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The Theoretical Basis of Punishment in International Criminal Law

By Dr. Farooq Hassan*

I. INTRODUCTION

Since 1945 a number of activities have been declared international criminal wrongs by international instruments which envisage punishment for the wrongdoer. While the list of such wrongs is still evolving, a question arises as to the theoretical basis for imposing punishment upon individuals pursuant to international law. The purpose of this article is to resolve this question by discerning a consistent theoretical basis for punishments prescribed by international law.

II. HISTORY

In order to comprehend the significance of punishment in international law, a brief historical review is essential to highlight the dramatic shift in orientation that has taken place since the holding of the Nuremberg Trials.¹ For centuries, international law confined itself to intra-state matters. Even a brief look at the "subjects" of international law reveals that the *raison d'être* of international law was to regulate the relationship of sovereign states and not to concern itself with individuals. In a famous statement addressing this point, Oppenheim stated:

Several writers maintain that the Law of Nations guarantees to every individual at home and abroad the so-called rights of mankind, without regarding whether an individual be stateless or not, or whether he be a subject of a member state - State of the Family of Nations or not. Such rights are said to comprise the right of existence, the right to protection of honour, life, health, liberty, and property, the right of practicing any religion one likes, the right of emigration, and the like. But such rights

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¹ See generally Lanterpacht, *The Law of Nations and the Punishment of War Crimes*, 21 BRIT. Y.B. INT'L L. 58 (1944); Historical Survey of the Question of International Criminal Jurisdiction, *Report by the Sec. Gen.*, 8 U.N. Doc. A/C.N.4/Rev.1 (1949); A. KIERIEM, *THE NUREMBERG TRIALS* (1959).

do not in fact enjoy any guarantee whatever from the Law of Nations, and they cannot enjoy such guarantee, since the Law of Nations is a law between States, and since individuals cannot be subjects of this law.²

Since international law did not recognize an individual as its proper subject, no international obligations were placed on individuals, especially those of a penal nature.

The major exception to this proposition was the recognition of piracy as a crime under internationally accepted behavior. Charles Cheney Hyde stated in 1945 that:

[Piracy] derives its internationally illegal character from the will of the international society. That society, by common understanding, reflected in the practice of states generally, yields to each of its members jurisdiction to penalize *any individuals* who, regardless of their nationality, commit certain acts within certain places. . . . National authorization of the commission of piratical acts could not free them from their international illegal aspect.³ (emphasis added)

Two points in this quotation merit closer review. First, the proscription of piracy, apparently, came from the "will of the international community." Accordingly, in theory, if the will of the international community could be attached to other forms of reprehensible individual conduct, it would be possible to recognize more international wrongs. By this process, the creation of international crimes seemed possible despite the theoretical objection long voiced by international jurists that only a state, and not an individual, could be the proper subject of international law. Arguably, this departure of practice from pure theory had existed for some time since nations, through international agreements, had prohibited slave trade, trafficking in women, and the transnational exportation of opium.

The second key point addressed by Hyde was the observation that the jurisdiction to try offenders for piracy was delegated by the international community to the state which was able to acquire personal jurisdiction over the pirate. Accordingly, since no transnational criminal tribunal then existed, by necessity, the international community allowed the international wrong of piracy to be tried by the tribunals of diverse states.

The *corpus juris* of customary international criminal law has a limited content and really only began to expand as a result of World War II.

² L. OPPENHEIM, INTERNATIONAL LAW § 292 (2d ed. 1912). These views originally appeared in the 1912 edition. His later editions modified this stand and reflected the growing importance of the individual in the international law field - particularly in human rights matters.

³ 1 C. HYDE, INTERNATIONAL LAW, CHIEFLY AS INTERPRETED AND APPLIED BY THE UNITED STATES 768-770 (2d rev. ed. 1945). The other exceptions relate to laws of war and are analyzed later in this article.

Important details of this development are analyzed later, but it should be emphasized that this expansion was largely brought about by the passing of several international instruments. International criminal law is still evolving by the methodology of obtaining the formal consent of states, which has resulted in the creation of various international wrongs. With regard to adjudication, the question of whether to create an international court of general criminal jurisdiction and/or courts of specialized competence or to delegate jurisdiction to the states remains as unresolved today as it was at the beginning of the century. Until international tribunals are created, however, international law has no option but to allow the indirect enforcement of its norms by domestic tribunals.⁴

III. OFFENSES UNDER INTERNATIONAL CRIMINAL LAW

An examination of the substance of different crimes is not usually undertaken in a discussion of the theoretical basis of punishment in the field of municipal jurisprudence. Most analyses focus on society's justification for punishment of an offender for violating the various rules of accepted conduct of that society. Similarly, this article does not intend to deal in detail with offenses created by the will of the international community by multinational agreements and instruments. Nevertheless, brief mention of the major wrongs which have been proscribed in the field of international criminal law is useful.

The International Military Tribunal at Nuremberg is a good starting point for such a discussion. Although recognizing a category of wrongs such as crimes against humanity, the Tribunal did not effectively distinguish them from "war crimes" (which, as later discussed, did exist in international criminal law). Since both of these offenses were held to be associated or arising out of war, international efforts were accelerated to respond to and address the issue of mass extermination of people on religious or ethnic grounds, whether committed in time of war or peace. Hence, the Genocide Convention of 1948 emerged as the first exhibition of the "will of the international community" to deal with mass extermination.⁵ This Convention aimed to punish all wrongdoers, even if they were

⁴ See generally 1 M. BASSIOUNI & V. NANDA, *A TREATISE ON INTERNATIONAL CRIMINAL LAW* (1973). See also Revised Draft Statute for an International Criminal Court, 9 U.N. GAOR Supp. (No. 12) at 23, U.N. Doc. A/2645 (1954). For earlier expositions on this subject see Wright, *Proposal for an International Criminal Court*, 46 AM. J. INT'L L. 60-72 (1952); Yuen-Li Liang, *Notes on Legal Questions Concerning the U.N., The Establishment of an International Criminal Jurisdiction First Phase*, 46 AM. J. INT'L L. 73 (1952); Finch, *Editorial Comment on the Draft Statute for an International Criminal Court*, 46 AM. J. INT'L L. 93-94 (1952).

