



DATE DOWNLOADED: Thu Apr 25 02:26:56 2024

SOURCE: Content Downloaded from [HeinOnline](https://heinonline.org)

#### Citations:

Please note: citations are provided as a general guideline. Users should consult their preferred citation format's style manual for proper citation formatting.

#### Bluebook 21st ed.

A. Rohan Perera, Towards the Establishment of an International Criminal Court, 20 COMMW. L. BULL. 298 (1994).

#### ALWD 7th ed.

A. Rohan Perera, Towards the Establishment of an International Criminal Court, 20 Commw. L. Bull. 298 (1994).

#### APA 7th ed.

Perera, A. Rohan. (1994). Towards the establishment of an international criminal court. Commonwealth Law Bulletin, 20(1), 298-309.

#### Chicago 17th ed.

A. Rohan Perera, "Towards the Establishment of an International Criminal Court," Commonwealth Law Bulletin 20, no. 1 (January 1994): 298-309

#### McGill Guide 9th ed.

A. Rohan Perera, "Towards the Establishment of an International Criminal Court" (1994) 20:1 Commw L Bull 298.

#### AGLC 4th ed.

A. Rohan Perera, 'Towards the Establishment of an International Criminal Court' (1994) 20(1) Commonwealth Law Bulletin 298

#### MLA 9th ed.

Perera, A. Rohan. "Towards the Establishment of an International Criminal Court." Commonwealth Law Bulletin, vol. 20, no. 1, January 1994, pp. 298-309. HeinOnline.

#### OSCOLA 4th ed.

A. Rohan Perera, 'Towards the Establishment of an International Criminal Court' (1994) 20 Commw L Bull 298  
Please note: citations are provided as a general guideline. Users should consult their preferred citation format's style manual for proper citation formatting.

-- Your use of this HeinOnline PDF indicates your acceptance of HeinOnline's Terms and Conditions of the license agreement available at

<https://heinonline.org/HOL/License>

-- The search text of this PDF is generated from uncorrected OCR text.

-- To obtain permission to use this article beyond the scope of your license, please use:

[Copyright Information](#)

require support from both within Malawi and from outside. He believed that a high degree of consensus had been reached on many issues. Upon other the parties had "gracefully agreed to disagree". The report on the Round Table would be an important contribution to Malawi and democratisation. The process now in train could not be reversed. But until the constitutional order were changed, it was the duty of the Government to retain effective control and it would do so.

Urgent priority was assigned to the establishment of the Electoral Commission, completion of an authentic electoral roll and the determination of the boundaries of electorates. The time-table for elections would have to be set. The process of change would occur in accordance with law. Although the Government was not willing to share its executive powers with the Opposition groups, believing that course to be unconstitutional, it would certainly discuss the process of change with the Opposition in the hope of ensuring the success of the future phases of transition.

#### *The hope for civic peace and democracy*

At the conclusion of the Round Table, some of the participants took the journey from Lilongwe to Lake Malawi. The road passed the refugee housing constructed for the flood of immigrants who had entered Malawi during the worst of the armed insurgency in neighbouring Mozambique. Now, the huts and villages are empty. With peace in Mozambique, most of the refugees have crossed the invisible border and returned to their homes. To reach the great lake which is the third largest in Africa, it is necessary to descend through a mountain pass to the plateau which leads to the water. On the way, children besieged visiting officials, presenting them with the most elaborate carvings of tractors and aeroplanes, perfectly constructed in balsa wood. On the side of the road, busy mothers tended to their large families. Children everywhere demonstrated the truth which Livingstone found. This is one of the most heavily populated parts of Africa. But its natural resources are limited. Its economic future depends upon controlling the population explosion and harnessing the relatively well-educated and disciplined community. Until now, it has not known the challenges and dangers of democracy.

At Lake Malawi, the tourist resorts seemed sadly deserted. The great stretch of water shone brilliantly in the afternoon light. Lake Malawi seemed peaceful, even eerily so. It is to be hoped that the process of consultation described above will ensure that civic peace is enjoyed throughout Malawi in the challenging years ahead. Meanwhile, Ngwazi, Dr H Kamuzu Banda remains in the President's residence. The Government remains very much in control of executive power. The Opposition forces are divided in a way reminiscent of the Opposition of Kenya. The promise of democratic transition remains only partly fulfilled.

## **Towards the Establishment of an International Criminal Court**

*By A Rohan Perera, Legal Adviser, Ministry of Foreign Affairs, Sri Lanka and Visiting Lecturer in International Law, Faculty of Law, University of Colombo, Sri Lanka*

Since the aftermath of the Second World War, the international community has demonstrated an interest in evolving a legal mechanism for the exercise of international criminal jurisdiction in respect of a category of crimes which came to be regarded as "international crimes". Indeed the International Law Commission from its

very first session had to deal with the question of the establishment of an International Criminal Court, in the context of its work on the preparation of a draft Code of Offences against the Peace and Security of Mankind.

