prosecuting would be enormous, stretching into hundreds of thousands of individuals. It would be 'impossible to prove an individual's guilt either because witnesses have been wiped out or dispersed... or because the German criminals acted collectively, in large numbers, and their personal responsibility cannot be established'.¹³ Thus the criminalisation of collectives was essential to simplify the task of prosecuting huge numbers of people, requiring the prosecution only to prove membership of the organisation in question. What is more interesting is the selection of individuals accused as representative of different categories of the German war machine, as well as in 'government, the military establishment ... and in financial, industrial and economic life of Germany. This selection of representative categories shows a marked tendency to collectivise guilt as it seems clear that these categories relate to the German nation itself. Indeed, this trend was well exemplified by Czechoslovakia who wished to indict the whole German government, not because of particular atrocities but because they were all regarded as 'bearing ultimate responsibility'.¹⁴ In many ways then, the Nuremberg Tribunal marked a staging post to individual responsibility rather than genuine individual moral responsibility, it was individual responsibility designed to symbolically try a whole nation, if not on the part of the framers and legal professionals involved, then certainly on the part of the Allied governments. Even the Chairman of the United Nations War Crimes Commission described the Germans as 'treacherous aggressors and they are as a nation chargeable with war guilt.'¹⁵ Similar sentiments were expressed in the

¹² Note of the Meeting of the War Criminals Commission Inter-Allied Court, Committee II, *Question of Establishing an International (inter-allied) Court*, 3rd June, 1944, P.R.O: FO 800/922, item 14.

¹³ European Advisory Commission - War Criminals, *Memorandum by the French Delegation*, 21st Feb 1945, P.R.O: EAC 45/13.

¹⁴ War Cabinet, *Interdepartmental Committee on War Crimes*, 20th March 1945. P.R.O: CAB 78/31. item 59.

¹⁵ Lord Wright, 'That the Guilty Shall Not Escape', *New York Times*, 13th May, 1945, P.R.O: FO 800/923. item 235.

Declarations by United Nations Governments and Leaders on war Crimes. Of this core group of 15 statements, 11 referred to the commission of war crimes by 'Germany', and 2 more condemned the 'German government'. Only Churchill and Roosevelt condemned 'Hitlerite Nazis' rather than the German nation.¹⁶ This expresses a conceptual orientation rather than a legal one and whilst it does not diminish the innovative nature of the Nuremberg Tribunal, it illustrates the scale of the reorientation that had to be made by Western governments and their populations.

But of course, the tribunal was nevertheless to impose criminal responsibility upon individuals rather than upon states. This led the tribunal in a particular direction, one which, as Pompe argues, was to, 'Come in the middle of, and contribute to the transition from, the traditional system of sovereignty and personal immunity to that of a real world community which will be built primarily upon the responsibility of men.'¹⁷ Yet it seems clear that this shift in orientation was not unproblematic. This bold consensus represented not only the beginnings of a new direction for the international community but also the culmination of a long period of debate and discussion during which both indecision and disagreement were manifest amongst the allies. Indeed, there are contradictory strands of argument running through the constitution of the Nuremberg Court that indicates the moral consensus though nascent, was by no means complete.

Form and Nature of Retribution

Although the intention to seek retribution for German war crimes was announced in the Moscow Declaration, 1943, the form and nature of such punishment was unresolved. What is certain is that the choice of a judicial response to these crimes was by no means

¹⁶ The countries were the Governments of the Nine occupied countries, plus Czechoslovakia in an extra declaration and Molotov who laid responsibility at the door of Germany. Poland and Stalin referred to the German government. Roosevelt to 'nazis' and Churchill to 'Hitlerite Nazis'. United Nations War Crimes Commission, *Declarations by United Nations Governments and Leaders on the Subject of War Crimes*, 14th June, 1944, P.R.O: FO 800/923, item 163.

¹⁷ C.A. Pompe, *Aggressive War, An International Crime*. The Hague: Martinus Nijhof, 1953, p.97.

an obvious one. The process for dealing with most war criminals was to return them for trial in the territory where their offences had been committed and upon this there was wide agreement. However, it was the process for dealing with major criminals whose offences had no particular geographical localisation that were the subject of discussion and there were several seriously proposed alternatives. At Teheran on 29 November 1943, Stalin raised proposals for widespread executions, apparently it seems in jest. Nonetheless Churchill showed a strong distaste for them.¹⁸ Yet a memorandum circulated by the Foreign Office staff in 1942 opposed the trial of arch criminals such as Himmler, not on the grounds that lynch justice was naturally to be preferred, but rather because their “guilt was so black” that it was “beyond the scope of any judicial process”.¹⁹ The scale of Nazi criminality was so great that it was mooted as beyond the capacity of standard judicial procedures.

In this sense the FCO reflected a view that system criminality stands outside normal legal parameters. Foremost in this line of thinking is Hannah Arendt whose work *The Human Condition* tackled the issue of confronting what she terms ‘the banality of evil’.²⁰ Arendt stresses the link between punishment and forgiveness, not mutually exclusive notions but concepts that are linked as part of the same process. Both perform the same function in allowing us to “complete” or “close” a particular line of action. Massive human rights violations involve what Kant termed ‘radical evil’- offences which are so extreme that ‘normal’ moral assessment seems both inadequate and redundant. Arendt argues that:

It is a structural element in the realm of human affairs, that men are unable to forgive what they cannot punish and that they are unable to punish what has turned out to be unforgivable. All we know is that we can neither punish nor forgive such offences and that they therefore transcend the realm of human affairs and the potentialities of human power, both of which they

¹⁸ The following extract is taken from his memoirs, but is confirmed by the accounts of others present this [the execution of 50,000 German officers and technicians] I thought it right to say “The British Parliament and public will never tolerate mass executions. Even if in war passion they allowed them to begin, they would turn violently against those responsible after the first butchery had taken place. the Soviets must be under no delusions on this point” Stalin however, pursued the subject I was deeply angered. “I would rather”, I said, “be taken out into the garden here and now and be shot myself than sully my own and my country’s honour by such infamy. Quoted in M. Marrus, *The Nuremberg war Crimes Trial 1945-46: A Documentary History*, Boston: Bedford Books, 1997. p.23.

¹⁹ Ibid.

²⁰ H. Arendt, *The Human Condition*, Chicago: Chicago University Press, 1958.

radically destroy wherever they make their appearance',²¹

For offences which are outside of our moral capacity there can never be adequate punishment, and consequently no conceptual space for forgiveness. Indeed, such offences lack even a vocabulary sufficient to express them. On this view, if such offences surpass even our linguistic ability to deal with them, it cannot be appropriate to attempt to punish them through a criminal system based upon our previous moral experience, a legal framework that is designed punish single aberrant violations of the law. As Carlos Santiago Nino points out one of the underlying principles of any legal framework is that:

blame and retributive punishment must be proportional to the magnitude of the evil committed. But how can this be done? Our vocabulary for moral blame soon runs out when we want to condemn the genocide of six million persons how can the punishment of these deeds be distinguished from those of an ordinary murder?'²²

In April 1944, the question of what was to be done with such criminals was still being posed by state representatives and the options of non-arrest and summary execution still entered discussion.²³ There is evidence that the allies seriously considered summary executions. Marrus describes how 'Churchill ... suggests that he adamantly opposed executions. On other occasions, however, we know that he took precisely the opposite view'.²⁴ Indeed, the British government manifested considerable reluctance to entertain the idea of trials. As late as 20th April 1945 the British reiterated objections to them. This attitude did not soften until the suicide of Hitler, Goebbels and, two weeks later, Himmler, at the end of April 1945. This, combined with the capture and summary execution of Mussolini meant that by the third week in May, foreign office ministers

²¹ Ibid., p. 241.

²² C. Santiago Nino, *Radical Evil on Trial*, London: Yale University Press, 1996, p. 141.

²³ Report of the United Nations War Crimes Commission, Committee III, *Scope of Retributive Action of the United Nations According to their Official Declarations*, 27th April, 1944, P.R.O: FO 800/922, item 10.

²⁴ M. Marrus, *The Nuremberg War Crimes Trial 1945-46: A Documentary History*; Boston: Bedford Books, 1997. p.23.

had agreed in principle to the idea of some judicial process.²⁵ The arguments in favour of individual responsibility proved persuasive enough for supporters of individual criminal responsibility to justify its adoption on the grounds that it would be a more effective deterrence against future abuses.²⁶

Yet even the decision to try major war criminals was clouded by the notion of collective responsibility. For instance, the Russian delegation at the negotiations for the London Charter²⁷ raised the idea that prosecutions of individuals alone would not be adequate and that any trial should consider the entire German polity, saying: 'We should pass judgement on the whole policy of Germany and not on individual acts taken apart from the whole.'²⁸

Legal issues

Having settled on a judicial approach to the question of retribution and upon those who would be tried, it remained to lay down the charges and jurisdiction of the court. Whilst the dynamic of change in the development of the laws of war may be the impact of technology and gross atrocities, the development of such laws had not so far been imposed or enforced. Instead their development was dependent on the consent of the parties to it. The regulation of hostilities has, in spite of its relatively recent arrival in codified international legislation, always been the subject of custom and convention between states. Thus the codifying of certain principles in law is based upon centuries of military practice. It is important to recognise that it is this customary practice that is

²⁵ R.E. Conot, *Justice at Nuremberg*, New York: Carroll and Graf, 1983, p. 15.

²⁶ S.R. Ratner, and J.S. Abrams, *Accountability for Human Rights Atrocities in International Law: Beyond the Nuremberg Legacy*, Oxford: Clarendon Press, 1997. p. 15.

²⁷ These negotiations were pursued at the International Conference in London from June 26 to Aug 8 1945, and lead to the London Agreement which produced the Statute for the Nuremberg Tribunal for the trial of the German Major War Criminals.

²⁸ Report of Jackson, R.H., US Representative to the International Conference on Military Trials, London: 1945. Ferencz, B.B., *Defining International Aggression Vol. 1*, New York, p. 377.

the source of international law, unlike other forms of statutory law whose source is the legislature from which it emerges. Thus the framers of the charter were required to base the charges on crimes which were criminal by customary law. Law which flows from a national government can be changed, but is legally binding upon individuals until such a time as that occurs. The customs and practice of military conflict are binding on all states by virtue of the fact that they are widely or commonly observed. No state needs to ratify or adopt relevant treaties for them to become legally binding. There is a simple reason for this; there is no international legislature to give the laws of war statutory form.

The laws of war ... have grown in somewhat the same manner that the common law of England grew in pre-parliamentary times ...when very little of the basic civil and criminal law of England was to be found in Parliamentary statutes, but rather in the decisions of the English common law courts - judge-made law based on custom and precedent.²⁹

This explains the common practice of trying such cases within a military tribunal (as at Nuremberg) or court martial, and also the constitution of a criminal tribunal for Former Yugoslavia. As the judge must “create” law based on his interpretation of customary practice, and the depositions of states, a jury-system is both inappropriate and unworkable. In addition, if practice codified in international law ceases to be customary practice, it is no longer an effective part of international law.

Thus, the focus of the laws of war has always been upon customary practice. Yet this was to prove simultaneously both empowering and constraining. It provided a firm legal basis for the charges, but it also conditioned the potential for creation of new charges. A clear example of the difficulties inherent in extending international law are seen within the creation of the category of crimes against humanity. This was a new category of

crime dealing with murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population.³⁰ The difficulty in creating such a category was that it had no real relationship to the customs and practices of law upon which the other charges crimes against peace and war crimes, which were founded on customary law, were based. It was necessary to create such a link in order to supply legal force to the charges, Bassiouni argues that ‘the drafters of the Charter found it necessary to establish a link between war and ‘crimes against humanity’ in order to meet the minimum requirements of the principles of legality’.³¹ They did this by extending the content of war crimes legislation to cover crimes against humanity, also the category of protected persons is similar, the difference lies in whether the violators are of the same or another nationality.³²

An interesting problem is the introduction of a new category of offence. This is of particular interest within the context of this thesis. The discussions which surround the validity of this course of action are illuminating in terms of the universality of moral judgements. Yet the unprecedented nature of crimes against humanity created legal difficulties, opening the *nullem crimen, nulla poena sine lege* line of defence, commonly known as retroactivity. The remedy was to link the conceptually distinct ‘crimes against humanity’ with the nexus of warfare by attaching them to the waging of aggressive war. The difficulty with allowing novel charges is the problem of retroactivity. The issue of retroactivity is set out in the International Covenant on Civil and Political Rights 1966, under Article 15, forbidding the prosecution of anyone for an offence that was not

²⁹ Taylor, 1971, Op Cit. n.5, p. 29.

³⁰ Judgement of the International Military Tribunal at Nuremberg, (1946) Art.6,para c. Reproduced in Roberts, A., and Guelff, R., *Documents on the Laws of War*, 3rd Edition, New York: Oxford University Press, 2000. It goes on to say ‘[...] before and during the war, or persecutions on political, racial, or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.’

³¹ M.C. Bassiouni, *Crimes Against Humanity in International Law*, London: Martinus Nijhoff, 1993. p. 153.

criminal at the time it was committed.³³ However, the definition is narrower than it would first appear. Arendt points out that there are both formal and substantive aspects to the notion of retroactivity.³⁴ Prosecution under any new law would be formally retroactive, the substantive question is whether the accused could have reasonably supposed the character of the acts to be criminal in nature. A description of 'crimes against humanity' which disputes a substantive retroactivity, must imply that such offences are universally recognised as criminal even if the law had not officially confirmed them as such. By linking this crime to the offences delineated in the traditional laws of war, it was ensured that the criminal content of the new category of offence was clearly legislated for elsewhere. There was a clear basis within the laws of war to demonstrate that such offences were indeed so recognised, for instance the Preamble of the Hague Convention 1907. However, the charge of 'crimes against humanity' suffered from the weakness of formal retroactivity at least and has been widely criticised on that account.³⁵ Whilst this has led to criticisms of an inherent and fundamental legal discrepancy in the Nuremberg Charter, the Nuremberg Tribunal has nevertheless succeeded in laying out a unique body of precedent which has since been successfully extended away from the nexus of inter-state war.

³² Ibid., p. 7.

³³ 1966 International Covenant on Civil and Political Rights, (1966), Art 15, para 1. reproduced in Ghandhi, P.R. *Blackstone's International Human Rights Documents*, 1st Edition, London: Blackstone Press, 1995. 'No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed.'

³⁴ H. Arendt, *Eichmann in Jerusalem: a Report on the Banality of Evil*, New York: Penguin Books, 1994, p.254.

³⁵ T. Taylor, *The Anatomy of the Nuremberg Trials : A Personal Memoir*, London: Bloomsbury Publishing Ltd., 1993, p. 29.

The Context of the Charter

The Scale of Criminality

Why did the allies, supported by the international community, design and conceive the Nuremberg Charter, overtly grounded in the historic traditions of the laws of war, yet tacitly revolutionary in its direction and implications? Patently, the scale of Nazi criminality demanded response and it would be disingenuous to lay emphasis in any other direction. There is no doubt that the atrocities of the Nazi government had a profound effect upon the perceptions and sensitivities of the European people. Indeed, Lord Wright, chairman of the UN War Crimes Commission claimed that ‘The revolting details of what was done in the camps of Germany have appalled the whole world.’³⁶ The Polish and Provisional Czechoslovak governments described the events as ‘unparalleled in all human history’,³⁷ and Molotov, on behalf of the USSR embassy described the activities of the German authorities as violating ‘the most elementary rules of human morality’.³⁸ This response is echoed by newspaper reports of the day. It is clear that such atrocities demanded an extreme response.

Tu Quoque

There is no doubt that the Nazi government had committed atrocities during the course of the war. However, it was equally certain by the standards of traditional laws of war,

³⁶ Lord Wright, ‘That the Guilty Shall Not Escape’, *New York Times*, 13th May, 1945, P.R.O: FO 800/923, item 235.

³⁷ Declaration Issued by the Polish Government and the Provisional Czechoslovak Government, Nov. 12, 1940.

³⁸ *The Molotov Notes on German Atrocities*, 27th Nov 1941. Issued on behalf of the USSR Embassy by HMSO, 1942, p.20.

the Allies had also been guilty of war crimes. As Arendt points out 'by the end of the Second World War everybody knew that technical developments in the instruments of violence had made the adoption of 'criminal' warfare inevitable.'³⁹ Two of the most outstanding examples of this shift in perception of what constituted 'acceptable' warfare were the responses to submarine warfare and aerial bombardment. Submarine warfare was unacceptable because it violated the London Charter of 1930 and aerial bombardment for its inability to discriminate between civilian and combatant populations. The contention here is that the creation of the category of 'crimes against humanity' was necessary to distinguish the egregiously criminal from the commonly criminal in a war which saw unprecedented bloodshed and technological horror. This thesis argues that technological advances served to collectivise war rather than to encourage discrimination and it was only by applying a radical individualism to criminality that this trend could be addressed. The category of 'crimes against humanity' expressed the criminality of policies which were not part of ordinary warfare but were committed to ideological beliefs entirely tangential to warfare, however bitter and extreme it might be. It was only in this respect, and in the category of the waging of aggressive war, that the Allies could not be accused of reciprocal crimes.

The clearest examples of the dilemmas faced by prosecuting governments were submarine warfare and aerial bombardment. The problems of justiciability for reciprocal offences was most clearly seen at the Nuremberg tribunal in the case of Admirals Erich Raeder and Karl Doenitz, successively Commanders-in-Chief of the German Navy. Amongst other things, they were charged with war crimes in violation of the London Naval Treaty of 1930. During the First World War the sinking of passenger and merchant vessels, most particularly the *Lusitania* which had cost nearly 1500 civilian lives, had led to strong pressure for the containment of the effects of submarine

³⁹ Arendt, Op Cit., p. 256.

warfare, particularly from neutral nations. The result was the London Naval Treaty and its additional protocols which forbade warships from sinking merchant vessels without first having “placed passengers, crew, and ship’s papers in a place of safety”.⁴⁰ In addition it required that distinctions be drawn between combatant and non-combatant vessels. By the Second World War it had become apparent that submarine warfare could no longer be effectively conducted in accordance with these rescue requirements.

Advances in the technology of anti-submarine warfare were such that it was virtually fatal for a submarine to surface anywhere near its target, let alone attempt rescue of its survivors.⁴¹ Nevertheless, at Nuremberg Admirals Raeder and Doenitz were charged with war crimes, in that U-boat operations had breached the international law of submarine warfare. However, as Geoffrey Best describes the situation:

The law itself - customary international law plus its conventional accretions at The Hague and London between 1907 and 1936 - was not reasonable in relation to the natures either of the weapons or of the war it was supposed to regulate, and, given that the submarine weapon was allowed at all, it raised expectations of restraint beyond what was militarily bearable.⁴²

That it was not reasonable to demand compliance with the rescue requirements of the London Naval Treaty was evident from the fact that no belligerent party to the conflict had observed them. This was demonstrated by the testimony of Admiral Nimitz who had been Commander-in-Chief of the United States Pacific Fleet from 1941 to 1945. He confirmed that the US had practised unrestricted warfare from 7 December 1941; US vessels had not rescued enemy survivors in cases where their own submarines or

⁴⁰ The most important of these is the 1936 London Procés-Verbal Relating to the Rules of Submarine Warfare Set Forth in Part IV of the Treaty of London, 22nd April 1930. Available in Roberts, A., and Guelff, R., *Documents on the Laws of War*, 3rd Edition, New York: Oxford University Press, 2000.

⁴¹ Taylor, 1971, Op Cit. n.5, p. 37.

⁴² G. Best, *Humanity in Warfare*, New York: Columbia University Press, 1980, p. 261.

missions were at risk.⁴³ The defence argued that the integration of the merchant fleet into Britain's military efforts made discrimination impossible and further that all major belligerents had practised unrestricted submarine and air warfare against merchant ships.⁴⁴ The Nuremberg tribunal therefore ruled that while it was clear that both Raeder and Doenitz had violated the London rescue requirements they should not be subject to criminal penalties on that account. This was illustrative of the difficulties facing the Allies, under the pressure of military necessity they had violated as many of the traditional laws of war as the Axis powers. As a result linking the prosecutions to the launching of aggressive war was as necessary as it was unfortunate.

Collectivism In Modern Warfare

The trend I have identified as approaching collectivisation in warfare was crucially linked to the development of new weaponry and the ability to target new population groups. It was not until the First World War that a substantive body of precedent and practice emerged in response to the escalation of wartime destruction. This was as a result of the production of massively destructive weapons. Indeed Latham describes how by 1914 'industrialised total warfare' based on mass production and destruction had emerged.⁴⁵ However, it was with the Second World War that war began to tend towards collectivism. In contrast to previous eras new technological developments allowed states to mobilise social resources for military ends. The inevitable result of this development, according to Sartre, is that 'It becomes increasingly difficult to make any distinction between the front and behind the lines, between civilian population and the

⁴³ Tusa and Tusa, *Op Cit.*, p. 360.

⁴⁴ Roberts and Guelff, *Op Cit.* n.9, p. 170.

⁴⁵ A. Latham, 'Re-imagining Warfare' in *Contemporary Security and Strategy*, London: Macmillan Press Ltd, 1997, p. 213.

soldiers. The consequence of this is that everyone is mobilised.⁴⁶ Martin Shaw argues that

Industrialised war became “total war” in a double sense, both because mechanised weaponry and transportation enabled “total” killing and destruction, and because expanded state control (or surveillance) of societies enabled “total” economic and ideological mobilisation.⁴⁷

Windsor argues that this change “was not merely a change of scale - it was a change in the social nature of war”.⁴⁸ From now on whole societies, instead of just armies, would go to war. This is interesting in terms of our argument for it posits an alteration in the relationship between state and civil society. Indeed, Windsor argues that ‘war became total because the state had become the whole of civil society.’⁴⁹ This implies that civil society became, for the first time, totally identified with the prosecution of war and consequently of some war crimes, notably the waging of aggressive war.

This strain of argument is certainly indicated in the records. In 1938 an investigation was begun into the legality of a relatively new form of warfare, aerial bombardment.

Although the killing of non-combatants was an old and well-established rule, it had not been fully incorporated into international treaties in relation to aerial bombardment.

Walzer claims there could have been little doubt as to the relation of aerial

bombardment to previous treaties,⁵⁰ but we do find questions raised in this vein. One view expressed by Landon specifically addressed the problem of assigning collective guilt. He outlines four reasons why aerial bombardment may be legitimate in modern warfare. Firstly, that whole nations are called to arms, everyone of a suitable age is

⁴⁶ J. Sartre, *On Genocide*, Boston: Beacon Press, 1968, p. 59.

⁴⁷ Shaw quoted in A. Latham, ‘Re-imagining Warfare’ in *Contemporary Security and Strategy*, London: Macmillan Press Ltd, 1997, p. 216.

⁴⁸ P. Windsor in C. Navari, (ed), *The Condition of States*, Milton Keynes: Open University Press, 1991, p. 134.

⁴⁹ *Ibid.*

conscripted and other population groups are asked or compelled to assist the military. Secondly, it must be legitimate to bomb outside the theatre of war if the targets are objects of value for military communications and preparations. Thirdly, wars are 'no longer dynastic but national'. Governments are representative, nations are responsible for their governments and therefore wars have become wars between all the individuals of the warring nations. And finally given these points, economic pressure on citizens of that nation is justified.⁵¹ However, it is also clear that Britain did reject the notion of unrestricted warfare on the grounds that with regard to international law it was 'not safe'.⁵² Indeed, the Hague Draft Rules of 1923 specifically prohibited 'Aerial bombardment for the purpose of terrorising the civilian population, of destroying or damaging private property not of military character, or of injuring non-combatants'.⁵³ Yet the original notion of collective guilt survives in the British decision to begin bombing German cities. The requirements of military necessity, were expressed succinctly by Group Captain Slessor in a letter to Sir William Malkin: 'Ultimately the only consideration which will limit the use of any method of warfare is that of expediency'.⁵⁴ But the campaign of bombing was justified in collective terms. From the beginning the attacks were defended as reprisals for the German blitz and Churchill apparently believed that the reprisals were necessary for British morale.⁵⁵ It is clear that saturation bombing, particularly at the close of the war when there was little realistic chance of a German victory, constituted war crimes in the sense of the Hague Conventions. Yet it had become clear that the old definitions between combatant and non-combatant, upon which the Hague Conventions were based, had become obsolete.

⁵⁰ M. Walzer, *War and Moral Responsibility*, Princeton: Princeton University Press, 1974. p. 94.

⁵¹ 'The Legality of Aerial Bombardment', *Aerial Warfare*, 1938-39, P.R.O: FO 800/937, FR: 77XXII.

⁵² Report of the Ministry of Defence, 1st March 1938, P.R.O: FO 800/937.

⁵³ Article 22, 1923 Hague Draft Rules of Aerial Warfare.

⁵⁴ Letter from Air Ministry to Sir William Malkin [head of the Committee for the Humanisation of Aerial bombardment], *The Question of Relative Vulnerability*, 12th July 1938, P.R.O: FO 800/937.

⁵⁵ Walzer, *Op Cit.* n.50, p. 96.

The only crimes which the allies could not also be accused of committing were those outside of all military necessity.⁵⁶ Hence, the codification of crimes against humanity was essential to give expression to the nature of Nazi criminality.

However, there are commentators, notably Lawrence Freedman and Andrew Latham, who argue that the totalising warfare of the Second World War has now given way to a new era of military engagement. Instead a new 'knowledge-intensive' warfare has emerged marking a decline of the mass army in favour of smaller, and increasingly professional, armed forces. As the technical limits of destructiveness are reached more attention is focused upon precision, with the development of weapons with the potential ability to minimise collateral damage and without the need to apply massive quantities of firepower.⁵⁷ Such evolution in the means of conflict leads to an evolution in the aims of warring parties and in turn this produces a different relationship to war between civilians and the state. Freedman notes that the conceptualisation of war as the business of professional elites leads to the notion of civilians as innocents and as inappropriate targets for military action.⁵⁸ As a result increased emphasis is placed upon the eradication of 'inhumane' or indiscriminate weapons.

However, although this new emphasis on precision warfare seems to imply a lack of engagement for civilians with conflict, this is not necessarily the case. It may be that the problems confronted at Nuremberg will reappear in a modern guise. Traditional tactics were geared towards the conduct of set-piece battles along a continuous front-line, however this has given way to combat operations conducted simultaneously against several key strategic targets. Latham describes this as a change in the governing logic

⁵⁶ Arendt, *Op Cit.*, p.254.

⁵⁷ A. Latham, 'Re-imagining Warfare' in *Contemporary Security and Strategy*, London: Macmillan Press Ltd, 1997, p. 221.

⁵⁸ L. Freedman, *Revolution in Strategic Affairs*, Oxford: Oxford University Press, p.16.

from attrition to 'the creation of 'chaos' and 'paralysis' through highly precise, simultaneous attacks through the length, depth and breadth of the battlespace'.⁵⁹ Yet the effects of this paralysis must necessarily be collective ones, aimed at a total national population.

The potential encroachment of war beyond the 'front line' is clearly evident in the Gulf War, and this conflict was complicated by the fact that one party fought a limited war, whilst the other fought a total war, a situation similar to that of the Vietnam War, and a pattern likely to continue into the future. We can see the extension of the effects of conflict to the civilian population. Ramsey Clark describes how, in the coalition against Iraq:

Bombs were dropped on civilians and civilian facilities all over Iraq. ... Of all the assaults, those on the water and food supply were the most deadly and revealing. . The public [were] debilitated from malnutrition, contaminated water, and disease. And sanctions caused a severe shortage of medical supplies.⁶⁰

Thus although military engagement could now be regarded as limited rather than total, the effects of war, particularly upon the defeated or weaker party are still totalising. Thus Freedman is ultimately pessimistic about the potential to contain the effects of war. He concludes that:

Whatever the intentions of belligerents, it can be difficult to prevent a conflict spilling over into civil society, attacks on power supplies, communications nodes and the transport system can all be justified by the need to disable enemy armed forces. Most seriously, when a country is in desperate straits ... attacking the

⁵⁹ Latham, *Op Cit* n.57., p. 228.

⁶⁰ R. Clark, *The Fire this Time*, New York: Thunder's Mouth Press, 1992. p. 208.

enemy's society can appear to be the only remaining option.⁶¹

This paradoxical redescription of civilians as unacceptable military targets, combined with an expansion of battlespace and a new ability to target civilian infrastructure has altered the relationship between civil societies during conflict. In terms of accountability this presents a potential distortion of moral responsibility, particularly in an attacking society where there is an active civil society and responsive government. As Windsor points out:

A civil society must either feel encumbered with the guilt of the state which wages all-out war, or else reject its own criteria and glorify the war for the sake of the state.⁶²

In the future whilst targeting may become more discriminate, suffering may become less so.

The Birth of Individual Responsibility

Individual Criminal Responsibility

The most outstanding feature of the Nuremberg Tribunals was the development of individual criminal responsibility. The IMT declared that

Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced.⁶³

⁶¹ Freedman, Op Cit., p48.

⁶² Windsor, Op Cit., p. 138.

⁶³ IMT, Vol. XXII, pp.565-566. Lenkiewicz Archive.