⁵ Convention on the Prevention and Punishment of the Crime of Genocide, *opened for signature* Dec. 9, 1948, *entered into force* Jan. 12, 1951, 78 U.N.T.S. 277, 280, T.I.A.S. No.

duly elected rulers or public officials. The trial of such people was left to the jurisdiction of the state in whose territory the act complained of had taken place.⁶ However, the Convention contemplated that eventually a tribunal of transnational penal jurisdiction might deal with the offenses covered within the Convention.⁷

The Convention also defined genocide in Article II to mean:

Any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, 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 intended to prevent births within the group;
- (e) Forcibly transferring children of the group to another group.⁸

Article III specifically provided that punishment *shall* be given in the case of the commission of the following acts: genocide; conspiracy to commit genocide; direct and public incitement to commit genocide; attempt to commit genocide; and, complicity in genocide.⁹

A brief look at this first major attempt to expand the body of international criminal law after the creation of the Nuremberg jurisprudence shows that, broadly speaking, the development of international criminal law proceeded on two parallel tracks: first, the creation of criminal offenses which pertained to such serious conduct on the part of the offenders as to be dealt with by the international system of law which also prescribed punishment for the wrongdoer; and second, the eventual creation of international tribunals, but in the interval, adjudication in domestic tribunals of the states which had territorial jurisdiction over the offense in question.

1021, [hereinafter cited as Genocide Convention]. Under Article I, "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 prevent and to punish." *Id.* at 280.

⁶ Article VI of the Convention states: "Persons charged with genocide or any of the other acts enumerated in Article III shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction." Genocide Convention, *supra* note 5, at 280.

⁷ Genocide Convention, *supra* note 5, at 282. For details of the evolution of efforts towards the establishment of international criminal courts see generally B. FERENCZ, AN INTERNATIONAL CRIMINAL COURT (1967).

⁸ Genocide Convention, *supra* note 5, at 280.

⁹ *Id.*

The impetus for such a movement was World War II; international conscience had been utterly shocked by Nazi atrocities. Realistically, if an authoritarian government desired, it could exterminate, incarcerate, banish or do any other number of things against individuals or groups, for any reason. Amongst the first important authors to stress this point was Professor Lemkin of Poland in 1933.¹⁰

The subsequent history of international penal law shows that its future development closely followed the style and pattern of the Genocide Convention. International instruments created the offenses, provided definitions, envisaged punishment and called for adjudication usually by domestic tribunals. In this evolution of international penal law, three kinds of international agreements emerged.

The first attempts to create international penal responsibility were directed towards *governmental action*. Only state authorities that had the necessary power to indulge in reprehensible conduct were proscribed by the Genocide Convention. Thus, for example, Article IV of the Genocide Convention provided: "Persons committing genocide or any of the other acts enumerated in Article III shall be punished whether they are constitutionally responsible rulers, public officials or private individuals."¹¹

Similarly, soon after the formation of the Genocide Convention in August 1949, other Geneva Conventions were signed setting out certain obligations of states in dealing with war situations affecting, for example, prisoners of war, the wounded and sick, and civilians.¹² These Conventions, *inter alia*, envisaged that "grave breaches" by the armed forces of the signatories would entail penal responsibility.¹³ In the same period these efforts were underway, in 1948 the international community produced the Universal Declaration of Human Rights through the U.N. General Assembly. This provided the most comprehensive set of guidelines and expectations of the international community in this century concerning the sanctity and dignity of mankind. The Universal Declaration emphasized the duty of states to safeguard the fundamental human rights of those who came under their jurisdiction.¹⁴

¹⁰ R. LEMKIN, *LES ACTES CREANT UN DANGER GENERAL (INTERETATIQUE) CONSIDERÉ COMME DÉBITS DE DROIT DES GENS* (1933).

¹¹ Genocide Convention, *supra* note 5, at 280.

¹² See Convention Relative to the Protection of Civilian Persons in Time of War of August 12, 1949, opened for signature Aug. 12, 1949, entered into force Oct. 21, 1950, 6 U.S.T. 3516, T.I.A.S. No. 3365, 75 U.N.T.S. 287 (entered into force for U.S. Mar. 4, 1976) [hereinafter cited as Civilian Convention]; Convention Relative to the Treatment of Prisoners of War of 1949, Art. 3, 75 U.N.T.S. 135, 136-8 [hereinafter cited as Prisoner Convention].

¹³ Prisoner Convention, *supra* note 12, arts. 129-31, at 238-40.

¹⁴ For a comprehensive discussion of the provisions and effects of the Universal Declaration on Human Rights, see *THE INTERNATIONAL DIMENSIONS OF HUMAN RIGHTS* (K. VASAK

The message of the Genocide and the Geneva Conventions was continued in the following three decades. As a result of persistent efforts by members of the United Nations to incorporate the work of the International Law Commission, conventions or drafts of various conventions were produced in some important fields. These important instruments proscribed wrongs such as apartheid,¹⁵ racial discrimination,¹⁶ and the denial of civil rights and political rights¹⁷ by states.

& P. ALSTON 8th ed. 1982) (2 vols.). [hereinafter cited as HUMAN RIGHTS].

¹⁵ International Convention on the Suppression and Punishment of the Crime of Apartheid, G.A. Res. 3068, 28 U.N. GAOR Supp. (No. 30) at 75, U.N. Doc. A/9030 (1973) [hereinafter cited as Apartheid Convention].

Art. I declared apartheid to be a crime affecting humanity. It defines apartheid as practices of racial segregation and discrimination as practiced in southern Africa, and shall apply to the following inhuman acts committed for the purpose of establishing and maintaining domination by one racial group of persons over any other racial group of persons and systematically oppressing them:

(a) Denial to a member or members of a racial group or groups of the right to life and liberty of person;

(i) By murder of members of a racial group or groups;

(ii) By the infliction upon the members of a racial group or groups of serious bodily or mental harm, by the infringement of their freedom or dignity, or by subjecting them to torture or to cruel, inhuman or degrading treatment or punishment.

(iii) By arbitrary arrest and illegal imprisonment of the members of a racial group or groups:

(b) Deliberate imposition on a racial group or groups of living conditions calculated to cause its or their physical destruction in whole or part;

(c) Any legislative measures and other measures calculated to prevent a racial group or groups from participation in the political, social, economic and cultural life of the country and the deliberate creation of conditions preventing the full development of such a group or groups, in particular by denying to members of such a racial group or groups basic human rights and freedom, including the right to work, the right to form recognized trade unions, the right to education, the right to leave and to return to their country, the right to a nationality, the right to freedom of movement and residence, the right to freedom of opinion and expression, and the right to freedom of peaceful assembly and association;

(d) Any measures, including legislative measures, designed to divide the population along racial lines by creation of separate reserves and ghettos for the members of a racial group or groups, the expropriation of landed property belonging to a racial group or groups or to members thereof;

(e) Exploitation of the labour of the members of a racial group or groups, in particular by submitting them to forced labour;

(f) Persecution of organizations and persons, by depriving them of fundamental rights and freedoms, because they oppose apartheid.