#### *Brief History of the Current Initiatives*

The General Assembly of the United Nations directed the International Law Commission in 1947, to—

- (a) formulate the principles of international law recognized in the Charter of the Nuremberg Tribunal and in the judgment of the Tribunal; and
- (b) prepare a draft Code of Offences against the Peace and Security of Mankind.<sup>1</sup> The Commission at its Second Session in 1950, adopted a formulation of the Principles of International Law recognized in the Charter and the judgement of the Tribunal.<sup>2</sup> At its Sixth Session in 1954, the Commission also finalized a draft Code of Offences against the Peace and Security of Mankind and submitted it to the UN General Assembly.<sup>3</sup>

The UN General Assembly, however, decided to postpone consideration of the draft Code on the basis that the draft as formulated by the Commission, raised problems closely related to the question of the definition of "aggression" which was being dealt with by a Special Committee of the United Nations. It was only in 1974 that the General Assembly adopted the "Definition of Aggression" by consensus, on the basis of the recommendation of the Special Committee.<sup>4</sup>

It took a further seven years before the General Assembly in 1981, invited the Commission to resume its work on the elaboration of the draft Code of Offences.<sup>5</sup> In 1991 the Commission provisionally adopted the draft Articles on the Code of Crimes.<sup>6</sup>

This work was considered to be the first phase of the work of the Commission on the question of an international criminal jurisdiction. Closely connected to the question of an international code of crimes was the question of its enforcement. Thus the UN General Assembly invited the Commission in 1991, to further consider and analyse within the formulation of the draft Code, the issues relating to an international criminal jurisdiction, paying particular attention to the proposals made in the General Assembly for the establishment of an international criminal court or other international trial mechanism.<sup>7</sup> This was an outcome of an initiative taken in the General Assembly by Trinidad and Tobago on the question of an international criminal jurisdiction in the context of transnational crimes such as international drug trafficking.

The UN General Assembly at its 47th Session in 1992, requested the International Law Commission to give high priority to its work on the establishment of an international criminal jurisdiction and to finalize the draft Statute of the Court.<sup>8</sup> Certain developments in the international scene acted as a catalyst to give an impetus to the work of the Commission. These were the "Lockerbie dispute" between the United States and Libya and the creation of an *ad hoc* tribunal for the trial of war crimes in the territory of former Yugoslavia.

#### *(A) Lockerbie Dispute*

The Lockerbie dispute arose out of the crash of PAN AM flight 103 over Lockerbie (Scotland) in 1988 which led to a Grand Jury in the United States indicting two Libyan nationals, charging them, *inter alia*, with having caused a bomb to be placed aboard the aircraft which subsequently exploded, causing the aircraft to crash. The Libyan Government refused United States and United Kingdom requests for extradition, opting instead to prosecute the suspects before its national courts. The matter was thereafter taken up in the Security Council.

Libya instituted proceedings before the International Court of Justice (ICJ) invoking the provisions of the Montreal Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, under which Libya claimed the right to either

extradite or prosecute the alleged offenders before its own courts. The Libyan Government contended before the ICJ that the United States by rejecting the Libyan efforts towards resolving the matter within the framework of the "extradite or prosecute" regime of the Montreal Convention and pressuring it to surrendering the two Libyan nationals to the United States, was acting in breach of its international legal obligations.

The United States, on the other hand, argued that a trial by Libyan Courts would be unacceptable in this case, "with clear implications of government involvement in terrorism, as well as the absence of an independent judiciary in the implicated State".

Consequent to action initiated by the United States and the United Kingdom, the United Nations Security Council adopted Resolutions 731 and 748 calling upon Libya *inter alia*, to "co-operate fully in establishing responsibility for the terrorist acts against PAN AM flight 103".

The ICJ made order ruling that the Security Council resolutions on Libya superseded any obligations the parties may have under any other international agreement, including the Montreal Convention.<sup>9</sup> The Lockerbie case brought to surface however, fundamental issues which questioned the very basis of the "extradite or prosecute" regime, namely, acceptance of the judicial system of a requested State by a requesting State in cases where a request for extradition is not granted.<sup>10</sup> The view that an international trial mechanism in the form of an international criminal court would help to fill a jurisdictional vacuum, where the requested State refuses to extradite its own nationals and where the requesting State clearly has no trust or confidence in the judicial system of the requested State, began to gain increasing attention.

#### (B) War Crimes in former Yugoslavia

The political developments in former Yugoslavia also served as a catalyst to accelerate efforts towards the establishment of an international criminal court of a permanent character. While Security Council Resolution 808 created the *ad hoc* tribunal for war crimes committed in the former Yugoslavia, there was general concern expressed that this should not be viewed as a precedent for the future. The proliferation of *ad hoc* tribunals was seen as having the potential for creating, *inter alia*, complex problems of overlapping jurisdiction.