But this development is more exciting in its implications than in its substantive outcomes. If we were to measure the importance of this principle by the success of its results, we may well conclude it to be of only nominal value. Its importance lies in the challenge it presents to traditional conceptions of international interaction. The history of international interaction is almost exclusively the history of state interactions. The Nuremberg Tribunal broke with this history both by introducing the individual as a legal personality to the international scene and by challenging the notion of state immunity from interference in domestic affairs.

State Criminality

The specific challenge that Nuremberg offered to the dominant workings of the international system was in its contradiction of the Acts of States Doctrine. This position was originally definitively expounded by Hans Kelsen.⁶⁴ Kelsen's position is a clear one. If states are in delict of international law then it is possible to prosecute such states and apply sanctions against them. Individuals are not the subjects of international law, although they may be responsible for war crimes in the narrow sense of the term, such small scale or specific offences can be prosecuted under national domestic laws. However, acts such as the waging of war, can by definition be committed only by the state. Although these acts are performed by individuals, they are only performed in their capacity as organ-of-the-state. Thus legally, their acts must be imputed to the state. This is possible because "Imputation to the state is a juristic construction, not a description of

⁶⁴ For a defence of state criminal responsibility see primarily H. Kelsen, 'Collective and Individual Responsibility for Acts of State in International Law', *Jewish Yearbook of International Law*, 1948; H. Kelsen, 'Collective and Individual Responsibility in International Law with particular Regard to the Punishment of War Criminals', *California Law Review*, Vol. 31, 1943, pp.530-571. For later work see F. Malekian, *International Criminal Responsibility of States: A Study on the Evolution of State Responsibility with Particular Emphasis on the Concept of Crime and Criminal Responsibility*. Stockholm: Borgstroms Tryckeri AB, 1985. For an overview of these positions see, Weiler, H.H., *International Crimes of State: A Critical Analysis of Draft Article 19 on State Responsibility*. 1989

natural reality.”⁶⁵ It is not only possible but indeed necessary for the business of international relations to occur, otherwise how could treaties be concluded or negotiations be conducted? The natural and essential assumption within international interaction is that the acts of any individual representing a state are in actuality the acts only of that state. However, Kelsen ultimately concludes that because the sanctions of international law fall upon the entire populations of states, via reprisals and war, then these sanctions are inevitably directed against those who have had no part in the offences. Thus he concludes that system criminality is not punishable collectively under international law. However, Nuremberg did not overturn state responsibility, instead it augmented it with a new notion of individual responsibility. Currently there may be simultaneous prosecutions directed both against the organs-of-state and the state itself. This is an issue which is explored in more depth in the next chapter.

The crucial innovation of Nuremberg was the criminalisation of these offences. Whilst states had traditionally been made responsible for their actions within the world community, this responsibility had been primarily a civil responsibility, whereas gross humanitarian violations, with Nuremberg, became criminal offences. In chapter two we saw that there are enormous conceptual difficulties in assigning responsibility to collectives. Although some theorists⁶⁶ have attempted to assign such moral blame, this has been of limited success, and is impossible to defend in the application of penal sanctions. As a result state criminal responsibility has proved to be extremely controversial even though it received support (for a certain number of violations of core norms of international law) within the ILC’s 1980 Draft Articles on State Responsibility, which finds state criminal responsibility in cases of a breach of “an

⁶⁵ H. Kelsen, *Collective and Individual Responsibility in International Law with particular Regard to the Punishment of War Criminals*, *California Law Review*, Vol. 31, 1943, pp.530-571. p.533.

⁶⁶ For instance P.A French, *Individual and Collective Responsibility*, 2nd Ed, Rochester Vermont: Schenkman Books Inc., 1972.

international obligation so essential ... that its breach is recognised as a crime by that community as a whole'⁶⁷ Ratner and Abrams list colonial domination, slavery, genocide and apartheid as examples of such a breach.⁶⁸ Given that the notion of state criminal responsibility survives through the current legislation, it is not surprising that post-World War II it was more intuitive to collectivise blame.

The Legacy of Nuremberg

How radical Nuremberg was in its imposition of individual criminal responsibility is clearly appreciated when set in the context of the traditional manner in which states enforced violations of the laws of war. It is easy to assume, given the complete lack of prosecutions from this time until the constitution of the *ad hoc* tribunals for former Yugoslavia and Rwanda, that this was a stillborn revolution. Although in 1948 the United Nations War Crimes Commission stated that the IMT Charter,

Presupposes the existence of a system of international law under which individuals are responsible to the community of nations for violations of rules of international criminal law, and according to which attacks on the fundamental liberties and constitutional rights of peoples and individual[s] constitute international crimes not only in times of war, but also, in certain circumstances, in time of peace.⁶⁹

there is little evidence that this was actually the case. Yet it would be a mistake to assume that the Nuremberg Tribunal had little effect, in fact it contributed significantly to the development of substantive law, not only for violations of the laws of war but

⁶⁷ Yearbook of the International Law Commission, Documents of the 32nd Session, Vol II: Part 1, 1980, and Yearbook of the International Law Commission, Report of the ILC to the General Assembly, Vol II: Part 2, 1980, A/CN.4/SER.A/1980. P.95

⁶⁸ Ratner and Abrams, Op Cit. n.26, p.15.

⁶⁹ United Nations War Crimes Commission, History of the United Nations War Crimes Commission and the Development of the Laws of War, London: Her Majesties Stationery Office. 1948

also general humanitarian law outlining the responsibilities of state's treatment of its own citizens in times of peace.

The three heads enumerated in the Nuremberg Charter have led to the development of a body of substantive law – the 1949 Geneva Conventions and the 1977 Protocols elaborating the Hague rules on the laws and customs of war as regards the international humanitarian law relating to protected persons; the Genocide Convention 1948; and the UN and European Torture conventions and other multilateral agreements as regards crimes against humanity.⁷⁰

We will examine these developments and the success of their absorption into international practice in the next chapter. What seems clear is that the rigid adherence to the nexus of inter-state warfare seen at the Nuremberg Tribunal has given way to a blurring of the distinction between crimes committed in conflict scenarios and domestically perpetrated system criminality. There have also been suggestions of the extension of the principle of individual criminal responsibility to radically different areas of law, for instance there have been calls for an ecocide convention inspired by the damage caused by the policy of defoliation in Vietnam.⁷¹ These demands have intensified following the environmental damage inflicted by Iraq during the Gulf conflict.

International Military Tribunal for the Far East (IMTFE)

Although there is a wealth of literature and research material available on the subject of the Nuremberg Tribunal, there is by contrast very little on its sister tribunal the IMTFE.

⁷⁰ H. Fox, 'An International Tribunal For war Crimes; Will the UN Succeed Where Nuremberg Failed', *The World Today*, Vol 49: No. 10, 1993, pp. 194-197. p.194.

⁷¹ R.A. Falk, in V. Held, S. Morgenbesser, and T. Nagel, *Philosophy, Morality and International Affairs: Essays edited for the Society for Philosophy and Public Affairs*, New York: Oxford University Press 1974, pp 123- 137, p.134.

This is despite the fact that the Tokyo tribunal generated an important development in the course of individual criminal responsibility assignation, that of command responsibility. This form of responsibility assignation is most unambiguously affirmed in the Yamashita case.

Context and Charter of the Tokyo Tribunal

The IMTFE, hereafter referred to as the Tokyo Tribunal, was established at Tokyo by special proclamation of Gen. MacArthur, Supreme Commander for the Allied Powers (SCAP) on 19 January 1946.⁷² As the Far Eastern counterpart to the Nuremberg Tribunal, it was designed to try Japanese war criminals with offences centred around crimes against peace. The basic policy for the trial and punishment of Japanese war criminals was the 'Proclamation Defining Terms for Japanese Surrender', of 26 July 1945, usually known as the Potsdam Conference, and accepted by Japanese representatives by the 'Instrument of Surrender' of 2 September 1945.⁷³ Of the twenty-eight defendants, fourteen had held the rank of general in the Imperial Japanese army and three were admirals in the Japanese navy. Of the civilian defendants, five were career diplomats, five were bureaucrats and politicians and one, Okawa Shumei, was a propagandist.⁷⁴ The most conspicuous of the military defendants was Tojo Hideki who had been Prime Minister at the time of Pearl Harbour and during most of the war.⁷⁵

For the most part the Charter of the Tokyo tribunal was modelled on that of its predecessor, the Nuremberg Tribunal. However, there were a few significant differences. Aside from the detail of the composition of the court, no organisations were

⁷² S.Yoon-Cho, 'The Tokyo War Crimes Trial', *Quarterly Journal of Library of Congress*, Vol. 24: No. 4, 1967, pp. 309-318.

⁷³ Woetzel, *Op Cit.* n.11, p. 227.

⁷⁴ R.H. Minnear, *Victor's Justice*, Princeton: Princeton University Press, 1971, p. 4.

⁷⁵ *Ibid.*, p. 4.

pronounced criminal as at the Nuremberg Tribunal, as the patriotic societies that were common in Japan were found to have a different character from the Gestapo or SS.⁷⁶ In addition, the Tokyo tribunal only had jurisdiction over individuals tried with offences which included crimes against peace.⁷⁷ A further difference was that:

The definition of crimes against humanity embodied in Art. 5c of the Charter was slightly different from that laid down in Art. 6c of the Nuremberg Charter: while the latter text stated that such crimes were ‘murder, extermination, enslavement, deportation, or other inhuman acts committed *against any civilian population*’, the words ‘against any civilian population’ were deleted from the Tokyo Charter, ... this was to make punishment possible for large scale killing of military personnel in an unlawful war.⁷⁸

This brought the conduct of the conflict and therefore the personnel who prosecuted the war into a central position within the tribunal. This, when coupled with the fact that a significant proportion of the military personnel accused had also had political posts, contributed to the most significant developments in individual criminal responsibility, that of ‘command responsibility’. It was this doctrine that was to inform the basis of the charges laid against Milosević at the ICTY. It is particularly well developed at Tokyo because of the character of the offences. Unlike the evidence at the Nuremberg Tribunal, there were no positively criminal orders.⁷⁹ Instead the crimes relied on the concept of ‘negative responsibility’ or legal culpability for having failed to prevent the

⁷⁶ These societies included the ‘Black Dragon Society’ and the ‘Greater Japan Society’. R.K. Woetzel, *Nuremberg Trials in International Law*, London: Stevens and Sons Ltd., 1960, p. 229.

⁷⁷ *Ibid.*, p. 228.

⁷⁸ Cassese, A., and Røling, B.V.A., *The Tokyo Trial and Beyond*, Cambridge: Polity Press, 1993, p. 3

⁷⁹ B. Røling in A. Cassese, (ed), *Current Problems of International Law: Essays on United Nations Law and on the Law of Armed Conflict*, Milan: Dott. A. Guiffre, 1975.

commission of war crimes.⁸⁰ A case which exemplified this principle was that of Tomoyuki Yamashita, Commander of the Japanese forces in the Phillipines 1944-45.⁸¹

Yamashita

The trial of Tomoyuki Yamashita was one of the 2,116 military trials that were prosecuted by national governments under the statute of the Nuremberg and Tokyo tribunals which addressed only the major war criminals.⁸² The reliance on the concept of negative responsibility coupled with command responsibility lead to the conviction of Yamashita, charged with:

Having failed to discharge his duty to control the operations of the persons subject to his command who had violated the laws of war by committing massacres, murder, pillage and rape against civilians and prisoners of war.⁸³

This was such a clear endorsement of the principle that it is not uncommon to find references to the ‘Yamashita principle’.⁸⁴ This is because the Yamashita case was the first authoritative statement of the doctrine of command responsibility.⁸⁵ It is especially significant for this thesis because the doctrine of command responsibility applies only at the apex of the responsibility structure, it cannot apply to low ranking soldiers. The Yamashita case is instructive in that its application is so strict. Reviewing the trial transcript reveals that whilst the bulk of the evidence presented goes towards cataloguing the atrocities and revealing their extent and brutality, there is little evidence

⁸⁰ Cassese and Roling, 1993, Op Cit. n.4, p. 5.

⁸¹ United States of America v Tomoyuki Yamashita, (1885-1946) Military Commission Convened by the Commanding General, US Army Forces, Manila, 1945. available at the SOAS archive, London.

⁸² Woetzel, Op Cit. n.11, p. 230.

⁸³ Meron, T., *War Crimes Law Comes of Age*, Oxford: Clarendon Press, 1998. p. 84.

⁸⁴ Ibid.

⁸⁵ Ibid., p. 86.

as to the links between Yamashita and the soldiers who committed the atrocities in person.⁸⁶ Indeed, Yamashita never denied that the offences had taken place but argued that he had no means of communicating with his troops and that command functions had been destroyed. However, in an appeal ruling, the US Supreme court upheld his conviction and the capital sentence that was imposed on the grounds that the general principle must be that commanders were responsible for their subordinates.⁸⁷ This strict view of criminal liability makes one of the grounds for the prosecution of Slobodan Milosevi . There is no ‘paper chain’ in the case of the high-ranking accused in the ICTY but efforts have been made to justify intent through the use of witnesses. This constitutes more convincing evidence than the reliance only on command responsibility as it shows ‘positive criminality’ rather than negative responsibility.

Conclusion

The Nuremberg Tribunal represented a significant departure from the long-established state focussed orientation to inter-state relations. Seen in the context of the customary orientation to states, the introduction of the individual as a target of international law was unprecedented and radical. The scale and extremity of nazi criminality demanded a comparable response and although a judicial solution was by no means a forgone conclusion, after much deliberation an international tribunal was duly constituted.

The detail of the tribunal revealed a cautious approach to individual responsibility. It linked prosecutions firmly to the nexus of inter-state war, to such an extent that this

⁸⁶ United States of America v Tomoyuki Yamashita, (1885-1946) Military Commission Convened by the Commanding General, US Army Forces, Manila, 1945. available at the SOAS archive, London.

⁸⁷ Meron, Op Cit. n.83, p. 84.

caused inconsistency in parts of the trial. The tribunal judges were intuitively most comfortable with the charges relating to violations of the laws of war, for these were the crimes most firmly based in customary international law. Yet those based on the then new charge of crime against humanity were the only crimes which exclusively addressed Nazi criminality. The nature of modern warfare had produced violations of the laws of war on both sides. Consequently, focus upon traditional violation of the laws of war, whilst legally more secure, served to skew the impression of the trial. The fact that none of the reciprocal behaviour of the allies during the conflict was addressed has served to create the impression that the tribunal was simply a stage for victor's justice.

Chapter 5

Later Developments in Legislation and Implementation

As we have seen, by far the greatest influence upon the course of international humanitarian law, particularly with regard to the principle of individual responsibility, had been the International Military Tribunal at Nuremberg. Its effect on the public and professional consciousness of war crimes was immense, but it also effected change in three main areas of international legislation. Firstly, although Nuremberg technically addressed only atrocities committed in war, it proved a springboard for the development of international human rights law¹ as it addressed the state's treatment of its own nationals.² Secondly, it directed responsibility away from the state and towards the individual, laying the groundwork for individual criminal responsibility which would culminate in the International Criminal Court. Finally, it influenced the development of international humanitarian law by, amongst other things, paving the way for the Red Cross to initiate new codification of the law of armed conflict through the Geneva Conventions 1949, and later the 1977 Protocols.³ It is the latter two developments which I shall address here.

¹ S.R. Ratner, and J.S. Abrams, *Accountability for Human Rights Atrocities in International Law: Beyond the Nuremberg Legacy*, Oxford: Clarendon Press, 1997, p.6.

² It did this through the inclusion of 'crimes against humanity' which technically had no link to the nexus of armed conflict (although however, in practice states have proved reluctant to tackle such abuses through the international legislature) Some commentators might disagree with this point, for instance G.I.A.D. Draper, 'The Ethical and Juridical Status of Constraints in War', *Military Law Review*, Vol 55, 1972, pp.169-186. He here argues that developments in humanitarian law have sprung from the human rights movement: However, I think the alternate position is defensible given that Nuremberg was firmly linked to the nexus of inter-state war and it was Nuremberg which established the legal precedent of intervention in the states treatment of its own nationals – surely the heart of human rights.

³ Ratner and Abrams, Op Cit. n. 1, p. 6.

The Nuremberg tribunal also marks a definite moral watershed in the development of humanitarian legislation. Whilst implementation may since have been uneven, within the enacted legislation we can see a new consideration for morality tied to the notion of individual responsibility. It is this issue which we will examine in relation to several major pieces of legislation.

The Geneva Conventions

Arguably, the most influential of these landmark agreements were the four Geneva Conventions (1949) made under the auspices of the Red Cross. These concern the amelioration of the condition of sick and wounded members of the armed forces both in the field and at sea, the treatment of Prisoners of War and the protection of civilians in persons in time of war.⁴ Essentially then, these conventions are concerned with the protection of 'war victims', and are located within the larger framework of the laws of war. Yet interestingly, the conventions carefully avoid the term 'war crimes' and contain no reference to the 'Nuremberg principles' which have since come into currency.⁵ At the time the novelty of the International Military Tribunals for Nuremberg and Tokyo was such that it was thought advisable to avoid incorporation of the legal aspects of these trials which were still in dispute. It was not until the following year that the Nuremberg Principles were authoritatively codified by the International Legal Commission (ILC), which had been working on an international code of crimes since its establishment.⁶

⁴ See Article 50 1949 Geneva Convention I. 'Grave Breaches' are also listed in Articles 51, 130 and 147 of the four Conventions as well as in Article 11, paragraph 4 and Article 85 of Protocol I. All include the same elements as above. Thus the notion of a 'grave breach' is both finite and exhaustive. A. Roberts and R. Guelff (eds), *Documents on the Laws of War*, Oxford: Clarendon Press, 1989, p. 169.

⁵ J.F. Kunz, in G. Lipsky, (eds), *Law and Politics in the World Community*, Berkeley: University of California Press, 1952. p. 285.

⁶ ILC, 'Principles of the Nuremberg Tribunal, 1950, No. 82.' Adopted by the ILC. 1950. Available internet, <http://deoxy.org/wc/wc-nurem.htm>, accessed 23.10.00.

Yet, it is still possible to trace a response to the atrocities of World War II and their remedy in the Nuremberg tribunal, in the language, the tone and the central concerns of the original conventions. It is evident that there is a strong moral sense running through these conventions inspired by the atrocities of World War II. That this was the intention is evident in the words of the rapporteur:

Future generations will certainly be astounded that, in the midst of the twentieth century, it was considered necessary to embody such elementary moral rules in our conventions. The vivid recollection of recent indescribable atrocities is, however, sufficient evidence that this was necessary.⁷

Although the inclusive nature of the conventions precluded overt inclusion of the Nuremberg Principles, there is evidently a moral consensus within this legislation. For instance, the protection of the aged and infirm, expectant mothers within the civilian population and the many provisions on child welfare, can have no logical reason for inclusion other than a shared moral conception that this was a proper area of concern.⁸

This trend was to be amplified with the Additional Protocols to the Geneva Conventions of 1949, drafted by a Diplomatic Conference in Geneva in 1977. The First Additional Protocol states that:

In cases not covered by this protocol or by other international agreement, civilians and combatants remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from the dictates of public conscience.⁹

⁷ J.F. Kunz, in Lipsky, *Op Cit.* n. 5, p. 295.

⁸ Convention IV, Articles 16 and 24

⁹ Reproduced in *War Crimes: Report of the War Crimes Inquiry*, Members- Sir Thomas Hetherington and William Chalmers, HMSO: Cm 744, Presented to Parliament July 1989, p. 52.

This statement traces its lineage back to the 1907 Hague Convention (IV) Respecting the Laws and Customs of war on Land, particularly to the so-called ‘Martens Clause’ found in the preamble:

Until a more complete code of the laws of war has been issued, the high contracting parties deem it expedient to declare that, in cases not included in the Regulations adopted by them, the inhabitants and belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilised peoples, from the laws of humanity, and the dictates of the public conscience.¹⁰

However, the inclusion of the Martens Clause in the 1977 Protocols marked a ‘moral enlargement’ in the scope of the legislation. For originally the Martens clause was not an attempt to make the laws of war universally applicable, but to refuse a circumscription in the laws of war which would apply between belligerents. In other words the scope of the crimes punishable would be universal within the parameters established above (those of inter-state war), not the scope of their application. In addition Article 3 makes it clear that such crimes are the responsibility of the state and are to be punished by compensation payments, as we shall see later, this precludes the possibility of individual criminal responsibility for breaches even as it strengthens the criminal character of the acts it describes. With the enlargement of the Protocols to cover ‘armed conflict’ rather than inter-state war,¹¹ and the inclusion of international law established by custom (a tacit reference perhaps to the principles of responsibility Nuremberg had established), the scope of the clause is increased. So, although these conventions are noted to be complementary to the Regulations annexed to the 1899 and

¹⁰ Roberts and Guelff, *Op Cit.* n.4, p. 44.

¹¹ Although it is debatable whether there is an intention to provide for individual criminal responsibility in these circumstances, this has become a contentuious point with regard to the ICTR.

1907 Hague Conventions, they represent a considerable enlargement of those earlier conventions. Although only nascent at this stage, these conventions could be interpreted as a move towards the universalism that many theorists are now identifying within the latest moves towards an International Criminal Court.

Central to these agreements is the notion of 'grave breaches' of the conventions which are defined similarly in all four conventions.

Grave breaches ... [are] those involving any of the following acts, if committed against persons or property protected by the convention: wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly.¹²

As we have seen this notion of 'grave breaches' has replaced the limiting use of the term war crimes, limiting because it was interlocked with the notion of inter-state aggression, within the discourse of international and domestic law, although the concept largely refers to those categories of offences which had hitherto been covered by the term war crimes.¹³ This is significant in the context of our discussion because it moves the treatment of war crimes away from the traditional nexus of inter-state conflict and towards a more universalist approach to aggression and conflict. This makes the 'criminalisation' rather than the 'politicisation' of war crimes more likely. Also, the replacement of 'war crimes' with 'grave breaches', allowed later additional protocols to expand the convention's application to cover armed conflict as well as inter-state

¹² Reproduced in *War Crimes: Report of the War Crimes Inquiry*, Members- Sir Thomas Hetherington and William Chalmers, HMSO: Cm 744, Presented to Parliament July 1989, p.51.

¹³ This is stated in the Additional Protocol of 1977 Article 85, paragraph 5. Grave breaches of the convention 'shall be regarded as war crimes'. This is of interest as several states refused to accept that

aggression. In addition, by definition 'grave breaches' can be committed only by the individual. This is evident when we consider Article 49 which requires contracting states to instigate effective penal sanctions against persons committing, or ordering to be committed, a grave breach.¹⁴ Erich Kussbach, the chairman of the International Fact-finding Commission, describes grave breaches as:

illegal acts not only perpetrated by but also attributable to individuals. Thus, they constitute criminal acts invoking the responsibility of individuals under domestic or- occasionally- international jurisdiction. The contracting states are obliged to take the necessary legislative steps to ensure the prosecution of the offenders under national criminal law.¹⁵

Yet, although the framers of the Geneva Conventions placed great emphasis on the matter of penal enforcement, ultimately it cannot be relied on to be effective. The potential for individual prosecutions still rests ultimately upon the artificial distinction between state and individual represented in the legislation via the distinction between 'grave breaches' and 'serious violations' of the conventions.¹⁶ 'Serious violations' occur where the obligations of the conventions are not met, and the state which is party to the conflict is culpable as it has capacity as the subject of the international law governing the operation of the convention. Thus, a serious violation occurs when a state refuses, for instance, to instigate penal enforcement against an individual. At first sight this may be unproblematic, but tensions emerge when we consider that 'grave breaches' often

grave breaches were war crimes because of the Military Tribunals established after World War II. For further discussion see F. Kalshoven, *Constraints on the Waging of War*, Geneva: ICRC, 1987.

¹⁴ 1949 Geneva Convention 1, Article 49 requires that 'The High Contracting Parties undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the present convention defined in the following article ...'

¹⁵ E. Kussbach, 'The International Humanitarian Fact-Finding Commission', *International and Comparative Law Quarterly*, Vol 43, Part 1, Jan. 1994. p. 177.

¹⁶ This distinction is by no means clear cut or rigorously specified but becomes apparent in Article 90, paragraph 2 of the first additional protocol to the conventions. For a more detailed discussion of this distinction see E. Kussbach (1994) and G.I.A.D. Draper (1972)

require resources beyond those available to the individual criminal. This is evident when the individual criminal is also an organ of the state, in which case the grave breaches are attributable to both the individual and simultaneously to the state to which the individual belongs. In this case a serious violation has also been committed by the state. Obviously, the practical ramifications of effecting individual prosecutions in this situation are enormous, for instance, as Draper points out 'if the belligerent is the author of orders that led to the 'grave breaches' there will manifestly be no domestic penal process.'¹⁷ In addition, although there is an entrenchment of the principle of individual responsibility the scope of the Conventions and Protocols ties their application once again with the state. Protocol I applies to international armed conflicts, Protocol II applies to wars of national liberation.¹⁸ Although they now apply to armed conflict as well as inter-state war, this only occurs where the state is a party to the conflict. In addition, they do not apply in cases where the violence is of too low a level, 'situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts'.¹⁹ Inevitably then penal sanctions against the individual are still linked to the nexus of state violence on a large scale.

Thus the tensions which lie beneath the surface of individual-state interaction in the commission of war crimes or grave breaches remain. It is my contention that this problem exists throughout all potential prosecutions but is only evident when it is

¹⁷ G.I.A.D. Draper, 'Implementation of International Law in Armed Conflicts', *International Affairs*, Vol 48, No. 1, Jan. 1972, p. 53.

¹⁸ See Protocol I, Article 1, paragraphs 3 for the same situations of international armed conflicts as those covered in the Conventions, and paragraph 4 for 'armed conflicts in which people are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination ...' For a detailed examination of the Conventions and additional Protocols see, F. Kalshoven, *Constraints on the Waging of War*, Geneva: I.C.R.C., 1987.

¹⁹ See Protocol II Article 1, paragraph 2.

apparent that large-scale or 'whole-state' violations have occurred. I argue that the road toward universal criminalisation of systematised atrocities is still largely untravelled, and where individual responsibility is introduced but state sovereignty remains prior, such prosecutions will inevitably dissolve into a series of minor prosecutions against the low-ranking agents of such crimes, primarily those which can be prosecuted by the state concerned within a national context. These are the 'narrow' war crimes which Kelsen describes.²⁰ It is for this reason that prosecutions are inevitably still politicised, as for even this to occur there must be an appropriate intra-state political situation to permit this.

As we would expect then, in terms of implementation these conventions have had uneven levels of success. Although they have entered into the common discourse of inter-state negotiation and discussion, substantial elements of the implementation procedure have in practice been ignored or side-stepped by the international community. Roberts gives the example of the system outlined in the 1949 Geneva Conventions of using the institution of Protecting Powers to supervise and implement the convention's provisions which has not been widely used.²¹ Certainly states have observed unevenly their duty to ensure those suspected of grave breaches are tried. Also although Article 90 of the 1977 Geneva Protocol provides for the establishment of an International Fact-finding Commission to enquire into grave breaches, and although this body was set up in July 1991, not one of the numerous problems between then and now has been referred to it.²² In part this is due to complications with adopting the protocol into domestic law, problems which have led to a widespread lack of ratification. However, Britain at least,

²⁰ See Note 18.

²¹ A. Roberts, 'Implementation of the Laws of War in Late 20th-century Conflicts' *Security Dialogue*, SAGE Publications, Vol. 29: No.2, 1998, p. 141.

²² *Ibid.*

finally ratified the protocols on 29th January 1998, thus formally accepting the competence of the Fact-finding Commission. It is hoped that this will lead to others of the 149 signatories ratifying the protocols. Yet, even if this were the case, it would seem that the current mechanisms for the ad hoc establishment of bodies to deal with alleged violations is currently preferred by the UN Security Council and the states which so painstakingly negotiated the protocols.²³

Genocide

If the Geneva conventions and their protocols expanded the ambit of international law post-Nuremberg to cover actions which had previously to be described as a crime against humanity, so did the Convention on the Prevention and Punishment of the Crime of Genocide (1948).²⁴ Here we saw the first move towards protecting the citizens of a population against its own government even at times when there is no armed conflict. As Helen Fein describes 'The UNGC [Genocide Convention] moved beyond pre-war international law, making genocide a crime in peace as well as in war, against one's own citizens and foreign citizens. The UNGC implied that genocide need no longer be unpunished and unrecognised.'²⁵ In addition there is an arguable intention to allow universal jurisdiction, a principle which has since become firmly entrenched. Meron notes that '...the crime of genocide ... may also be a cause for prosecution by any state.'²⁶

It is certainly widely accepted that crimes against humanity are subject to universal

²³ 'Britain in the USA', Foreign Office Press Release, 29.01.98, available, internet, <http://britain-info.org/bis/hdev/290198.stm>, accessed 18.10.99

²⁴ Convention on the Prevention and Punishment of the Crime of Genocide (1948) available in P.R. Ghandi, *Blackstone's International Human Rights Documents*, London: Blackstone Press Ltd., 1995, pp. 18-21

²⁵ H. Fein, *Genocide: A Sociological Perspective*, London: Sage Publications Ltd, 1993, p.3. Fein is here evidently referring to Article 1 'The contracting parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to punish'.

jurisdiction.²⁷ But it is the cutting of the tie between state conflict and enforcement that marked the most significant shift in the treatment of such crimes. This was an important departure from the Geneva Conventions and Protocols; the novelty of punishing gross humanitarian violations in times of peace as well as war cannot be overstated in its implications for a limited state sovereignty. It is interesting to note that the emphasis of the debate has now shifted from arguments that the state should respect human rights during peacetime which, at least in terms of political rhetoric, seems an unassailable position, to arguments that the state should be limited in its ability to override human rights in its prosecution of war.²⁸

There are several points to make about this treaty. Firstly, despite the progress it represents and although it is moral in character, its record of enforcement is dire. In addition, in the cases in which it has been employed it has been less a rigorous legal ascription, and more a tool of political rhetoric and condemnation. However, it has offered a stability to the definition of genocide that has been absent in other types of systematic criminality such as crimes against humanity, and whilst that definition may have been on occasion unfortunately limiting, nonetheless it offers an objective benchmark for the treatment of minority groups within states. Yet this great legislative step towards universalism, although it stops short of absolute moral universalism (as its focus is upon multiple acts of aggression against a strictly delimited collective group rather than any act of aggression against individual citizens committed by the state), has been rendered virtually useless as a piece of substantive legislation.