For applying the principles of international criminal responsibility and the possible trials of offenders see Art. III, IV and V of this Convention.

¹⁶ International Convention on the Elimination of All Forms of Racial Discrimination, G.A. Res. 2106, 20 U.N. GAOR Supp. (No. 14) at 47, U.N. Doc. A/6014 (1965) [hereinafter cited as Discrimination Convention].

¹⁷ International Covenants on Civil and Political Rights, U.N. Doc. A/2929 (1955). As of January 1982, 28 States have ratified the Optional Protocol to the International Covenant

A second area of evolving international concern was acts of terrorism against civilian targets. International instruments were created to protect diplomats; to outlaw hijacking; to outlaw the taking of hostages; and to ban terrorist activity causing personal or property damage.¹⁸

A third international concern was directed towards offenses analagous to domestic criminal laws which were gaining a transnational character. Wrongs of this category included such activities as trafficking in drugs, stealing national treasures for illegal exportation, causing transnational environmental hazards, and engaging in slave trade.¹⁹ This three-fold classification of international crimes devised above is based not on juristic criteria, but rather on the personality of the offender and his motives.

IV. PUNISHMENT UNDER INTERNATIONAL LAW

The sanctions which one state may use against another state under the law of force are not treated in this article. Since states are considered proper subjects of the law of nations, retaliatory action by the violated state against the offending state is always permissible. Suffice it to say, this type of sanction is covered by international rules relating to reprisals, retaliation, and intervention, a part of the larger field of the law of force. Before the creation of the League of Nations, international law clearly envisaged a decentralized system of world community. Under this system, every state could decide for itself when to resort to one of these techniques of settling acts of aggression against the state. There were principles governing the resort to such measures, but in the absence of any international authority or forum, a state could always choose to invoke any one of the doctrines mentioned above to suit its purposes. The following section focuses on punishment inflicted on individuals under international law through a judicial tribunal.

A. *Violations of Laws of War: Prosecutions*

There are several recorded cases since the 17th century in which mil-

on Civil and Political Rights, thereby giving their citizens the right of individual petition to the U.N. Human Rights Committee, *supra* note 14, at 36 n.27.

¹⁸ See, e.g., Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents, *adopted* Dec. 14, 1973, *entered into force* Feb. 20, 1977, 28 U.S.T. 1975, T.I.A.S. No. 8532, G.A. Res. 3166, 28 U.N. G.A.O.R. Supp. (No.30) 146, U.N. Doc. A/9030 (1974) (*entered into force* for U.S. Mar. 18, 1977) [hereinafter cited as Agents Convention].

¹⁹ Various attempts have been made to draw up an international criminal code. See, e.g., M.C. BASSIOUNI, INTERNATIONAL CRIMINAL LAW: A DRAFT INTERNATIONAL CRIMINAL CODE (1980) [hereinafter cited as DRAFT CODE], which contains a tabulation of wrongs within the ambit of international penal law.

itary personnel were, or could have been, punished for unlawful actions during warfare.²⁰ The U.S. Articles of War provided for such prosecutions as early as 1775.²¹ During the American Revolution, trials of this nature were held by both the British and the American army authorities.²² This development of making warfare more humane and regulated continued throughout the 19th century. A milestone was reached with the start of the International Red Cross movement in the second half of the 19th century in Switzerland.²³ Among the first truly international agreements to emerge as a result of the ideology of the 19th century was the 1869 Geneva Convention, which enacted rules for ameliorating the condition and welfare of wounded soldiers. The movement of the International Red Cross had considerable impact and many countries passed domestic regulations for members of their own armed forces aimed at insuring proper conduct from its army.²⁴

After World War I, in 1919, the Treaty of Versailles called for some form of punishment of the Germans. For example, Article 228 of the Treaty provided for trial by military tribunals of German war criminals. Article 227 envisaged the trial of Kaiser William II.²⁵ Nothing of importance, however, took place in this field until the outbreak of World War II.

This movement reached a high-water mark with the passage of the four Geneva Conventions in 1949. For the first time, these Conventions distinguished simple breaches of domestic rules from "grave breaches."²⁶ These Conventions further required their signatories to prosecute the offenders of domestic laws by domestic tribunals under the laws of that state. By the common Articles 49, 50, 129 and 146 of the Four Geneva Conventions, respectively, "grave breaches" were declared to be international crimes.²⁷ Since these provisions were contained in a multilateral treaty, they illustrate the process of laying down principles of interna-

²⁰ The "unlawful actions" envisaged by these rules covered areas, such as failing to maintain 'good order' amongst soldiers or for violating the rules of Law of Nations applicable to warfare. See generally Gross, *The Punishment of War Criminals*, 11 NETH. INT'L L. REV. 356 (1955).

²¹ See generally G. DAVIS, *A TREATISE ON THE MILITARY LAW OF THE UNITED STATES* (rev. ed. 1918).

²² See Colby, *War Crimes*, 23 MICH. L. REV. 482, 499-500 (1925).

²³ See *infra* notes 48-60 and accompanying text.

²⁴ See generally G. DRAPPER, *THE RED CROSS CONVENTIONS* (1958).

²⁵ See Wright, *The Legal Liability of the Kaiser*, 13 AM. POL. SCI. REV. 121 (1919). He was to be tried for the "Supreme offense against international morality and the sanctity of treaties," but was in fact never tried. See also Garner, *Punishment of Offenders Against the Laws and Customs of War*, 14 AM. J. INT'L L. 70 (1920).

²⁶ For a comprehensive discussion of the Four Conventions, see 2 HUMAN RIGHTS, *supra* note 14, at 427-47.

²⁷ *Id.*

tional penal responsibility for future application by the will of the international community.