From the political perspective, the creation of an *ad hoc* tribunal for Yugoslavia was seen in some quarters as politically motivated and discriminatory. Thus in a letter addressed to the UN Secretary-General, the Minister of Foreign Affairs of the Federal Republic of Yugoslavia stated:

Yugoslavia is one of the advocates of the idea concerning the establishment of a permanent international tribunal and respect for the principle of equality of States and universality and considers, therefore, the attempts to establish an *ad hoc* tribunal discriminatory, particularly in view of the fact that grave breaches of international law of war and humanitarian law have been committed and are still being committed in many armed conflicts in the world, whose perpetrators have not been prosecuted or punished by the international community . . . War crimes are not committed in the territory of one State alone and are not subject to the statute of limitations, so that the selective approach to the former Yugoslavia is all the more difficult to understand and is contrary to the principle of universality.<sup>11</sup>

Thus the resort to *ad hoc* courts have been criticised, *inter alia*, on the ground that the members of a court established in response to a particular situation might be influenced by that situation and fail to observe the rules of objectivity and impartiality. The proliferation of ethnic conflicts in many parts of the world has given rise to a growing sense of urgency towards the early establishment of a permanent institution to exercise international criminal jurisdiction, rather than *ad hoc* tribunals which are established *ex post facto*.

In the words of President Clerides of Cyprus at the Commonwealth Heads of Government Meeting, in October 1993—

The existence of an international criminal court as a permanent institution would provide objectivity and continuity and would dispose of the argument regarding *ex post facto* legislation and "victor's law".<sup>12</sup>

Similar sentiments were echoed by the German Representative at the Sixth Committee of the United Nations:

The International Law Commission's work has proven that a permanent mechanism for international criminal adjudication is feasible. Related events in the political sphere have not only confirmed this conclusion, they have also demonstrated beyond doubt that the establishment of a permanent criminal court is a political necessity which does not lend itself to further delay. On 25 May 1993, the Security Council . . . decided by Resolution 827 to create the "International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law committed in the former Yugoslavia".

The creation of this *ad hoc* tribunal signifies a number of political implications which merit some reflection:

*Firstly*, it shows that the lack of effective prosecution of international crimes can contribute to the emergence of situations which constitute a threat to international peace and security. *Vice versa*, international criminal adjudication can help to redress such situations.

*Secondly*, it underlines the urgent necessity to have a mechanism in place to prevent such situations from building up unchecked.

*Thirdly*, the process of establishing *ad hoc* tribunals provides ample evidence for the necessity of a permanent court . . . Germany highly appreciates and welcomes the creation of the *ad hoc* tribunal. But we feel that it would be a fallacy to assume that emergency measures like Security Council Resolution 827 already provide an answer to the underlying problem, namely the general lack of prosecution of international crimes.

This lacuna needs to be filled by a permanent tribunal".<sup>13</sup>

Another important facet was underlined by President Clerides of Cyprus at the Commonwealth Summit when he stated:

In addition to its other advantages, I am convinced that, had a permanent international court been in existence, many serious problems faced recently by the international community, particularly situations which received much publicity and gave rise to considerable controversy and complaints of double standards, would have been obviated through the resort to such a court.<sup>14</sup>

Current international developments outlined above, demonstrate how the "extradite or prosecute" regime in existing international Conventions could be undermined when overriding political considerations result in a failure to comply with treaty obligations by either State party to a dispute. The establishment of an international criminal court could serve to fill the vacuum in a situation where there is a failure either to extradite or prosecute for whatever reason, provided the element of political impartiality necessary to generate the trust and confidence of the international community is preserved.

An examination of current initiatives towards the establishment of an international criminal court would not be complete without reference to the initiative undertaken by the League of Nations for the establishment of such a court. In this instance too a tragic event in the history of Yugoslavia, namely the assassination of King Alexander I, acted as a catalyst for the initiative of the League of Nations to conclude Conventions on the suppression of terrorism and for the establishment of an international criminal court. The same concerns which surfaced in the current Lockerbie case were uppermost in the minds of the State representatives in the League of Nations in 1937. In the words of the Representative of Belgium:

"If the two drafts were accepted, it would mean . . . that when a State, a signatory to both Conventions wished neither to hand over a foreign individual who had committed a terrorist act on foreign territory, nor to judge him itself, because it had no interest in the affair, it would have the right to hand over the delinquent to the international criminal court. It was quite conceivable indeed, that a foreign individual who has committed a terrorist crime on foreign territory might be a source of serious international difficulty to the country of asylum.

