NOUVELLES ÉTUDES PÉNALES

International Criminal Law : Quo Vadis ?

Proceedings of the International Conference held
in Siracusa, Italy,
28 November – 3 December 2002,
on the Occasion of the 30th Anniversary of ISISC

érès éditions

N°19
2004

ASSOCIATION
INTERNATIONALE
DE DROIT PENAL

ISBN : 2-7492-0381-3
CF - 2600

11, rue des Alouettes, 31520 Ramonville Saint-Agne
www.edition-eres.com

NOUVELLES ÉTUDES PÉNALES

2004 **N° 19**

TABLE OF CONTENTS – *SOMMAIRE*

Conference Proceedings
International Criminal Law : Quo Vadis ?
28 November – 4 December 2002
Siracusa, Italy

Panel 1 – The Values, Policies, and Goals of International Criminal Law in the Age of Globalization

Panel 2 – The International Criminal Justice System: Complementarity between International and National Institutions

Panel 3 – International Crimes: Criteria for their Identification and Classification, and Future Developments

Panel 4 – The Harmonization of General Principles of Criminal Law: The Statutes and Jurisprudence of the ICTY, ICTR, and the ICC

Panel 5 – The Emergence of Uniform Standards of "Due Process" in International and National Criminal Proceedings

Panel 6 - The Modalities of International Cooperation in Penal Matters and their Expansion

Panel 7 – Victims' Rights

Conference Proceedings
Contemporary Perspectives on Terrorism
16 – 22 June 2002, Noto, Italy
Young Penalists' Section of the AIDP

The International Community's Recognition of Certain Acts as "Crimes under International Law"

Dr. Lyal S. Sunga*

1. Introductory Remarks

The Institute, under the guidance of its President, Professor M. Cherif Bassiouni – who has shown not only great intellectual leadership but also a brilliant organizational sense – contributes immensely to the development of international criminal law. Among its broad range of activities, the Institute provides a valuable forum for diplomats, Government officials, academics and practitioners working in the field of international criminal law to exchange views, and through vigorous discussion and debate, to help sharpen the international community's focus on critical aspects of international criminal law norms and implementation. Exemplary in this regard was the Thirtieth Anniversary Conference which brought together numerous experts in the field to share their views on cutting edge themes. As Rapporteur for Panel 3 entitled "International Crimes: Criteria for Their Identification and Classification and Future Developments," it is my honour to encapsulate the main points advanced in the presentations and ensuing discussion as well as to offer my own reflections.

The Panel gave rise to much stimulating discussion and featured: H.E. Sharon Williams, Judge *ad litem* of the International Criminal Tribunal for the Former Yugoslavia and Professor of International Criminal Law at Osgoode Hall Law School in Toronto; Professor Bert Swart, Judge in the Court of Appeals of Amsterdam and Professor of Criminal Law at the University of Amsterdam Faculty of Law and Member of the Conseil de Direction of AIDP; Professor Kai Ambos, Professor of Criminal Law at the Max Planck Institute for International and Comparative Criminal Law; and finally, Professor Ellen S. Podgor, Professor of Law at the Georgia State University College of Law in Atlanta. Panel 3 was ably chaired by H.E. Pierre Joxe, currently Member of the Constitutional Council, and formerly Minister of Defense, Minister of Justice and Member of Parliament of the Republic of France.

---

* Associate Professor of Law, University of Hong Kong Faculty of Law (China).

2. Synopsis of Main Points Raised in the Presentations

A. H.E. Sharon Williams

Judge Williams pointed out that in the absence of a composite international criminal code, international criminal law had developed in a very piecemeal way. She distinguished straightaway international from transnational crimes, underlining the point that the presence of an international element did not necessarily suffice to qualify a given crime as a crime under international law. 'Transnational crimes,' she said, were crimes that concerned "essentially domestic criminal conduct," but were perpetrated across international boundaries. She gave the example of fraud which can involve perpetrators, victims or acts, in more than one State. The immediate question then becomes "what determines the essentially domestic character of crimes as opposed to their being essentially international in character?"