As a result, particularly of the Nuremberg jurisprudence, it was finally established that through judicial procedures, individuals could be punished for at least some international crimes, whether declared as such by international law or by treaty.²⁸ From a theoretical viewpoint, this was certainly a matter of controversy and debate. Since by its own premises, international law at that time did not as a general rule recognize or give any right to an individual, how could it attempt to impose criminal liability on an individual. Amongst the proponents of such a view is Kelsen, who said that only a state had the *locus standii* under international law to be a proper plaintiff or defendant.²⁹ Conversely, an individual was automatically excluded.³⁰ Kelsen further emphasized that the U.N. Charter, as well as the Statute of the International Court of Justice, did not recognize the capacity of an individual to bring proceedings before international institutions.³¹

However, the Nuremberg Charter expressly rejected this theoretical objection: "The official position of defenders, whether as Heads of State or responsible officials in Government departments, shall not be considered as freeing *them from responsibility* or mitigating punishment."³² In other words, irrespective of the fact that a guilty state may also be culpable, the offender of the laws of war remained answerable. Art. 8 of the Charter further declared: "The fact that defendant acted pursuant to order of his Government or of a superior shall not free *him from responsibility*, but may be considered in mitigation of punishment, if the Tribunal determines that justice so requires."³³ (emphasis added). Thus, by 1946 it could justifiably be said that international law did accept, in certain identified and limited circumstances, the notion of individual criminal responsibility; and, that the award of punishment would largely be indirect, through state tribunals, and only on rare occasions would punishment be directly by internationally constituted forums.³⁴

²⁸ For details of cases see *Proceedings in the Trial of the Major War Criminals Before the International Military Tribunal*, 42 vols. (1949), [hereinafter cited as Blue Series]; the trials were published as *Trials of War Criminals Before the Nuremberg Military Tribunal*, 14 vols. (1949) [hereinafter cited as Green Series].

²⁹ Kelsen, *Collective and Individual Responsibility for Acts of State in International Law*, 1948 JEW. Y.B. INT'L L. 226.

³⁰ *Id.*

³¹ *Id.* at 229-35.

³² 15 Green Series, *supra* note 28, at 11, Art. 7.

³³ 15 Green Series, *supra* note 28, at 12, Art. 8.

³⁴ For statements of this position, see S. GLUECK, *WAR CRIMINALS, THEIR PROSECUTION AND PUNISHMENT* (1944); J. KEENAN & B. BROWN, *CRIMES AGAINST INTERNATIONAL LAW* (1950); R. WOETZEL, *THE NUREMBERG TRIALS IN INTERNATIONAL LAW* (1960); E. DAVIDSON, *THE TRIAL OF THE GERMANS* (1966).

V. THE THEORETICAL BASIS OF PUNISHMENT IN JURISPRUDENCE

The drive to hold people criminally responsible under international law must now be examined to see upon what legal theory it is based. By way of caution, it must be mentioned that the answer to a similar inquiry within the confines of municipal jurisprudence is far from conclusively settled. The debate remains colorful today. While a great body of juristic opinion asserts that deterrence is the underlying basis for inflicting punishment, others maintain that retribution or rehabilitation of the offender justifies the imposition of punishment. Thus, when venturing to resolve this issue of international legal theory, neither a facile solution nor a necessarily "right" one can be expected. Before proceeding to analyze the present state of international criminal law to determine whether a consistent theory of punishment exists, it is necessary to briefly look at this subject from a juridical viewpoint.

In jurisprudence, a comparative analysis of different legal systems reveals that, by far, the most widely advocated justification for punishment is deterrence.³⁵ One of the most powerful expositions of this view is to be found in the writings of Plato. He said:

[N]o one punishes the evildoer under the notion, or for the reason, that he has done wrong, — only the unreasonable fury of a beast acts in that manner. But he who desires to inflict rational punishment does not retaliate for a past wrong which cannot be undone; he has regard to the future, and is desirous that the man who is punished, may be deterred from doing wrong again. He punishes for the sake of prevention. . . .³⁶

The object, therefore, of deterrence is to maintain *social control*. Prima facie, this theory asserts that if one wrongdoer can be made uncomfortable with the infliction of evil or unpleasant consequences, it will deter others and thus keep the order of the society intact. The utilitarians were keen to emphasize that the threat of unpleasant consequences will persuade the rational potential violator to choose logically and thus refrain from the act contemplated or likely to be undertaken. A modern authority of high juristic standing maintains that criminal punishment operates "by announcing certain standards of behavior and attaching penalties for deviating . . . and then leaving individuals to choose. This is a method of social control which maximizes individual freedom within the framework of the law."³⁷

³⁵ Morris, *Impediments to Penal Reform*, 33 U. CHI. L. REV. 627 (1966). Morris maintains that with insignificant exceptions, every major legal system "has deterrence as its primary essential characteristic." *Id.* at 631.

³⁶ Plato, *Protagoras*, in *WORKS OF PLATO* 193, 211-12 (I. Edman ed. 1956).

³⁷ H.L.A. HART, *PUNISHMENT AND RESPONSIBILITY* 23 (1968); see also Andenaes, *The Morality of Deterrence*, 37 U. CHI. L. REV. 649, 651 (1970).

According to this view, the giving of advance notice or warning of the state's punitive ability in cases of violations of its laws helps to keep the potential violators within the societal rules of behavior. One is reminded of a famous quote of Bentham: "Punishment must be the object of dread more than the offense is an object of desire."³⁸ Thus, an impressive body of writings maintains that deterrence is the *real* motive behind the infliction of punishment. Indeed, according to many, this is the majority view.³⁹

The second theoretical justification in the municipal field focuses on retribution as the justification for punishment. Kant, a leading supporter of the retribution "school," emphasized that the utilitarians' view was wrong inasmuch as: "[O]ne man ought never to be dealt with merely as a means subservient to the purpose of another. . . ."⁴⁰ While clearly not recognized by many authorities as representative of the correct position, this theory is echoed even in contemporary cases. In one such case, an American court observed that although retribution was not viewed with great fervor or favor by the great majority of authorities, the legal system had not reached a stage where the notion of "just desserts" could be completely taken out of consideration.⁴¹

A third theory expounded in modern writings about punishment is rehabilitation. This view stresses that in the past, criminal law has focused more on the *act* rather than on the *personality* of the offender. The advocates of this theory stress that the punishment should fit the criminal and not the crime; the aim ought to be to treat the person in a way that he can eliminate the propensity to commit the wrongful act in the future.⁴²

Likewise, this brief summary of the three major theories of municipal jurisprudence serves as the basis of any later discussion aimed at discerning the probable theory of punishment in the international criminal law field.

³⁸ Bentham, *Theory of Legislation* in READINGS IN JURISPRUDENCE AND LEGAL PHILOSOPHY 329, 332 (Cohen & Cohen eds. 1951).

³⁹ Morris, *supra* note 35, at 638.

⁴⁰ Kant, *Philosophy of Law* in READINGS IN JURISPRUDENCE AND LEGAL PHILOSOPHY 320 (Cohen & Cohen eds. 1951). *But see* O.W. HOLMES, *Punishment, Morals and the External Standard (from Lecture II)* in THE COMMON LAW 43-45 (1881). *See also* Platt, *The Meaning of Punishment*, 2 ISSUES IN CRIMINOLOGY 79 (1966):

"Judicial punishment can never be imposed merely for the purpose of securing some extrinsic good, either for the criminal himself or for civil society. . ." *Id.*

⁴¹ United States v. Bergman, 416 F. Supp. 496, 500 (S.D.N.Y. 1976).