There was the danger for example, that the criminal might be acquitted by the courts of the country of refuge, or be given so negligible a sentence that the injured State would regard the punishment as quite inadequate. Such a situation might cause serious international difficulties or at all events, difficulties of very serious import, such as to disturb the good understanding between the two States in question. In such a case, why not make it, if not incumbent upon the State acceding to the International Criminal Court, at all events optional for that State, to hand over the accused to the International Criminal Court, which would mete out judgment with strict guarantees of impartiality.”<sup>15</sup>

The complexity of some of the far-reaching proposals made in the League of Nations ultimately worked against the general acceptance of the Court by the international community. Issues such as the competence of the Court to try accused persons by default, its competence to try nationals of non-State parties to the Statute of the Court were perceived as “attempts to solve problems beyond its powers”. There were also apprehensions that the creation of the Court could, give rise to a plurality of prosecutions and prejudice to the competence of national courts.

The unsuccessful outcome of the League of Nations initiative underlined the fact that the international community of States were not yet ready to move away from traditional doctrines of criminal jurisdiction such as the principles of territoriality and nationality and to wholeheartedly embrace the doctrine of universal criminal jurisdiction vested in an international criminal court.

Thus in the current initiatives to establish an international criminal court, it is essential that the experience of the League of Nations initiative be duly taken into account. Indeed, the discussions on the Statute of the court, both in the International Law Commission and in the Sixth Committee clearly revealed an awareness of the issues that had surfaced in the League of Nations and a determination to address these issues with a view to arriving at flexible and pragmatic solutions.

The structure of the proposed court as set out in the Report of the Working Group of the International Law Commission reflected this flexible and pragmatic approach to the establishment of an International Criminal Court, taking due account of the fundamental concerns of States.<sup>16</sup>

The International Criminal Court was to be established by a Statute in the form of a treaty entered into by State parties. The Court would exercise jurisdiction only over individuals and its jurisdiction would be limited to “crimes of an international character” as defined in specific international treaties in force (other than one specific exception). More importantly, the jurisdiction of the court was to be concurrent and not exclusive, preserving the sovereign right of a State party either to try the offender itself before its national tribunals or to refer the offender to the International Criminal Court. Moreover such jurisdiction depended on the specific consent of the State party in which the crime had been committed and the State of which the offender was presumed to be a national.

While the draft Statute prepared by the Working Group of the International Law Commission sought to address some of the fundamental concerns of Member States relating to their sovereign right to prosecute offenders, the discussion of the draft Statute in the Sixth Committee of the 48th Session of the General Assembly, brought to surface several issues of fundamental importance to States which must be addressed and acceptable solutions found. These were *sine qua non* for the proposed Court to command widespread, if not universal acceptance it must necessarily enjoy, in order to discharge the grave responsibilities that are to be entrusted to it.

#### *Consideration of the Draft Statute by the Sixth Committee at the 48th Session of the UN General Assembly*

From among the issues highlighted during the debate in the Sixth Committee, this article proposes to deal with the following key issues:

- (i) The mode of creation of the Court and the relationship to the United Nations;
- (ii) Jurisdictional issues;
- (iii) Reference of cases to Court by the Security Council;
- (iv) Surrender of offenders to Court.

(i) *Relationship between the Tribunal and the United Nations*

The Draft Statute reflects a divergence of views which existed in the International Law Commission with regard to the nature of the relationship that should be established between the Tribunal and the United Nations.<sup>17</sup> Draft Article 2 provides for two alternate formulations as follows:

- (I) The Tribunal shall be a judicial organ of the United Nations.
- (II) The Tribunal shall be linked with the United Nations as provided for in the present statute.

The first formulation reflected the view of those who supported the idea that the Tribunal should formally be established as an organ of the United Nations. The second formulation is a reflection of the views of those who advocated a more flexible but a close co-operative relationship with the United Nations, short of establishing the Tribunal as an organ of the United Nations.

There was agreement in the Commission on the need for a close relationship between the Tribunal and the United Nations inasmuch as such relationship would clearly demonstrate, *inter alia*, the acceptance of the principle of the criminal responsibility of the individual towards the world community. It was felt that such a relationship would confer the requisite authority on the Tribunal, as well as contribute towards the universal recognition of the Tribunal and guarantee that the Tribunal functioned in the general interest of the international community.<sup>18</sup> The divergency of views arose on the precise form which this relationship should take.

The proponents of the view that the Tribunal should be established as an organ of the United Nations saw the possibility of its establishment in terms of Articles 22 and 29 of the UN Charter. Article 22 of the Charter states that:

The General Assembly may establish such subsidiary bodies as it deems necessary for the performance of its functions,

while Article 29 contains identical provision with respect to the Security Council.

