WILLIAM A SCHABAS*

The creation of an International Criminal Court, long a distant dream of human rights activists and criminal law scholars, now finally seems inexorable. Although there have been occasional and isolated murmurings of difficulty, there is now virtually no doubt that a major diplomatic conference will take place in Rome in June, 1998, and that it will conclude with the adoption of an international treaty, the statute of the permanent international criminal court. There are a few more hurdles: the October meeting of the Sixth Committee of the General Assembly will provide a chance to take the pulse of Member States; and there are still a few remaining sessions of the Preparatory Committee, at which some outstanding issues will be debated. It is, of course, naive to expect that the PrepCom sessions will resolve some of the truly fundamental issues that divide States, of which the most important currently seems to be the "trigger mechanism". Understandably, States are nervous about how cases may be brought before the Court. After resisting the whole concept for more than forty years, how can there be any surprise that many States - particularly the major powers - will want to make sure they retain a degree of control over the Court's docket, mainly so as to make sure that their names do not appear on it.

Ultimately, this and similar issues must reach the floor of the diplomatic conference, where compromise solutions will be hammered out in informal negotiations and then, if consensus is impossible, the matter put to a vote. Consensus on everything may, indeed, prove impossible. This should be no surprise, nor should an instrument that fails the test of unanimity be viewed as unacceptable. Some States are still opposed to the project, and they may attempt to reduce the draft statute to an impotent text before, ultimately, declining to ratify it in any case. Adoption of a text by consensus means that it can never go beyond the lowest common denominator. While this may be acceptable for programmatic resolutions in the General

---

* *Dean, Department of Law, University of Quebec at Montreal, Canada.*

Assembly and other bodies, such an approach may prove to be a fatal impediment where the creation of an international criminal court is concerned.

These brief remarks are not intended to review all of the results obtained and the open issues, an impossible task in such limited time. On the subject of results obtained, suffice it to say that the success of the project now seems assured. The work and contribution of so many over years and even decades means that the promise of Article VI of the Convention for the Prevention and Punishment of the Crime of Genocide to create an international criminal jurisdiction, made by the General Assembly on December 9, 1948, will come true some forty-nine years later. As for open issues, I will attempt to address some of the procedural matters that remained unresolved following the August session of the Preparatory Committee, and the question of penalties, due to be considered in the upcoming December meeting of the Preparatory Committee.

1. Procedural questions

Debate about the procedural regime of the permanent criminal court has been enormously enriched by the practice of the two ad hoc criminal tribunals, established to adjudicate and punish war crimes and crimes against humanity committed in the former Yugoslavia and in Rwanda.

Originally, the Security Council had suggested that the Tribunals should observe an adversarial-type procedure, similar to that developed by the common law. The Rules adopted by the judges of the two Tribunals seem to give effect to this, although the practice of the Tribunals also reflects elements borrowed from the largely inquisitorial approach of the Romano-Germanic system. Nor is the practice of the two Tribunals entirely consistent. It appears that the Arusha tribunal leans somewhat more towards the Romano-Germanic system than the court in The Hague, perhaps a result of the personal influence of its president, Senegalese jurist Liaty Kama. The Appeals Chamber has not yet been able to enforce a coherent procedural model on both Tribunals because of its refusal to consider interlocutory matters.

Churchill once declared that the greatest legacy of England was the common law, which has taken root, thanks to British colonialism, in the far corners of the globe. Napoleon stated that he considered his greatest achievement to be the codification of civil law. Napoleon's Code penal, would appear to have filled the gaps where the common

law did not reach, particularly in Europe, Africa and Latin America. Both Churchill and Napoleon were convinced that their system was the better. They were both, no doubt, partly right and partly wrong. The two systems each have much to offer as international law struggles with the creation of a new jurisdiction. The problem is getting to the best parts of both, because each system is defended by loyal and astonishingly intolerant partisans who see only good in their own system and only bad in the other one.

Fortunately, this may be changing, thanks to the ad hoc Tribunals. What seems to be happening in Arusha and The Hague is an ongoing experiment with comparative criminal procedure, borrowing what may or may not prove to be the better elements of the two major systems of domestic criminal procedure. And this is influencing the debates about procedural issues for the permanent International Criminal Court.