⁴² *See* Hadden, *A Plea For Punishment*, 23 CAMBRIDGE L.S. 117 (1965); *see also* G. PATON, TEXTBOOK OF JURISPRUDENCE (1972) where the author states, at 360: "Modern criminology considers that the *personality* of the offender is as important as his *act* and emphasizes that the wrongdoer is not only a criminal to be punished but a patient to be treated." (emphasis in original).

VI. ESSENTIAL FEATURES OF THE INTERNATIONAL CRIMINAL JUSTICE SYSTEM

Before determining whether one or more of the three theories of punishment under municipal criminal law has been the basis of the punishment of crimes created under international law, the essential features of the international criminal justice system must be examined.

The most important characteristic is that, unlike domestic legal systems, international law never dealt with the notion of individual culpability. While historically crimes like piracy had been recognized as international wrongs, their punishment was left to domestic legal systems. Furthermore, the *conception* of a criminal act like piracy for the purposes of punishment may differ from one system of law to another. Under French law, for example, an armed vessel with irregular papers in peacetime can be guilty of piracy.⁴³ On the other hand, under an English Act of 1829, a British subject engaged in slave trade was declared guilty of piracy.⁴⁴ While international law conceptually recognized piracy to be robbery on the high seas, domestic systems could define the crime as they wished. The two examples given above were wrongs of piracy under the domestic laws of France and England, but were not tantamount to piracy, *jure gentium*. Thus a domestic offense may cover the same area as an international offense, or it may have a larger or more restricted definition as a result of domestic legislation.

Historically, the list of criminal wrongs under international law only began to emerge and enlarge as an aftermath of the happenings in Germany during World War II. The undeniable cause of the acceleration of the development of international criminal law was the jurisprudence developed at Nuremberg. The manifest purpose of the Nuremberg jurisprudence was a desire to punish the wrongdoers of the Nazi regime for perpetrating activities which shocked the moral judgment of the international community.⁴⁵ But an important reason behind punishing the Nazis was also future prevention of similar happenings: "It is high time that we act on the juridical principles that aggressive war-making is illegal and criminal . . . so as to make war less attractive to those who have governments and the destinies of people in their power."⁴⁶ It is then quite reasonable to conclude preliminarily that deterrence was a major goal of emerging post-World War II international criminal law. The aim was to make the act in question, in the words of Justice Jackson, "less

⁴³ J. BRIERLY, *THE LAW OF NATIONS* 312 (1963).

⁴⁴ *Id.*

⁴⁵ See generally B. FERENCZ, *supra* note 7, for details of events leading to the establishment of the Nuremberg Tribunal.

⁴⁶ Jackson, *Report to the President by Mr. Justice Jackson, June 6, 1945*, in *INTERNATIONAL CONFERENCE ON MILITARY TRIALS* 42, 52-53 (1945).

attractive" to future violators.⁴⁷ Likewise, retribution was not the sole aim of the victors in judicially trying the members of the defeated German war machine. The long-term object of punishing the major Nazi war criminals was made manifest by the U.S. Chief Prosecutor Jackson when he said:

That four great nations, flushed with victory and stung with injury stay the hand of vengeance and voluntarily submit their captive enemies to the judgment of the law is one of the most significant tributes that Power has ever paid to Reason The common sense of mankind demands that law shall not stop with the punishment of petty crimes by little people. . . .⁴⁸

It is thus submitted that the rationale for the events which created the bulk of international criminal law immediately following World War II was to deter others in the future from doing the things done by the Nazis.

The types of crimes which were created by international instruments focused on tyrannical governments as well as private individuals. On one hand, some instruments emulating the ethos of the Nuremberg jurisprudence aimed at preventing massive brutalities by a government of the people under its jurisdiction. Other instruments were created to deal with unlawful conduct on a transnational plane by individuals or groups on the grounds of real or perceived grievances or for purely economic gains. It should be noted that while governments or members thereof were the targets of the first set of international criminal rules, non-governmental targets such as groups or individuals were the targets of the latter kinds of international rules.

VII. INTERNATIONAL CRIMINAL PUNISHMENT: WHAT THEORY?

Reformation can be immediately eliminated as a possible justification. International law, unlike municipal law, is not concerned with the rehabilitation of the offender. Municipalities mete out punishment to create better citizens. International law, however, is not concerned with citizens and hence does not seek the rehabilitative objectives of domestic law. In addition, unlike municipal law which defines numerous activities as crimes, international law identifies very few activities as criminal. Consequently, deterrence or retribution, or both of these theories may lie behind the notion of international criminal punishment.

Before the outbreak of World War II, the body of international criminal law was at best amorphous. With few notable exceptions in the areas of piracy and warfare, the idea of a state or an individual being punished

⁴⁷ *Id.* at 53.

⁴⁸ R. JACKSON, *THE CASE AGAINST THE NAZI WAR CRIMINALS* 3 (1946).

for a violation of an international norm has only gained relatively recent acceptance in the international community.

As a general principle, physical violence is prohibited by municipal law. However, international law has no option but to accept the fact of war—violence between states.⁴⁹ International law can only regulate the consequential disaster when armed conflict erupts.

Humanitarian movements, like the one pioneered by Henry Dunant, signaled the growing desire to create tighter regulation of armed conflict at the beginning of the 20th century. The Hague Conferences of 1899 and 1907, aimed at disarmament, acknowledged that there existed no replacement for war as an instrument to maintain international security. The Hague delegates, therefore, rather than seeking to achieve the unrealistic goal of banning war altogether, sought merely to establish rules regulating the conduct of armed warfare.

Eventually, a few developments emerged for controlling certain kinds of internationally unacceptable conduct.⁵⁰ Principally, the aim of the Hague Law was to lessen the rigors of warfare.⁵¹

The thrust of these international legal developments was to preserve "chivalrous" warfare rather than to create a body of international penal law. However, as a result of massive violations of human rights and of laws of war by Germany in the Second World War, the Allies took it upon themselves to *punish* the perpetrators of these wrongs by judicial process. For example, on December 17, 1942, the British Foreign Secretary, on behalf of the Allied governments, condemned the notorious activities of Nazi Germany "[i]n the strongest possible terms this bestial policy of cold-blooded extermination and reaffirmed their solemn resolution to ensure that those responsible for those crimes shall not escape retribu-

⁴⁹ See, e.g., Geneva Convention Relative to the Protection of Civilian Persons in Time of War of August 12, 1949, *opened for signature* Aug. 12, 1949, *entered into force* Oct. 21, 1950, 6 U.S.T. 3516, T.I.A.S. No. 3365, 75 U.N.T.S. 287 (*entered into force* for U.S. Feb. 2, 1956).