The contrary view which emerged in the Commission questioned the possibility of establishing an international criminal court as a judicial organ of the United Nations under resolutions adopted by the General Assembly and the Security Council, in terms of the above provisions, without a formal amendment of the UN Charter. They therefore advocated another kind of link with the United Nations such as a treaty of co-operation along the lines of those between the United Nations and the Specialized Agencies.<sup>19</sup>

The discussion on this issue when the draft Statute of the tribunal was considered by the Sixth (Legal) Committee, at the 48th Session of the United Nations, reflected a general preference to the approach of the tribunal being established through a multilateral treaty, with an independent personality, nevertheless having a close relationship with the United Nations, in terms of such treaty. The intervention of the Representative of Germany reflected the views of a substantial number of delegations:

The first open question relates to Article 2 of the draft Statute and concerns the very nature of the future tribunal: could it be conceived as a judicial organ of the United Nations or are there obstacles to such a course of action? The answer to this question obviously has to do with the tribunal's mode of creation: is it possible to "legislate" its creation under the Charter or is it necessary to create first a new contractual basis, a separate treaty establishing the future tribunal?

In the course of discussions in the International Law Commission, it was apparently suggested that concurrent resolutions of the General Assembly and the Security Council

under Articles 22 and 29 of the Charter might suffice as a legal basis for the permanent tribunal. In my Government's view, however, a close reading of the Charter would probably not support such a proposition. Therefore, it would seem preferable to establish a new contractual basis in order to put the permanent tribunal on a solid legal foundation.

This conclusion would also seem to follow from considerations of legal and practical necessity. The German Government would by no means argue against the political desirability of having the tribunal as closely linked to the United Nations as the International Court of Justice. In theory, such linkage would best serve our common objective of attributing to the future tribunal a truly universal role. We all know, however, that it might be impractical to envisage an amendment to the Charter, which would be necessary if we wanted to make the tribunal a judicial organ of the United Nations like the International Court of Justice.

The establishment of the tribunal by a separate treaty does not have to imply a separation from the United Nations system. As elaborated in the draft Statute, there are indeed various possibilities of linking the tribunal to the main organs of the United Nations . . .<sup>20</sup>

Similarly, the Representative of Sri Lanka, while expressing the view that the court should be linked to the United Nations, in order to ensure that the institution is vested with the requisite authority and to generate the confidence of the international community, supported the idea of the "conclusion of a multilateral Convention for the establishment of the court, under the auspices of the United Nations" as a possible procedural mechanism to bring about a formal linkage between the court and the United Nations.<sup>21</sup>

It is submitted that this approach would help to avoid the complex and politically contentious issue of Charter amendment. It would also be difficult to subscribe to the view that resolutions by the General Assembly and the Security Council could create a judicial organ of the United Nations, when the relevant provisions of the Charter only refer to the establishment of "subsidiary organs". Article 92 of the United Nations Charter which provides for the establishment of the International Court of Justice as "the principal judicial organ of the United Nations" should also be borne in mind, if the question of creating further "judicial organs" of the United Nations is to be pursued. The concluding remarks of Sir Robert Jennings, President of the International Court of Justice, in his address to the 48th Session of the UN General Assembly is particularly relevant in this regard:

I cannot leave this theme of the role of the International Court of Justice without a mention of today's tendency to proliferate other and specialized courts and tribunals . . . The relationship of these tribunals to each other and to each others jurisdiction, and their respective contributions to the directions taken by the development of international law by the resulting case law, raises interesting and difficult questions which might at some time have to be addressed.

There is only one thought I wish to leave with the members of this General Assembly on this occasion; there can only be one "principal judicial organ" of the United Nations as there is only one Supreme Court in any legally ordered community; and that position of the International Court of Justice ought always to be remembered and strenuously protected.<sup>22</sup>

## (ii) Jurisdictional Issues

The core issue of the jurisdiction of the court is dealt with in Articles 22, 23, 24 and 26 of the draft Statute. The crucial issue to be addressed by the International Law Commission was the determination of the jurisdiction of the court, *ratione materiae*, pending a Code of Crimes Against the Peace and Security of Mankind, which was yet to be negotiated. A proposal submitted by the Special Rapporteur was that offences falling within the jurisdiction of the Court should be defined by special treaties between States parties or in an unilateral instrument of a State.

The Articles as presently drafted provide for two strands of jurisdiction. The first strand of jurisdiction is set out in draft Article 22. This Article confers jurisdiction on the court with regard to those crimes as defined in pre-existing multilateral Conven-

tions. The list includes crimes covered under the 1948 Convention on the Prevention and Punishment of the Crime of Genocide and the 1973 International Convention on the Suppression of the Crime of Apartheid, which specifically conferred jurisdiction on an international court in respect of disputes arising out of their application. The draft Article also covered crimes established under other widely multilateral Conventions, which though, not specifically providing for recourse to an international court, deal with crimes which, given their seriousness, could be regarded as "international crimes" and are to be dealt within an "extradite or prosecute" regime.