There is then the question of guilty pleas. The August PrepCom spent several hours debating an amendment designed to provide for an expedited procedure in cases where an accused pleads guilty. While this may once have seemed highly theoretical, one accused before the Yugoslavia Tribunal has already taken such a step, admitting guilt and asking the court to sentence him in the absence of any independent evidentiary findings. Lawyers trained in the Romano-Germanic system were shocked at the suggestion, and when Drazan Erdemovic actually pleaded guilty in The Hague, the French judge who presided the hearing, Claude Jorda, was noticeably uncomfortable with the procedure, as his written judgment suggests.

Guilty pleas in the common law system are often linked to the system of "plea bargaining". However, plea bargaining as it is generally practised is used to deal with high volume crimes and seems clearly inapplicable to an international court designed to judge the world's criminal elite. There is much misunderstanding among Romano-Germanic lawyers about the legal effects of a guilty plea in the common law. It does not generally bind the court, which may and should refuse a guilty plea if the accused suggests the existence of a defence, or if the evidence of the crime appears insufficient. Moreover, common law judges are not bound by the common suggestions that prosecutor and defense lawyer may make following successful plea negotiations. In the Erdemovic case, the accused hinted at a defence of duress, but this was dismissed by the Tribunal which considered such a plea to be unavailable in the case of crimes against humanity, except in mitigation of sentence. What the guilty plea can offer the International Criminal Court is a technique of

expediting cases when an accused admits guilt. Surely this cannot be so objectionable to lawyers trained in the other system? Like the common law judge, the instructing magistrate of the Romano-Germanic system is not bound by an admission of guilt, although the latter will most certainly be influenced by such a development. A confession of criminal responsibility by the accused is surely a fact of paramount relevance, whatever the system of procedure.

There is also the issue of in absentia trials. The Secretary-General's report to the Security Council at the time the International Criminal Tribunal for the former Yugoslavia was being created suggested that in absentia trials, a feature of the Romano-Germanic system of criminal procedure, was not being contemplated. However, international human rights norms, and specifically article 14 of the International Covenant on Civil and Political Rights, do not forbid such a practice. They do, of course, entrench the right of an accused to be present at trial, but an accused may renounce to such a right by refusing to give effect to a summons to attend in court. The Human Rights Committee has already ruled that in absentia trials do not violate article 14 of the Covenant. The judges of the ad hoc Tribunals attempted to meet the Romano-Germanic system half way by devising a special procedure that closely resembles the in absentia trial, with the significant distinction that it does not impose a penalty once criminal liability has been determined. Saving this distinction, however, the so-called "Rule 61" procedure looks suspiciously similar to the in absentia practice. Rule 61 states:

Rule 61: Procedure in Case of Failure to Execute a Warrant

a) If a warrant of arrest has not been executed, and personal service of the indictment has consequently not been effected, and the Prosecutor satisfies the Judge who confirmed the indictment that:

i) he has taken all reasonable steps to effect personal service, including recourse to the appropriate authorities of the State in whose territory or under whose jurisdiction and control the person to be served resides or was last known to him to be; and

ii) he has otherwise tried to inform the accused of the existence of the indictment by seeking publication of newspaper advertisements pursuant to Rule 60, the Judge shall order that the indictment be submitted by the Prosecutor to his Trial Chamber.

b) Upon obtaining such an order the Prosecutor shall submit the indictment to the Trial Chamber in open court, together with all the

evidence that before the Judge who initially confirmed the indictment and any other evidence submitted to him after confirmation of the indictment. The Prosecutor may also call before the Trial Chamber and examine any witness whose statement has been submitted to the confirming Judge.

c) If the Trial Chamber is satisfied on that evidence, together with such additional evidence as the Prosecutor may tender, that there are reasonable grounds for believing that the accused has committed all or any of the crimes charged in the indictment, it shall so determine. The Trial Chamber shall have the relevant parts of the indictment read out by the Prosecutor together with an account of the efforts to effect service referred to in Sub-rule (a) above.

d) The Trial Chamber shall also issue an international arrest warrant in respect of the accused which shall be transmitted to all States.

e) If the Prosecutor satisfies the Trial Chamber that the failure to effect personal service was due in whole or in part to a failure or refusal of a State to co-operate with the Tribunal in accordance with Article 28 of the Statute, the Trial Chamber shall so certify, in which event the President shall notify the Security Council.