²⁶ T. Meron, *War Crimes Law Comes of Age*, Oxford: Clarendon Press, 1998, p.160.

²⁷ See M.C. Bassiouni, *Crimes Against Humanity in International Criminal Law*, The Hague: Martinus Nijhoff, 1992, pp. 510-527; Also, T. Meron, *War Crimes Law Comes of Age*, Oxford: Clarendon Press, pp. 248-256; Y. Dinstein, and M. Tabory, (eds), *War Crimes in International Law*, The Hague: Martinus Nijhoff, 1996. p.16.

²⁸ Draper. Op Cit. n.17, p.174.

The reluctance by states and the U.N. to label massacres and other atrocities as genocide according to its strict legal definition²⁹ has seemed to render this convention impotent on many occasions. Fein notes that ‘between 1960 and 1979 there were probably at least a dozen genocides and genocidal massacresalthough in a few cases these events stirred public opinion ... these acts were virtually unnoted in the western press and not remarked upon in world forums ‘³⁰ Leo Kuper also comments on the record of the U N saying:

the performance of the United Nations in response to genocide is as negative as its performance on charges of mass murder. There are the same evasions of responsibility and protection of offending governments and the same overriding concern for state interests and preoccupation with ideological and regional alliances.³¹

This lack of enforcement has meant that the body of precedent and thus the expansion of the detail and ambit of the convention has been severely limited. In addition, the original convention has proved limited in its application to the point of paradox in some cases.

The great evolution that this legislation represented was the complete cutting of the link between armed conflict and genocide. This represented a crucial step forward from Nuremberg where, as we have seen, all crimes were required to be linked to the nexus of

²⁹ Art II (Genocide Convention) ‘genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious groups, as such: a) killing members of the group, b) causing serious bodily or mental harm to members of the group, c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part, d) imposing measures intending to prevent births within the group, e) forcibly transferring children of the group to another group. See P.R. Ghandi, *Blackstone’s International Human Rights Documents*, London: Blackstone Press Ltd., 1995, p.19.

³⁰ Fein, *Op Cit.* n. 25, p. 6. Fein cites amongst others the Kurds in Iraq, southerners in the Sudan, Chinese and ‘communists’ in Indonesia, Hindus and other Bengalis in East Pakistan, the Ache in Paraguay, many peoples in Uganda and East Timor.

³¹ L. Kuper, *The Prevention of Genocide*, New Haven: Yale University Press, 1985, p160. This point is echoed in S. Totten, W. Parsons, and I.W. Charney, (eds) in *Century of Genocide: Eyewitness Accounts and Critical Views*, New York: Garland Publishing Inc., 1997, p22. Indeed the stated purpose of this volume is to counteract such complacency by introducing eye-witness accounts.

inter-state war. In this respect, the Genocide Convention pioneered an expansion of international concern outside the framework of the laws of war, and towards more explicitly humanitarian ideals.

There are several key points to be made concerning this legislation. Firstly, it provides for a strict individual criminal responsibility for genocide. Also, for individuals to be found guilty there must be commission of one of the acts listed in Article II,³² but there must in addition be the intent to commit such an act, and the direction of any of these acts towards any specifically mentioned category of groups. The protected groups are confined to ‘national, ethnical, racial or religious groups’.³³ The Genocide Convention was officially initiated within the United Nations General assembly with the unanimous passage of Resolution 96(I).³⁴ However, Abrams points out that, ‘As the product of a negotiating process, the Genocide Convention represents a political compromise that departs in several important respects from the treatment of genocide in the works of Lemkin, the Nuremberg Principles, and Resolution 96(I).’³⁵ The main difference here was the inclusion by Lemkin and Resolution 96(I) of political and other groups, such as economic or particular social groups (such as professional groups). The decision to omit political groups has caused great controversy and as we shall see through examining the Cambodian situation, has led to paradoxical application of the definition of genocide. Arguments against the inclusion of political groups, rested on the notion that membership of political organisations is contingent and avoidable, whereas ethnic or

³² Convention on the Prevention and Punishment of the Crime of Genocide (1948) available in Ghandi, P.R., Blackstone’s International Human Rights Documents, London: Blackstone Press Ltd., 1995, pp. 18-21

³³ Article II, Genocide Convention, (1948)

³⁴ In Ratner and Abrams, Op Cit. n.1, GA Res. 9696(I), United Nations Doc. A/64/Add.1 pp.188-89, (1946)

³⁵ Ratner and Abrams, Op Cit. n. 1, p. 26

national memberships are not. In addition, political groups do not have stable characteristics for identification. In reality, inclusion of political groups would have constituted such an infringement of state sovereignty that states would have been unwilling to ratify the convention,³⁶ and a primary goal of the convention was that it was as inclusive as possible. The ‘intent requirement’ has proved another controversial aspect of the convention. The intent to destroy a racial group in whole or in part distinguishes genocide most from other crimes and ‘unless this intent element is present, no act, regardless of how atrocious it might be, can constitute genocide.’³⁷ In tandem with the exclusion of political groups from the convention it is possible for governments to claim that a targeted group was a political enemy and only coincidentally an ethnic group. An interesting issue is also the numerical aspect of genocide. Although a group need only be destroyed ‘in part’, scholars have disagreed over how large that part needs to be. However, the consensus and understanding seems to be that it must constitute large numbers, or at least have a substantial impact upon that group, for example targeting the leadership of a protected group. To me this seems of greater importance in determining whether genocide has been committed than the intent requirement. Although responsibility and intent is therefore exclusively aimed at individuals, we can see that there is still an inextricable link with the state. No individual could commit genocide without mobilising considerable resources, resources which are usually only available to an organ of the state.

A good example of this, and an illustration of some of the deficiencies of the convention itself is provided by examining the international reaction to the atrocities committed by

³⁶ The decision to omit political groups was primarily at the insistence of the Soviet Bloc and has caused great controversy, in part this was why the US refused to ratify the Convention for decades.

³⁷ Ratner and Abrams, *Op Cit.* n. 1. p. 33.

the Khmer Rouge regime in Cambodia under Pol Pot.³⁸ Kiernan describes how ‘for nearly four years freedom of press, of movement, of worship, of organisation, and of association .. all completely disappeared.’ Of 8m. inhabitants of Cambodia 1.5m. were worked, starved and beaten to death.³⁹ Yet legal action has yet to be taken to bring the perpetrators to justice. The killings in this case were directed at the whole society rather than a particular ethnic minority. The failure to make any provision for either auto-genocide or the extermination of either political or social groups, (for instance the french educated elite were targeted), has inevitably had ramifications for the convention as an effective response to systematic extermination. Thus Kiernan describes how: ‘The charge of genocide remains hostage to political fortune.’⁴⁰ This is an unfortunately instructive example of how the genocide convention has tended to be used. It serves as a focus for public and professional opinion, it spawns mock trials⁴¹ and allows legal judgements as to the seriousness of offending behaviour, However, its use as a substantive legal instrument has been undermined by the reluctance of states to accept the implications that such a judgement might bring in an international court.

By the same token the Genocide Convention can, and has been, used simply as a tool for political rhetoric or as a merely verbal expression of condemnation. An example of this sort of misuse occurred following the military occupation of Lebanon by Israeli armed

³⁸ For a full historical account of Political Pot’s rise to power and policies of the Khmer Rouge see B. Kiernan, *The Pol Pot Regime: Genocide in Cambodia under the Khmer Rouge 1975-79*, New Haven: Yale University Press, 1996.

³⁹B. Kiernan, *The Pol Pot Regime: Genocide in Cambodia under the Khmer Rouge 1975-79*, New Haven: Yale University Press, 1996, p. 9

⁴⁰ Kiernan in Totten, S., Parsons, W., and Charney, I.W.,(eds), *Century of Genocide; Eyewitness Accounts and Critical Views*, New York: Garland Publishing Inc., 1997, p.356.

⁴¹ See note 24 above. Also see the Russell Tribunal convened on Nov 13, 1966 in an attempt to assess whether the US had comitted genocide in Vietnam, see Sartre, J.P., *On Genocide*, Boston : Beacon Press, 1968. Also the International Commission set up by private individuals to establish the legality of Israel’s actions in the Lebanon, see the *McBride Report*, ‘Israel in Lebanon. Report of the International Commission to Inquire into Reported Violations of International Law by Israel During the Invasion of the Lebanon’, London: Ithaca Press, 1983.

forces. During this time the Lebanese President, Bechir Gemayel (leader of the Phalangists) was assassinated, his death was attributed by the Phalangists to the Palestinians. The Israeli army entered West Beirut to ensure order and prevent reprisals. However, they allowed the Phalangists to enter two Palestinian refugee camps, Sabra and Shatila, to track 'Palestinian terrorists'.⁴² Under the umbrella of the Israeli military, who surrounded the camps, the Phalangists entered and on Sept 16, 1982, massacred hundreds of civilians.⁴³ Parsons describes how 'the results of this atrocity were carried into the living rooms of the world, attracting unprecedented sympathy in the US for the Palestinians and creating revulsion in Israeli public opinion.'⁴⁴ Cassese highlights several relevant certainties within this situation,

1. The massacre was perpetrated by the Phalangists
2. The Phalangists entered the Palestinian camps only with the consent and under the eye of the Israeli army.
3. The latter discovered at once that the Phalangists were killing the inhabitants of the camps indiscriminately and did nothing to stop the slaughter.⁴⁵

The high profile of Middle Eastern affairs and the immediacy of television coverage ensured at least that this atrocity was brought to the attention of the public and the international community. However, the response revealed more of the deficiencies of international law than its benefits and no individuals were found criminally responsible for the massacre. In its investigation, the Israeli Commission of Enquiry (also known as the Kahan Commission.) chose neither to apply Israeli law nor international law but instead to refer to moral and religious imperatives. In doing so it followed a line of neo-natural law, concluding that Israeli armed forces were only indirectly responsible for the

⁴² A. Cassese, *Violence and Law in the Modern Age*, Cambridge: Polity Press, 1986, p.77.

⁴³ A. James, *Peacekeeping in International Politics*, London: Macmillan Press Ltd., 1990, p. 356.

⁴⁴ A. Parsons, *From Cold War to Hot Peace: UN Interventions 1947-1995*, London: Penguin Books Ltd, 1995, p.30.

massacre, but simultaneously omitting a ruling on the apprehension and treatment of the individuals (Phalangists) who were directly responsible.⁴⁶ In 1982 the UN General Assembly approved a resolution which actually condemned the massacre as genocide referring to the Genocide Convention. This unequivocal resolution:

affirmed that genocide is a crime under international law which the civilised world condemns, and for the commission of which principals and accomplices – whether private individuals, public officials or statesmen, and whether the crime is committed on religious, racial, political or any other grounds- are punishable.⁴⁷

In addition, it goes on to state:

Appalled at the large-scale massacre of Palestinian civilians in the Sabra and Shatila refugee camps situated at Beirut, Recognising the universal outrage and condemnation of that massacre, [...] Resolves that the massacre was an act of genocide.⁴⁸

Yet, this was not the positive development it seemed. Although the resolution mentions punishment of perpetrators, it makes no provision for criminal proceedings, nor does it call for Israel or any other state to find and punish the individuals responsible. Instead the massacre is simply defined as genocide without reference to the proper consequences of such a definition. As we have seen, the thrust of my argument is that conceptually it is in the assignation of blame and punishment that the difficulties with individual criminal responsibility, at the current stage of development of international

⁴⁵ Cassese, *Op Cit.* n. 42, p.78.

⁴⁶ See *International Legal Materials Vol 22: 1983*, p.473ff. For commentary on this report see A. Cassese, *Violence and Law in the Modern Age*, Cambridge: Polity Press, 1986.

⁴⁷ General assembly Resolution, 'The Situation in the Middle East', A/RES/37/123, Dec 16, 1982. available online, gopher://gopher.un.org/00/ga/res/37/123%/09%/2b, accessed 13.06.00, this extract is from section D.

law, become apparent. At the very least it is indicative of the manner in which the genocide convention has been invoked but also, as we shall see, it is relevant when considering the evolution of the notion of 'command responsibility' which we will examine later. However, when we consider that the ICTY makes direct reference to the Genocide Convention in its statute, incorporating the definition of genocide and its punishable acts verbatim from the original,⁴⁹ we can see that undoubtedly the Genocide Convention has provided a valuable source of international law, for the very length of its survival indicates an acceptance of its principles into international customary law.

Yet although these were important steps towards an individual approach to prosecutions, the principle of individual criminal responsibility had virtually lain dormant between the flurry of activity post-WWII and the 1990's. As we have seen, the international Fact-finding Commission has not had one case referred to it and numerous instances of gross humanitarian abuse had gone unpunished. The genocide convention had produced no criminal prosecutions, apart from the Israeli invocation of its provisions in the trial of Eichmann. Most of the responses to violations of humanitarian law were political rather than judicial in their character.⁵⁰ Whilst, as we have seen, although legal instruments can provide a focus for public and government opinion, a benchmark for state behaviour and a source of legal language to empower criticism of abusing regimes, without the political will to establish penal sanctions for individuals they are substantively empty. Indeed, the international community has on occasion abandoned the notion of individual criminal sanctions against offenders, and instead

⁴⁸ General assembly Resolution, 'The Situation in the Middle East', A/RES/37/123, Dec 16, 1982. available online, gopher://gopher.un.org/00/ga/res/37/123%/09%/2b, accessed 13.06.00, this extract is from section D.

⁴⁹ Article 4 is transposed from Articles II and III in the Genocide Convention

⁵⁰ A. Roberts, 'The Laws of War: Problems of Implementation in Contemporary Conflicts', *Duke Journal of Comparative and International Law*, Vol. 6 : No.11. pp.11-78.

imputed responsibility towards the state regardless of the direction of international legal instruments.

Expansion of Offences

Another welcome development fostered by the tribunals has been the expansion of the definition of crimes against humanity to include systematic rape as a specific category of offence. Although Article 46 of the Hague Regulations could be broadly construed to prohibit rape,⁵¹ in practice it has seldom been interpreted in such a manner. However, there was something of a precedent in the Tokyo Tribunal where rape was listed as a war crime, the most notorious example being the rape of Nanking.⁵² Under the weight of the events in Former Yugoslavia the use of rape both as an attack on individuals and as a systematic policy used to fracture and disperse Muslim communities, was protested by many concerned observers. The special rapporteur of the United Nations Commission on Human Rights, Tadeusz Mazowiecki, characterised the pattern of rape in former Yugoslavia as a method of 'ethnic cleansing' 'intended to humiliate, shame, degrade and terrify the entire ethnic group'.⁵³ The ICRC and various states have accelerated the treatment of rape as a war crime by adopting a broad construction of existing law. The ICRC declared that the grave breach of 'wilfully causing great suffering or serious injury to body or health'⁵⁴ covers rape. This implies that rape could also, in particular

⁵¹ Article 46 refers to 'Family honour and rights, the lives of persons, and private property, as well as religious convictions and practice must be respected.' Convention Respecting the Laws and Customs of War on Land, with Annex of Regulations, Oct 18, 1907 [Hague Convention No. IV]

⁵² It was estimated by the IMT for the Far East that approximately 20,000 cases of rape occurred in Nanking in the first month of occupation. See W.P. Nagan, 'Strengthening Humanitarian Law: Sovereignty, International Criminal Law and the Ad Hoc Tribunal for Former Yugoslavia,' *Duke Journal of Comparative and International Law*, Vol 6 : 11, pp.127-165, p. 163.

⁵³ Mazowiecki, T., 'Report on the Situation of Human Rights in the Territory of Former Yugoslavia', UN Doc. A/48/92-S/25341, (1993)

⁵⁴ Article 147 of Geneva Convention IV.

conditions, be treated as other grave breaches such as torture or inhuman treatment. Moreover, the massive and systematic practice of rape, and its use as a ‘national’ instrument of ‘ethnic-cleansing’ qualify it to be prosecuted as a crime against humanity.⁵⁵ However, it should not be forgotten that rape has always been a violation of the laws of war, it was codified as a capital crime in Lieber’s Code of Instructions as early as 1866, and as such could be prosecuted in a domestic court or military court martial and has always carried a natural imputation of individual responsibility. However, in such a context it is a war crime in the narrow sense of the term, the development of the ICTY and ICTR was that it became redefined as an illegal instrument of war, an unacceptable military strategy. As such, it came under the ambit of crimes against humanity, and individuals could be criminally responsible for using it as an instrument of military strategy. This is a major contribution to the scope and nature of crimes against humanity. This development was confirmed by the first convictions for sexual offences at the ICTY, on 22 February 2001.⁵⁶ The final and yet probably most outstanding contribution that the tribunals represented was in preparing the ground for the establishment of an International Criminal Court (ICC).

Of course, the need for such a court was first recognised over 50 years ago when the Genocide Convention was adopted by the General Assembly. In the same resolution the ILC was invited to ‘study the desirability and possibility of establishing an international judicial organ for the trial of persons charged with genocide.’⁵⁷ Previously to this the ILC had been asked to formulate a ‘Draft Code of Crimes Against the Peace and

⁵⁵ Meron, *Op Cit.* n.26, p. 207.

⁵⁶ On Feb 22 2001 Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic were sentenced to 28 years, 20 years and 12 years respectively for crimes which included rape as a crime against humanity.

⁵⁷ General Assembly Resolution 260, 9 Dec , GA/RES/260 (1948)

Security of Mankind', these were to indicate the principles of international law that had sprung from the Nuremberg Tribunal. Although work began on this issue, and in 1950 'Principles of the Nuremberg Tribunal' was adopted by the ILC.⁵⁸ The General Assembly postponed consideration of the full draft code submitted in 1954. This was because the draft code as formulated by the commission raised problems closely related to those of a definition of aggression, and given that it had entrusted a Special Committee with the task of preparing a report on a definition of aggression, it was decided in resolution 897 (IX) Dec 4, 1954, to defer the Draft Code until after the committee had submitted its report.⁵⁹ Although, this issue surfaced periodically, it was not until 1991 that the General Assembly invited the commission to analyse the question of international criminal jurisdiction, including proposals for the establishment of an international criminal court. This culminated in the adoption at the 46th session in 1994 of a draft statute of an international criminal court which the commission submitted with the recommendation that an international conference was convened to conclude a convention on the matter.⁶⁰ This was to be of course, the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome, 15 June- 17 July 1998.

The convening of an international court marks a significant departure from the criminal tribunals of the ICTY and ICTR in terms of ceding sovereignty, the issues I have raised concerning the relationship between individual and state, particularly when that

⁵⁸ International Law Commission, *Principles of the Nuremberg Tribunal, 1950*, available online at the website of the International war Crimes Commission: <http://deoxy.org/wc/wc-nurem-htm>. Accessed 23.10.00.

⁵⁹ Ibid.

⁶⁰ Ibid.

individual is an organ of state, remain largely unchanged.⁶¹ Instead, what needs to be examined is how the statute and practical operation of the court impact upon that relationship, and as a result, how that relationship is altered and the likelihood of prosecution is impacted. Accordingly, I propose to treat these issues as they are raised in both the ICTY/ICTR and the ICC in depth in a separate chapter.

State Responsibility and International Crime

Whilst considering the import of the new willingness to ascribe individual criminal responsibility for system crime it is valuable to examine the treatment of state criminality. This represents a tension between collective and individual assignments of responsibility. The Geneva and Genocide Conventions manifest a dualism in responsibility assignment, in that there are offences for which responsibility can be assigned simultaneously to state and to individual. This demonstrates a potential not only for tension but also for discretion in the direction in which responsibility is assigned. The principal organisation which adjudicates state responsibility is of course the ICJ. The use of this judicial institution is particularly indicative of a collectivised response to system crime. This trend is manifested particularly in the ICJ decisions and advisory opinions on humanitarian issues which are of particular interest within the context of this thesis as they highlight both the intersection between state and individual, and the contradictory position of an individual who is an 'agent of the state'. Comparing the treatment of system crime within the ICJ and the ICTY/ICTR highlights the importance of prosecutions in the designation of responsibility. Through this we can

⁶¹ Many authors have highlighted this important facet of the ICC, see for instance H. Corell, 'Nuremberg and the Development of the International Criminal Court', *Military Law Review*, Vol. 149, pp.87-100, 1995. Y. Dinstein, and M. Tabory, (eds), *War Crimes in International Law*, The Hague: Martinus Nijhoff, 1996. and I. Josipovic, 'The International Criminal Tribunal and the Croatian legal System.' *Croatian International Relations Review*, Vol. II: No. 4/5, 1996.

see that the label 'criminal' has very different outcomes, and therefore very different implications, in its collective application.

An 'international crime' can have two connotations. It can be the type of offence which is always committed by an individual but are designated by treaty or by customary international law as criminal, for instance, terrorism.⁶² The second approach to international crime targets responsibility collectively towards states; breaches of international obligations are criminal when:

An internationally wrongful act which results from the breach by a state of an obligation so essential for the protection of fundamental interests of the international community that its breach is recognised as a crime by that community as a whole, constitutes an international crime.⁶³

There are two major treaty instruments which may direct responsibility at either the individual, the state, or towards both simultaneously. These are the Genocide Convention and the Geneva Conventions of 1949 on the Protection of War Victims supplemented by Additional Protocol I of 1977 on the Protection of Victims of International Armed Conflicts.⁶⁴ Here, the criminal acts of individuals are simultaneously 'internationally wrongful acts' and 'crimes'.

An interesting case in this respect were the proceedings instituted by Bosnia-Herzegovina in the ICJ against Yugoslavia (specifically Serbia and Montenegro) for

⁶² S. Rosenne, 'War Crimes and State Responsibility', *Duke Journal of Comparative and International Law*, Vol. 6: No. 1, 1995, pp. 65- 81.

⁶³ Ibid.

⁶⁴ Ibid.

violating the Genocide Convention.⁶⁵ In a decision which highlights the co-existence of collective and individual approaches to system crime, the ICJ ruled that a state's responsibility could be engaged under the Genocide Convention not only where the state had failed to fulfil its obligations of prevention and punishment, but also where the state itself had perpetrated the crime of genocide.⁶⁶ Thus the case in the ICJ ran parallel to the prosecutions by the International Criminal Tribunal for Former Yugoslavia (ICTY). On 8 April 1993, the ICJ issued an order calling on Yugoslavia to 'take all measures within its powers to prevent commission of the crime of genocide' and to ensure that any armed units, organisations and persons that may be subject to its control, direction and influence do not commit any acts of genocide.⁶⁷ What is instructive here is that whilst the ICTY applied individual criminal responsibility, the proceedings instituted by Bosnia-Herzegovina were civil in character.⁶⁸ Although the designation is 'criminal' towards Yugoslavia, when implementation of this ruling is seen it appears qualitatively different from that of the ICTY. There is no retributive or penal consequences for the criminal state. Such collective responsibility assignments are, therefore, inevitably less indicative of an international polity than the penal sanctions within comparable individual prosecutions.

Conclusion

⁶⁵ G. Guillaume, 'The International Court of Justice and Human Rights', in N.H. Wirajuda and F. Delon, *The Fourth Informal ASEM Seminar on Human Rights*, Singapore: Asia Europe Foundation, 2001.

⁶⁶ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Preliminary Objections, Judgement*, ICJ Reports, 1996.

⁶⁷ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Provisional Measures*, Order of 8 April 1993, ICJ Reports, 1993.

⁶⁸ Meron, *Op Cit.* n.26, p. 193.

The creation of international legislation connected to the development of individual criminal responsibility can be characterised as a journey that is less a steady progression and more a series of fitful leaps. However, this should not disguise the fact that real progress has been made. The development of individual criminal responsibility was by no means inevitable, and represents a novel departure from traditional conceptions of international law. Undoubtedly this departure was fuelled by the atrocities of WWII, but once these precedents had been set they laid the groundwork for the later constitution of the ICTY and ICTR as well as the ICC.

The adoption of individual responsibility was a deliberate and difficult path promoted by the legal community in opposition to a significant current of thought which supported the traditional conception of international law whereby states were always the subject of such legislation with only occasionally citizens as its object. The expansion of crimes against humanity and genocide as statutory offences, and the treatment of these crimes as committed by individuals who were criminally liable for their actions, made individuals the subjects of international law for the first time. This compares with a dominant conception of states as the subjects of international law and the non-retributive, compensatory characteristics encountered in collective responsibility assignments, even when the collectives, or states, involved, are labelled as criminal. This is only clearly seen at the point of implementation of the judicial decision. It is within the treatment of violations of humanitarian law that there is the most obvious deviation from the dominant tradition of state responsibility, and it is by examining system criminality and its lexicon of accountability that the changing relationship between individual and state becomes evident.

Yet, although the principle of individual criminal responsibility has been adopted through the legislature, we could tentatively suggest that the political acceptance of this principle lags some way behind. For although the Geneva Conventions place great emphasis on penal enforcement, there has yet to be a case brought to its enforcement body, the fact-finding commission. Also in the years since the legislation was set in place terrible atrocities have gone unpunished by the international community. Where action has been taken, it has tended to be political rather than judicial, actions such as sanctions against South Africa or the withdrawal of trading or aid relationships. Even within the tradition of state criminal responsibility and international crime, when states are found guilty it is guilt of a very different character to that found in the ICTY/ICTR. All this points to the difficulty in moving beyond the traditional approach to system crime as being a state responsibility rather than an individual one. However, the constitution of the ICTY and ICTR suggest a renaissance in the willingness to make individuals responsible for systematic criminality. It is the resonance the crimes committed in former Yugoslavia have with the crimes of WWII, that accelerated public and media demands for action. When evidence of death camps and 'ethnic cleansing' came to light, the parallels with the holocaust became pointed in a way that was absent from most other crimes. Thus we might suggest that the techniques for dealing with such crimes also had to be reminiscent of post-World War II. It is clear that the tendency to collectivise blame is a strong undercurrent, sustained by the most fundamental traditions of international law. However, the arguments in favour of individual responsibility have proved persuasive enough for supporters of individual criminal responsibility to justify its adoption on the grounds that it is a more effective deterrence against future abuses.⁶⁹ However, currently the principle of individual

⁶⁹ Ratner and Abrams, *Op Cit.* n. 1, p. 15.

responsibility sits in an uneasy relationship with the principle of state sovereignty. It rests in contradiction to the common practice of states but without overturning it, and whilst it does so it will be in danger of lapsing into legal form without political substance.

Chapter 6

Features of Responsibility Assignment

The willingness of the international community to apply the principle of individual criminal responsibility by sponsoring prosecution of offenders indicates a nascent moral community. This in turn must imply a basic polity against which criminal offences have been committed. Yet, this development is mitigated by the structural conditions under which states co-exist, resting in contradiction to the principles which underpin traditional international interactions. In addition, this moral consensus is more basic than political rhetoric might suggest. Since the Nuremberg Tribunal, there had been no international action whatsoever towards enforcing the legislation agreed post-Nuremberg, despite some egregious examples of atrocities, until the ICTY was convened. Up to this point, there was seemingly little political will to deal with states and none to prosecute individuals. In short, there was no move towards a substantive criminal legal regime and thus little evidence of a true moral community.

It would be foolish to deny the impact of political context on system crime, but to blame post-Nuremberg inaction solely on macro-power relationships can be both superficial and unproductive. If we highlight moral consensus and analyse this as being in tension with traditional collectivised approaches to state relationships, the emphasis is reversed. Whatever the political context of the crime, were the moral consensus around its criminality strong enough, action would have been taken. In fact, the moral consensus around Nazi criminality was so great that it overrode the traditional power dynamics and state structural traditions. By analysing the character of later atrocities, appalling as they might have been, universal moral consensus was not strong enough to prompt international criminal and penal sanctions. This was not due in many cases to the scale

of the atrocities but to their ambiguities, for many of them blended political or military dynamics with humanitarian ones. Genocide is perhaps a form of system crime that has the least relationship to the laws of war. It has always been applicable to governments in times of peace and universally enforceable. Yet it is also the most controversial and delegitimising of allegations. In fact, although I have identified the application of individual criminal responsibility as logically resting on shared moral values, the consensus around these values is extremely narrow and deeply restrictive. This becomes readily apparent when we assess some atrocities according to their character rather than their international context. Indeed, this adds more to an explanation of the pattern in prosecutions than reliance on macro-political conditions for it is the moral character of an atrocity that determines the likelihood of international prosecutions.