The list of these Conventions set out in Article 22 include, the Geneva Conventions on Armed Conflicts of 1949, the Hague Convention for the Suppression of Unlawful Seizure of Aircraft (1970), the Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (1971), the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents (1973), the International Convention against the Taking of Hostages (1979), the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation and the Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms located on the Continental Shelf (1988). The common feature in these Conventions is the fact that they provide for an "extradite or prosecute" regime.

The second strand of jurisdiction is set out in Article 26, which has two components. Firstly, it covers a category of crimes referred to as "crimes under general international law". Article 26(2)(a) defines such crimes as a crime "under a norm of international law accepted and recognized by the international community of States as a whole as being of such a fundamental character that its violation gives rise to the criminal responsibility of individuals". The commentary to the draft Articles of the Statute explains that this provision seeks to cover international crimes which have their basis in customary international law and which would otherwise fall outside the purview of the jurisdiction of the court. One example that has been cited is the crime of "aggression" which is not defined by treaty.<sup>23</sup>

The other category of crimes sought to be covered under the second strand of jurisdiction are "crimes under national law" such as drug related crimes, which give effect to a multilateral treaty and which having regard to the terms of the treaty, constitute "exceptionally serious crimes". Specific reference is made to the 1988 UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances.

According to the Working Group of the International Law Commission, the rationale for the two strands of jurisdiction, in particular, the distinction drawn between multilateral Conventions dealing with "international crimes" and multilateral Conventions dealing with "exceptionally serious crimes" is that while the former Conventions define crimes as international crimes, the latter merely provide for the suppression of undesirable conduct constituting crimes under national law.<sup>24</sup>

The point of departure in Article 26 dealing with the second strand of jurisdiction is that the "special consent" of the concerned States are required before the court exercises jurisdiction over crimes covered by that Article. With regard to the categories of States who could consent to the court's jurisdiction for crimes falling under Article 26, the Statute uses different criteria. In exercising jurisdiction in respect of "crimes under general international law" the Statute requires that both the consent of the State on whose territory the suspect is present and that of the State on whose territory the act or omission in question occurred, be obtained.

On the other hand, for crimes under national law which give effect to a provision in a multilateral treaty aimed at the suppression of such crimes, the only consent required is that of the State on whose territory the suspect is present and which has jurisdiction in conformity with the treaty to try the suspect for that crime before its own courts.

When the draft Statute was considered by the Sixth Committee at the 48th Session of the United Nations General Assembly, some delegations expressed serious misgivings with regard to the approach of the Commission in providing for two strands of jurisdiction.

Firstly, it was felt that the crimes referred to as "crimes under general international law" lack sufficient clarity and specificity to constitute an independent source of jurisdiction for the Court. Attention was drawn to the fact that the principle of *nullum crimen sine lege* requires clarity and precision in the definition of crimes in the Statute. Several delegations expressed the view that the jurisdiction of the Court must, at least initially, be confined to well-defined crimes under generally accepted multilateral Conventions.<sup>25</sup>

The second issue which gave rise to serious misgivings was the necessity for the separation made between the multilateral Conventions listed in Article 22 and those listed in Article 26(2)(b), namely, the 1988 United Nations Convention against Illicit Traffic in Narcotic Drugs.

According to the Working Group, two main considerations had led to the treatment of the group of Conventions under the first strand in Article 22 and separate treatment under Article 26, of the 1988 UN Convention on Drug Trafficking. These were:

- (a) the fact that the crimes under Article 22 are themselves defined by the treaty concerned in such a way that an international criminal court could apply a basic treaty law in relation to the crime dealt with in the treaty; and
- (b) the fact that the treaty created, with regard to the crime therein defined, either a system of universal jurisdiction based on the principle *aut dedere aut judicare* or the possibility that an international criminal tribunal try the crime or both.

This approach of the Working Group attracted the dissent of some members of the Commission as well as the criticism of some delegations during the debate in the Sixth Committee. It was pointed out that both the Hague and Montreal Conventions on Offences against Aircraft as well as the Hostages Convention do not expressly define the unlawful acts covered by the respective Conventions as "international crimes", except obliging State parties to "make the offence punishable by severe penalties". The Representative of Jamaica pointed out:

Thus, although the Drugs Convention does not expressly define crimes as international crimes, it is in no worse position in this respect than the Hague and Montreal Conventions. In any event, we find it odd that the Working Group should place great store by the definition in a treaty of a crime as an international crime; one would have thought it more helpful to examine a particular treaty to see whether in terms of the regime it establishes for a particular crime, it is constituting an offence as an international crime . . .