Judge Williams concluded that the international community identifies a crime under international law as an act that:

1) constitutes a "core crime as such;"
2) affects a serious interest of the State;
3) runs counter to commonly shared values of States; or
4) involves more than one State, rather than only one, as well as nationals of more than one State.

In the ensuing discussion, a number of interlocutors referred to 'transnational crimes' as those which concerned "*essentially domestic* criminal conduct" perpetrated across international boundaries. Fraud involving perpetrators, victims or acts, in more than one State was given as an example, raising the question as to what exactly determines the 'essentially domestic character of crimes' as opposed to their being 'essentially international in character' or for that matter 'purely domestic.'

B. Professor Bert Swart

Professor Bert Swart adopted the basic distinction between international and transnational crimes and categorized crimes under international law as:

1) crimes against the peace and security of mankind;

2) other crimes of concern to the international community as a whole;
3) crimes of concern to States.

He queried whether the category of 'crimes against the peace and security of mankind' could further expand in future. Since torture had become incorporated under the rubric of crimes under international law, he asked, why should not also enforced disappearances, or for that matter, all serious human rights violations, become considered 'crimes under international law'?

In his paper (included in the present collection) Professor Swart considered that:

> "Crimes against the peace and security of mankind threaten basic values and interests of the community of nations. Their unique feature is that the characterization of certain types of conduct as criminal does not depend on national law but has its direct and immediate basis in international law. ...Secondly, there are international crimes which harm the interests of individual States or groups of States and with regard to which an agreement has been reached that the conduct to be prevented and repressed will be made a criminal offence under the domestic laws of the States that are parties to the agreement. That agreement primarily serves the purpose of facilitating prevention and repression at the national level through mutual cooperation in criminal matters. Here, the characterization of a type of conduct as criminal depends on national law. Often these crimes are referred to as "transnational crimes," "conventional crimes," or "crimes under treaty."

Professor Swart noted that both the 1991 and 1996 versions of the ILC Draft Code of Crimes against the Peace and Security of Mankind covered only crimes that 'threaten basic values and interests of the community of nations whereas 'international crimes' concerned only individual States or a section of the international community at large. In contrast, Professor Bassiouni has argued for a more 'unitary approach' on the grounds that all crimes under international law share in common the basic fact that each one has been qualified by the international community as a whole as a 'crime under international law.'

Professor Swart pointed out that both the ILC's 1994 Draft Statute for a Permanent International Criminal Court[1] and the Rome Statute of the International Criminal Court[2] distinguished between "serious crimes of concern to the international community as a whole" and "international crimes." He further surmised that: "for the purpose of a discussion on the criminalization and codification of international crimes, it may be of some use to distinguish between three categories of crimes: crimes against the peace and security of mankind, other crimes of concern to the international community as a whole, and crimes of concern to (individual) States." Later on he remarked that "the concept of crimes against the peace and security of mankind is not static but flexible and open-ended."

C. Professor Kai Ambos

In his presentation, Professor Ambos highlighted numerous issues concerning the development of crimes under international law and in particular the expansion of the legal definitions of 'war crimes,' 'genocide,' and 'crimes against humanity' since World War II. Because of the large number of specific issues Professor Ambos raised, it is more convenient to provide my own reflections on his valuable presentation as we proceed through it, rather than to lump them together with my reflections on issues arising from the other presentations.

As regards the crime of genocide, Professor Ambos underlined ongoing debate as to how a group should be defined in relation to the crime - whether by mainly objective criteria or by the more subjective approach taken in the ICTY's *Jelesic* case. Another perennial issue has been whether the crime of genocide hinged upon or implied a minimum number of persons to be killed or threatened (a matter of *actus reus*) or whether it related only to the intent to destroy in whole or in part a substantial part of the group (a matter of *mens rea*).