Several of the most outstanding and widely debated atrocities (in terms of their moral character) are summarised in Fig 1. These characteristics include the scale of the offences, the nature of the targeted group, the character of the techniques in terms of how systematised and orchestrated the attacks were and the nature of the conflict during which they occurred. Only those atrocities at which accusations of gross system crime or genocide have been levelled have been included. This is because the great number and frequency of attacks by governments on their citizenry and their varying degrees of criminality would preclude thorough analysis. Thus, the more general abuse of human rights ranging from the denial of civil and political rights to more general life-integrity violations¹ such as torture and disappearance have not, for the most part, been included. Given that there was a consensus around the criminality of the Nazi regime which has since been absorbed into international humanitarian law, I have taken the Nuremberg Tribunal offences as defining the moral character of actionable system crime. In

¹ The term is that of S.C. Zanger, 'A Global Analysis of Political Regime Changes on Life Integrity Violations, 1977-93', *Journal of Peace Research*, Vol. 37: No. 2, 2000, pp. 213-233.

particular, I have compared the character of the offences in terms of systematisation but also, and more unusually, in terms of how dispassionate they were. The more dispassionate the programme of system criminality, the more clearly the intent towards the target group emerges.² Thus, the death camps of Nazi Germany were systematised in a deliberated and dispassionate manner and the victims were selected purely on the basis of ethnicity. In this way the pattern and nature of the killing is morally relevant to the issue of criminalisation.

Fig 1. shows that unlike other atrocities, the events in former Yugoslavia were resonant with the events in Nazi Germany. Whereas the varying contexts and circumstances of other atrocities impacted upon the way they were regarded, in former Yugoslavia there were clear moral parallels between the two occasions and for this reason a clear moral consensus to criminalise the atrocities³. We shall look at the constitution of the ICTY/ICTR in depth in the next chapter, but here we will examine three differently profiled cases which indicate the variety of elements and characteristics that make up the component parts of any atrocity. The three cases are that of the US engagement in Vietnam and the domestic prosecution of Calley; the Cambodian regime under Pol Pot; and Indonesia's action against the East Timorese and the Committee of Enquiry into the Santa Cruz massacre.

In examining these events much of the analysis would be lost were they not to be placed in the context of allegations made about the wider conflicts in which they were embedded. Accordingly, we will look first at the allegations made about war crimes in

² This issue of intent is crucial in determining prosecutions for genocide and crimes against humanity. It is dealt with in some depth in chapters 5, in relation to the Genocide Convention and Chapter 7, as it emerged in relation to prosecutions at the ICTY.

³ The exception to this is the ICTR which does not present the same pattern as the Nuremberg Tribunal. There is, however, wide consensus around the idea that the willingness to intervene in non-international conflict was a development fostered by the ICTY.

these conflicts and the difficulties associated with proof of such allegations and action with respect to them. Not least, we will revisit the core question here, first raised in chapter 3, of what constitutes system criminality. The conduct of the Cambodian regime lacked a crucial component of the crime of genocide, in that the target was not an ethnic group. Whilst within East Timor although there was a targeted ethnic group the pattern of the atrocities committed was uneven and was not unambiguously orchestrated by the regime in the same way until late in the conflict. In many cases, it is clearly apparent that there have been violations of humanitarian law but the cases under consideration exist at the boundaries of such judgements. This is particularly true of the case in Vietnam where there were allegations of war crimes that can be re-expressed as a fundamental dispute over the nature of illegal warfare and what can acceptably be defined as being within the normal parameters of waging war.

The US in Vietnam

The accusations levelled against the US conduct in Vietnam have been extreme and considerable. Most famously, they have included the charge of genocide, levelled by the unofficial War Crimes Tribunal (Russell Tribunal) founded by Bertrand Russell.⁴ The Russell tribunal was an unofficial international enquiry into US conduct undertaken by respected intellectuals and experts in the field of international law. There were also allegations that there were violations of the laws of war primarily centring on the use of weaponry such as cluster and fragmentation bombs and napalm which it is alleged, caused unnecessary suffering. In addition, the policy of free-fire zones and defoliation have also been described as violations of the laws of war. However, the focus here is

primarily on the charge of genocide, as it is an example of the sort of system crime that could be the subject of international criminal responsibility. The table below summarises both the component elements of the genocide convention and the US strategies that could comprise them.

UNGC Clause Violated Acts	Comparable Events in Vietnam
Killing members in whole or in part	Massive bombing, free fire zones 'indiscriminate shooting, murder, rape and looting'
Causing serious bodily or mental harm	Anti-personnel weapons, napalm, fragmentation bombs
Deliberately inflicting conditions of life calculated to bring about its physical destruction in whole or in part	Defoliation, shooting livestock, transferring populations to refugee camps
Imposing measures to prevent births within the groups	Transferring populations to refugee camps
Forcible transferring children of the group to another group	None
Was the 'intent to destroy in whole or in part, a national ... group as such' present?	None

Fig 2. Summary of the UNGC Clause Violated Acts and the Comparable US Strategies in Vietnam.⁵

These complaints have been due in no small part to the prosecution of Lt. Calley for the My Lai massacre in the province of Quang Ngai. This was a province targeted as an

⁴ P. Limquenco, and P. Weiss, *Prevent the Crime of Silence: Reports from the sessions of the International War Crimes Tribunal, founded by Bertrand Russell*, London: Bertrand Russell Peace Foundation Ltd., 1971.

⁵ L. Moir. 'The Historical Development of the Application of Human Law in Non-International Armed Conflicts from 1949', *International and Comparative Law Quarterly*, Vol. 47: Part 2, 1998, pp. 337-361.

area that required ‘sterilisation’,⁶ or pacification, and it was in this province that the most controversial event of the war occurred, the massacre at My Lai on 16 March 1968.⁷ Task Force Barker under the aegis of the Americal (23rd) Division included three companies and miscellaneous units, one of the companies, Company C, 1st Battalion, 20th Infantry under the command of Lieutenant Calley. He in turn was under the command of Captain E. Medina. The orders were to search and destroy the village of Son My, quadrant 4 in the My Lai sector, and the troops were told they would meet a force of around 250 Vietcong and could expect heavy casualties.⁸ In fact, the village contained only old men, women, children and infants who offered no resistance to the advancing troops. By the time the US troops had left almost all the civilians had been killed, there had been a significant number of rapes and total destruction of property and livestock.⁹ Civilian deaths were estimated at around 200,¹⁰ these included babes in arms, a special category of protected civilian as they can in no circumstances be described as combatant. Eyewitness accounts described Lt. Calley personally shooting groups of unarmed civilians in groups of twenty.¹¹ Public disquiet was also aroused by the conclusions of the Peers Report. On the 26 November 1969, General Peers had been appointed to head the official military investigation into the alleged ‘cover-up’ and the report ultimately concluded that there had been a serious attempt to conceal the massacre and protect the perpetrators.¹² Calley’s court martial was uncomfortably close

⁶ Attributed to an anonymous senior officer, much quoted in the literature. The full quote is ‘We’ve been told by our superiors that in many areas there isn’t any chance of pacifying the people, so instead we’ve got to sanitize our region – kill the Vietcong and move the civilians out. We are not going to be able to make the people loyal to our side. So we are going to sterilise the area until we can win it back’, cited here in S. Hersh, *My Lai 4: A Report on the Massacre and its Aftermath*, New York: Random House, 1970, p. 4.

⁷ A. Everett, K. Johnson, and H.F. Rosenthal, *Calley*, New York: Dell, 1971, p.3.

⁸ R. Hammer, *The Court-Martial of Lt. Calley*, New York: Coward, McCann and Geoghegan, 1971, p.18.

⁹ Ibid.

¹⁰ J. Olsen, R. Roberts, *My Lai: A Brief History with Documents*, Boston: Bedford Books, 1998. p. 4.

¹¹ Ibid., p. 26.

¹² W.R., Peers, *Report of the Dept of the Army Review of the Preliminary Investigation into the My Lai Incident*, Vol. 1, ‘The Report of the Investigation’, Washington: US Government Printing Office, 1970.

to demonstrating a charge of the Russell Tribunal, that the Vietnam War revealed a 'spirit of genocide in the minds of American soldiers'.¹³ The military context of the US action in Vietnam is crucial to an evaluation of these claims, for the nature of military engagement conditioned and limited the range of options available to the US.

Context

The Geneva Agreement of 1954, ending the first Vietnamese war had established a temporary border between North and South Vietnam pending elections due to be held in 1956. When the South Vietnamese refused to allow the election, Ho Chi Minh, the leader of North Vietnam, began recruiting sympathetic southern Vietnamese into a southern army, known as the Vietcong. The Vietcong launched a guerrilla war against the American-backed regime of Diem.¹⁴ The strategic situation was complicated by the differing objectives of the combatants. Olsen and Roberts describe how whilst the Vietcong fought a political war, gaining popular support and moving in and out of south Vietnam, particularly the Quang Ngai province, the Americans fought an increasingly territorial war where attention was focused on gaining and holding land.¹⁵ This is particularly relevant for a consideration of the nature and potential criminality of events induced by the very trajectory of the conflict itself. Indeed, the very necessity of foreign intervention could be said to prefigure the perception of America as an illegitimate intervener by the Vietnamese people. Walzer in his theory of humanitarian intervention goes so far as to claim that a government such as that of the south, that receives economic and technical aid, military resources and strategic advice and yet still cannot maintain order, is clearly illegitimate.¹⁶

¹³ Limqueco, *Op Cit.* n.4, p. 11.

¹⁴ Olsen and Roberts, *Op Cit.* n.10, p. 4.

¹⁵ *Ibid.*, p. 6.

¹⁶ M. Walzer, 'The Theory of Aggression', in Luper-Foy, S(ed), *Problems of International Justice*, Boulder: Westview Press, 1988, p. 172.

There is no doubt that the resulting character of the conflict as a guerrilla war made the distinction between combatant and non-combatants virtually impossible to sustain in such a counter-insurgency scenario. This is demonstrated by US policy on 'free fire zones'. In theory, free-fire zones were areas from which non-communists had been removed; those who remained were by definition Vietcong or Vietcong sympathisers. They remained in the hamlets at their own risk.¹⁷ However, even the most staunch defenders of the American engagement in Vietnam accept that many of the innocent civilians evacuated returned to their homes, Paust admits that if this was the case for 'even half of the hundreds of thousands of civilians killed in Vietnam, it would seem to demonstrate [...] at the very least a key failure in United States foreign policy'.¹⁸ This violates the key norm of 'discrimination' in warfare. The principle of discrimination between combatants and non-combatants is linked to the debate on collective vs individual responsibility. Indeed, the principle of discrimination has become a benchmark for assessing morality within the conduct of war.

The My Lai Massacre

It is clear that it was due to the persistence of one Ronald Ridenhour, a Vietnam veteran discharged from the army, that the My Lai case came to trial at all. He had heard rumours of a slaughter of unarmed civilians which on his enquiry were confirmed by some of the soldiers of Charlie Company. On 29 March 1969, he wrote a detailed letter to his local Democratic congressman, Mo Udall, and copied it to thirty other leading government officials.¹⁹ At the congressman's insistence the army instructed Col. Wilson

¹⁷ Olsen and Roberts, Op Cit. n.10, p. 8.

¹⁸ J.J. Paust, 'My Lai and Vietnam: Norms, Myths and Leader Responsibility', *Military Law Review*, Vol.57, Summer, 1972, p.57.

¹⁹ Letter from Ronald L. Ridenhour to Secretary of Defence, March 29th 1969. in W.R., Peers, *Report of the Dept of the Army Review of the Preliminary Investigation into the My Lai Incident*, Vol. 1, 'The Report of the Investigation', Washington: US Government Printing Office, 1970, p. 7-11.

to head the Army's Criminal Investigations Division in an enquiry into the allegations. As a result, Calley was the first to be charged, possibly because his discharge was imminent and a civilian court could not have charged him.²⁰ But alongside Calley, 11 other men were also charged with participation in the slaughter and another officer was charged with murder in a nearby hamlet. Seymour Hersh, a reporter, broke the story of the charges and details of the crimes the men were accused of on 13 November 1969.

Calley was the central figure in the prosecutions over My Lai. However, by the end of the Peers enquiry there were 23 others accused including those both higher and lower than himself in the chain of command. Calley, however, was in the unique position of having both ordered and participated in the slaughter. Officers higher than him had played no direct part in the slaughter, and those lower had followed the orders they had been given by him. He alone had both initiated and participated in the slaughter.²¹

Calley was tried by court martial, not under the Geneva Conventions for 'grave breaches', but for a common murder by a person subject to the Uniform Code of Military Justice, an Act of the US Congress.²² He was charged with Violation of the Uniform Code of justice, Art 118, specifying the murder of an unknown number, not less than 30, of the occupants of My Lai 4.²³ From the outset, there was no doubt that Calley had killed, and had ordered killed, civilians. The question hinged on whether the killings were pre-meditated or justified under the rules of proper military conduct.²⁴

Calley claimed in his defence to be acting under orders from his superiors, specifically attempting to shift the blame to Medina, his superior officer. In answer to the charge of

²⁰ Hammer, Op Cit. n.8, p. 32.

²¹ Ibid., p. 33.

²² G.I.A.D. Draper, 'Implementation of International Law in Armed Conflicts', *International Affairs*, Vol. 48: No 1, 1972, p. 51.

²³ He was also charged with the premeditated murder of 70 more villagers and two more specified murders, one of which was a child aged 2. All under Art 118. T. Tiede, *Calley: Soldier or Killer*, New York: Pinnacle, 1971, p. 112.

pre-meditation, he claimed to be under combat-stress at the time of the killings, although it was clear no shots had been fired before Calley opened fire.²⁵ In addition, the incidence of ‘parallel killings’ was raised as mitigation. Such practices, it was claimed, were part of the landscape of the conflict.²⁶ All of these defences failed and Calley was found guilty on all counts.²⁷

It is against the backdrop of guerrilla action that the massacre at My Lai needs to be placed, for it crucially conditioned the knowledge and expectations of the soldiers, impacting upon the degree and quality of their responsibility. It is the relation of the crime to the wider conflict which informs the debate surrounding the trial and conviction of Lt. Calley for violations of the laws of war. One of the key issues of the case was the controversy that surrounded Calley’s argument that such an event as the massacre at My Lai was a routine feature of the US military strategy in Vietnam.

Assessment

What seems certain is that the massacre took place against a background in which the local populace was itself regarded as the enemy. This seems clear when we look more closely at controversial policies such as the ‘Strategic Hamlet Programme’ launched nominally by the government of Saigon, but enforced by the US. This programme later known as ‘pacification’ or ‘rural construction’ was formulated in 1962,²⁸ establishing the ‘free-fire zones’ which covered large areas of the province of Quang Ngai. Hersh estimates that

²⁴ Tiede, Op Cit. n.23, p. 119.

²⁵ Ibid.

²⁶ Hammer, Op Cit. n.8, p. 197.

²⁷ Ibid.

²⁸ Hersh, Op Cit. n.6, p. 4.

Tens of thousands of tons of bombs, rockets, napalm and cannon fire were poured into the free-fire zones during 1965, '66 and '67.'[...] By the spring of 1967 ... as a side effect of the two years of US operations in Quang Ngai, at least 138,000 civilians had been made homeless and 70% of the dwellings in the province had been destroyed.²⁹

This policy, which simultaneously alienated the local population at the same time as it de-humanised them in the eyes of the US troops, was a direct response to the dynamics of counter-insurgency. The Hague Convention IV, 1907 prohibits the attack and bombardment of undefended dwellings. However, occupation by a military force defines a village or town as a defended place and therefore subject to attack. Such places are legitimate military objectives. Thus, there were no strict violations of traditional laws of war with regards to pacification.³⁰ However, it seems clear that many commentators link this destructive policy with the My Lai massacre. On this view contempt for the indigenous population was inevitable, a by-product of the attempt to conduct military operations in such an environment.³¹

The links between the general population and the guerrilla fighters is a complex one and this relationship impacts upon the laws of war in a contradictory way. On the one hand as Mao-Tse-Tung famously remarked the people are the ocean through which the revolutionary fish swims. The guerrillas are dependant upon the support of the general populace.³² Yet, at the same time their imperative is to provoke the established power into acts of reprisal against the populations who shelter them. The strategic imperative for a fighting force that is under-resourced and with fewer combatants necessarily

²⁹ Ibid., p. 5.

³⁰ Lewy elaborates on this point arguing that as the conflict was not clearly international in character, the entire body of the laws of war did not apply. Instead only Art 3 of the Geneva Conventions 1949 which specifically applies to conflicts not of an international character. G. Lewy, *America in Vietnam*, New York: Oxford University Press, 1978, p. 227.

³¹ Hersh, Op Cit. n.6, p. 11.

³² Paust, Op Cit. n.18, p. 135.

embodies stealth and subterfuge and violations of the traditional laws of war. The word ‘necessarily’ is resonant in this context. Although guerrilla warfare is not new, it is relatively young as a recognised part of international law. Although there had been recognition of the role of guerrilla fighters, this was ill developed in international law and mainly operated to deny official status to insurgents whilst it elaborated their treatment.³³ Yet, it seems difficult to deny the logistic imperative of guerrilla warfare, and given that it is difficult to deny this, it is also difficult to override the customary reservation that if an action is militarily necessary it is acceptable. Certainly, the Hague Convention 1907 was ambiguous on the matter of recognition for guerrilla forces emphasising the condition of ‘bearing arms openly’ amongst others.³⁴ But by the 1977, Geneva Protocol this condition had been modified to encompass the realities of guerrilla warfare.³⁵ This demonstrates an acceptance that the principle of military necessity is modified in this circumstance.³⁶

Yet, this issue was addressed squarely by the Russell Tribunal. As early as 1969, Bertrand Russell organised a non-governmental ‘mock’ tribunal. This was set up to collect evidence and conduct investigations in order to determine whether the US

³³ For instance, the Lieber Code 1863, Art 82. which states that hostiles who dissociate themselves from the ‘character and appearance of soldiers’ are not entitled to prisoner of war status, and shall be ‘treated summarily as highway robbers or pirates’. Also in 1856 the Attorney General described how irregulars are to be treated as ‘lawless banditti, not entitled to the protection of the mitigated usages of war as practised by civilised nations’. Paust, *Op Cit.* n.15, p. 131.

³⁴ 1907 Hague Convention IV Respecting the Laws and Customs of War on Land, Annex to the Convention Regulations Respecting the Laws and Customs of War on Land, Section 1- On Belligerents, Art 1 and Art 2.

³⁵ 1977 Geneva Protocol I Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflict, Section II, Art 43. Para 3. The relevant passage includes ‘Recognising, however, that there are situations in armed conflicts where, owing to the nature of the hostilities an armed combatant cannot so distinguish himself, he shall retain his status as a combatant provided that, in such situations, he carries his arms openly:

During each military engagement, and

During such time as he is visible to the adversary while he is engaged in a military deployment preceding the launching of an attack in which he is to participate.’

This modification is evidently concluded with resistance forces in mind.

government was responsible for committing various crimes in Indo China. Of note in this context was the argument made by Jean-Paul Sartre claiming that the US had committed genocide in Vietnam. It is illustrative because Sartre tackled the issue of intent by claiming that 'intent' could be implicit within a certain course of behaviour. His central contention was that the very nature of the conflict as anti-guerrilla warfare, admonitory in character, and waged by a powerful nation against a developing nation, meant that strategic logic naturally and inescapably led to genocide. He described a 'genocidal intent implicit in the facts'.³⁷ There are some difficulties with this concept of genocide; firstly, it doesn't meet the standards of strict intent imposed by the convention. For instance, the US set up refugee camps for the indigenous population and although they were unpopular, there is no evidence that the inmates were in any danger. This indicates the reverse of genocidal intent, in fact there were accommodations made to guarantee some measures of safety. The evidence is only that these measures were prioritised far below military advantage. Whilst the strategy may have been brutal and ill advised, it was regarded as a necessary response to the conflict and was openly adopted and debated. It was recommended by advisors, both military and political, and initially accepted by the media, it was even sanctioned after a fashion by a popular election. Sartre's argument implies that as strategic logic leads to genocide, intent can be attributed to the collective 'America', rather than to individuals. But if responsibility is to be allowed implicitly, the whole society is implicitly guilty. This is inherently unsatisfactory in terms of outcome, to blame everyone is in a very real sense, to punish no one and it is significant that the prospect of penal sanctions is dismissed as impractical.³⁸ This clearly shows that collectivising blame inevitably divorces it from the end step of criminal sanctions. But in addition, it also shows that where there is

³⁶ Even though this protocol was concluded after the Vietnam War it is based on customary practice and therefore indicative of a pre-existing and wide consensus.

³⁷ Limqueco, *Op Cit.* n.4. p. 11.

³⁸ Sartre, J.P., and Dedijer, V., *War Crimes in Vietnam*, Nottingham: Spokesman Pamphlet, No 12.

evidence that there was not a clear and purely criminal intent, there will be no real consensus around prosecutions. The concept of necessity, related as it is to the survival of state sovereignty, always trumps individual criminal responsibility, except under narrowly circumscribed and restricted circumstances around which there is a shared moral consensus.

This case has shown the ambiguities that surround the notion of military necessity and intent. In this case the target group were not selected purely on the basis of ethnicity but rather as a consequence of the dynamics of counter-insurgency operations. The next case examines a radically different situation where the target group was selected for political purposes rather than military ones. Here the potentials for taking action are equally difficult and also ambiguous in terms of the intent requirement demonstrated in the precedent set by the Nuremberg Tribunal.

Cambodia

The Khmer Rouge regime in Cambodia under Pol Pot (1975-1979) aimed at nothing less than radical transformation of the whole of Cambodian society. The scope of the intended changes was enormous:

Its designs penetrated beyond the reorganisation of political and economic institutions, social relations and kinship systems, and into the very seat of human consciousness itself. This was genuine totalitarianism ... The aim was to transform the grammar of thought within the culture.³⁹

The process of imposing this transformation left an estimated 1,671,000 dead by 1979, from all ethnic groups including that of the majority. The thoroughgoing nature of the

³⁹ T. Findlay, *Cambodia: The Legacy and Lessons of UNTAC*, SIPRI Research Report No. 9, Oxford: Oxford University Press, 1995, p. 193.

transformation Pol Pot's regime envisaged as well as the systematised nature of the measures that were imposed in pursuit of this goal, are key to assessing the claims of genocide in Cambodia.

As the scale of the crimes perpetrated against the Cambodian people became known, calls for international action against the perpetrators began to gain momentum. As was the case in the Vietnam conflict, concerned groups began to lobby for the application of individual criminal responsibility for the Khmer leadership. These calls have centred on Pol Pot, but other individuals widely believed to be responsible were Khieu Samphan, Hu Nim, Son Sen, Ieng Sary, Ieng Thirith and Koy Thuon.⁴⁰ Some examples of such demands have come from the US Cambodian Genocide Project, which proposed a world court in 1980 to try Khmer leaders, the Australian section of the International Commission of Jurists which called for trials of the leadership of the Pol Pot regime in Jan 1990, and the Minnesota Lawyers International Human Rights Committee which held a one day mock trial of Pol Pot in June 1990. In addition, the "Campaign to Oppose the Return of the Khmer Rouge" has the support of over 45 US organisations and the Oxfam initiated NGO Forum – a coalition of private voluntary agencies working in Cambodia.

However, despite the consensus around this opinion evident in the media,⁴¹ NGO's and the legal community there has been a reluctance to address this issue on the part of individual states and the international community. Despite the report submitted by Ben Whitaker, Special Rapporteur to the UN on Genocide, which described it in 1985 as

⁴⁰ Ibid.

⁴¹ For instance N. Cumming-Bruce, 'End of the Nightmare', *The Guardian*, June 24, 1997, p. 2.; P. Shenon, 'Cambodian Factions Sign Peace Pact,' *New York Times*, Oct 24, 1991, p. 16.; and L. Murdoch, 'Evans Backs Pol Pot Trial,' *Melbourne Age*, Oct 24, 1991, p. 1.

genocide “even under the most restricted definition.”⁴² Due to an ethnic dimension to the atrocity, the first time that the genocidal activity of the Pol Pot regime was officially recognised in an international forum (as the initiator of the resolution noted) was when the UN sub commission on Human Rights passed a resolution noting “the duty of the international community to prevent the recurrence of genocide in Cambodia,” and “to take all necessary measures to avoid conditions that could create for the Cambodian people the risk of new crimes against humanity”.⁴³ Yet, despite this unequivocal condemnation of the Pol Pot regime, legal action has yet to be taken to bring the perpetrators to justice.

Context

Ruled by the French until independence in 1954, Cambodia had spiralled into severe economic decline until the civil war of 1970 when communists mounted a bitter insurgent campaign to seize power. Food shortages, high inflation and a rapid decline in the standard of living promoted disturbances and unrest amongst the peasantry. This situation was further complicated by the general strategic position in the region, during the US engagement in Vietnam. The US began bombing the border regions of Cambodia where Vietnamese fighters took cover, but quickly extended this campaign to the increasingly large areas under communist control.⁴⁴ ‘Between 1970 and 1973, the US dropped 3 times the tonnage of bombs on Cambodia that it had dropped on Japan during all of WWII.’⁴⁵ More than half of this total was dropped in the last 6 months, culminating in the carpet-bombing of the whole country in July and August. This tipped

⁴² B. Whitaker, ‘Revised and Updated Report on the question of the Prevention and punishment of the Crime of Genocide’, *Report to the Economic and Social Council*, E/CN.4/Sub.2/1985/6, 2 July, 1985.

⁴³ Quoted from ‘1991/8 Situation in Cambodia’, Resolution passed by UN Sub commission on Human Rights, Aug 23, 1991. In R. Jenner, *The Cambodian Gamble*, Belgium : European Centre for Far Eastern Research, 1991, p. 35.

⁴⁴ B. Kiernan, *The Pol Pot Regime: Genocide in Cambodia under the Khmer Rouge 1975-79*, New Haven: Yale University Press, 1996.

⁴⁵ Findlay, *Op Cit.* n.39, P. 190.

the balance in favour of Pol Pot's communists who propagandised the situation to gain popularity.⁴⁶ On April 17 1975, the Khmer Rouge occupied Phnom Penh and immediately proceeded to evacuate the city and impose the radical restructuring of Cambodian society.

Character

The main aims of the Khmer Rouge were to create a society based around the soil. Under this regime religion, money and private property were to be eradicated. The aim was to create an agrarian society in which life was communal and no one was distinguished from society by either wealth, private property or education. Thus the evacuation of the cities, which caused immense loss of life, was prioritised as the means to social levelling.⁴⁷ A key feature of this regime was the struggle for centralised, top-down control, characterised by suspicion and mistrust. The harsher the regime became in an attempt to impose its ideological vision, the more resistance it created and the more brutally it struggled for centralised control.⁴⁸

Undoubtedly Pol Pot's regime targeted some groups more brutally than others. Ideologically, religious groups were targeted, as were some regions such as the politically suspect Eastern Zone which bordered Vietnam.⁴⁹ Yet, other targeted groups included intellectuals and urban dwellers, and such repression was not based upon ethnicity. Although there was undoubtedly an ethnic dimension to the killings, it is clear that numerically at least, the greatest proportion of victims came from the majority

⁴⁶ Kiernan, *Op Cit.*n.44, p. 22.

⁴⁷ Findlay, *Op Cit.* n.39, p. 193.

⁴⁸ Kiernan, *Op Cit* n.44, p. 27.

⁴⁹ S. Totten, W. Parsons, I.W. Charny, *Century of Genocide: Eyewitness Accounts and Critical Views*, New York: Garland Publishing Inc, 1997, p. 343.

Khmer ethnic group. By the time Vietnam invaded in 1979 ending the Khmer Rouge rule, an estimated 21% of the total population had been killed.⁵⁰

Assessment

That the Political Pot regime planned, initiated and successfully waged a campaign of mass murder and extreme coercion is not in doubt. The central question here is why this case was never subject to individual criminal responsibility. The impact of the international political context here cannot be denied; the situation in Cambodia was central to the geo-political landscape of the region. Yet, there were opportunities to have launched individual trials some years later after Vietnam withdrew from the country in 1989. The international community proposed to unite all the main political factions in a Supreme National Council. The transition to democracy was to be supervised by the UN through UNTAC (UN Transitional Authority in Cambodia.) The Paris Agreement which brokered the power sharing deal within Cambodia⁵¹ was an undoubted opportunity to impose individual criminal liability had there been sufficient international consensus to do so. The situation in Cambodia at the time of the agreement was clearly not conducive to allowing an internal resolution of the situation. The Khmer Rouge had significant armed support and a government which excluded them would have faced substantial opposition. There were efforts to establish some form of accountability within the new regime, but these were timid and incomplete. During UNTAC's administration of the area, a Special Prosecutor's Office was established by administrative directive, to press charges against suspects for flagrant political and

⁵⁰ Ibid., p. 343.