With regard to this issue, the Drugs Convention, like the other Conventions listed in Article 22, oblige States parties to make the offences crimes under their domestic law. This is a feature of all treaties whose aim is the suppression of particular criminal conduct; it is not, in our view, a feature which makes the offence less an international crime. But, in any event, it is common to all the Conventions.<sup>26</sup>

Several delegations underlined the need to treat drug related offences as grave crimes under international law on par with the crimes covered in the treaties listed in Article 22, rather than as mere "undesirable conduct" punishable under national law and dealt with under secondary strand of jurisdiction. Thus the Representative of Sri Lanka stated:

New and alarming dimensions of drug trafficking have emerged in the post cold war period. The ramifications of the nexus between narcotic traffickers, terrorist groups and the illicit arms trade pose an ever increasing threat to peace and security within and among nations in many parts of the world. This demands that the international community treat these activities as grave crimes under international law.<sup>27</sup>

Thus a substantial body of opinion emerged from the discussions in the Sixth Committee that the 1988 UN Convention should, for purposes of the court's

jurisdiction, be treated on par with the other multilateral treaties listed in Article 22. These discussions also brought to surface the fundamental issue whether there was sufficient justification for the distinction being made in the draft Articles between the primary and secondary strands of jurisdiction.

(iii) *Reference of cases to court by the Security Council*

Article 25 of the draft Statute provides that cases pertaining to crimes referred to in Article 22 or 26(2)(a), may be submitted to the court "on the authority of the Security Council". Such provision was considered necessary to make use of the court as an alternative to establishing *ad hoc* tribunals by the Security Council.<sup>28</sup> The relationship between the Security Council and the proposed International Criminal Court is further elaborated in Article 27 of the draft Statute which states:

A person may not be charged with a crime of, or directly related to, an act of aggression under Articles 25 or 26(2)(a) unless the Security Council has first determined that the State concerned has committed the act of aggression which is the subject of the charge.

The vesting of such authority on the Security Council alone without the General Assembly enjoying a similar authority was a matter of concern for some States. The Representative of Jamaica, expressing the views of his Government, during the Sixth Committee debate stated:

Giving the Security Council the power to refer cases to the court without investing the General Assembly with a similar power will not help to achieve the kind of balance that many feel should be a feature of a restructured United Nations.<sup>29</sup>

According to the Working Group, the Security Council would not normally be expected to refer a "case" in the sense of a complaint against named individuals, but would more usually refer to the tribunal a "situation of aggression", leaving it to the prosecutor of the tribunal to investigate and indict the individual concerned.<sup>30</sup> It is to be noted, however, that once a Security Council Resolution on any situation of aggression is adopted, it would be open to any interested State to refer the case to court following the procedure in Article 29.

Given the sharp political divide which exists within the international community on the issue of the existing powers of the Security Council and the implications of a provision of this nature on the larger issue of Charter review and the restructuring of the United Nations, it is submitted that the more prudent and realistic course for the Commission would be to restrict the authority of referring cases to court, only to State parties, at least during the initial phase of the court.

(iv) *Surrender of an accused to court*

Article 63 of the Statute outlines the procedure for the surrender of an accused to court. The Article requires a State party which has accepted the jurisdiction of the court with respect to a particular crime, to take immediate steps to arrest and surrender an accused to the court. A State party which is also a party to the treaty in question which defines the particular crime, but has not specifically accepted the court's jurisdiction, is required to either surrender or prosecute the accused. The Article also requires that a State party should, as far as possible, give priority to a request from the court for the surrender of an accused, over a request for extradition from other States. It is further provided that the surrender of an accused person to court constitutes, as between the States parties to the Statute, sufficient compliance with a provision of any treaty requiring that a suspect be extradited or the case be submitted to its competent authorities for the purpose of prosecution.

These provisions could well give rise to issues of some complexity, particularly where it concerns an extradition request made by a State party to one of the multilateral treaties covered in the Statute, which, however, is not a State party to the Statute. The requested State, if it is a State party both to the Statute of the court, as well as the

multilateral treaty concerned, could be placed in a legal as well as a political dilemma where there is a competing request from the court.

It must be noted in this connection that the treaties covered in Article 22, except for the 1948 Genocide Convention and the 1973 Apartheid Convention, did not provide for the submission of an offender to an international criminal court. What Article 63 attempts to do is to extend the "extradite or prosecute" regime in these Conventions, by analogy, to cover the case of the surrender of an accused to court. While this should not give rise to questions of substantial difficulty, where both the requesting and the requested States are parties to the Statute, the position could be otherwise when the requesting State is not a party to the Statute and the Statute of the court requires the State party to the Statute of the court to give precedence to a request from the court, where there is a competing request from the court.

This is a question which requires further examination by the Commission, paying due regard, *inter alia*, to the provisions of the Vienna Convention on the Law of Treaties (1969) on modification of treaties.