⁵⁰ See, e.g., The Declaration of Paris, April 16, 1856, which abolished privateering. See also Declaration of St. Petersburg December 11, 1868, prohibiting the use of projectiles in war under 400 grams charged with explosive or inflammable substances.

⁵¹ For examples of some of the well known international instruments of this nature, see, e.g.,

(a) Hague Convention, Oct. 18, 1907, Conv. VIII, arts. 1-5, concerning automatic and contact mines.

(b) Hague Convention, Oct. 18, 1907, Conv. IX, arts. 1-6, concerning bombardment by naval forces in time of war.

(c) Hague Convention, Oct. 18, 1907, Conv. VI, arts. 1-5, concerning enemy merchantmen at the outbreak of hostilities.

(d) Hague Convention, Oct. 18, 1907, Conv. VII, arts. 1-6, concerning the conversion of merchantmen into men-of-war.

tion."⁵² Subsequently, on October 30, 1943, the Moscow Declaration was issued which envisaged the trial of members of the German armed forces and of the ruling party by judicial tribunals for wrongs such as massacres, atrocities, executions and killings of hostages.⁵³

One of the consequences of the Moscow Declaration was the creation of the International Military Tribunal at Nuremberg.⁵⁴ This tribunal had jurisdiction principally to try three kinds of offenses: crimes against peace, war crimes and crimes against humanity.⁵⁵ On October 18, 1945, 24 major war criminals were indicted. The Tribunal rendered a judgment on September 30, 1946, in which the accused were sentenced for various wrongs. All of the accused who were ultimately sentenced by the Tribunal were found guilty, *inter alia*, of ordinary war crimes recognized by the existing customary international law. As previously described, the major provisions of Hague Convention IV, 1907, which sought to codify the laws of war, had been declared to be customary law by the time of the Nuremberg Trials. At Nuremberg, the Tribunal relied particularly on Articles 46, 50, 52 and 56 of the Annexed Regulations of the Convention, and ruled that they had been violated by the Nazis. A portion of the original preamble and one article of this famous Convention are provided so that the reader may appreciate the object of creating the laws of war as well as perhaps understand the idea of punishment executed by the international

⁵² 385 Parl. Deb., H.C. (5th ser.) cols. 2083-84 (1942).

⁵³ For the text of the Moscow Declaration, see HISTORY OF THE UNITED NATIONS WAR CRIMES COMMISSION 107 (1948).

⁵⁴ See U.N. Charter and Judgment of the Nuremberg Tribunal, U.N. Sales No. 1949, vol. 7, at 3 (1949).

⁵⁵ *Id.* at 4, Art. 6, which defined the jurisdiction of the International Military Tribunal. It reads as follows:

The following acts, or any of them are crimes against coming within the jurisdiction of the Tribunal for which there shall be individual responsibility:

(a) *Crimes against Peace*: namely, planning, preparation, initiation, or waging of a war of aggression, or a war in violation of international treaties, agreements, or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing;

(b) *War Crimes*: namely violations of the laws or 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;

(c) *Crimes against Humanity*: namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or 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.

community:

Considering that, while seeking means to preserve peace and prevent armed conflicts between nations, it is likewise necessary to bear in mind the case where the appeal to arms has been brought about by events which their care was unable to avert;

Animated by the desire to serve, even in this extreme case, the interests of humanity and the ever progressive needs of civilization;

Thinking it important, with this object, to revise the general laws and customs of war, either with a view to defining them with greater precision or to confining them within such limits as would mitigate their severity as far as possible. . . .⁵⁶

It is important to note that the substance of the codified law was described to be "general laws and customs of war." The idea of subjecting the guilty party to punitive measures is reflected in Article 3, which reads: "A belligerent party which violates the provisions of the said Regulations shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces."⁵⁷ In sum, the post-1945 era witnessed the recognition of various wrongs as crimes by both conventional and customary international law with the attachment of some kind of punishment, usually damages, for their violation.

Historically, Article 3 created a new kind of rule in that a violation of the Hague Regulations was specifically to be punished. Previously, only reparations for war damage had been claimed by victors.⁵⁸ Apparently, a literal reading of this Article suggests that a violation of a rule of the Hague Convention was sufficient to allow the injured party to ask for compensation. It is also arguable that the principle could be applied not only to a violation of the Hague Regulations, but also to a violation of a rule of the international laws of war.⁵⁹

In sum, while up to 1945 a violation of the laws of war was generally satisfied, if at all, by payment of compensation by the defeated state, the jurisprudence of the Nuremberg Trials made punishment of the individual both necessary and possible. Furthermore, while in the former case the penalty was the payment of compensation by defeated *states*, in the latter instance the *individuals* responsible for violations of laws of war were to be punished directly. Since this entire body of law had largely developed as a response to the Nazi atrocities, it is also undeniable that

⁵⁶ Hague Convention, Oct. 18, 1907, Conv. IV, at Preamble.

⁵⁷ *Id.* The reference to Regulations in the text were an annexed part of the Convention and are generally referred to as 'Hague Regulations' and constitute the operative parts of the Convention.

⁵⁸ 2 L. OPPENHEIM, INTERNATIONAL LAW 293 (2d ed. 1961).

⁵⁹ *Id.* at 295.

retribution cannot be ruled out as a factor justifying the punishment of the accused.

Thus, it is suggested that while, as a matter of policy, punishment was based on wider considerations of deterring future occurrences of this kind, an immediate reason for punishing the guilty was retribution. The approval of the principles of the Nuremberg Tribunal by the U.N. General Assembly was a reflection of the desire to formulate an international criminal code incorporating the Nuremberg jurisprudence in order to deter all future lawbreakers. Since the object of creating a norm is to dictate future behavior, deterrence would justify the imposition of punishment for that norm's violation.