⁵¹ The Paris Agreement comprised three stages Paris I, July 1989, the Australian Initiative, November 1989 and Paris II signed in Oct 1991. Hong, M., 'The Paris Agreement on Cambodia: In Retrospect', *International Peacekeeping*, Vol. 2: No. 1. Spring 1995, pp. 93-98.

human rights crimes.⁵² Yet, there was no independent Cambodian judicial and penal system to conduct the prosecutions.

UNTAC did not attempt to establish a complete new judicial system...Foreign donors balked at financing the construction of gaols. The idea of importing foreign judges and lawyers was never pursued, although it was considered within UNTAC. According to human rights groups, the failure to follow this through was the result of legalism and timidity...⁵³

The few suspects detained were still awaiting trial when UNTAC departed and prosecutions were left to the new government. Both the Secretary of State for the US, James Baker, and the then Foreign Minister of Australia, Gareth Evans, confined themselves to offering support to an incoming Cambodian government which may decide to prosecute.⁵⁴

Although there was an ethnic dimension to the killings, and the Khmer regime could properly be brought to book for those killings, under the Genocide Convention the great mass of the Cambodian population who were killed were ethnically identical with the oppressing regime. Thus, only part of the population is a protected group.

Although presented as a communist atrocity by many western sources,⁵⁵ there is evidently an ethnic / race dimension to Khmer policies at this time.⁵⁶ Yet, it is also clear that the killings were targeted at perceived political opponents rather than ethnic groups and the intention was fixed upon political objectives rather than racial ones. However, the targeting of ethnic groups for further political purposes should not technically debar

⁵² Findlay, Op Cit. n.39, p. 66.

⁵³ Ibid., p. 67.

⁵⁴ Kiernan in Totten et al, Op Cit. n.49, p. 356.

⁵⁵ For a more controversial discussion of the power politics surrounding the US and later Vietnamese impact upon Cambodia see W. Shawcross, *Sideshow: Kissinger, Nixon and the Destruction of Cambodia*, New York: Pocket Books, 1979. and particularly 'The Trouble with John Pilger', *The Observer*, London, March 17, 1991, p. 20.

prosecutions for genocide or crimes against humanity. Provided the intention was to destroy the target group, it may not necessarily preclude action even if the group was being targeted for some eventual end other than pure racial hatred. However, the Cambodian case admirably shows the limits to international moral agreement. Despite the scale of the killings, their political objectives and nature set them outside the limits of moral consensus.

Indonesia in East Timor

Another case which demonstrates the restricted nature of international consensus is that of Indonesia in East Timor. The allegations over Indonesia's conduct in East Timor are longstanding and assert a general pattern of severe human rights abuse including torture and disappearance. However, given that this thesis focuses on prosecutions and enforcement of humanitarian law, two incidents, separated by eight years, are particularly relevant. We shall assess the judicial response to them, looking at the impact of the perceived character of the offences and how the principle of individual criminal responsibility has matured in the intervening period.

Two specific incidents in the Indonesian occupation stood out as being appropriate for the application of individual criminal responsibility. Although they took place within the context of widespread human rights abuses, they were discrete and actionable offences. One was the massacre at Santa Cruz on 7 November 1991, and the other were the massacres committed after the referendum in 1999. The international response to the massacres at Santa Cruz in 1991 and the more widespread massacres following the Referendum on Independence in 1999, altered significantly in tone with a new willingness to consider international jurisdiction. The invasion of East Timor by

⁵⁶ Kiernan, *Op Cit.* n.44, p. 26.

Indonesia took place in 1975 and was marked by bitter resistance and harsh repression. The long and concentrated attempt to subdue the East Timorese has become one of the most dramatic human rights situations on the international agenda. However, although the issue had been on the UN agenda since 1977, it was not until the massacre at the Santa Cruz cemetery in November 1991, which was by chance videoed by western journalists⁵⁷ that demands began to be made for some form of action. Yet until this point the international community had seemingly accepted Indonesia's occupation of East Timor as a 'fait accompli'.⁵⁸ It was not until the post-referendum massacres that we can trace calls for criminal prosecutions of the individuals responsible.

Context

East Timor had been a Portuguese colony for 400 years before it had declared its independence only days before its annexation by Indonesia. On 28 November 1975, one of the East Timorese political parties, Revolutionary Front for an Independent East Timor (FRETILIN), declared independence from Portugal because Portugal was considering dismantling its colonies. On 7 December 1975, Indonesia sent its troops into the territory on the grounds that other East Timorese political parties and elements were seeking its intervention.⁵⁹ The Security Council condemned the intervention by Indonesia, adopting resolution 384/1975 calling for the withdrawal of Indonesian forces. On 17 July 1976 Indonesia formally annexed the territory and proclaimed East Timor as the 27th province of Indonesia. The General Assembly rejected this claim and called for the national self-determination of the East Timorese.⁶⁰

⁵⁷ The journalists in question were Allan Nairn and Amy Goodman *Excerpts From The Testimony Of Allan Nairn Before The United States Senate Committee On Foreign Relations*, February 27, 1992, available online, <http://etan.org/timor/nairndili.htm>, accessed 20 July 2002.

⁵⁸ 'Report of the International Platform for Jurists for East Timor', July 1999, available online, [http://www.unhchr.ch/huridoca.nsf/\(symbol\)/A.54.726+S.2000.59.En](http://www.unhchr.ch/huridoca.nsf/(symbol)/A.54.726+S.2000.59.En), accessed 15 Aug 2002.

⁵⁹ General Assembly 54th Session, 'Question of East Timor', 31 January 2000, A/54/726, S/2000/59.

⁶⁰ Ibid.

The Santa Cruz Massacre

The occupation was accompanied by brutal measures to subjugate the territory, yet despite an estimated total death toll of 200,000 (out of a total population of less than 800,000),⁶¹ there were still few concrete measures to divert the course of the conflict. Western governments continued to sell arms to Indonesia and the US, Australia and the UK continued to train the Indonesian military.⁶² However, the Santa Cruz massacre brought the issue of East Timorese self-determination back into international focus.⁶³ On 12 November 1991 Indonesian forces shot into an unarmed crowd of people who had gathered at the Santa Cruz cemetery in Dili for a memorial service for a youth shot dead by Indonesian security forces.⁶⁴ The youth, Sebastiao Gomes, had been scheduled to speak with a UN sponsored delegation that was due to arrive from Portugal. Although the delegation never arrived the security forces reportedly hunted those prepared to speak.⁶⁵ The funeral of Gomes attracted over a thousand mourners and commemoration continued culminating in a memorial service on 12 Nov 1991, attended by 3-5000 people. Allain Nairn, one of the journalists present, claimed that Indonesian troops arrived and opened fire on the unarmed crowd without provocation in a systematic and disciplined manner.⁶⁶ After the journalists returned to the west, their testimony and the videotape of the incident was extensively publicised in the west.

⁶¹ Senate Committee Findings, 'Human rights abuses in East Timor since 1975', *Final Report on the Inquiry into East Timor*, 07 December 2000, available online, http://www.apf.gov.au/senate/committee/fadt_ctte/East%20Timor/c05.doc

⁶² 'Report of the International Platform for Jurists for East Timor', July 1999, available online, [http://www.unhcr.ch/huridoca.nsf/\(symbol\)/A.54.726+S.2000.59.En](http://www.unhcr.ch/huridoca.nsf/(symbol)/A.54.726+S.2000.59.En), accessed 15 Aug 2002.

⁶³ General Assembly 54th Session, 'Question of East Timor', 31 January 2000, A/54/726, S/2000/59.

⁶⁴ Ibid.

⁶⁵ Nairn, A., *Excerpts From The Testimony Of Allan Nairn Before The United States Senate Committee On Foreign Relations*, February 27, 1992, available online, <http://etan.org/timor/nairndili.htm>, accessed 20 July 2002.

⁶⁶ Ibid.

Largely in response to the international reaction, the Indonesian government set up a Committee of Inquiry which issued its preliminary report on 26 December 1991. Whilst the report acknowledged some mistakes and lack of control, it absolved the authorities, including the military command in East Timor, of any responsibility for the massacre.⁶⁷ Although several senior military officers were removed from their posts, they were not formally charged with any offences. Subsequently, nine junior ranking officers and one policeman faced court martial but on relatively minor charges.⁶⁸ This contrasted with the heavy sentences handed out to demonstrators, this issue was raised by the UN Human Rights Commission who complained of the:

disparity in the severity of sentences handed to those civilians not indicted for violent activities – who should have been released without delay- on the one hand, and to the military involved in the violent incident on the other.⁶⁹

Yet despite the relative strength of the international communities position in relation to imposing prosecution, no attempts to insist on individual criminal responsibility were made. Although, the Santa Cruz massacre had revived interest in the issue of East Timorese self-determination, there was little or no discussion of individual criminal responsibility for the Indonesian regime itself. Although the UN Commission of Human Rights had kept East Timor on its agenda, ‘investigating allegations of extrajudicial killings, torture, ‘disappearances’ and acts of sexual violence’,⁷⁰ there were no suggestions of international prosecutions until the events of 1999.

⁶⁷ Totten et al, *Op Cit.* n.49, p. 277.

⁶⁸ *Ibid.*

⁶⁹ ‘Situation in East Timor’, Commission on Human Rights Resolution 1993/97, 11 March 1993, available online, <http://www.unhchr.ch/Huridoca/Huridoca.nsf/TestFrame/0e3e31789ad306fdc1256a8b002fdbb9>

⁷⁰ General Assembly 54th Session, ‘Question of East Timor’, 31 January 2000, A/54/726, S/2000/59.

In May 1998, following the resignation of President Suharto, the new government of Indonesia under President Habibie committed itself to reform and respect for human rights. Habibie offered East Timor the opportunity to decide by referendum between either autonomy within Indonesia or independence. On 30 August 1999, nearly 99% of the registered voters turned out for the vote. The UN missions in East Timor (UNAMET) announced on 4 September, that over 78% of the voters had chosen independence. Localised militias, who had apparently been mobilised by the Indonesian military in an attempt to intimidate the electorate, embarked on a wave of destruction including widespread killing and forcible deportments.⁷¹ This violence led to the establishment of an International Commission of Enquiry on East Timor.⁷² The Enquiry concluded that there had been ‘a pattern of serious violations of fundamental human rights and humanitarian law in East Timor’.⁷³ Further to this, it recommended that the UN should establish an independent and international body to investigate violations of humanitarian law and identify those responsible.⁷⁴

Assessment

It is clear that the responses to both of these events occurring in the same place, with the same actors, were treated substantially differently. Prior to the 1991 Santa Cruz massacre, there was little intervention in what was treated as a domestic case. Even

⁷¹ ‘Report of the International Platform for Jurists for East Timor’, July 1999, available online, [http://www.unhcr.ch/huridoca.nsf/\(symbol\)/A.54.726+S.2000.59.En](http://www.unhcr.ch/huridoca.nsf/(symbol)/A.54.726+S.2000.59.En), accessed 15 Aug 2002.

⁷² General Assembly 54th Session, ‘Question of East Timor’, 31 January 2000, A/54/726, S/2000/59.

⁷³ General Assembly 54th Session, ‘Question of East Timor’, 31 January 2000, A/54/726, S/2000/59. Section 9 Para 142

⁷⁴ General Assembly 54th Session, ‘Question of East Timor’, 31 January 2000, A/54/726, S/2000/59. Section 9 Para 152. The recommendations listed were that ‘The United Nations should establish an independent and international body charged with 1. Conducting further systematic investigations of the human rights violations and violations of international humanitarian law in East Timor during the period from January 1999; 2. Identifying the persons responsible for those violations, including those with command responsibilities; 3. Ensuring reparations for the violations from those responsible; 4. Prosecuting those guilty of serious human rights violations within the framework of its function to ensure justice; and 5. Considering the issues of truth and reconciliation.

when Santa Cruz brought the issue to the international public, the Indonesian regime was allowed to deal domestically with the allocation and enforcement of individual responsibility. Even though the inadequacies of this approach were widely accepted, there was still little official reference to internationally sponsored trials. The massacre itself was small in scale and an allegation of widespread criminal killings would have assaulted Indonesia's sovereignty. This is particularly true given that repression of insurgents is the sovereign right of any state. It would seem that even when a political target group is identical with an ethnic target group there is a reluctance to take action. This indicates how restricted is the consensus around system crime, it must be unambiguously ethnically directed.

This contrasts with the recommendations which followed the massacres of 1999. As well as the International Commission of Enquiry for East Timor, 'Operation Indictment: War Crimes committed by Indonesian military and security forces against the peoples of East Timor' was drawn up in readiness of prosecution. This related to 44 cases between September 1975 and March 1999 which could cause a war crimes tribunal to find validity in the charge of war crimes.⁷⁵ In addition, the description of the situation in Indonesia during 1999 made by Mary Robinson the UN High commissioner for human rights, was that there was 'overwhelming evidence of a that East Timor has seen a deliberate, vicious and systematic campaign of gross abuse of human rights. I condemn those responsible in the strongest terms'.⁷⁶ This is in addition to the recommendations and protests of NGO's such as Amnesty International, Asia watch and the International Commission of Jurists. This reorientation to international jurisdiction was due to the

⁷⁵ Senate Committee Findings, 'Human rights abuses in East Timor since 1975', *Final Report on the Inquiry into East Timor*, 7 December 2000. Available online, http://www.aph.gov.au/senate/committee/fadt_ctte/East%20Timor/c05.doc

⁷⁶ UN Economic and Social Council, *Report of the High Commissioner for Human Rights on the human rights situation in East Timor*, 17 September 1999. E/CN.4/S-4/CRP.1

numerical scale and widespread nature of the crimes; in this respect, they were reminiscent of the charges at Nuremberg.

There are also great parallels between the massacre at My Lai in Vietnam and the massacre of demonstrators at the Santa Cruz cemetery. Both were small in scale but both inspired wider allegations about the pattern of violence within which they occurred. In both cases, the issue of parallel killings was sidestepped in Courts Martial and the accused received light sentences for minor offences. Both of the wider conflicts which framed these offences were driven by military or political considerations, issues around which states' interactions are bound by custom and protocol.

Conclusion

Although a precedent had been set for prosecuting gross and widespread human rights abuses at the Nuremberg Tribunal, there was little political will to approach and try these cases. Yet, few of the atrocities had the moral character of earlier Nazi crimes. The restricted nature of international moral consensus is shown by the evident lack of will to pursue allegations in cases where there was purity of intention displayed in genocide by killings that were exclusively motivated by racial hatred and carried out in a systematic and controlled manner. In the many cases of atrocities that had occurred since the Nuremberg Tribunal, none had shared the characteristics of Nazi system crime until the conflict in former Yugoslavia. This conflict also saw dispassionate, systematised attacks against an ethnic minority. In this sense, it was resonant with the crimes of the Nazi government. The consensus around these sorts of crime is evident, for instance, when the attacks by Indonesia in East Timor became widespread and clearly orchestrated there was more willingness to consider and recommend individual prosecutions. In addition, when states take decisions grounded in military or political

logic any prosecution is an intervention that represents a violation of the key norm of sovereignty. As the notion of individual criminal responsibility is in tension with this norm, where moral consensus is weak criminal responsibility will not be applied and states will be the focus of protest or representations. In the next chapter we will examine two more recent cases and examine more closely the issues involved in collective and individual assignments of responsibility.

Chapter 7

Tensions in the Modern Application of Individual Responsibility

The creation of the International Criminal Tribunal for former Yugoslavia (ICTY) was an undeniably groundbreaking response to allegations of widespread atrocities by both parties to the conflict. It represents the first serious attempt by the international community to address this problem by legal means and as such, its importance cannot be underestimated. Its constitution represents a qualitative shift in the justiciability of system criminality and as a visible and concrete symbol of the significance of international law; it was as bold as it was ambitious.

That it was radical is evident from the complete lack of prosecutions in the period post-Nuremberg. As we saw in chapter three, there had been no move whatsoever towards prosecution for what many would regard as some of the most serious abuses of human rights this century.¹ For instance, although the Geneva Conventions place great emphasis on penal enforcement, there has yet to be a case brought to its enforcement body, the fact-finding commission. Where action of some sort has been taken, it has tended to be political rather than judicial, actions such as sanctions against South Africa or the withdrawal of trading or aid relationships through agreements such as the Lomé Convention (now superseded by the Cotonou Agreement) Not only had there been no prosecutions for genocide, within the genocide convention the legal mechanisms in place to try it were of doubtful value, and there was no court specifically constituted to

¹ See S. Totten, W. Parsons, I.W. Charny, *Century of Genocide: Eyewitness Accounts and Critical Views*, New York: Garland Publishing Inc, 1997, for some examples.

adjudicate upon it.² Thus the inclusion of such offences as justiciable under the constitution of the ICTY/ICTR was a substantive step forward. Taken together with other advances in international law such as the prosecution of rape as a military strategy as a crime against humanity, the tribunals represent a clear advance in the justiciability of system criminality. But within the context of an investigation into the current condition and status of a potential international moral consensus it could be possible to overestimate its significance. Whilst it represents a significant step forward it cannot be regarded as the definitive proof of moral consensus it might first appear to be, for it is limited in several crucial ways. There is evidence that the moral consensus necessary to fully support this shift is still undeveloped as indicated by some difficulties with the current prosecutions, for instance funding difficulties and problems with the apprehension of suspects in terms of state cooperation. In addition, the legal character of the prosecutions indicates that the international community stops some way short of the full and absolute moral consensus necessary to indicate a nascent polity. This is also evidenced in both cases of non-prosecution such as, for instance, the current impunity of Saddam Hussein of Iraq.

This chapter looks at the ICTY/ICTR in some depth with the aim of establishing to what extent they are indicative of a fledgling international polity. That this term is so loosely generic is intentional, for given the current state and level of international interaction it would be foolhardy to imply anything but the most tentative of steps in this direction. The term 'polity' implies only a unified supervision of public affairs, it refers in the most general sense to some form of overarching political organisation. This thesis

² Prosecutions were to be undertaken in the state where the offences were committed (Art VI) and states could bring complaints about violations of the convention by other signatories to the International Court of Justice. (Art IX) 1948 United Nations Convention on the Prevention and Punishment of the Crime of

begins with the observation that the first steps in this direction are implied by the assignment of individual responsibility,³ and goes on to assess the real extent and influence of this principle in practice. To this end this chapter will look at both the practical aspects of the court's operation, and also the legal aspects of the tribunals constitution. It also compares the tribunals with some other recent cases of system criminality, in terms of consistency of approach, to ascertain how well established the principle of individual responsibility is. In addition, we will look at the problem of the unity of law and its potential impact upon the future course of this aspect of international law. This will go to show that despite the massive step forward the ICTY and ICTR represent, there is still room to argue that the principle of individual criminal responsibility is in tension with, and ultimately, abeyance to, traditional forms of interstate interaction and that this tension is not only expressed politically as we shall see in this chapter, but also to some extent, legally, as we shall explore in greater depth in chapter 8. That there is such a tension is evident when we look at inconsistencies in approaching gross examples of system criminality such as that shown in the measures against Iraq and the apparent impunity of Saddam Hussein.

The Context of the Tribunals

The Ad Hoc International Criminal Tribunals former Yugoslavia (ICTY) and Rwanda (ICTR)

Genocide. Genocide has since been deemed part of customary international law and therefore applicable to all states.

³ This is implied by the criminalisation of these offences. Criminality must imply a society against which the offences are committed. As we have seen in chapter 4, the minimum conditions needed to assign criminal responsibility can only be located within individuals. Thus, any move towards collectivising blame is necessarily a move away from a global polity and vice versa.

Considering the dearth of prosecutions since Nuremberg the constitution of the International Criminal Tribunal for Former Yugoslavia, (ICTY), and its sister tribunal the ICTR is all the more outstanding. The beginning of the process that would lead to the constitution of the ICTY and the International Criminal Tribunal for Rwanda (ICTR), could perhaps be marked by the London Conference for Former Yugoslavia, held on 29 Aug 1992. There, the then German Foreign Minister, Dr Klaus Kinkel, proposed establishment of a criminal court saying, “Those responsible for all crimes and violations of human rights, both inside and outside the camps, must be brought to account. An international court of criminal justice has to be created.”⁴ Prior to this there had been increasing evidence that there were death camps, torture camps and rape camps. As well as this, there was also evidence, largely presented by pioneering NGOs such as Amnesty International, as well as the key report of the Helsinki Watch Committee, of Aug 1992, alleging the widespread occurrence of genocide, mass killings and disappearances.⁵ This conflict certainly had characteristics which made it more amenable to intervention. Although it had the character of a civil war, after the newly independent states of Croatia and Bosnia had been recognised, the continued Serbian hostilities in these states gave the conflict an international element, combined with multiple hostilities between and within other former FRY states. Also it was clear that the basic aims of some parties included removing a rival ethnic population. Thus the conflict was waged less as combat between rival forces and more as a series of successive actions against civilians.⁶ All of these elements made the links with

⁴ Speech of the German Minister for Foreign Affairs, Dr Kinkel, at the London Conference, 1992. ‘General debate, Aug 26, 1992: Conference Statement.’ Available online: <http://Un.org/icty/publication/path.htm#a>, accessed 12.08.00.

⁵ W.P. Nagan, ‘Strengthening Humanitarian Law: Sovereignty, International Criminal Law and the Ad Hoc Tribunal for Former Yugoslavia,’ *Duke Journal of Comparative and International Law*, Vol. 6: 11, pp.127-165, p.129.

⁶ A. Roberts, and R. Guelff, *Documents on the Laws of War*, 3rd Ed, Oxford: Oxford University Press, 2000, p.565.

Nuremberg rigorously defined and the legal precedent unambiguous. After Security Council Resolution 764 drew attention to obligations under international humanitarian law and suggested the possibility of individual responsibility for grave violations.⁷ Resolution 771 called for states to submit data on the offences,⁸ whereas 780 established an impartial commission of experts to examine this data.⁹ Resolution 808 entailed an agreement in principle to establish an international tribunal to try individuals for serious violations of humanitarian law in the former Yugoslavia.¹⁰ Finally resolution 827 of 22 Feb 1993, officially established the ICTY.¹¹

All this would seem to suggest a fairly orderly progression through the international system, but it is certain that the Security Council took action only after information about the atrocities have been extremely well publicised by the media and the NGOs.¹²

In particular, two US sources, Roy Gutman of Newsday and the key report of the Helsinki Watch Committee which came out in Aug 1992, had a substantial impact upon public opinion.¹³ Nagan suggests that the domestic political situation in the US may have been a key factor in its insistence on security council action. Suggestions of inaction by the incumbent administration, particularly in the face of such appalling reports, may have fuelled the opposition campaign. Perhaps the electoral position of both of the parties encouraged the Bush administration to push the Bosnian crisis away

⁷ Security Council Resolution 764, Section 10, July 13, UN Doc. S/RES/764 1992

⁸ Security Council Resolution 771, Aug 13, S/RES/771 1992

⁹ Security Council Resolution 780, Oct 6, S/RES/780 1992

¹⁰ Security Council Resolution 808, Feb 22, S/RES/808 1993

¹¹ Security Council Resolution 827, May 25, S/RES/827 1993

¹² Thus strengthening public opinion in favour of some form of action. R. Norton-Taylor, 'The Ghosts of Nuremberg', *The Guardian*, 25 Aug 1995, p.5.

¹³ Nagan, *Op Cit* n.5, p.129.

from the domestic agenda, and into an international forum.¹⁴ Certainly the US gave a great deal of support to the notion of an international tribunal, despite, or perhaps because of, the murky associations of its representative Lawrence Eagleburger.¹⁵ Support also came from France, which was the only state that had commissioned official follow-up to the proposal for an Iraqi war crimes trial,¹⁶ and continued to lobby the international community for action, in addition to proposing a permanent international court. This combined with the coalescence of factors which allowed, and indeed demanded, a comparable response to that seen at Nuremberg.

It was the death of the Rwandan Prime Minister Habyarimana and other government officials on 6 April 1994 that sparked a wave of violence so severe that it has been described as the worse genocide since WWII. An interim government under the presidency of Venat Theodore Sindikubwabo seized power, and it is this interim government that is largely blamed for the genocide which followed.¹⁷ By the time a new broad-based government of national unity had been established on 19 July 1994, the conflict had left 500,000 dead, 3 million internally displaced and 2 million fled to neighbouring countries.¹⁸ The United Nations Assistance Mission for Rwanda (UNAMIR) with a peacekeeping force of 2,500 had been established in Rwanda since

¹⁴ Ibid.

¹⁵ Eagleburger was rumoured to be a 'drinking buddy' of Milosevic, during his time as US Ambassador to Yugoslavia, in addition as a private citizen he was co-director of the Yugoslav Bank along with Milosevic and was also the president of a US company importing cars from Yugoslavia. These allegations are most clearly made in Aran K. Mitra, 'US Policies have Helped Serbs Dominate,' *St Louis Post Dispatch*, Aug 20, 1993, at 7b.

¹⁶ France commissioned Professor Pellet to report on the issues of international law and the likely shape a prosecution of Saddam Hussein might take. P. Pellet, 'The International Responsibility of Saddam Hussein', April 16, 1991. In *The Path to the Hague*, available online - <http://Un.org/icty/publication/path.htm#a>, accessed 12.08.00

¹⁷ T. Sapru, 'Into the Heart of Darkness: The Case Against the Security Council Foray in Rwanda,' *Texas International Law Journal*, Vol. 32, 1997, pp.329-354, p. 334.

¹⁸ Report of the Secretary-General on the Situation in Rwanda, 3 Aug 1994, S/1994/924

Oct 1993 following four years of civil war. This was scaled down to 270 on the 21 April 1994. From then the massacres continued uninterrupted until the UN approved French intervention at the end of June.¹⁹ It seems clear that the international community was well aware of the impending disaster, but chose not to intervene.²⁰ Indeed, General Delleire has publicly accused the US, British and French governments of deliberate concealment of intelligence about the situation, going as far as to lay individual responsibility for inaction on the heads of state of these countries.²¹ Given this, it is easy to see why it has been suggested that the plight of African victims would not have generated the same outcry as the suffering of Europeans. On this view, it is solely the precedential effect of the ICTY which led to the ICTR.²²

What seems clear is that the tribunals have contributed substantially to the expansion of international criminal law and the development of the norms of humanitarian action. Firstly, it has undoubtedly paved the way for further action to be taken by the international community against any aggressors. Most notably it immediately spawned a successive *ad hoc* tribunal for Rwanda, with the adoption of security council resolution 955.²³ The constitution of this tribunal was a far simpler affair as a precedent had already been created by the ICTY. There was only one negative vote cast, and that was by the Rwandese government, this reflected principally their unhappiness that the death

¹⁹ B. Willum, 'Legitimising Inaction Towards genocide in Rwanda: A Matter of Misperception?', *International Peacekeeping*, Vol.6: No 3, Autumn 1999, pp 11-30. P.11.

²⁰ *Ibid.*, p.13.

²¹ General Romeo Delleire in interview with Tim Sebastian, 'Hard Talk', BBC News 24, 4.35 am, Mon 15 April 2002.

²² P. Akhavan, 'The International Criminal Tribunal for Rwanda: The Politics and Pragmatics of Punishment', *American Journal of International Law*, Vol.90: 1996, pp501-510.

²³ Security Council Resolution 955, S/RES/955 (1994)

penalty was not be imposed.²⁴ In addition both tribunals paved the way for the constitution of an International Criminal Court , but more importantly they established a benchmark for individual criminal responsibility. As such they are deservedly described as the ‘twin pillars of moral outrage on which the beginnings of a long-awaited international criminal jurisdiction can be discerned’.²⁵ This notion of the tribunals as indicative of universal moral consensus, strong enough to support the development of international criminal jurisdiction is central to this thesis. This thesis also argues that this is in turn is indicative of some form of international polity.

Legal Issues

However, apart from a refinement in international norms, the tribunals also made several innovations in the scope and parameters of international criminal law. Of course, simply the invocation and operation of criminal trials develops international law as rules of procedure and evidence are laid down and refined, and also a corpus of cases produces precedent, enlarging and interpreting legal statutes. But the ICTY and the ICTR not only refined, but considerably enlarged, the scope of application of international law. There are ten substantive differences between the ICTY and the Nuremberg Charter.²⁶ I shall assess several of the most relevant to the argument of this thesis.

²⁴ R. Goldstone, *Prosecuting War Criminals*, London: The David Davies Memorial Institute, 1996,p.5

²⁵ Akhavan, Op Cit. n.22.