Ambiguity persisted also over the elements of specific intent to commit genocide and the threshold that should be applied at trial. Did a perpetrator have to exhibit only knowledge or awareness of the likely result of genocidal acts or is the *mens rea* requirement satisfied only at a much higher level of proximate cause and effect? Related to the problem of specific

---

1. *See* the Report of the International Law Commission on the work of its forty-sixth session: 2 May-22 July 1994, U.N. Doc. A/49/10 Supp. 10, UN General Assembly, 1994.
2. Statute of the International Criminal Court, *adopted in Rome in a non-recorded vote*, 120 *in favour*, 7 *against* and 21 *abstaining*, on 17 July 1998, *entered into force* on 1 July 2002; (A/CONF. 183/9).

intent was the question as to whether direct perpetrators of genocide remain subject to a different *mens rea* standard than either accomplices or superiors who, in principle, could perhaps be swept within the ambit of genocide prosecutions for a less active role both physically and mentally. In effect, a clear order from a superior to subordinate officers to commit genocide disclosed specific intent and was probably relatively unproblematic. Less clear were cases where a superior made no order to commit genocide, but failed to prevent, halt or punish such acts being carried out by subordinates where he or she ought to have known they were being perpetrated.

As regards crimes against humanity, Professor Ambos queried whether the requirement of 'widespread or systematic' was entirely disjunctive or whether there might be a conceptual relationship *between* 'widespread' and 'systematic' that had to be understood, particularly given the implied connection to a policy of attack. Another point was whether the reference to 'civilian population' in the chapeau to Article 7(1) of the Rome Statute might possibly have become redundant now that the legal category of 'crimes against humanity' applied in all situations - both in armed conflict and beyond. Professor Ambos also remarked that if we considered 'knowledge of the attack' in connection with 'crimes against humanity' as an awareness of the risk that the conduct constituted a crime under international law, this would imply that perpetrators had to be knowledgeable about the intricacies of international criminal law - perhaps an unrealistic requirement.

As for war crimes, undeniably the Rome Statute had advanced humanitarian law considerably by its clearly stipulating individual criminal responsibility for crimes committed both in international and non-international armed conflict situations. In this connection, Professor Ambos wondered whether international and non-international conflict situations could perhaps be assimilated. Of course, in a fundamental sense, the distinction between international and non-international armed conflict could not be considered to have been rendered moot, because Article 8 of the Rome Statute prescribes criminal responsibility for different sets of crimes for international and non-international armed conflicts and the ICC Prosecutor therefore must distinguish between the two. Professor Ambos raised the interesting point as to whether we can say that there is a non-international armed conflict only in a part of a country rather than the whole country in cases where armed hostilities are intense but localized. For my own part, I would argue that ultimately, because the State of a whole sovereign territory is the legal entity that is a party to the Geneva Conventions and which incurred responsibility under international law for

non-compliance, from a purely juridical point of view, although we could speak colloquially of an armed conflict in Chiapas or in Chechnya, as long as the Geneva Convention requirements were met to take the situation beyond 'internal disturbances and tensions, such as riots, isolated and sporadic acts of violence' (to use the language of Article 1(2) of Protocol I), we would have to say that, if there were non-international armed conflicts in Chiapas and Chechnya, there were non-international armed conflicts in Mexico and Russia.[3]

Another ambiguity relating to the scope and application of the Rome Statute=s provisions on war crimes related to the degree of connection necessary between the criminal act in question and an ongoing armed conflict. Did a perpetrator have to know that there was an armed conflict in course? What other criteria if any would have to link criminal acts to the armed conflict? These questions were important because they determined how one could distinguish between ordinary criminal acts and war crimes.

Although the issues raised above were by no means novel, they remained important and they will certainly confront the ICC from its earliest phase of operations.

D. Professor Ellen S. Podgor

Professor Podgor emphasized 'cybercrime' as a transnational crime but one that almost escaped definition. She suggested that cybercrime had to be addressed as a crime committed in cyberspace and that implied that it should figure as a crime under international law. Although she did not make the analogy, she could have added that, like slave-trading and piracy committed in *res communis*, a danger could be that unless every State were recognized to have authority to prosecute offenders, then no State might feel sufficient jurisdictional connection to undertake this responsibility, and consequently, perpetrators could enjoy *de facto* impunity.