Retribution, on the other hand, though not historically a significant part of the evolutionary trends of international criminal law, was a definite component of at least the punishments awarded by the International Military Tribunal at Nuremberg. While understandable in the context of Nuremberg, retribution does not appear to be the predominant theory in the other post-World War II developments in this area. A great deal has been said by many authorities who question the moral justification for retribution in the majority of criminal cases. Beccaria, a leading author of the 19th century on the subject said: "[Punishment should] always be done so as to make *the greatest impact and the most enduring impression upon all members of society*, while inflicting the *least pain on the body of the offender*."⁶⁰ (emphasis added). While the severity and certainty of punishment seem acceptable according to the deterrent theory for maintaining a legal order,⁶¹ something remains to be said for its moral justification.

A. 'Morals' in Deterrence

The morality and justice of this theory is predicated upon the awareness that man, a rational being, is fully capable of understanding the consequences of most acts, but chooses to act hedonistically as a self-seeker. The morality, therefore, of deterrence lies in preventing such tendencies from assuming conduct violative of society's rules by making an example of violators.⁶²

Philosophers such as Kant objected to this mode of thinking.⁶³ Some modern writers have made similar arguments: "Judicial punishment can never be imposed merely for the purpose of securing some extrinsic good,

⁶⁰ Monachesi, *Pioneers in Criminology IX: Cesare Beccaria*, 46 J. CRIM. L.C. & P.S. 439, 445 (1955).

⁶¹ *Id.* at 446.

⁶² For an analysis of the deterrence model, see F. ZIMRING & G. HAWKINS, *DETERRENCE* (1973).

⁶³ See Kant, *supra* note 40 and accompanying text.

either for the criminal himself or for civil society. . . ."⁶⁴ These views are essentially directed towards the institution of punishment in the domestic law, but there is no reason why, in principle, the same cannot be said about this controversy in the international criminal field.

Just as the general welfare of the citizens and the supreme need for maintaining the social order in the domestic scene are considered paramount, the need for ensuring the sanctity of the most fundamental values of the international community also demands that potential violators be forewarned from committing breaches of the international order. Indeed, since the wrongs for which punishment is prescribed by international law are not only few in number but too grave to be left unattended altogether, the position of deterrence must be emphasized. The importance of the announced intention of the international community to take specific action against individual violators is evidenced by its creation of a set of international rules for matters which are of crucial significance. Since, unlike municipal law, international law is without a full-fledged system of enforcement, there is no alternative but to ensure that the threat of pre-announced sanctions is realized.⁶⁵ The realization that one's own security and freedom will be in jeopardy by punishment may help in preventing that violation from occurring.

While these arguments tend to explain the functional use of punishment in the international criminal field, they do not really reveal much about the *morality* of this institution. In truth, the only morality, if any at all, is the argument provided by the utilitarians: punishment is the only method, at an unavoidable cost, to maintain a working system of control.⁶⁶ The desire for observance of the rules of the international system comes, in theory, from the consent of the members of this community. Presumably these rules represent the interests and security of all responsible members of the international community.⁶⁷

While producing results, deterrence creates the theoretical dilemma that infliction of punishment of an individual is being undertaken for the sake of extraneous beneficial goals.⁶⁸ Kant particularly criticized this aspect of deterrence to justify retribution since that was by itself the end, and presumably a deserved one.⁶⁹

Although this criticism is sound from a philosophical view, and valid

⁶⁴ Bittner & Platt, *The Meaning of Punishment*, in 2 ISSUES IN CRIMINOLOGY 79 (1966).

⁶⁵ Singer, *Psychological Studies of Punishment*, 58 CALIF. L. REV. 405 (1970); see also Farris *Sentencing*, 18 CRIM. L. Q. 421 (1975).

⁶⁶ Michael & Wechsler, *Criminal Law and Its Administration*, in READINGS IN JURISDICTION AND LEGAL PHILOSOPHY 341 (Cohen & Cohen eds. 1951).

⁶⁷ Andeanes, *The Morality of Deterrence*, 37 U. CHI. L. R. 649, 651 (1970).

⁶⁸ See the observations of the Author in *Time*, Sept. 25, 1978, at 40.

⁶⁹ For a discussion of Kant's position, see Ewing, *A Study on Punishment II: Punishment As Viewed By the Philosopher*, 21 CAN. BUS. REV. 102 (1943).

to some extent in the field of municipal law, it has no real application in the international field. In the field of international criminal law, the introduction of punishment has resulted from a realization that when gross violations of basic human rights occur, the civilized world should terminate such conduct by punishing the wrongdoer for the benefit of all. Prevention of future mischief is the underlying theme.

Even in the case of the Nuremberg jurisprudence, where retribution was present, the deterrent aspect was nevertheless equally apparent. Indeed, the norms which this jurisprudence produced were of a far-reaching declaratory nature and clearly emphasized the deterrent or preventive aspects of punishment.

Deterrence was the major justification for punishment in international criminal law up to 1945; an inquiry is necessary to determine if it is also the basis in the post-World War II period. The international crimes which have been created since 1945, such as hijacking, kidnapping, and killing of protected persons, are very similar to municipal law crimes. Indeed, in some form, modern international crimes overlap or are identical to a wrong in the penal laws of the various states.

There are two factors which explain the strong influence of municipal jurisprudence on international crimes. First, the list of international criminal wrongs is not very long. At the intra-state level, there are rules of humanitarian law, war crimes aggression by one state against another,⁷⁰ the illegal use of certain kinds of weapons,⁷¹ genocide,⁷² war crimes against humanity,⁷³ and violations of the basic human rights by flagrant

⁷⁰ G.A. Res. 3314, 29 U.N. G.A.O.R. Supp. (No. 31) at 142, U.N. Doc. A/9631 (1974). See B. FERENCZ, 2 *DEFINING INTERNATIONAL AGGRESSION: THE SEARCH FOR WORLD PEACE* 50-53 (1975); Stone, *Hopes and Loopholes in the 1974 Definition of Aggression*, 71 *AM. J. INT'L L.* 224 (1977). For economic coercion, unlawful if against the U.N. Charter, see Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States, 25 U.N. G.A.O.R. Supp. (No. 28) at 121, U.N. Doc. A/AC. 125/2625 (1970).

⁷¹ See, e.g., Convention on the Prohibition of the Development Production and Stockpiling of Bacteriological (Biological) and Toxic Weapons and on their Destruction, 27 U.N. G.A.O.R. Supp. (No. 30) at 17, U.N. Doc. A/8189 (1970); Geneva Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases of Bacteriological Methods of Warfare, Doc. C. 362 M. 135 1927 IX (1927); Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space and Under Water, Aug. 5, 1963, 14 *U.S.T.* 1313, T.I.A.S. No. 5433; Treaty on the Prohibition of The Enplacement of Nuclear Weapons on the Sea Bed and The Ocean Floor and in the Sub-Soil Thereof, 25 U.N. G.A.O.R. Supp. (No. 28) at 11, U.N. Doc. A/8189 (1970); Treaty on Principles Governing the Activities of States in Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies, Jan. 27, 1967, 18 *U.S.T.* 2410, T.I.A.S. No. 6347; Antarctic Treaty, Dec. 1, 1959, 12 *U.S.T.* 794, T.I.A.S. No. 4780.