²⁶ 1. The ICTY is more broadly international than the Nuremberg Tribunal which was constituted by the allies. 2. It has jurisdiction over offences committed after its constitution instead of only in retrospect. 3. It has indicted suspects from more than one side of the conflict. 4. It does not include crimes against peace. 5. Crimes expressly include that of genocide. 6. The ICTY has jurisdiction over crimes against humanity committed in internal as well as international armed conflict, but is not limited to only those crimes against humanity substantively connected to a war crime. 7. Rape is specifically included as a

Customary law

The statute of the tribunal contributes significantly to affirming major components of international humanitarian law as customary law.²⁷ This is significant in that it is indicative of a shared consensual basis to the laws in question. To define an offence as illegal under customary law is indicative of shared standards and a commonly expressed moral standard. Perhaps the most important development in this respect was the treatment of the provisions of the Genocide Convention (Articles II and III) as established customary law.²⁸ Properly falling under the wider category of crimes against humanity, these provisions were repeated verbatim in the statutes establishing jurisdiction of both tribunals. This is particularly interesting in the context of our wider argument, genocide is a pure system crime and articulation of opposition to it is purely expressed in moral terms. Logically there is no connection with conflict and it is an indictable offence when committed internally. It is this fact that sets it apart as evidential with respect to the potential for an international polity. To criminalise this offence is to imply that genocide is committed against world society rather than simply individuals. However, in its definition of crimes against humanity set out in the Statute of the ICTY, Article 5 requires that all crimes against humanity must have a causal nexus with an armed conflict.²⁹ In this respect, the security council erred on the side of

crime against humanity. 8. Due process protections have been extended⁹. The ICTY has a death penalty. 10. The ICTY is not empowered to impose the death penalty. Summary provided in A. Roberts, and R. Guelff, *Documents on the Laws of War*, 3rd Ed, Oxford: Oxford University Press, 2000, p.565.

²⁷ T. Meron, 'The Normative Impact on International Law of the International Tribunal for Former Yugoslavia', in Y. Dinstein, and M. Tabory, (eds), *War Crimes in International Law*, The Hague: Martinus Nijhoff, 1996, p.211.

²⁸ Meron, *Ibid.*, p. 213.

²⁹ Goldstone, *Op Cit.* n.24, p. 8.

caution treating the requirements of customary law as paramount. Thus at this stage the principle of full criminalisation of individuals for this offence was not fully expressed. However, it represented an advance from the position at the Nuremberg and Tokyo tribunals which dealt exclusively with crimes committed around the nexus of aggressive war. Although the crime of aggressive war was clear cut in the circumstances that led to the Nuremberg and Tokyo tribunals, the notion of aggression is, at the boundaries of the concept, as fraught as ever in the current political climate, with states still reluctant to agree a workable definition of aggression. In this context the notion of armed conflict is a more secure one, given that it makes reference to the Geneva conventions and their protocols, and as such is firmly within the ambit of customary law.

Internal Atrocities

Whilst the ICTY retained, in some form, the requirement of a link with armed conflict, although much relaxed in comparison with that of the Nuremberg Tribunal, its impact upon the development of international law can be seen by the advance achieved by its sister tribunal the ICTR. The statute of the ICTR dispenses with this requirement altogether and in its definition of crimes against humanity in Article III, does not require a nexus with armed conflict.³⁰ Indeed, the statute is ‘predicated on the assumption that the conflict in Rwanda is a non-international armed conflict.’³¹ This is perhaps based upon the decision of the appellate court in *Prosecutor v Tadic* within the ICTY where it was unanimously held that:

³⁰ Statute of the International Tribunal, Art 3.

³¹ Meron, *Op Cit.* n.27, p. 231.

It is by now a settled rule of customary international law that crimes against humanity do not require a connection to international armed conflict. Indeed, as the prosecutor points out, customary international law may not require a connection between crimes against humanity and any conflict at all. Thus, by requiring that crimes against humanity be committed in either internal or international armed conflict, the security council may have defined the crime in Article 5 [of the ICTY statute] more narrowly than necessary under customary international law.³²

Art 4 of the statute for Rwanda was both controversial and groundbreaking. It provided for prosecution of persons violating common article three of the Geneva conventions.³³

The novelty and importance of this decision lies in the fact that the Geneva conventions are so well established, and have such a long history of observance as to be an accepted part of customary law but that they have not previously been subject to criminal sanctions. A report by the Secretary-general recognised the extension to international law that the statute of the ICTR represented:

The Security Council has elected to take a more expansive approach to the choice of the applicable law than the one underlying the statute of the Yugoslav Tribunal, and included within the subject-matter jurisdiction of the Rwanda Tribunal international instruments, regardless of whether they were considered part of customary international law or whether they have customarily entailed

³² Prosecutor v Tadic, in the Appellate Chamber of the ICTY, available online: file://A:\ICTY, Tadic- Appeals Judgement_files\tad-aj990715e.htm

³³ Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, of August 12, 1949. Chapter, Article 3 'Common article three' relates to the conduct of participants in 'armed conflict not of an international character', its provisions are described as 'a minimum' and are therefore illustrative rather than exhaustive. Referring to those who take no active part in the hostilities it prohibits 'a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture; b) taking of hostages; c) outrages upon personal dignity, in particular humiliating and degrading treatment; d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognised as indispensable by civilised peoples. Available A. Roberts, and R. Guelff, *Documents on the Laws of War*, 3rd Ed, Oxford: Oxford University Press, 2000, p.198.

the individual criminal responsibility of the perpetrator of the crime.³⁴

Until the Rwanda statute, common article three had not been subject to criminal proceedings. This is an important development in terms of assessing the impact of responsibility assignation as a signpost to the development of an international polity. Criminalising non-compliance with such a widely observed treaty is clear move towards solidifying the rule of international law.

Another move towards extending the scope of international law was seen with the first ever convictions for rape brought by the ICTY. Although rape has a long legislative history as a narrow war crime, see chapter five, this marked the beginning of its treatment as a crime against humanity. On Feb 22 2001 Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic were sentenced to 28 years, 20 years and 12 years respectively. The convictions of the men were for various charges including rape as both a crime against humanity and as a violation of the laws or customs of war. In addition, enslavement was prosecuted as a crime against humanity. Trial Chamber II found that rape was 'used by members of the Bosnian Serb armed forces as an instrument of terror'.³⁵ This is somewhat different from the common description of the charge as 'rape as a military strategy'. The judges found that there was no evidence of high-level strategic planning, thus excluding prosecutions of indirectly responsible individuals. All of the defendants were personally responsible for the crimes. This was also evident in the Trial Chamber judgement which also stated that "lawless opportunists should expect no mercy, no matter how low their position in the chain of

³⁴ UN Doc. S/1995/134, Para 12 (1995)

command may be" ³⁶ Thus in this case, the prosecutions were relatively unproblematic and directed at relatively low-ranking offenders. The difficulties inherent in proving a strategic motive remain to be seen.

The statute of the ICTR represents an important convergence between the application of humanitarian law in internal as well as international armed conflicts. Despite this development, there are a few dissenting voices. Sapru, for instance rejects this as an intrusion into domestic affairs which is outside of the United Nations mandate, and is particularly indefensible under a Chapter VII action. Sapru argues that it is inappropriate to characterise internal problems as threats to international security. ³⁷ Sapru's argument however, neglects the nature of customary law. Essentially it is both fluid and reactive, it is intended to evolve alongside the international community. It is significant for a consideration of a nascent international polity though, as it achieves more fully the principle of individual criminal responsibility.

Individual Criminal Responsibility

The ICTY also represented an extension of the principle of individual criminal responsibility. This was represented by the inclusion of acts of planning and participation in the preparation of a crime, and also aiding and abetting.[Article 6] ³⁸

³⁵ *Judgement Of Trial Chamber II In The Kunarac, Kovac And Vukovic Case*, ICTY, The Hague, 22 February 2001. JL/P.I.S./566-e

³⁶ *Judgement Of Trial Chamber II In The Kunarac, Kovac And Vukovic Case*, ICTY, The Hague, 22 February 2001. JL/P.I.S./566-e

³⁷ T. Sapru, 'Into the Heart of Darkness: The Case Against the Security Council Foray in Rwanda,' *Texas International Law Journal*, Vol. 32, 1997, pp.329-354. For a good review of the benefits of the ICTR see P. Akhavan, 'The International Criminal Tribunal for Rwanda: The Politics and Pragmatics of Punishment', *American Journal of International Law*, Vol. 90, 1996, pp.501-510.

³⁸ Statute of the International Tribunal (adopted May 25, 1993) Articles 5 and 6, available online, <http://www.UnitedNations.org/icty/basic/statut/statute.htm>, accessed 26.10.00.

Although these changes are not in themselves huge, they represent a firming and shaping of the norms of individual criminal responsibility, a vital development if the requirements of deterrence are to be served.

In addition, according to Article 6 the tribunal has jurisdiction over persons only, there are no criminal collectives or organisations. This is a far narrower definition of liability than that of Nuremberg, and as such is a fuller realisation of the principle of individual responsibility. This had lead some theorists to describe such a direction as part of a 'modern trend' to exclude strict liability and impose individual responsibility.³⁹

However, it seems clear that the assignment of guilt to collectives was essentially a practical solution to the enormous task of de-nazification undertaken by national courts under the aegis of the Nuremberg statute.⁴⁰ Once an organisation had been pronounced criminal it was only necessary for the prosecution to prove that an individual had belonged to that organisation in order to deliver a guilty verdict. However, this was still a move towards individual responsibility as the organisations pronounced criminal were only those for which individuals had had to undertake positive and autonomous steps to gain membership, as in, for example, the SS. The United nations War Crimes Commission reported that:

Organisations such as the Gestapo and the S.S. were direct-action units, and were recruited from volunteers accepted only because of aptitude for, and fanatical devotion to, their violent purposes.⁴¹

³⁹ K. Turkovic, 'The Contribution of the Statute of the ad hoc International Criminal Tribunal for Former Yugoslavia to the Development of International Humanitarian Law.' *Croatian International Relations Review*, Vol. II, No 4/5-1996. p. 25

⁴⁰ United Nations War Crimes Commission, *The Problem of the Major War Criminals*, 16 May 1945. P.R.O reference: FO 800/923, p. 4-5.

As we saw in chapter 4, this autonomy is one of the necessary conditions of criminal responsibility. However, within the prosecutions at the international Nuremberg Tribunal for the ‘major war criminals’, the accused were selected as ‘representative’ of the wider population. The accused were drawn from categories encompassing propagandists and industrialists as well as every branch of the military and government.⁴² In many ways this was a collectivised approach to responsibility, rather than an extraction of ‘most guilty’ individuals. In many senses the Nuremberg Tribunal was crucially concerned with the prosecution of a whole state, it simply did this symbolically rather than practically as is the case with reparations and sanctions. Thus the ICTY represents a significant step towards the principle of individual criminal responsibility, rather than the accused being representative of different categories of society, indictments are made solely on the basis of evidence and apply to anyone committing an offence.

To this end Art 7 of the tribunal statute provides that:

The official position of any accused person, whether as Head of State or Government or as a responsible Government official, shall not relieve such person of criminal responsibility nor mitigate punishment.⁴³

Neither a plea of superior orders nor immunity by reason of official position in the state should constitute a defence. However, it does seem that a belief that the act was justified

⁴¹ Ibid., p. 5.

⁴² See Chapter 2 on Nuremberg.

⁴³ Statute of the International Tribunal (adopted May 25, 1993) Article 7. available online, <http://www.United Nations.org/icty/basic/statut/statute.htm>, accessed 26.10.00. Also available in A. Roberts, and R. Guelff, *Documents on the Laws of War*, 3rd Ed, Oxford: Oxford University Press, 2000, p. 565.

for military purposes might constitute a plea in mitigation, more crucially it may also be used to disprove the issue of intent.⁴⁴ The issue of intent is a difficult one in these circumstances and best explored by an analogy with domestic law. Suppose an individual were to hit another on the back with, say, a large piece of wood, causing injury. In one case we can assume that the individual intended the hurt they caused. However, further investigation of the circumstances might show that the individual was in fact attempting to save the injured party from the potentially fatal bite of a scorpion they had spotted on their back. In this circumstance we can clearly see a distinction between intent and motive. The intention in both circumstances would have been the same, to hit the injured party with a large piece of wood. But in the second case the motive is different from the intent. At Nuremberg the distinction between motive and intent was hidden, as it is in most domestic cases. The motive was well documented and clearly criminal, as well as being evident from the pattern of killings. But when such documentation is not available it may seem impossible to prove the mens rea of genocide especially given that within the genocide convention there is no numerical threshold after which mass killings become genocide. Within the genocide convention the proof of the offence lies solely with the 'intent to destroy ... a racial group'.⁴⁵ Francois Hampson points out, that it is therefore the business of the prosecuting lawyers to infer intent from the actions, orders and behaviour of the accused and as a result it is preferable to avoid the convention altogether and prosecute on other grounds.⁴⁶ The ICTY has, however, clarified the manner in which charges of genocide may be introduced by imposing the requirement that violations must be widespread and

⁴⁴ H. Fox, 'An International Tribunal for War Crimes: Will the UN Succeed Where Nuremberg Failed?', *The World Today*, Vol. 49, No.10, 1993, pp.194-197, p. 195.

⁴⁵ See chapter 3.

⁴⁶ Interview conducted with Françoise Hampson. University of Essex, Colchester. , February 22 2002.

systematic, thus introducing an extra element into the prohibited conduct.⁴⁷ Meron suggests that this may have ‘made the burden of proving crimes against humanity more difficult to meet’.⁴⁸ Yet given the difficulties I have outlined with the concept of intent, a new focus upon the more concrete notion of parallel or pattern killings must be an advantage. Indeed, in the first successful prosecution for Genocide achieved in the ICTY against General Krstic⁴⁹, Mark Harmon relied principally upon witnesses and the pattern of the killings.⁵⁰

Yet although it is possible to infer intent and therefore prosecute those who are remote from the crime, there still seems to be a gap between what is legally possible and what is politically feasible. Notwithstanding Art 7, it is still impossible to prosecute those who are current heads of state. As we have seen the reason for this is not a legal one, there are clear grounds for arguing that the perpetrators of genocide at least cannot claim impunity. However, there are equally well grounded precedents for claiming immunity from prosecution. The ICJ went to great lengths to distinguish between the two concepts in its latest judgment⁵¹ yet came down in favour of allowing immunity from prosecution for heads of state and diplomatic staff. This despite the fact that in the deliberations over the form and nature of the Nuremberg Tribunals the doctrine of sovereign immunity was already described as ‘obsolete’ and a ‘relic of the doctrine of

⁴⁷ Statements of France, Britain, the United States and the Soviet Union in the Security Council, 25 May 1993, S/PV.3217; UN Secretary-Generals Report of 3 May 1993, S/25704, para.48.

⁴⁸ Meron, *Op Cit.* n.27, p. 233.

⁴⁹ Radislav Krstic (IT-98-33) Judgement on 2 August 2001 13 March 2000 - 26 June 2001. Found guilty by virtue of his individual criminal responsibility on one count of genocide, one count of crimes against humanity and one count of violations of the laws or customs of war by Trial Chamber I on 2 August 2001 and sentenced to 46 years' imprisonment. Both Defense and Prosecution have filed notices of appeal on 15 August 2001 and 16 August 2001 respectively.

⁵⁰ Interview conducted with Mark Harmon QC, ICTY, The Hague, April 11 2002.

⁵¹ See chapter 8, *Belgium v The Democratic Republic of the Congo*.

the divine right of kings'.⁵² Ultimately then in cases of system crime, the immunity is coextensive with the crime. This was doubtless, as Witteween put it, a 'conservative' decision, but one essential to protect the current manner of inter-state interaction.⁵³ Thus we are left with an illogical and contradictory position, but one ultimately expressive of the tensions between individual and state in system criminality. On first sight this latest decision from the ICJ seems to contradict the statute of the ICTY, perhaps representing a reversal of the gains made by the ICTY. This contention is demonstrated when we assess the path through the ICTY that the prosecution of its most high-ranking accused followed, that of Milosevic.

Milosevic

On the 22 May 1999, an indictment was issued by the chief prosecutor Louise Arbour against Slobodan Milosevic.⁵⁴ Charged with both crimes against humanity and violations of the laws and customs of war, it was the first time proceedings had been instigated against a current head of state.⁵⁵ At the time of issue Milosevic was still president and it was to be another 27 months until his extradition to the ICTY on June

⁵² United Nations War Crimes Commission, *The Problem of the Major War Criminals*, 16 May 1945, P.R.O reference: FO 800/923, p.4.

⁵³ Interview conducted with A. Witteween, Information Officer, ICJ, The Hague, 8 April, 2002.

⁵⁴ Along with Milan Milutinovic and Nikola Sainovic, who both held various high-ranking positions within Milosevic's government. Colonel General Dragojub Ojdanic, the Chief of the General Staff of the VJ, and Vljako Stojljakovic, the minister of Internal Affairs of Serbia. All also charged with crimes against humanity and violations of the laws of war. Listed in the indictment, available online <http://www.un.org/icty/indictment/english/mil-ii990524e.htm> accessed 18.08.00

⁵⁵ Milosevic Indictment, available online <http://www.un.org/icty/indictment/english/mil-ii990524e.htm> accessed 18.08.00, p1.

28 2001.⁵⁶ Whilst Milosevic was in power the ICTY made relatively few moves towards enforcing the warrant. However, after Milosevic attempted to deny that the opposition had won the Sept 26 2000 Serbian election, a campaign of civil disobedience and strikes eventually forced him to concede on October 6 2000.⁵⁷ After this time the ICTY prosecutor, Carle Del Ponte began a series of representations to secure Milosevic's extradition to stand trial at The Hague.

In contrast with the case of Iraq below, the General Framework Agreement for Peace in Bosnia and Herzegovina (Dayton Peace Agreement) had been strongly oriented towards individual responsibility.⁵⁸ But although the Dayton agreement contained fairly robust language with regard to co-operation with the tribunal, enforcement of that cooperation had been another matter.⁵⁹ Nevertheless, the agreement contained several explicit references to the ICTY, outlining the responsibilities of corporations and public officials.⁶⁰ Yet Milosevic's position as incumbent head of state allowed him immunity from prosecution. His removal whilst in office would be unsustainable within the current international diplomatic structure. The head of state is more than their state's representative, in legal terms he or she embodies that state within traditional diplomatic

⁵⁶ Milosevic Case (IT-02-54), 'Kosovo, Croatia, Bosnia and Herzegovina', ICTY, The Hague: Ongoing. Details included in the case material: Slobodan Milosevic, born on 20 August 1941 in Pozarevac, Serbia, Federal Republic of Yugoslavia. Arrested: 1 April 2001 in Belgrade by local authorities. Transferred to ICTY: 29 June 2001. Initial Appearances:

3 July 2001, 'not guilty' plea entered for all counts on the 'Kosovo' indictment.

29 October 2001, 'not guilty' plea entered for all counts on the 'Croatia' indictment.

11 December 2001, 'not guilty' plea entered for all counts on the 'Bosnia' indictment.

⁵⁷ 'The Milosevic Years', April 24 2002, CNN.com. available online <http://www.cnn.community/2002/WORLD/Europe/02/11/milosevic.timeline>, accessed 12.08.02.

⁵⁸ *The General Framework Agreement for Peace in Bosnia and Herzegovina*, Office of the High Representative, December 14 1995.

⁵⁹ T. Meron, 'Answering for War Crimes: Lessons from the Balkans', *Foreign Affairs*, Jan/Feb 1997, pp. 2-8.

⁶⁰ See the General Framework Agreement for Peace in Bosnia and Herzegovina, Annex 1a, article X, also Annex 9, article IV and Annex 11, article VI.

norms. Were heads of state at risk of detention, the practice of international diplomacy would be unworkable. As we shall see in chapter 8 this is a principle that has been upheld and reinforced by the ICJ and it is here, at the apex of responsibility, that the tension between traditional inter-state structure and the principle of individual criminal responsibility, is most revealed. It is telling that in the most outstandingly successful application of individual responsibility, the case of Milosevic, the principle of sovereignty triumphed.

Even when Milosevic had conceded electoral defeat Del Ponte had to respect the sovereign autonomy of Yugoslavia. She began by making representations to the newly formed government of the opposition, headed by Kostunica. Initially declaring that he would not co-operate with the tribunal, Kostunica was put under pressure to meet Del Ponte by members of his government after the Tribunal issued a revised warrant for Milosevic's arrest.⁶¹ In it the tribunal demanded that Milosevic's financial assets were frozen and demanded that the former president and other indicted criminals were handed over to The Hague. In a statement the ICTY said that Yugoslavia, as a holder of UN seat, was obliged to comply with its obligations under Security council resolutions. If Yugoslavia did not comply, the ICTY threatened to seek UN sanctions against it.⁶² Her first meeting with Kostunica was reportedly 'frosty', with the president refusing to accept the jurisdiction of the tribunal.⁶³ By April 1, Milosevic had been arrested on charges of domestic corruption, and by April 4 the Tribunal had issued a statement

⁶¹ J. Steele, 'Kostunica Put Under UN Pressure Over Milosevic', *Guardian*, January 25 2001, available online, <http://www.guardian.co.uk/international /story/0,3604,427117,00.html>.accessed 15.08.02.

⁶² *Statement to the Press by Carle Del Ponte, Prosecutor of the International Criminal Tribunals for the Former Yugoslavia and Rwanda*, The Hague, December 20 2000, FH/P.I.S./550-e.

⁶³ Steele, J., 'Kostunica Snubs Call to Seize Milosevic', *The Guardian*, January 24 2001, available online, <http://www.guardian.co.uk/international /story/0.3604,427117,00.html>.accessed 15.08.02.

calling for Milosevic's extradition.⁶⁴ However, the untried nature of the procedure was evident in the round of negotiations that proved necessary to bring Milosevic to trial. It was US support and the pressure brought to bear by a proposed donor's conference.⁶⁵ Thus the economic and diplomatic strain Yugoslavia was placed under was considerable. They capitulated and extradited Milosevic on June 28 2001, just 24 hours before the opening of the international donor's conference.⁶⁶ It is illustrative to compare this case with that of a notable case of non-prosecution, that of Saddam Hussein.

Saddam Hussein

Although the proposals to make Saddam Hussein criminally liable for violations of humanitarian law had failed to produce action by any international body, it had prepared the ground to try perpetrators active in later conflicts and prosecution is still a prospect for Saddam Hussein. The position over Iraq is indicative of a real reluctance to carry individual responsibility to its logical conclusion, demonstrated in the Gulf Conflict. With the egregious crimes of the Iraqi Regime under Saddam Hussein, the international community was presented with a clear-cut and, certainly from the legal sense unproblematic, case of both war crimes against Kuwait, and genocide against its own population. These crimes were ordered by a small number of men and the allegations

⁶⁴ *The ICTY President And Prosecutor Insist On The International Obligation Of The Federal Republic Of Yugoslavia To Promptly Transfer Slobodan Milosevic To The Hague*, The Hague, 4 April 2001, SB/P.I.S./584e

⁶⁵ 'Prosecutor Upbeat on Milosevic Trial', BBC News, May 11 2001, available online, <http://news.bbc.co.uk/1/hi/world/Europe/1324354.stm>, accessed 03.04.03

⁶⁶ 'Milosevic Extradited', BBC News, available online <http://news.bbc.co.uk/1/hi/world/Europe/1324354.stm>

were supported by a large mass of documentary evidence.⁶⁷ In addition, Iraq was a defeated belligerent, thus the way should have been clear for application of the full force of individual criminal responsibility. When Iraq invaded Kuwait in 1990, it seemed the international community held some enthusiasm for individual prosecutions.⁶⁸ Security Council Resolution 674 makes numerous references to current international law naming no less than six treaty violations. Pointedly, it also refers to individual responsibility for grave breaches under the Geneva Convention.⁶⁹ The month before, the idea of an international criminal court had been mooted by Margaret Thatcher and George Bush, and a year later, after the massacre of Kurdish Iraqis, the matter was raised with more urgency by Hans Genscher in a meeting of the (then) 12 member states of the European Community.⁷⁰ As a result, a letter to the Secretary-General was drafted and sent on April, 16 1991, requesting that he:

examine the question of the personal responsibility of the Iraqi leaders in the tragedy that is unfolding, in particular on the basis of the Convention against genocide, and the possibility of trying them before an international court.⁷¹

⁶⁷ James Scheffer, US Ambassador at Large for War Crimes Issues, named 12 men at a conference of the Kurdish Organisation for Human Rights, Sept 18, 2000, as wanted to stand trial for 'war crimes, crimes against humanity and genocide'. They were, Saddam Hussein, Ali Hassan al-Majid, Uday, Quasay Saddam Hussein, Hamza, Taha Ramadan, Barzan al-Tikriti, Watban al-Tikriti, Sabawi al-Tikriti, Izzat al-Douli, Tariq Aziz and Aziz Salih Noman. Scheffer described 'millions of pages of Iraqi documentation.', a substantial part of which have been handed to the Iraqi research and Documentation Project to be posted online. Scheffer, D., 'Saddam Hussein: War Crimes and Crimes against the Iraqi People.' Available <http://www.totse.com/files/FA006/Kurderm.htm>, accessed 24.10.00.

⁶⁸ Y. Dinstein, and M. Tabory, (eds), *War Crimes in International Law*, The Hague: Martinus Nijhoff, 1996, P.16.

⁶⁹ Security Council Resolution 674 (1990) of 29th October 1990, S/RES/674 1990 – Oct 29, available online: <http://www.United Nations.org/Docs/Scres/1990/674e.pdf>, accessed 24.10.00.

⁷⁰ ICTY, *The Path to The Hague: Documents on the Origins of the ICTY*. Available online, <http://www.United Nations.org/icty/publication/path.htm#a>, accessed 13.08.00, p.3

⁷¹ Text of a letter from Mr Poos, President-in-Office of the Council of Ministers of the European Communities, to the Secretary-General of the United Nations, reproduced in full in, ICTY, *The Path to the Hague: Documents on the Origins of the ICTY*. Available online, <http://www.United Nations.org/icty/publication/path.htm#a>, accessed 13.08.00, p.5.

Although in an address to the European Council by Jacques Santer (the acting President at that time) he stated that the United Nations Secretary- General had responded “with interest” to the letter,⁷² neither the United Nations Secretary general nor other United Nations bodies eventually followed through on the proposal. Indeed, there was a remarkable silence on the issue, despite the fact that the resolution at the end of the conflict, Security Council Resolution 687 of April 3 1991, is one of the longest ever passed.⁷³ It deals in detail with the cease-fire and the dismantling of Iraq capacity for chemical warfare, yet it makes no mention of personal responsibility for war crimes.⁷⁴ However, the security council did pursue the issue of reparations, demanding that Iraq: accept in principle its liability under international law for any loss, damage or injury arising in regard to Kuwait and third states, and their nationals and corporations, as a result of the invasion and illegal occupation of Kuwait by Iraq.⁷⁵

This firmly links the reparations with violations of the laws of war, thus it seems clear that the security council chose on this occasion to abandon the innovation of individual criminal responsibility, in favour of a relatively unproblematic reliance upon state responsibility without penal sanctions. Further evidence for this position can be seen within the international community’s emphasis upon economic sanctions.

⁷² Plenary Session of the European Council, speech of Mr Santer, President-in-Office of the Council, 17 April 1991. Available online: <http://www.UnitedNations.org/icty/publication/path.htm#a>, accessed 13.08.00

⁷³ A. Roberts, ‘The Laws of War in the Gulf Conflict’, *International Security*, Vol. 18: 3, Winter, 1993/94, pp.134-181, p174.

⁷⁴ Security Council Resolution 687, 1991, S/Res/687 1991

⁷⁵ Security Council Resolution 686, 1991, S/Res/687 1991, Para 2

The economic sanctions imposed on Iraq were also linked to violations of the laws of war. They were first imposed on 6 August 1990, in response to the invasion and occupation of Kuwait on 2 August 1990. The Security Council declared this to be illegal and imposed comprehensive sanctions under SC res 661.⁷⁶ All exports from Iraq and Kuwait were banned, similarly, the sale of weaponry to those countries, also, all funds were to be denied to Iraq.⁷⁷ According to Article 41, Chapter VII of the UN Charter:

The Security Council may decide what measures involving the use of armed force are to be employed [...] These may include the complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations.⁷⁸

These powers were intended to allow for mandatory imposition but in practice the Security Council had settled for the call for the relatively ineffective voluntary sanctions until Iraq's invasion of Kuwait. Here, for the first time sanctions were used against an aggressor as a coercive weapon on the grounds of 'threat to international peace'.⁷⁹ From the outset Iraq seemed extremely vulnerable to such measures, its one product, oil, was relatively easy to track and interdict and Iraq imported between 60-70% of its basic food requirements.⁸⁰ For the sanctions to be lifted, Iraq had to meet a comprehensive list of conditions including weapons inspection and restriction, withdrawal from Kuwait, and an undertaking not to commit or support acts of international terrorism. However, it did

⁷⁶ Security Council Resolution 661.

⁷⁷ E. Herring, *Sanctions on Iraq*, unpublished paper, p. 8.

⁷⁸ Department of Public Information, *Charter of the United Nations and Statute of the International Court of Justice*, New York: United Nations, 1994.

⁷⁹ N.D. White, 'Collective Sanctions: An Alternative to Military Coercion', *International Relations*, Vol. XII: No. 3, Dec 1994, pp.75-91.

⁸⁰ D. Bethlehem, (ed), *The Kuwait Crisis: Sanctions and their Economic Consequences*, Cambridge: Grotius, 1991 cited in White, *ibid*.

not include provisions for the prosecution of those committing war crimes or grave breaches in the course of the conflict as the Dayton Agreement had done. Instead, its purpose was to secure compliance by Iraq to the demands of the international community, so in this sense they were not 'punitive' in the true sense of responsibility assignation.