During the consideration of the draft Statute in the Sixth Committee, delegations also emphasised the need to ensure that the provisions of the Statute on surrender of fugitive criminals do not prejudice the legal regime created through bilateral extradition treaties. Thus the Representative of the United States, stated:

We also believe that there is a need to think through how the international criminal court will affect existing extradition relationships, whether according to treaty or other legal mechanisms. The United States has, as we have pointed out, put considerable energy into entering into bilateral extradition treaties with numerous governments. The arrangements for the proposed court should be in addition to, and not frustrate the purposes of those treaty relationships. Thus we should consider whether a request for surrender of an accused person to the international criminal court should really take precedence over a proper request for extradition under an extradition treaty, or whether the court should function more as a mechanism to be used when national courts are unable, or unwilling, to act.<sup>31</sup>

This approach envisages a somewhat limited role for the court consistent with the "alternate" character of its jurisdiction.

This article has sought to highlight some of the major substantive issues which have engaged the attention of States, as reflected in the debate in the Sixth Committee at the 48th Session of the United Nations General Assembly. However the provisions of the draft Statute dealing with procedural issues such as, investigations, institution of proceedings, indictments, trials, sentence, appeals, etc raise equally important issues which should engage the close and careful examination of the international community of States. Such an examination should lead to the broadest possible international consensus on international criminal jurisdiction. Such a consensus is essential, if a repetition of the experience of the League of Nations initiative, where the proposed Convention for the establishment of an International Criminal Court failed to attract a sufficient number of Contracting States required for its entry into force, is to be avoided.

#### Endnotes

1. GA Resolution 177 (II) of 21 November 1947.
2. Yearbook of the International Law Commission, 1950. Vol II pp 374-378. Doc A/1316.
3. Yearbook of the International Law Commission, 1954. Vol II pp 150-152. Doc A/2673.
4. GA Resolution 3314 (xxix) of 14 December 1974.
5. GA Resolution 36/106 of 10 December 1981.
6. Official Records of the General Assembly, Forty-Sixth Session, Supplement No. 10. (A/46/10) Para 173.
7. GA Resolution 46/54 of 9 December 1991.
8. GA Resolution 47/33 of 25 November 1992.

9. Case concerning the interpretation and application of the 1971 Montreal Convention arising from the Aerial incident at Lockerbie. *Libyan Arab Jamahiriya v The United States of America*; Request for indication of Provisional Measures (Order dated 14 April 1992; International Court of Justice, Reports of Judgements—1992.)
10. See also A R Perera "Order of the International Court of Justice in the Lockerbie Dispute between Libya and the USA", *Sri Lanka Journal of International Law*, Vol. 4 (June 1992) p 175.
11. A/48/170; S/25801 of 21 May 1993.
12. Statement by President Clerides on the Topic International Criminal Court, Executive Session, CHOGM, October 1993.
13. Statement by the Representative of Germany, Mr Christoph Muller, Sixth Committee, 26 October 1993.
14. *Supra* n 12.
15. Proceedings of the International Conference on the Repression of Terrorism, Geneva, 1–16 November 1937; League of Nations Document: c 94, M 47, 1938 V, 1 June 1938 at p 63.
16. See Official Records of the General Assembly, Forty-Seventh Session, Supplement No. 10, (A/47/10) Para 99 and Annex.
17. For text of Draft Statute see, Report of the ILC on the Work of the Forty-Fifth Session, 3 May–23 July, 1993; GA Records, Forty-Eighth Session, Suppl No. 10 (A/48/10) Annex pp 258–335.
18. Report of the International Law Commission on the Work of the Forty-Fifth Session; *supra* n 17 at p 32.
19. *Idem* at p 33.
20. *Supra* n 13.
21. Statement by Mr A Rohan Perera, Representative of Sri Lanka, Sixth Committee, 27 October 1993.
22. Statement by Sir Robert Jennings, President of the International Court of Justice, UN General Assembly, 15 October 1993.
23. Report of the International Law Commission on the work of its Forty-Fifth Session; *Supra* n 17 at p 280.
24. *Idem* at p 281.
25. For eg: Statement of the Representative of Sri Lanka, *supra* n 21.
26. Statement by His Excellency Patrick Robinson, Representative of Jamaica, Sixth Committee, 26 October 1993.
27. *Supra* n 21.
28. Report of the International Law Commission on the work of its Forty-Fifth Session at p 278.
29. *Supra* n 26.
30. *Supra* n 28.
31. Statement by Hon Conrad K Harper, United States Representative, Sixth Committee, 26 October 1993. (Press Release USUN 171—(93).

## A Question of Humanity: Delay and the Death Penalty in Commonwealth Courts

*By John Hatchard, Senior Lecturer in Law, University of Buckingham, United Kingdom*

### Introduction

Does prolonged delay render a decision to carry out a sentence of death an inhuman and degrading punishment? This question has been considered by courts in several Commonwealth jurisdictions. Previously, the 1982 Privy Council judgment in *Riley v Attorney General of Jamaica*<sup>1</sup> was perhaps the best known authority on the issue,