---

3. One may recall that the ICRC Commentary to Geneva Convention I alludes to a range of 'convenient criteria' in distinguishing non-international armed conflict situations from isolated acts of riot, rebellion or banditry. Such factors relate to the degree of organization of a military force opposing the Government, the recourse of the Government to regular military forces against insurgents, Government recognition of the insurgents, the belligerents self-identification as belligerents, official U.N. attention to the matter, insurgent *de facto* authority over persons in a determined territory and the agreement of insurgents to be bound by the Geneva Conventions. *See* COMMENTARY TO GENEVA CONVENTION I FOR THE AMELIORATION OF THE CONDITION OF THE WOUNDED AND SICK IN ARMED FORCES OF THE FIELD (Jean Pictet ed.,1952), at 49-50.

3. My Reflections

A. Looking for 'Essential Elements' in Crimes under International Law

At first glance, I would agree broadly with Judge Williams' distinction between transnational and international crimes. Certain kinds of acts seem to have only local repercussions, while others seem to threaten values basic to the international community as a whole. Nonetheless, while it is probably true that transnational crimes do concern acts that constitute at the same time criminal conduct under domestic law, I wonder whether any approach that seeks to pinpoint something 'essential,' 'inherent' or 'intrinsic' in the kind of act or conduct itself can take us very far in explaining why a particular community, whether local, regional or international, identifies such act or conduct as criminal. Rather than to search for the *essential* element in the kind of act, might it not be more fruitful to concentrate more on the process of international criminalization as a form of the State's political response to address particular concerns in light of prevailing changing social and international dynamics. Indeed, Judge Williams highlighted a similar point very well in her presentation when she referred to the fact that international criminal law norms specifically prohibiting maritime hijacking did not develop until the International Maritime Organization spurred multilateral action on the problem following the Achille Lauro Affair of 1984.

Yet, it is still worth asking whether there is really anything essential in terrorism or drug-trafficking, or for that matter, cross-border fraud, that makes these acts *intrinsically* international rather than transnational in character or the other way round. Could it not be that were States eventually to consider certain kinds of fraud to be of sufficient gravity which should be addressed by multilateral i.e. international mechanisms, rather than on a transnational basis that relied more on State cooperation, nothing *intrinsic* in the crime of fraud itself prevents the international community from taking this step. In other words, States remain free to distinguish among domestic, transnational and international matters at any given moment in history according to the changing, sometimes unpredictable economic, political and social exigencies of the moment.

B. The Concept of 'Core Crime'

Taking this argument further, one could also say that when we refer to the international community having recognized a particular crime under international law as a 'core crime as such,' we are bordering on a tautology,

because whatever the international community considers to constitute both a core crime and a crime under international law depends on the collective political will and nothing more. Perhaps any argument that purports to uncover the essential ingredients that qualify an act to be a crime, or further, to qualify it as a *core crime* is probably circular in that it presumes at least part of that which it is seeking to explain. In other words, to speak of 'core crimes' might add little to the debate analytically because the very fact that the international community designates certain acts and not others as 'crimes under international law' implies that such acts are considered to touch the core of social interest and concern. My concern over 'intrinsic,' 'inherent,' 'essential' and 'core crimes' as they are employed in this context is not a terminological or semantic one only, but rather, one basic to the kind of enquiry that should be adopted as a matter of logic in our efforts to understand the international community's recognition of certain acts as 'crimes under international law.'

C. The Ambiguity of 'Serious Interests of the State'

Another criterion advanced for the identification of crimes under international law was that the kind of act in question had to affect a serious interest of the State. While it is undoubtedly true that crimes affect a serious interest of the State, this criterion does not necessarily assist us to identify the kinds of acts that should qualify as crimes under *international* law since presumably all crimes are considered to affect a serious interest of the State in one way or another which is why they were proscribed as crimes in the first place. For example, a failure to proscribe and enforce responsibility even for petty theft could be considered to affect a serious interest of the State in the sense that such failure could give rise to an increase in the commission of other kinds of crimes, such as grand theft, extortion, burglary and assault,

The obvious rejoinder would be that petty theft cannot be equated with genocide, war crimes or crimes against humanity: there is an obvious disparity in the gravity of crimes under international law as compared to petty theft. However, if it is the *gravity* of the crime that determines whether it should be dealt with internationally or domestically, then strictly speaking, its seriousness or gravity might not be related to an *interest of the State* as such, but more to the interests of the international community as a whole. Neither is this a question of semantics only, because the interests of an individual State can run counter to those of the international community as a whole. In this connection, one can think of the 'criminal State' that invades

another State for enrichment or other advantage. Accordingly, we see in Article 1 of the Rome Statute of the International Criminal Court[4] that the ICC shall be a permanent institution with "the power to exercise its jurisdiction over persons for the most serious crimes of *international concern*." This implies not only the interests of single States taken collectively, but rather the interests of all States taken together: the two are not quite the same. The former relates only to the sum of individual State interests (which might include such illegal acts as aggression, while the latter refers to multilateral interests that States share in common in the service of common values (which rules out such offences).