Reparations

However, there was one area in which the sanctions regime dealt with a form of moral assignation, the issue of reparations. Iraq was required to pay compensation 'for any direct loss, damage, including environmental damage and the depletion of natural resources, or injury to foreign governments, nationals and corporations' incurred during its illegal invasion and occupation of Kuwait.⁸¹ Here there is a clear focus towards collective treatment of Iraqi citizens, rather than the assignation of individual criminal responsibility.

Reparations focus not on punishment or deterrence but on the victims of such crimes. Yet for reparations to make moral sense, they must be distributed to victims, but they must also come from those responsible for the injury. Even, Michael Scharf, a defender of reparations as a policy option, doubts that this could have occurred in Iraq. He points out that reparations address the goals of:

⁸¹ Sec Res 687, 3 April 1991.

restoring, rehabilitating and reconstructing, but in a way that frustrates the goals of preventing and deterring. This curious contradiction occurs because although a collective entity called Iraq is to pay the damages, there is a perverse lack of logic in who is actually making the payment.⁸²

Unlike Scharf, I argue that this problem is not confined to Iraq, but is inevitable when collective entities are seen as morally liable for criminal offences. The inconsistency endemic to war crimes prosecutions was also evident when we consider that several junior Iraqi officers who happened to be captured in Kuwait were prosecuted in Kuwait for lesser offences. The measures demanded of the Iraqi state were compensatory in character rather than criminal and therefore reflected a view of inter-state interaction which regards states as monolithic and represents a reversal in terms of affirming international moral consensus. Where the concepts of individual responsibility collide with the tradition priorities of inter-state interaction, then individual responsibility is clearly insufficiently developed to prevail.

Sanctions

Although the sanctions regime succeeded in its immediate objectives, it has failed in its longer term ambitions. The aim of sanctions was expressly stated not to be to starve the Iraqi people into submission, but initially to weaken Iraq's hold on Kuwait, and then to force compliance with its international obligations to disarm and compensate its victims.⁸³ However, the sanctions regime was simultaneously absolutely effective, in that it devastated the Iraqi economy, but ineffective, in that it seemed the pressure of that devastation fell principally upon the Iraqi people rather than the regime itself. This

⁸² M.P. Scharf, 'The Politics of Establishing an International Criminal Court', *Duke Journal of Comparative and International Law*, Vol. 6: 11, pp167-186, p.183.

⁸³ White, Op Cit. n.79.

led to growing international sympathy⁸⁴ for the Iraqi people and condemnation of the sanctions regime.⁸⁵ Although sanctions are widely viewed as the preferred alternative to force, their application in Iraq has raised question marks over their ability to achieve desired results and their compatibility with the laws of war.⁸⁶ The indiscriminate nature of the effects of sanctions have been raised as a cause for concern.⁸⁷ But if the decision to use sanctions is indicative of a traditional approach to conflict which collectivises individuals within states, (as opposed to individualising the responsibility for aspects of the conflict), the condemnation of the sanctions regime is also illustrative, in that it demonstrates a growing discomfiture with collectivised blame. As we have seen in chapter five, moral behaviour in warfare is discriminated behaviour, how well the distinction is drawn between combatants and non-combatants is the 'moral benchmark' of modern warfare. An indication that this principle is in play here is the tendency to criticise the sanctions regime in terms of its impact upon children, women and the sick, even though this is not necessarily relevant in post-conflict Iraq.⁸⁸ Whereas in warfare these groups are delineated as non-combatants, and therefore less appropriate as military targets, this distinction loses its force in a post-conflict scenario. This suggests that the distinction is less a military one and more a moral one. These groups are not perceived as less dangerous than other groups, the rationale behind their protection in conflict

⁸⁴ In the UK alone there are many groups campaigning against the sanctions regime, these include Campaign against Sanctions on Iraq, Campaign Against War and Sanctions on Iraq, Emergency Committee on Iraq, Gulf Crisis Group, Iraqi People First, Manchester Coalition Against Sanctions and War on Iraq, Sussex campaign Against Sanctions on Iraq and Voices in the Wilderness UK.

⁸⁵ G. Bahgat, 'Beyond Sanctions: US Policy Toward Iraq', *International Relations*, Vol. XIII, No. 4, April 1997, pp.57-68.

⁸⁶ Roberts, Op Cit. n.73.

⁸⁷ Ibid.

⁸⁸ For example R. Fisk, 'Innocent Victims Made to Suffer for the Sins of Saddam', *The Independent*, March 7 1998. D. Halliday, [Humanitarian Coordinator in Iraq, 1997-98] 'On Resignation', *Middle East International*, available <http://www.cam.ac.uk/societies/casi/briefing/pamp-ed1.html>, accessed 07.08.02. S. Jenkins, 'Waging Peace', *The Times*, Aug 5 1998. and J. Dreze, and H. Gazdar, 'Hunger and Poverty in Iraq 1991', *World Development*, Vol. 20: No. 7, 1992, pp.921-945. G. Alagiah, 'Starvation- The West's Weapon of Mass Destruction Against Iraq', *The Independent on Sunday*, Feb 28 1999.

scenarios, but rather, less guilty. Halliday's comment was a typical one when he claimed that 'We are in the process of destroying an entire society. Its as simple and terrifying as that. It is illegal and immoral.'⁸⁹ The strength of the criticisms of the sanctions regime are an indication of a new regard for individual moral culpability.

Individual Prosecutions

This view is also supported by the observation that there have been many calls for the prosecution of Saddam Hussein and his deputy, Ali Hassan Al-Majid. The special rapporteur for Iraq has continually reiterated the responsibility of those at the 'highest level of government':

There can be no doubt as to the State of Iraq's responsibility for the systematic violation of human rights in Iraq. Similarly, there can be no doubt as to the special and individual responsibility of senior members of the Iraqi Government for serious human rights violations over many years.⁹⁰

He has also named Saddam Hussein and his deputy for crimes against peace, war crimes and crimes against humanity occurring during both peacetime and during war.⁹¹ In particular, the Anfal Campaign against the Iraqi Kurds was noted as a clearly criminal

⁸⁹ D. Halliday, [former UN Assistant Secretary-General and Humanitarian Coordinator in Iraq] in, *The Independent*, October 15, 1998. available online, http://cam.ac.uk/societies/casi/briefing/pamp_ed1.html, accessed 07.08.02

⁹⁰ M. Van der Stoel, *Report on the Situation of Human Rights in Iraq*, Economic and Social Council: UN, 1995, Para 66. E/CN.4/1995/56

⁹¹ M. Van der Stoel, *Report on the Situation of Human Rights in Iraq*, Economic and Social Council: UN, 1994, Para 189. E/CN.4/1994/58

act that was subject to individual criminal responsibility.⁹² The reports allowed responsibility to both state and individuals, as well as defining clearly criminal acts which are subject to universal jurisdiction and linking those acts to the firm legal grounding of armed conflict. Thus, there was evidently the legal scope to assign individual responsibility should the Security Council so choose. The US Senate, March 13 1998, passed a resolution calling for a UN war crimes tribunal to try Saddam Hussein. Former President George Bush once compared Saddam to Hitler. Madeleine Albright has expressed interest in moving against Saddam in the international legal arena.⁹³ However, none of these moves to indict has gone further than symbolism or rhetoric. Due, it has been suggested, to the possibility that any push to indict and convict Saddam Hussein would face opposition from United Nations Security Council members Russia and China.⁹⁴

That there could be problems with individual prosecutions is beyond doubt. It would have been difficult to arrest Saddam Hussein, even under conditions of total occupation, which the coalition forces were anxious to avoid.⁹⁵ After the end of the hostilities it would have been awkward to call for his arrest whilst simultaneously negotiating cease-fire agreements with his regime. Furthermore outside powers were reluctant to press for trials if local powers would not support them.⁹⁶ In addition, as head of state such an

⁹² M. Van der Stoep, *Report on the Situation of Human Rights in Iraq*, Economic and Social Council: UN, 1994, Para 189. E/CN.4/1994/58

⁹³ 'U.S. Senate calls for war crimes trial for Saddam Hussein', available online

<http://www.1worldcommunication.org/worldnews.htm#Rebels%20With%20a%20New%20C> accessed 05.05.02

⁹⁴ 'U.S. Senate calls for war crimes trial for Saddam Hussein', available online

<http://www.1worldcommunication.org/worldnews.htm#Rebels%20With%20a%20New%20C> accessed 05.05.02

⁹⁵ C. Richards, 'CIA Chief Tells Why Saddam Survived,' *The Independent*, Jan 9, 1993.

⁹⁶ Roberts, *Op Cit.* n.73.

intervention would have represented a serious erosion of Iraq's sovereignty. These difficulties are representative of the difficulties that inevitably attend prosecutions of organs of state. As I have asserted, the boundaries between state and individual are insufficiently fixed to allow prosecutions for system criminality where there is little or no practical distinction between offender and state. However, these conditions were also present in the case of Milosevic, as we have seen. Yet an indictment against Milosevic was made regardless of the early practical difficulties of bringing him in person to trial.

Conclusion

The constitution of the ICTY and the ICTR have represented a significant strengthening of the application of the principle of individual responsibility. However, this advance is by no means as unambiguous or entrenched as might first be thought. Significantly, in Iraq, another case of armed conflict in which atrocities had been committed against civilian populations, and also a conflict which had been internationalised by security council involvement, there has been no such move to apply individual responsibility. Instead, the situation has been 'collectivised' by the use of sanctions, an element of which included provision for reparations. This is significant in terms of this thesis in that it indicates an approach to Iraqi offences which treats them as civil in character, rather than criminal. This indicates a traditional state-to-state view of international interaction, rather than the more universalist notion of the world comprised of represented, and criminally liable, individuals. A civil approach to offences does not indicate a real regard for a potential international polity. It is only the criminalisation of offences as crimes against humanity which implies a global body politic against which the crime has been committed. Reviewing the action with respect to Iraq, and considering how standard a mode of interaction took place, the embeddedness of its

tradition and the weight of history and common practice upon which it rests, the achievements and implications of the ICTY and ICTR are all the more striking. For the first time since Nuremberg the principle of individual criminal responsibility has been made concrete, yet the gap between the legally possible and the politically feasible remains and the principle remains in tension with the traditions and practice of common state-to-state interaction. However, the tribunals have opened a new phase in the treatment of gross abuses and as we shall see in chapter 8, the willingness and potential to prosecute those at the apex of responsibility has been expressed in a variety of novel legal and political forms.

PAGINATION AS IN ORIGINAL

Chapter 8

The Future of Responsibility Assignment

The progress towards individual criminal responsibility and the moral development it represents is not confined exclusively to violations of the laws of war. Many pieces of international legislation, such as the Convention on Torture, 1984, whilst they may have originated in the laws of war, have long since lost their connection with armed conflict. Perhaps the most salient feature of the developments post-ICTY has been the new willingness to recognise principles of justice in concrete legal action in circumstances discrete from armed conflict. These have included the extradition of Pinochet, the issue of warrants against Abdulaye Ndombasi and Ariel Sharon by Belgium, and the pursuit of Osama bin Laden. In addition, a variety of domestic remedies have been used by states internally for prosecutions including truth commissions and amnesties revealing a different orientation to justice. Set against the background of urgency created by the beginning of the trial of Milosevic, the first trial of a former head of state, and the frustrated attempts to apprehend Radovan Karadic, it might seem that the moral consensus around prosecution for system criminality is beyond question. These rapid developments at the turn of the 20th century are dramatic enough to be characterised by Rodley as the genie being released from the bottle.¹ However closer examination of these developments reveal some deep-rooted difficulties with the attempts to accommodate these prosecutions, given the structural conditions under which the international community operates.

¹ N.S. Rodley, 'Breaking the Cycle of Impunity for Gross Violations of Human Rights: The Pinochet Case in Perspective', *Nordic Journal of International Law*, Vol.: 69, pp.11-26. p. 25.

This thesis argues that the introduction of individual criminal liability, for crimes which are large enough in scope to require the resources of the state in their commission, expresses a nascent international society. This is because the victim is not in the essential sense an individual, aggregate of individuals or even nation or ethnic group, the victim is, conceptually, a polity in the case of criminal offences. As Arendt observed in her commentary on the Eichmann trial:

Just as a murderer is prosecuted because he has violated the law of the community, and not because he has deprived the Smith family of ... its breadwinner, so these modern state-employed mass murderers must be prosecuted because they violated the order of mankind, and not because they killed millions of people.²

In the same way as in domestic law, complaints by one individual against another are civil in character, whilst violations of the criminal code are violations against the community in which they occur. For this reason victims do not choose whether criminal proceedings take place or not, the 'victim' is the law-making community itself. In addition, as we saw in chapter 4, only individuals can bear criminal guilt. As it is logically incoherent to distribute criminal guilt across a collective, actions against states are civil in character. Thus, the failure to apply individual criminal responsibility is a failure to assign responsibility of any meaningful kind. In these cases, there is an effective denial of an international polity.³

This chapter will show that the legislation has developed in two strands one promoting the criminal trial of individuals, in tandem with, and often overlapping, the traditional foundation of international interaction, the legal obligations of states to one another in

² H. Arendt, *Eichmann in Jerusalem: a Report on the Banality of Evil*, New York: Penguin Books, 1994, p. 244.

³ In addition, Eichmann's trial on 12 counts including four for committing 'crimes against the Jewish people' was also an effective denial of the claims embodied in the charge of 'crimes against humanity'.

an anarchic system rather than a polity. This will demonstrate that although the principle of individual criminal responsibility, and therefore the expression of a nascent international polity seems prevalent, it is by no means as well developed as it may appear. Some of the most abiding principles of international law run contrary to this development, such as the principles of sovereign immunity, non-intervention and indeed a legal tradition which regards states as 'large individuals' or the monolithic bearers of individual legal personality. To designate something 'criminal' implies a minimum level of moral consensus whereas a system which delivers full and effective criminal liability requires a full consensus. This issue is especially evident in the treatment of 'system criminality', necessarily committed with the resources of the state. When we look at the pattern of prosecutions (and failure to prosecute), international moral consensus is still relatively weak when set against the principles of sovereign immunity and non-intervention.

National Courts and Extradition

Pinochet

One of the most striking of these developments was the case brought against Auguste Pinochet by Spain. The decision by the House of Lords on March 24, 1999 that Pinochet was not immune from being extradited to Spain for prosecution for offences committed as head of state of Chile, had, as Rodley describes, 'an element of especial political and juridical novelty'.⁴ This novelty centres around the decision that Pinochet's status as head of state at the time of the offences, did not preclude prosecution. This is important within the framework of this argument in that it demonstrates the tensions

⁴ Rodley, *Op Cit.* n.1, p. 11.

inherent in the application of the principle of individual criminal responsibility for system criminality. The Law lords opinions usefully summarised the various arguments surrounding the issues of assigning responsibility and highlighted the clash between the principles of sovereign immunity and individual responsibility.

On 17 October 1998 whilst undergoing medical treatment at a London clinic Pinochet was placed under formal arrest. The charges were eventually to include conspiracy to murder and to torture, and actual torture and hostage taking.⁵ A Spanish judge, Baltasar Garzon ordered the initial international arrest warrant that led to the British warrant for Pinochet's extradition on behalf of the Spanish judiciary. A series of legal challenges eventually resulted in the case reaching the House of Lords for what was to be the first hearing of three.⁶ The final decision was reached in Pinochet 3. The criminal responsibility of Pinochet was quickly established, the terms of the Convention on Torture unambiguously provided for responsibility at the highest level.⁷ Pinochet could avoid extradition only by invoking immunity from prosecution. The notion of state or sovereign immunity is an important one in international law relating as it does, not to the individual but to the state.⁸ Here the individual is regarded as 'the embodiment of the state itself'.⁹ The State Immunity Act is a legal expression of the Acts of State doctrine¹⁰ and forms a fundamental principle of international interaction. It is crucial in

⁵ Ibid., p. 18.

⁶ Known as Pinochet 1, Pinochet 2 and Pinochet 3. The ruling of Pinochet 1 which held that state immunity did not apply in relation to these offences was challenged by a further appeal. This asked for a reversal of the decision on the grounds that one of the judges was affiliated to Amnesty International which had been an 'intervenor' in the case. The judgment of Pinochet 1 was set aside on the grounds that even the appearance of bias should be avoided. Accordingly, a new hearing took place (Pinochet 3) handing down a decision in March 24 1999.

⁷ Article 1(1) 'inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.'

⁸ ILM No3, p.236. and Rodley.

⁹ Opinion of Lord Millett

¹⁰ H. Kelsen, 'Collective and Individual Responsibility for Acts of State in International Law', *Jewish Yearbook of International Law*, Vol. 22, 1948.

the warrants issued by Belgium against Abdulaye Ndombasi and Ariel Sharon which we will shortly examine, and demonstrates the limits of the application of the principle of individual responsibility. The strength of this principle is reflected in the fact that all of the law lords agreed that a serving head of state enjoys immunity. This is reflected in the position expressed by a member of the FCO who underlined the fact that the British government in common with others could not contemplate so extreme an action as prosecution of a current head of state.¹¹ Lord Goff described sovereign immunity as a key general norm of international law whose centrality to the international system was of higher priority than the repression of crimes under international law, even when that law prescribed universal jurisdiction.¹²

However, Pinochet, as a former head of state, could be held for prosecution. Yet the outcome was uncertain, given that the prosecution related to acts carried out whilst Pinochet was in office.¹³ This was despite the as yet, unrevised, 1978 Sovereign Immunity Act which extends legal immunity to former, as well as current, heads of state.¹⁴

Lawyers acting for Pinochet, seized on the fact that he had been the Chilean head of state during the time the alleged crimes were committed.... By doing so, they forced British judges, first in the Divisional Court and then in the House of Lords, to choose between two very different views of international law.¹⁵

The first view was the traditional one, which upheld the view of states as the only relevant actors in the international law, the second was a view of international law as

¹¹ Interview with A., McDermott, Senior Research Officer, Global Issues Research Group, FCO, 24 January 2001.

¹² Rodley ILM 606-607, 1999.

¹³ At this stage, Milosevic had not yet been indicted by the ICTY.

¹⁴ State Immunity Act 1978, Section 20.

both applicable to, but more importantly, accessible to, individuals. The Pinochet case is an important one in that it posed the two competing views of international law in the starkest possible terms.¹⁶

The eventual judgment revealed scope for further extension of the principle in that it was held that there was no immunity in Pinochet's case. The strongest reasoning behind this, expressed by Lord Millett, was that with regards to torture:

The official governmental nature of the act, which forms the basis of the immunity, is an essential ingredient of the offence. No rational system of criminal justice can allow an immunity which is co-extensive with the offence.¹⁷

This is an effective argument in favour of allowing prosecutions, highlighting precisely the point of collision in the relationship between individual and state in cases of system criminality. It offers scope for eventual extension of the principle of individual criminal liability, for if it were to more generally supersede sovereign immunity; it could be regarded as signalling a firm moral consensus around the issue of system criminality.

At the very least the Pinochet case represents a small advance in the growth of a fledgling international moral consensus, supported and expressed by a legal framework. The justiciability of these offences represents a new development in that it replaces *raison d'état* as the ultimate conditioning factor in the consequences for leaders of gross human rights violations. This can be seen in the British response to Chilean attempts at a politically negotiated settlement to the affair, a Downing Street spokesman said that

¹⁵ Byers, M., 'In Pursuit of Pinochet', From LRB Vol. 21, No 2, 21 January 1999, Oxford University press, available online, <http://www.lrb.co.uk/v21/n02/byer2102.htm> accessed 01.07.02,

¹⁶ Ibid.

¹⁷ Rodley ILM 651, 1999

“There is no deal, it is a judicial decision, not a political one,”¹⁸ Although the US placed a great deal of political pressure upon the Home Secretary, Jack Straw, who faced a quasi-judicial decision on whether to allow the extradition to proceed,¹⁹ Bindman, the solicitor who acted in concert with Amnesty International to push forward Pinochet’s prosecution, confirmed that in this case he felt the governmental response was legal in its character.²⁰ How deeply this principle is held is a moot point, but there is no doubt that it was the increasingly legalistic parameters of the international response to system criminality that allowed the government to treat this case in this manner. In essence, this was a successful challenge to a state and claims of state sovereignty laid down by a court, although opportunistic and unsteady, ultimately it must represent the beginnings of a new primacy of international justice.

Belgium

However, the precedent set by the Pinochet case is by no means firmly entrenched. This can be seen by the contradictory position of Belgium after the ICJ decision on its arrest warrant of 11 Apr 2000 for Mr. Abdulaye Yerodia Ndobasi, Minister for Foreign Affairs of the Democratic Republic of the Congo v Belgium, charged with Grave breaches of the Geneva conventions, crimes against humanity and incitement to racial hatred. Belgium had enacted domestic legislation, the war crimes law 1993, which enables anyone to bring a war crimes case against any world leader and sought to try Ndobasi, in a Belgian court for allegedly urging the slaughter of minority Tutsi’s in 1998.²¹ The International Court of Justice, ICJ, handed down the decision on 6 March 2002, that Ndobasi enjoyed immunity as he was the then incumbent foreign minister

¹⁸ A. Grice, ‘Straw Faces Huge Pinochet Revolt’, *The Independent*, Nov 30, 1998.

¹⁹ G. Hawthorn, ‘Pinochet: The Politics’, *International Affairs*, Vol. 75: No.2, 1999, pp. 253-258.

²⁰ Interview with Geoffrey Bindman, Solicitor in Pinochet Case, Bindman and Co., London, July 2 2002,

for the Congo.^{22 23}The decision was founded on customary international law rather than legal instruments which were ambiguous in relation to immunity. Several important points were made in the judgment in relation to this thesis.²⁴ Firstly, immunity is designed to facilitate officials in the performance of their duty therefore detention on any charge for an offence of any kind interferes in such a manner. Secondly, in response to Belgium's argument that war crimes and crimes against humanity were exceptions to this rule because of their character, the court investigated the customary application of the principle of individual criminal responsibility by states. It concluded that there was no evidence that these crimes were customarily treated differently. On the evidence of recent cases including the Pinochet ruling, the court concluded that there were no exceptions to the rule of immunity (this is likely to refer to the unanimous opinion of the Law Lords that there were no grounds for detaining a current head of state) and that this immunity applied in the same way to diplomatic ministers. In addition, the decision highlights ways in which incumbent ministers may be prosecuted, the state itself may choose to prosecute the accused or the state may waive immunity. Finally, the court drew the distinction between impunity and immunity. The criminal character of the act does not change, only its legal consequences for the individual.²⁵ Herein lies the tension between individual and state in system crime, where the crime can only be committed

²¹ 'March 6, 2002- Belgian court delays decision on Sharon war crimes investigation' Wiesenthal Centre, <http://www>. Accessed Mar 8 2002.

²² Ndombasi has since lost office which may significantly impact upon the likelihood of his being prosecuted in future. However, at the time of the issue of the international arrest warrant by Belgium, he was a current foreign minister.

²³ In its Judgment, which is final, without appeal and binding for the Parties, the Court found, by thirteen votes to three, 'that the issue against Mr. Abdulaye Yerodia Ndombasi of the arrest warrant of 11 April 2000, and its international circulation, constituted violations of a legal obligation of the Kingdom of Belgium towards the Democratic Republic of the Congo, in that they failed to respect the immunity from criminal jurisdiction and the inviolability which the incumbent Minister for Foreign Affairs of the Democratic Republic of the Congo enjoyed under international law' and, by ten votes to six, 'that the Kingdom of Belgium must, by means of its own choosing, cancel the arrest warrant of 11 April 2000 and so inform the authorities to whom that warrant was circulated'. Findings on Arrest Warrant of 11 April 2000. (Democratic Republic of the Congo v. Belgium) 14 February 2002, ICJ.

²⁴ Press statement of Judge Gilbert Guillaume, President of the International Court of Justice, 14 February 2002. <http://www>. Accessed March 8 2002.

with the resources of the state by an actor who legally personifies the state, the traditional principles upon which international order is founded specifically preclude prosecution. At the apex of responsibility for system criminality, the principle of individual responsibility clashes directly with the principle of sovereignty. Where these principles clash, the traditional principle of sovereignty holds sway. The principle of individual responsibility, and therefore the implication of universal morality, is by no means as well developed as it might first appear.

This decision has implications for the future of prosecutions by Belgium. There are some 40 similar claims now before Belgium courts which have now been thrown into question. These include criminal proceedings against Palestinian leader Yasser Arafat, Cuban President Fidel Castro, Iraqi President Saddam Hussein, Ivory Coast President Laurent Gbagbo and ex-President Hashemi Rafsanjani of Iran among others. The most notable of these pending cases is the indictment of Israeli Prime Minister, Ariel Sharon for indirect responsibility for the massacres at Sabra and Chatilla.²⁶ The ruling due from the Belgian court on the case was delayed on Mar 6 2002, to give the court more time to consider the legal implications of the ruling on the warrant for Ndombasi in the light of the decision on immunity. The lawyers for the 23 survivors of a 1982 massacre in two Palestinian refugee camps asked the court to hold off on any decision until they introduce new arguments in light of the International Court of Justice ruling.²⁷

Verhaeghe, prosecuting lawyer, argued to the court that the International Convention on Genocide 1948, which Israel signed, supersedes all other international law in the Sharon case. That would allow the investigation into Sharon's alleged role in the killings of

²⁵ Ibid.

²⁶ For the factual background to the massacres including the General Assembly and Security Council Res, see Chapter 3.

²⁷ 'March 6, 2002- Belgian court delays decision on Sharon war crimes investigation' Wiesenthal Centre, <http://www>. Accessed Mar 8 2002.

Palestinian refugees to continue, he said. 'The convention expressly states that there is no immunity for those who commit acts of genocide,' adding that the United Nations declared the massacre at Sabra and Chatilla as an act of genocide.²⁸ The new hearing is scheduled for May 15 2002.²⁹ Arguments about the nature of genocide as a crime against an international moral order now have the potential to be explored, for arguments about the scope of jurisdiction in cases of genocide may well address the moral priority of prosecuting such crimes as well as the technical issues in jurisdiction.

The *Belgium v. Congo*, ICJ, ruling illustrated another important point with regard to the likelihood of prosecution in its confirmation of the ability of states to waive immunity or effect prosecutions domestically. If high-ranking criminal officials cannot be clearly delineated from the state, prosecutions will be domestic and focus on individual crimes, disregarding the pattern in which they occur or the evidence of system criminality. This distinction between the individual and their state must be effected by the state itself as well as by other states. Moral responsibility for system criminality will be assigned only when it can be focussed on a few individuals whose actions can, in some sense, be demonstrated as both narrowly intentional and deviant as well as not being organs-of-the-state. Accordingly, examination of some of the forms domestic prosecutions by states take is illuminating. Courts Martial, truth commissions and amnesties are all responses of a kind to system criminality, yet these mechanisms can differ as much in their objectives as their operation.

²⁸ In fact, a General Assembly resolution simply described the massacre as 'genocide', (there was no criminal investigation) but no further action was either mooted or taken. See Ch 3.

Truth Commissions

An alternative to an international criminal system is the operation of domestic truth commissions. These could be characterised as serving the purposes of reconciliation rather than justice. These are seen by their supporters as a preferred option to international prosecution on the grounds that they neither violate the sovereignty of the states involved nor do they impact on a potentially fragile transition period in unstable states.³⁰ Hayner describes four defining characteristics of truth commissions. Firstly, they focus on the past, secondly their objective is to paint an overall picture of human rights abuses across a period of time, also they are temporary with a limited mandate, and finally, they are vested with authority, by way of their sponsor, that allows investigative function.³¹ Truth commissions have become increasingly popular, between 1974 and 1991, nine commissions had been established, all by the president or parliament of the country, but six were established between March 1992 and late 1993 alone. Of these six, four were untraditional models, sponsored by the UN, opposition party or NGO's.³² This illustrates the most outstanding feature of truth commissions; they are context specific. This impacts upon their success rates and the small number of cases makes it difficult to establish general principles concerning the extent of their contribution. What seems clear is that there is no reason why truth commissions should not be complementary to international prosecutions. Although they are often presented

²⁹ 'March 6, 2002- Belgian court delays decision on Sharon war crimes investigation' Wiesenthal Centre, <http://www>. Accessed Mar 8 2002.

³⁰ J.R. Bolton, 'The Global Prosecutors', *Foreign Affairs*, Vol. 78: No. 1, pp. 157-164.

³¹ P. Hayner, 'Fifteen Truth Commissions- 1974 to 1994: A Comparative Study', *Human Rights Quarterly*, Vol. 16: No.4, 1994, pp. 597-655.

³² Ibid.

as alternatives to international trials, the principles upon which they are based are not in fact oppositional to criminal proceedings. However, truth commissions are not judicial bodies and as such, they do not indicate progress towards international polity in the way that the criminalisation of 'immorality' and the assignment of individual responsibility does.