⁷² See Genocide Convention, *supra* note 5, at Art. II.

⁷³ See Bassiouni, *International Law and the Holocaust*, 9 *CAL. W. INT'L L.J.* 202 (1979).

abuse of a state's authority such as apartheid⁷⁴ and racial discrimination.⁷⁵ Finally, there are the crimes committed by non-government and other private individuals, consisting of slavery,⁷⁶ piracy,⁷⁷ hijacking,⁷⁸ unlawful actions against protected persons,⁷⁹ the taking of hostages,⁸⁰ unlawful transfers of national treasures, counterfeiting internationally-commercially negotiable paper,⁸¹ and the transnational transportation of drugs.⁸²

Secondly, the major adjudication mechanism at the international level (barring the trial of the major Nazi war criminals by the International Military Tribunal) has been through the indirect method. As the crime of piracy indicates, the absence of an international forum obligated the states to be its agents for the purposes of enforcement. As such, the states remained the agency for prosecuting individuals for piracy. The Genocide Convention followed a similar pattern of trial by national tribunals until an international criminal court could be created. The four Geneva Conventions of 1949 also envisaged the contracting parties to make appropriate provisions for prosecuting the violations of the Conventions committed by individuals coming within a country's jurisdiction.

In the absence of a transnational tribunal of criminal jurisdiction, the states will continue to enforce international criminal law. Indeed, even municipal enforcement is a hypothetical possibility since no sanction of any significance has yet been undertaken solely on the basis of a violation of transnational laws since World War II. That is not to say that there have been no violations of international criminal law. There have been some serious commissions of *prima facie* crimes which were probably unlawful under the Nuremberg jurisprudence, the Genocide Convention, or

⁷⁴ See Apartheid Convention, *supra* note 15 and accompanying text.

⁷⁵ See Discrimination Convention, *supra* note 16 and accompanying text.

⁷⁶ See Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, U.N. Doc. E/Conf. 24/23 (1957).

⁷⁷ For a contemporary definition of piracy, see the *Informal Composite Negotiating Text of the Law of the Sea Conference*, reprinted in 16 INT'L. L. MATERIALS 1108, at Art. 101.

⁷⁸ See Convention on the Suppression of Unlawful Seizure of Aircraft, signed Dec. 16, 1970, entered into force Oct. 14, 1971, 22 U.S.T. 1641, T.I.A.S. No. 7192, 860 U.N.T.S. 105 (entered into force for U.S. Oct. 18, 1970); Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, signed Sept. 23, 1971, entered into force Jan 26, 1973, 24 U.S.T. 564, T.I.A.S. No. 7570 (entered into force for U.S. Feb. 28, 1973).

⁷⁹ See Agents Convention, *supra* note 18 and accompanying text.

⁸⁰ See International Convention Against the Taking of Hostages, adopted Dec. 17, 1979, G.A. Res. 34.146, 34 U.N. G.A.O.R. Supp. (No. 39), U.N. Doc. A/34/189 (1979).

⁸¹ See International Convention for the Suppression of Counterfeiting Currency, opened for signature April 20, 1929, 112 L.N.T.S. 372 (1931).

⁸² For background on this topic, see Convention for the Suppression of Illicit Traffic in Dangerous Drugs, 198 L.N.T.S. 299 (1936).

the Geneva Conventions. However, international political considerations have prevented both the trial of such offenders and the creation of an international criminal court up to now. No grounds exist for hoping that this trend will change in the near future. In the absence of regular international tribunals, enforcement possibilities are weak and will remain so in the foreseeable future.

As such, the quest for finding an acceptable theory of punishment under international criminal law remains largely philosophical and academic.⁸³

B. Moral Values Enforced?

Perhaps even more than in municipal law, the statement that deterrence actually enforces, or reinforces, the moral values of a society is applicable in international criminal law. The major international criminal wrongs, those for which trials have been envisaged by the international community, are really those actions which forced the international conscience to respond as it did at Nuremberg.

The interdependence of moral values and enforcement mechanisms of criminal law is usually found in municipal systems. The social environment generates a set of values, some of which may find themselves reduced into legal rules. For such rules, the basis is the moral values of that society. Conversely, if the laws were abolished, those attitudes which collectively comprise those societal values may themselves be altered. Without criminal law, therefore, it is not unreasonable to expect a deterioration of those values. Accordingly, the threat of punishment is incorporated into the socialization process of a particular society. If the prohibited conduct is usually dealt with by punishment, the immorality of the act will become accepted into the norms of that society.⁸⁴ Some authorities maintain that because a state is the protector of a given society, it should actually lend guidance in the role of punishing the wrongdoer.⁸⁵

The above argument is applicable in the international criminal field. The world community has, in a few cases, like those of hijacking or war crimes by the Nazis, collectively shown its willingness to punish such conduct. Indeed, the reinforcing of international morals in World War II was further strengthened by the penal law of the Nuremberg Trials and by the creation of the Genocide Convention. Thus, while not always necessarily true, criminal laws of punishment do contain the ethos of a society's

⁸³ See B. Ferencz, *Compensating Victims of War Crimes*, 12 VA. J. INT'L L. 343 (1972).

⁸⁴ For a similar statement of this position, see Goecki, *Miranda and Beyond*, 1975 U. ILL. L.F. 296.

⁸⁵ See Weiler, *Why Do We Punish? The Case for Retributive Justice*, 12 U. BRIT. COLUM. L.R. 295 (1978).

morality. It is, of course, possible that in an immoral society, its laws, by the same reasoning will be equally 'immoral.'

VIII. CONCLUSION

Deterrence is the major justification for various international criminal laws. While retribution was a factor in conjunction with deterrence as a rationale for the Nuremberg Trials, retribution is not a consistent factor in the making of most international penal laws, appearing only periodically when particular wrongful acts shock the international conscience. If nothing else, deterrence may serve as a reminder that international law does not always allow its most flagrant violators impunity: "The shared wisdom of generations teaches meaningfully . . . that the utilitarians have a point; we do, indeed, lapse often into rationality and act to seek pleasure and avoid pain."⁸⁸

⁸⁸ *United States v. Bergman*, 416 F. Supp. 496, 500 (S.D.N.Y. 1976).