D. The Concepts of "International Peace and Security" and "Crimes against the Peace and Security of Mankind"

In his paper, Professor Swart took account valuably not only of the Rome Statute, but also of the views of scholars and the ILC codification efforts, employing a wide-angle lens to the picture. Indeed, one can agree broadly with the substance of the three-fold distinction among: crimes against the peace and security of mankind (or better, 'crimes against the peace and security of humanity'); 'crimes of other concern to the international community' (which might not affect peace and security directly, but which form the subject of international cooperation); and 'crimes of concern to States.' Furthermore, Professor Swart carefully noted the flexibility and open-endedness of the process of criminalization, in other words, the continuation of legal interpretation, adjudication and codification in this field.

While the substance of the three-fold distinction seemed quite useful, two sets of weaknesses in this approach could still be noted. Could one really distinguish between crimes affecting international peace and security or 'the peace and security of mankind' to use the language of the ILC draft Code on the one hand and 'other crimes of concern to the international community as a whole' on the other? Is it not true, that in some way, all crimes of concern to the international community affected international peace and security? The problem here is that 'peace' and 'security' were broad concepts and their meaning depended on whether we chose to adopt 'peace and security' in the sense of the Charter of the United Nations which referred to aggression rather than international criminal law violations

4. *See* Statute of the International Criminal Court, *supra* note 2.

(although the relevance of crimes under international law to international peace and security has been developing through the Security Council's action to establish *ad hoc* international criminal tribunals). If we considered 'peace and security' to relate more to the peace and security of people and individuals, in other words, if we viewed it more from the angle of human security from violence and breach of the peace, rather than from the angle of the disruption of a State's legal sovereignty, then in principle, *any* crime of concern to the international community as a whole could be considered to degrade international peace and security simply because it involved an act of concern to the international community. This approach has the virtue of linking 'international crimes' to 'peace and security' as a matter of conceptual and semantic definition, rather than to make the distinction between the two essentially one requiring a factual determination. The question then becomes "At what point could we really say that a crime of international concern affected 'the peace and security of mankind'?"

Were the concept of 'crimes against the peace and security of mankind' to be understood to denote the same thing as 'international peace and security,' then we would still have to distinguish among 'crimes against the peace and security of mankind' and 'other crimes of concern to the international community as a whole' simply because not all 'crimes of concern to the international community as a whole' could be said to constitute at the same time 'crimes against the peace and security of mankind.' If the concept of 'crimes against the peace and security of mankind' were to mean anything at all, then small-scale drug-trafficking or counterfeiting which counted as 'other crimes of concern to the international community as a whole' could not be considered also 'crimes against the peace and security of mankind' simply because these crimes might cause little if any disturbance to the international community as a whole. In other words, if we considered that 'crimes against the peace and security of mankind' *meant* 'crimes against international peace and security,' then we evoke war and other major threats to international peace as our standard. On the other hand, if we considered 'crimes against the peace and security of mankind' as a concept unique to international criminal law with little or no relation to the constitutional framework of the Charter of the United Nations, then we ignore the fact that historically, the international community has identified certain acts as crimes under international law precisely because they disturb international peace and security and threaten the legal and political sovereignty of the State at the same time. These conundrums lead me to reflect a little on the importance of considering the historical context of the development of international criminal law.