A difficulty with truth commissions is the potential, when investigations are located domestically, for the perpetrators of abuse to avoid responsibility for their actions by providing for amnesty or simply ignoring the findings. In this way the context sensitivity of truth commissions can be a drawback rather than the advantage it is presumed to be, truth commissions can be a technique for subverting both justice and reconciliation. A case in point is that of Chile. The Chilean president Patricio Aylwin created the Truth and reconciliation Commission (or Rettig Commission) by executive decree only a month after taking office in 1990, in response to public demands to expose the truth about the brutal Pinochet regime.³³ The mandate of the Rettig commission was restricted due to the political realities of the 'pacted transition' of power between Pinochet's regime and the opposition. In the early 1980's, the population had begun to press for democratisation through increasingly vocal human rights organisations. In 1988 Pinochet offered to hold a plebiscite on whether he should remain president and opposition parties eventually decided to participate on the grounds that it was the only opportunity for ending military rule. This difficult decision implied acceptance of Pinochet's self-legitimising 1980 constitution and the 1978 self-amnesty law.³⁴ Thus after losing the plebiscite Pinochet remained as commander-in-chief of the army, he also controlled the senate and had appointed almost all of the Supreme Court

³³ M. Ensalaco, 'Truth Commissions for Chile and El Salvador: A Report and Assessment', *Human Rights Quarterly*, Vol. 16: No. 4, 1994, pp. 656-675.

³⁴ C. Santiago Nino, *Radical Evil on Trial*, London: Yale University Press, 1996, p. 37.

justices.³⁵ The armed forces made it clear to the new president that a military uprising would ensue should indictments or prosecutions become an issue for the armed forces.³⁶ Thus unlike other truth commissions such as those in South African and El Salvador, the Rettig Commission did not function as part of a broader concerted effort to transform society, but in lieu of such a transformation.³⁷ The Rettig Commission was successful in terms of its own limited and essentially timid mandate but the later extradition of Pinochet demonstrated a far higher level of expectation for responsibility assignation.

However, where truth commissions have functioned successfully they have been accepted as a valid means for strengthening newly democratic institutions. Although concerns have been raised that the extradition of Pinochet violated Chile's sovereign right to exercise prosecutorial discretion,³⁸ it is clear that such discretion was imposed on Chile rather than chosen. Where truth commissions are widely perceived as legitimate, as was the case with those established in South Africa,³⁹ no further international proceedings have ever been launched against the amnesties offered to individuals in return for detailed testimony about their crimes. Roth argues, contra Kissinger, that 'no prosecutor has challenged this arrangement, [the South African truth commissions] and no government would likely countenance such a challenge'.⁴⁰ The principle of complementarity embedded in the statute of the ICC, which we will

³⁵ Ibid.

³⁶ D. Pion-Berlin, 'To Prosecute or Pardon? Human Rights Decisions in the Latin American Southern Cone', *Human Rights Quarterly*, Vol.16, 1993, pp. 105-130.

³⁷ Ensalaco, Op Cit. n.33.

³⁸ H.A. Kissinger, 'The Pitfalls of Universal Jurisdiction', *Foreign Affairs*, Vol. 80: No. 4, 2001, pp. 86-96

³⁹ There have been three commissions 1. Commission Of Enquiry into Complaints By Former African National Congress Prisoners And Detainees (also known as the Skweyiya Commission) 2. Commission Of Enquiry Into Certain Allegations Of Cruelty And Human Rights Abuses Against Detainees By ANC Members (also known as the Motsuenyane Commission) 3. Commission of Truth and Justice

⁴⁰ K. Roth, 'The Case for Universal Jurisdiction', *Foreign Affairs*, Vol. 80: No. 5, 2001, pp. 150-153.

examine in more detail below, should serve as sufficient protection for governments which choose reconciliation rather than prosecution. It seems that for the near future international prosecutions will only be considered where truth commissions manifestly fail either to aid reconciliation or to serve justice.

International Criminal Court (ICC)

The idea of an international criminal court was first put on the international agenda by the Nuremberg and Tokyo Tribunals, and was also implied by the Genocide convention which described the potential for an 'international penal tribunal'.⁴¹ The International Law Commission (ILC) started working on a draft Statute for a Permanent Court but although there has been a Draft Statute for an ICC since 1951,⁴² the momentum for such a court was lost with the political and ideological confrontations of the Cold War.⁴³ In 1989 Trinidad and Tobago, on behalf of six Caribbean states, proposed the re-activation of ILC work on the issue. This was motivated by particular concern for cross-border drug trafficking.⁴⁴ The General Assembly took immediate action asking the ILC to renew its work on the draft statute, and by 1994, the ILC had presented a revised draft with recommendations for a diplomatic conference. This suggestion was met with some resistance and an ad hoc committee was established to consider the major substantive and administrative issues arising from the ILC draft.⁴⁵ By Dec 1995,⁴⁶ the

⁴¹ United Nations Convention on the Prevention and Punishment of the Crime of Genocide, 1948, Article 6.

⁴² R.K. Woetzel, *The Nuremberg Trials in International law*, London: Stevens and Son, 1960, p.47.

⁴³ V. Popovski, 'The International Criminal Court: A Synthesis of Retributive and Restorative Justice', *International Relations*, Vol. XV: No.3, Dec 2000, pp.1-15.

⁴⁴ Ibid.

⁴⁵ GA Res 49/73 of Dec 9 1994.

⁴⁶ GA Res 50/46 of Dec 11 1995.

General Assembly decided to establish a preparatory committee to consider a new and less radical draft statute drawn up by the ILC.⁴⁷

The Preparatory Committee made significant contributions that confirmed and accelerated the growth of international humanitarian law. The original impetus for the court, cross-border criminality and the enormous jurisdiction it implied, had been abandoned to concentrate on humanitarian law and the new era of individual criminal responsibility ushered in by the ICTY/ICTR. By April 1998, the Preparatory Committee completed its drafting of a 'widely acceptable, consolidated draft text' for submission to an international conference.⁴⁸ The United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court was finally held in Rome from June 15 to July 17 1998 to 'finalise and adopt a convention on the establishment of an international criminal court'.⁴⁹

In general, the Rome Statute of the ICC continues the trends manifest in the ICTY/ICTR. It has jurisdiction over the crimes of genocide, crimes against humanity, war crimes and the crime of aggression.⁵⁰ Most interestingly, its jurisdiction reflects precisely the tension this thesis examines. It applies only to individuals, rather than organisations or states. In addition, official capacity will not be grounds for immunity:

Official capacity as Head of State or government [...] shall in no case exempt a person from criminal responsibility under this statute, nor shall it ... constitute a grounds for reduction of sentence.⁵¹

⁴⁷ Popovski, Op Cit. n.43.

⁴⁸ 'Establishment of an International Criminal Court', available online, accessed on 23.11.00, <http://www.un.org/law/icc/general/overview.htm>

⁴⁹ Ibid.

⁵⁰ Rome Statute of the International Criminal Court, Article 5, section 1, A/CONF.183/9

So it might seem that it fully represents the principle of individual criminal responsibility. However, in terms of an indication towards an international moral polity, it is less convincing. This can be seen with a closer look at the court's mechanisms for implementation. Through these we can see that the political control is still located firmly within the state. Whilst the ICTY had primacy over national courts, at the ICC the reverse is the case. Also, the statute only applies to the states which are signatory to the agreement. 'Where either the state on whose territory the crime occurred or the state whose nationals are suspects has ratified the court's statute or has given its consent'.⁵²

The orientation is toward a society of states rather than an international moral order. This sits uneasily with the criminalisation of offences such as crimes against humanity and genocide. However, cases may also be referred by the prosecutor or by the Security Council under Chapter VII powers. Ironically, the Security Council may be the direction from which advances towards establishing an international moral order are most likely. It is likely that the Security Council would refer a case to the court were the offence so extreme that there was a consensus around prosecution regardless of whether the state was signatory or not. There is certainly the legal potential, and with the ICTY and ICTR the legal precedent, for egregious offences to be characterised as threats to international peace and security, always providing there is the political will to do so. These are precisely the conditions which would demonstrate the existence of an international moral consensus.

The treaty was finally ratified on April 12 2002 after the signing of the last three of the sixty states necessary to bring the treaty into force. However, despite the initial enthusiasm of the US it refused to ratify the treaty on the grounds that all cases should

⁵¹ Ibid.

⁵² FCO, 'The International Criminal Court', Focus International, available online, accessed 26.10.99. <http://files.fco.gov.uk/info/briefs/1597.pdf>

be referred from the Security Council, thus allowing the US to veto any cases against it. The fact that the US failed to carry this point is clearly indicative of the growth of some form of international moral community. Another significant point is the ratification level for the ICC, set at sixty, this is one of the highest thresholds for any treaty, it equals the 1982 Convention on the Law of the Sea and is only exceeded by the 1993 Chemical Weapons Convention, (with 65).⁵³ The rationale for such a high threshold was to secure widespread acceptance and legitimacy for the court rather than a speedy entry into force.⁵⁴ However, the ratification was accomplished remarkably quickly, another indication that there is a growing international consensus around criminal prosecution for the most extreme system criminality.

The US objections to the jurisdiction of the court are illustrative of the wider debate about the potentials and pitfalls of international justice. Kissinger's defence of the US position neatly encapsulates this debate.⁵⁵ Kissinger argues firstly that the canon of international humanitarian law is more a statement of common standards than substantively envisaged penal practice, and that the new practice of pursuing heads of state through national courts, as in the Pinochet case) is potentially a political weapon. On this view, international law is not law in the true sense of the term, but, lacking in coercive enforcement and undemocratic (in that it is not constituted by an accountable and representative body).⁵⁶ Yet there are specific legal duties to prosecute laid out in both the Convention on Torture and for grave breaches of the Geneva Conventions, to which many states have signed.⁵⁷ In effect, signatories are simply ceding this duty to a

⁵³ A. Roberts, and R. Guelff, *Documents on the Laws of War*, 3rd Ed, Oxford: Oxford University Press, 2000, p.668.

⁵⁴ Ibid.

⁵⁵ Kissinger, Op Cit. n. 38, and Roth, Op Cit. n.40.

⁵⁶ Bolton, Op Cit. n.30.

⁵⁷ Roth, Op Cit. n.40.

common court. Bolton also criticises universal jurisdiction for imposing a rigid model of justice on complex political circumstances. Yet, he does not deny that criminalisation is appropriate in some cases⁵⁸ and it is this that is the key principle in demonstrating a commonly shared moral position. That this common position is unestablished is demonstrated in the opportunistic, partial and uneven application of the law. Even so, to criminalise an offence is to assert the existence of a moral community, however undeveloped, against which the offence is committed.

This especially demonstrated by the inclusion of several instances when even offences outside an armed conflict can be prosecuted. For both genocide and crimes against humanity there needs to be, ‘a widespread and systematic attack directed against any civilian population, with knowledge of the attack’.⁵⁹ Britain was instrumental in the inclusion of internal conflict, whereas for the US it was a serious obstacle to ratification.⁶⁰

Anti-terrorism Measures

By contrast another development in the application of individual criminal responsibility has taken a different direction and consequently presents us with the opportunity to consider the political rather than purely legal issues that surround the principle. The actions and rhetoric of the international coalition in conflict with Afghanistan following the terrorist attack upon the US, Sept 11 2001, when aerial attacks levelled the World Trade Centre’s twin towers and damaged the Pentagon represents such a development.

⁵⁸ Bolton, Op Cit. n.30.

⁵⁹ Rome Statute of the International Criminal Court, Article 7, section 1, A/CONF.183/9

⁶⁰ I. Black, ‘Battle for War Crimes Court’, *The Guardian*, 25.02.99. Also in FCO, ‘The International Criminal Court’, Focus International, available online, accessed 26.10.99.
<http://files.fco.gov.uk/info/briefs/1597.pdf>

This conflict presents a clear opportunity to discuss the nature of moral responsibility given that it simultaneously extends the principle of individual responsibility to its ultimate degree, yet also has the potential to undermine its legal credibility. This thesis conceptualises the action in Afghanistan as representative of the performative contradictions encountered in application of the principle of individual responsibility within a framework of inter-state interaction. That it represents in some manner the acceleration of the principle of individual criminal responsibility is demonstrated by the immediate and focused assignation of responsibility to Osama bin Laden. That it represents the potential to undermine the juridical nature of the assignation of responsibility is illustrated by the observation that whilst the respective governments of both the US and the UK have firmly linked the terrorism to an individual, Osama bin Laden,⁶¹ the resulting retaliation was directed against a state by a coalition of states. I argue that the focus upon the state even when the target of the action is an individual is a result of the prevailing structural conditions within the international system. This conflict marks both the acceleration of the principle of individual responsibility at the same time as it demonstrates that inadequacies of the international system. It represents its zenith in that bin Laden is perhaps the first individual to have achieved true recognition as ‘hostes omnium’, enemy of all, whilst amply illustrating the point that states operate in an environment that favours the traditional structure of state-to-state interaction. Armatta, of the Coalition for International Justice, argues that rather than reinforcing the principle of individual responsibility, the action against Bin Laden has in

⁶¹ In the US as early as 11 Sept 2001, Colin Powell described himself as ‘absolutely convinced’ that bin Laden and the al-Qaeda network were responsible for the attacks. Washington CNN, *Powell says US Can Link bin Laden, Al-Qaeda to Attack*, available Internet. <http://www.cnn.community/2001/US/09/23/gen.america-under.attack> Accessed 04.11.01

In the UK, Tony Blair in his speech following the launch of the attacks on Afghanistan on 7 Oct 2001, stated that ‘there is no doubt in my mind [...] that these attacks were carried out by the al-Qaeda network, headed by Osama bin Laden’, reprinted in full at <http://www.cnn.community/2001/WORLD/europe/10/07/gen.blairspeech> accessed 04.11.01

fact served only to criminalise an entire cultural group.⁶² On this view, the action against him represents not an advance in the application of individual responsibility, but instead progress towards increasing collectivism in moral blame. This view might be reinforced by the ‘side-effects’ of post 9.11 action. For instance, Britain’s derogation from Article 48 of the Human Rights Act, withdrawing the usual civil and political rights from resident foreign nationals, is a clear indication of the assignment of collective blame.

Conclusion

The examples we have looked at here are expressive of the main tension encountered in applying individual criminal responsibility, the tension between universal jurisdiction and state sovereignty. The willingness of the international community to enforce new standards of individual criminal responsibility seems to have been much increased since the constitution of the ICTY/ICTR. However, the current model of inter-state relations may not be able to sustain a full realisation of the principle. The traditional diplomatic structures that enable states to function and communicate, continually constrain the limits and potential for making individuals criminally liable for their actions whilst in office.

The Pinochet case demonstrated a clear extension of the principle of individual criminal responsibility when set against the classic doctrine of sovereign immunity. On this occasion, the challenge was successful, but the difficulties encountered by Belgium in its attempts to apply universal jurisdiction through its own national courts are currently

⁶² Interview with Judith Armatta, Hague Division of the Coalition for International Justice, The Hague, 9

foundering. This is due to the reluctance of the ICJ to violate the traditional structure of international diplomacy. In the same way, we see the principle of individual responsibility pushed forward but nevertheless constrained within the constitution of the ICC. Much of the frustration experienced by the human rights lobby might be dissipated by the realisation of how fundamental the changes they seek might be for the traditional structure of state interaction. Individual criminal responsibility implies and requires far more than the prosecutions thus far might seem to indicate. Change thus far has been driven by egregious examples of gross criminality. It might seem that change of this magnitude can only be inspired by criminality of an equal magnitude.

The ICC also exhibits the tensions between individual responsibility and sovereignty. It underscores the moral right of states and their citizens to justice against offenders and thereby logically indicates a moral order that transcends state borders. At the same time, it achieves this by paying homage to a traditional state structure that reinforces sovereign autonomy. By applying only to signatory states, the ICC implicitly denies the existence of a transcending moral order. Further to this, the doctrine of complementarity ensures that domestic systems of justice are prior to those of the international court, provided they function effectively. Truth commissions are seen as a non-threatening alternative to prosecutions given that they leave state sovereignty intact. However, as non-judicial bodies they do not necessarily impact upon the course of international justice. In addition, the increasing number of such commissions indicates a concern to address past abuses rather than deny them, and as such, they contribute to a new climate of openness characterised by a regard for the truth and a concern for human rights.

Although discrete from international criminal law, the secular notion of universal human rights is supported by such developments. The statute of the ICC has jurisdiction over some crimes even when not committed around the nexus of armed conflict, a development which contributes to the blurring of the lines between war crimes, related to inter-state interactions, and human rights abuses committed by government over its own citizens. For this reason it is possible to conclude that the principle of individual criminal responsibility is set to be strengthened in the future although to what extent the principle can entrench is limited by the current structures of international law and, more importantly, by the traditional structures of inter-state interaction. The novelty of the change in approach to responsibility assignation is indicative of a whole change in political orientation as yet in its infancy. As Hawthorn observes:

Like all far-reaching political change, this has started in opportunism, will be partial and paradoxical, and in having to accommodate to the existing international politics, is certain to be incomplete.⁶³

⁶³ Hawthorn, Op Cit. n.19.

Conclusion

The principle of individual criminal responsibility for system criminality is a principle that has gained in scope and recognition since the Nuremberg Tribunal. The new willingness to endorse the principle is evident in the proliferation of techniques for dealing with system crime, including national courts which claim universal jurisdiction, truth commissions, courts martial, commissions of enquiry and domestic criminal trials as well as international prosecutions. This thesis has focused on international criminal trials as being of exceptional importance. It is the original proposition of this work that international prosecutions are the only application of criminal responsibility that imply an international polity, because they are the only prosecutions that imply some form of moral consensus.

Yet the pattern of this principle's application has been marked by both expansion and covert restraint. The restraint of the principle emanates from the traditional structure, focus and protocols of the international system itself. Ad Takayanagi, a defence lawyer at the Tokyo tribunal argued:

Duties and responsibilities are placed on states and nations and not on individuals, this immunity is both a legal principle and a practical necessity'.¹

It is this, coupled with the relative youth of the principle, which explains the apparent inconsistencies and opportunism of its application. This has become clear through the course of this thesis by means of an analysis of the principle of individual criminal responsibility viewed in opposition to the application of collective responsibility. This distinctive approach is marked by analysis of international interaction as occurring

¹ R.H. Minnear, *Victor's Justice*, Princeton: Princeton University Press, 1971, p. 45.

within a moral framework rather than focusing on the principle of individual criminal responsibility as just an event occurring within a political framework. This new focus has shed light upon the development, condition and potentials for an international polity based upon shared moral values. This thesis addresses the notion of international society, where inter-state relations are characterised by common norms and values², rather than world society, which analyses the common norms and values of individuals across the system³. Yet the focus upon the individual has evident implications for the discussion of world society exemplified by Dietrich Jung⁴, in that it identifies a trend towards universalism.

However, further to this, a key insight of this thesis has been that it is only within the act of prosecution that real evidence for moral agreement is found. Theoretical attempts to ground a notion of universal morality have ultimately proved inconclusive as have empirical attempts to demonstrate cross-cultural moral beliefs. Whilst a common approach has been a deep textual analysis of the legislation, examining its language, scope and coverage, this approach has fundamental limitations. Although it can provide valuable insights as to the potential for moral consensus, it cannot securely show that such consensus really exists. It is only within the realm of retribution that a moral order is implied.

² R. Little, 'The English School's Contribution to the Study of International Relations', *European Journal of International Relations*, Vol. 6: No. 3, 2000, pp. 395-422.

³ B. Buzan, 'From International System to International Society: Structural Realism and Regime Theory Meet the English School', *International Organisation*, Vol. 47: No. 3, 1993, pp. 327-352.

⁴ D. Jung, 'The Political Sociology of World Society', *European Journal of International Relations*, Vol. 7: No. 4, 2000, pp. 443-474.

Assignment of Responsibility

The importance of the assignment of individual criminal responsibility as opposed to collective responsibility is located within the very nature of responsibility assignment. To assign criminal responsibility, that is responsibility which entails penal sanctions, the conditions for full responsibility must be satisfied. This means that for an entity to bear criminal guilt, the requirements of autonomy, agency and intention must be met. By viewing responsibility assignment under these strict conditions it is apparent that collectives cannot satisfy the criteria for criminal guilt. Were this not the case then the trend towards assigning collective responsibility would not be in tension with the principle of individual criminal responsibility. This thesis has shown that the criminalisation of offences, can only truly be realised by the assignment of individual responsibility and that this implies shared moral values in a way that simply assigning blame does not.

Yet, it is equally apparent that the traditional manner of viewing states, which are the ultimate collective entities, regards them as monolithic bearers of legal personality. This tendency to regard states as large individuals has a direct bearing on how we picture state interaction. The inability to assign criminal responsibility to collectives with any coherence means that responsibility assignment has a very different outcome when applied to states. The traditional response to breaches of international law by states is based upon compensation rather than retribution. For example, the ICJ awarded compensation to the UK against Albania with respect to the minefield laid in the Corfu Channel case on humanitarian grounds.⁵ As such, it has the character of civil law rather than criminal law. This thesis has shown that, traditionally, responses to atrocities have

⁵ G. Guillaume in, N.H. Wirajuda and F Delon, *The Fourth Informal ASEM Seminar on Human Rights*, Singapore: Asia Europe Foundation, 2001, p. 39.

been collective in their application. They included measures such as reparations and sanctions and were designed to focus on state-to-state relationships. This type of response to states in delict of their international obligations was epitomized by reparations in the sum of five million dollars in gold marks, awarded against Germany according to the terms of the Treaty of Versailles, 1919.⁶ As we saw in chapter three, although the treaty also provided for the prosecution of 800 war criminals including Kaiser Wilhelm II, the few prosecutions which occurred at Leipzig were ineffective and more indicative of disarray than consensus.⁷ This is a function of the structural conditions under which states interact. Sovereign equality is an essential feature of the international landscape and, as such, it conditions and generates diplomatic protocols. These are more than simply customs; they allow international interaction to proceed.⁸ Thus, the application of individual criminal responsibility challenges the historic modes of state interaction and the most elemental norms of the international system.

Thus although the Nuremberg Tribunal did not represent an unproblematic application of individual criminal responsibility, given the structural context in which it occurred, it was a startling challenge to tradition. This thesis has contextualised this development to demonstrate both the depth of its challenge and the limitations of its practical incarnation. Nevertheless, it contributed enormously to the expansion of the principle of individual responsibility for system crime and founded the development of an entire body of law aimed at addressing gross atrocities. Yet the consensus that the prosecutions of major Nazi criminals implies is both restricted and confined, a fact

⁶ W.L. Shirer, *The Rise and Fall of the Third Reich: A History of Nazi Germany*, London: Book Club Associates, 1978, p. 58.

⁷ J.B. Keenan and B.F. Brown, *Crimes against International Law*, Washington D.C.: Public Affairs Press, 1950

⁸ This was a point reinforced by Arthur Wittveen of the ICJ in interview and it is born out by recent ICJ decisions such as *Democratic Republic of the Congo v. Belgium, Findings on Arrest Warrant of 11 April 2000*. ICJ Reports, 14 February 2002.

amply demonstrated by the dearth of prosecutions until the constitution of the ICTY/ICTR.

Undoubtedly the political conditions of the Cold War impacted upon the capacity of the international community to take action in cases of gross abuse, but there were also occasions when there were opportunities to take action against offending individuals which were simply not taken. For instance, at the Paris Agreement relating to Cambodia human rights issues were addressed and the idea of prosecutions was mooted.⁹

Individuals were even taken into custody but no prosecutions resulted. By viewing this through the lens of moral responsibility it is clear that, at the time, there was simply not a strong enough international consensus around the issue of prosecutions to criminalise the events in Cambodia. This was because the character of the abuses committed diverged in several respects from those committed in Nazi Germany. It is political willingness to drive forward the issue of prosecution that is the primary factor in the justiciability of system crime. Crucially this willingness is founded on a consensus triggered in only the most narrow of circumstances.

One of these circumstances was the situation in former Yugoslavia. Consensus was triggered here because the character of the abuses perpetrated was resonant with those addressed at the Nuremberg Tribunal. The emotional quality of the atrocities was characterised by the dispassionate and bureaucratised targeting of an ethnic group. This displayed a similar purity of intent to that addressed by the Nuremberg Tribunal and therefore generated the necessary consensus to motivate the assignment of individual criminal responsibility. Yet this principle, although it has been expanded by the

⁹ T. Findlay, *Cambodia: The Legacy and Lessons of UNTAC*, SIPRI Research Report No. 9, Oxford: Oxford University Press, 1995.

constitution of the ICTR, is by no means fully entrenched. In fact, the more natural focus for responsibility assignation is still the nation-state. This is seen by the collectivisation of blame represented in the application of sanctions to Iraq following the Gulf War, 1991. The contrast between the treatment of Slobodan Milosevi and Saddam Hussein illustrates the tensions between collective and individual responses to abuse. Although the more coherent approach to Iraq's breaches of the laws of war and the treatment of its own ethnic minorities would be to indict Saddam Hussein, instead there has been a collectivised response to Iraq's actions. The application of sanctions, though they are promulgated as compensatory requirements, is more readily perceived as illegitimately punitive. This demonstrates both the expansion and covert restraint of the principle of individual criminal responsibility. It has made gains in that non-discriminatory or collective retribution is perceived as incoherent and immoral, but it is covertly restrained by an international system that more readily focuses on the collective, or nation-state.

That the principle is gaining ground, however, can be seen in the proliferation of alternative manifestations of individual responsibility. These include the willingness of some governments, such as Belgium and Spain, to pursue individual prosecutions through their domestic courts and the prosecution of individuals through domestic criminal proceedings. For instance, the former members of the Dergue who have been prosecuted in the Ethiopian courts.¹⁰ Yet although the principle is gaining currency, the structural conditions under which states operate prevent its full realisation. As chapter eight showed, even the ICC has some of these limitations inherent in its form and

¹⁰ J. Ryle, 'An African Nuremberg', *The New Yorker*, 2 Oct 1995, pp. 50-61, and P. Hayner, 'Fifteen Truth Commissions- 1974 to 1994: A Comparative Study', *Human Rights Quarterly*, Vol. 16: No.4, 1994, pp. 597-655.

structure.¹¹ A full realisation of the principle of individual criminal responsibility should have no geographical limitations, given that, theoretically at least, as its name indicates, system crime is a crime against all of humanity. But this vision of universal jurisdiction is tempered by the treaty based form of the court. It applies only to signatory states which actually cede their own prosecutorial authority to the court. Given that states have always exercised the right to prosecute individuals for war crimes if committed against their nationals or on their territory it is not such a great evolution in the prosecution of system crime as it might appear. Ultimately it is subject to, and conditioned by, the traditional norms of state interaction.

Potential for Further Research

Yet having established this, the opportunity for further research is presented - particularly on the nature of the criminal events which are likely to lead to prosecution. How and when individual responsibility is assigned and the precise moral character of the events likely to be considered actionable has a crucial bearing on assessing the nature, extent and likely potential for international moral consensus. An issue of particular interest is the impact of the domestic political structure of states, in which offending behaviour is found, on responsibility assignation. The starting point for such research would be the observation that individuals in an elitist political structure are far more easily designated responsible than those in democratic regimes where authority is balanced and divided. The assertion that democratic regimes are complicit in fewer atrocities¹² is certainly one that bears further research given such events as the Nato

¹¹ V. Popvski, 'The International Criminal Court: A Synthesis of Retributive and Restorative Justice', *International Relations*, Vol. XV: No.3, Dec 2000, pp. 1-15.

¹² A.D. Renteln, *International Human Rights: Universalism vs. Relativism*, London: SAGE, 1990.

bombing in Kosovo. It may be that individual responsibility for such events is simply more difficult to assign in democratic political systems. Conversely, in authoritarian regimes where power is more narrowly concentrated, it may be far easier to isolate responsible individuals. The variety of detail and the fine nuances of power distribution in domestic political structures make this a complex and extensive research task, but one that may well shed light on the pattern of war crimes prosecution.

This may well also provide a further explanation for some of the tendencies to collectivisation in moral blame that this thesis has identified. Where criminal activities occur through the machinery of the state, the tendency is often to revert to the traditional collective approach to such activities. It may well prove to be that where an offender cannot easily be distinguished from their collective the response is to collectivise the blame by focusing on the state itself as we have seen in relation to Vietnam where the Russell Tribunal accused the US rather than individuals, as discussed in chapter 6.¹³ This reversion to traditional modes of approaching atrocities is manifested in the treatment of atrocities as political rather than moral events. This is evident when there is an avoidance of the assertion of the rights of an international polity either by characterising the events as crimes against a national polity, through internal prosecutions for violations of the laws of war, or by temporarily ‘decriminalising’ the event and treating it as a civil offence by applying traditional collective remedies such as sanctions or diplomatic representations to governments.

¹³ B. Russell, *War Crimes in Vietnam*, London: Allen & Unwin, 1967.

The Current Status of Justiciability

The principle of individual criminal responsibility is gaining ground and this is manifested in a new willingness by the international community to address the issues of system crime. However, the principle is far from firmly entrenched, it is activated in only the most narrow of circumstances and it is based on a consensus that is narrow and limited. But more fundamentally it contradicts the most abiding traditions of the international system. A full realisation of the principle of individual criminal responsibility would challenge the entire foundations of international interaction and would require a massive re-orientation not only in international law, but also in the perceptions and attitudes of the actors within it. Whilst this principle resides in tension with, and in contradiction to, the structural conditions of state interaction, its application will be fragmented, inconsistent and opportunistic. Yet, where it exists, limited as it is, it must imply universal moral values, and from that an international polity, however tenuous and undeveloped it may be at present.

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