E. The Importance of Historical Contextualization

In my view, to understand fully how and why the international community over time has identified and recognized certain acts as crimes, one has to place the whole question into broad historical perspective because only then does the phenomenon of criminalization become apparent as a process. I would even say that to consider the various categories of crimes under international law in the abstract ignores the whole purpose and relevance of codification as a phase in the development of a larger system of norms and implementation. In other words, what appears at first to be chaos and disorder in the identification and classification of international crimes in fact can be understood as a series of manifestations, over a long historical process, on the part of the international community to develop a comprehensive *system* of international criminal law, an approach I laid out in a book published on the eve of the Rome Conference.[5]

Here is where I would have preferred a much more historically integrated approach to international criminal law than I feel Professor Swart has employed. Rather than to contrast the approaches of the Rome Statute and ILC Draft Statute on the one hand, to the 1991 and 1996 ILC Draft Codes on the other, would it not be more pertinent to view the Rome Statute as having largely *overtaken* the ILC's work on both the Draft Code and the Draft Statute? After all, all these and other products of the ILC in the area of international criminal law represent steps or phases that culminated eventually in the Rome Statute. In other words, excessive focus on conceptual categorization can throw out of focus the interrelations among all these developments in the overall evolution of international criminal law.

In this connection, I found it interesting that a number of interveners wondered whether the International Law Commission's draft Code of Crimes against the Peace and Security of Mankind might be helpful in terms of the further codification and progressive development of international criminal law. For my own part, I feel it would be unlikely for the candlelight of the International Law Commission's category of 'crimes against the peace and security of mankind' to retain much relevance against the noonday sun of the Rome Statute. The Rome Statute represents a far more extensive codification and progressive development of international criminal law than the ILC draft Code. In effect, we could consider that the

---

5. *See further* LYAL S. SUNGA, THE EMERGING SYSTEM OF INTERNATIONAL CRIMINAL LAW: DEVELOPMENTS IN CODIFICATION AND IMPLEMENTATION (1997).

establishment of the ICC has overtaken the ILC codification project in terms of the historical development of international criminal law.

F. 'Crimes under International Law' versus 'International Crimes'

To make one final terminological/conceptual observation, it is becoming more common to hear international criminal law scholars refer to 'international crimes' rather than the less elegant 'crimes under international law.' One should recall that the term 'international crimes' was employed very much as a concept separate and distinct from 'crimes under international law.'

The term 'international crimes' was enshrined in the International Law Commission's Article 19 of Part 1 of the 1976 version of the Draft Articles on State Responsibility[6] in contradistinction to 'international delicts.' Both international crimes and international delicts were supposed to refer to an internationally wrongful act breaching an international obligation "so essential for the protection of fundamental interests of the international community that its breach is recognized as a crime by that community as a whole."[7] At the time, and for decades afterwards, the ILC consistently dissociated the concept of crimes committed by States from crimes committed by individuals (termed 'crimes under international law').

As we know, the fundamental illogicality of referring to the State as the perpetrator of a crime, and therefore as a 'criminal State,' as well as the impossibility of putting a State in jail (collective sanctions notwithstanding!) forced the ILC finally to drop the concept of 'international crime' completely from the draft Articles on State Responsibility for Internationally Wrongful Acts. Accordingly, the draft Articles adopted by the International Law Commission at its fifty-third session in 2001 make no reference to the concept.

Now that the ILC has finally abandoned the confusing concept of international State crime, and the robust regime of the Rome Statute has brought the doctrine of individual criminal responsibility under international law to the fore, the term 'international crime' is rapidly losing its old association with State crime. The term now seems to be used increasingly as synonymous with 'crime under international law.' There is now little risk of harm or confusion since the *only* criminal responsibility regime under

6. 2 YEARBOOK OF THE ILC (1976) Part 2, at 75, U.N. Doc. A/CN.4/ Ser.A /1976/ Add.1 (Pt. 2).
7. Article 19(3) of Part 1 the ILC's 1976 Draft Articles on State Responsibility, *Ibid*.

international law now relates directly to individuals and not States. This is not to rule out or ignore the fact that individuals acting on *behalf of* the State or exercising State power may be held criminally responsible. The point is that such individuals can be held criminally responsible in an individual and personal capacity: the State cannot be held *criminally* responsible as a State. Neither can organizations, such as corporations, shield the individual from criminal responsibility under international law. The beauty of the Rome Statute is that it establishes definitively and comprehensively that individuals cannot escape responsibility for crimes under international law by trying to hide under the blanket of collective anonymity.