The only reason why the Rule 61 proceeding is not being used more widely at Arusha and The Hague is that the judges simply do not have time to hear the cases. They are too busy hearing cases where the accused is present to invest time considering cases where the accused is still at large.

In debates on the issue, common lawyers often treat the matter as if it is a question of fundamental rights. Actually, common law has never found in absentia procedure to be of any great interest for the same reason that the international judges use the Rule 61 procedure so infrequently. Common law views it as a waste of judicial energy to hear evidence in cases where the accused cannot be punished. And even common law jurisdictions recognise exceptions to the general rule, for example in summary hearings on relatively minor charges or where an accused absconds while a trial is underway. In other words, common law makes a practical objection, not one of fundamental principle.

The limited use of the Rule 61 procedure in The Hague has shown the procedure to be of some value. In the Karadzic and Mladic case, heard in July, 1996, the Tribunal reviewed evidence over several days of hearings and came to the conclusion that a strong prima facie case of guilt existed. This conclusion is of immense legal and above all political significance, especially should it ultimately prove

impossible to actually bring the two accused to court. Even common lawyers have understood and appreciated the value of such proceedings and hopefully the drafters of the statute for the International Criminal Court will profit from this experience.

2. Penalties

The agenda of the December session of the PrepCom includes the question of penalties. The Statutes of the two ad hoc tribunals contain brief provisions dealing with sentencing, proposing essentially that sentences be limited to imprisonment (thereby tacitly excluding the death penalty, as well as corporal punishment, imprisonment with hard labour, and fines) and that they be established taking into account the "general practice" of the criminal courts in the former Yugoslavia or Rwanda, as the case may be. The Rules of Procedure and Evidence adopted by the judges in accordance with the Statutes, provide somewhat more detail, identifying some of the aggravating and mitigating factors that may be taken into account by the trial court during the sentencing process. To date, discussions about sentencing in the International Law Commission, the Sixth Committee and the PrepCom suggest there will be little or no change from the approach in the case of the ad hoc Tribunals.

An important issue in the establishment of penalty provisions is the nulla poena sine lege rule. Review of the drafting of the statutes for the ad hoc Tribunals show how important this principle was. It resulted in a reference to sentencing practice in the former Yugoslavia and in Rwanda and the suggestion that the Tribunals should look to domestic sentencing practice in determining the appropriate sentence. But application of this concept has proven difficult if not impossible, as the Trial Chambers of the Tribunal in The Hague have indicated in their sentencing judgments in the cases of Erdemovic and Tadic. It would indeed be unfortunate if the drafters of the statute of the permanent Court get overly excited about this question. After all, the nulla poena issue was settled at Nuremberg, when Nazi war criminals were sentenced to death or life imprisonment even in the absence of positive law texts setting out the range of sentences in black letter provisions.

Some useful guidance in this respect comes from the European Court of Human Rights, which took a less "positivistic" approach to the nullum crimen nulla poena problem in two judgments issued on November 22, 1995. The rule nullum crimen nulla poena sine lege is enshrined in article 7 of the European Convention of Human Rights.

The cases before the Strasbourg Court dealt with the common law of England, and with the existence of an offense of spousal rape despite the absence of any legislated text. The accused argued that while it was open for Parliament to create a new offense of spousal rape, they could not be condemned for rape of their wives given that the common law defines rape as non-consensual intercourse with a woman other than the wife. Endorsing the report of the European Commission on Human Rights, the European Court affirmed that "laws" as they are meant in the maxim sine lege include unwritten laws, and moreover that these laws may be redefined over time by judges in accordance with changing social values. The question, said the Court, is not whether a positive law text enacted by Parliament exists prior to the commission of the offence, but only whether criminal liability was sufficiently foreseeable and accessible to the accused. Clearly, the European Court of Human Rights would have little difficulty with a sentencing provision relying on general principles of law or customary law, as was the case at Nuremberg. Can an accused seriously argue that since Nuremberg the possibility of a serious prison sentence for war crimes and crimes against humanity, up to and including life imprisonment, was not "accessible and foreseeable"?

Classical criminal law theory proposes several objectives for punishment: deterrence, retribution, protection of the public and rehabilitation. In the Erdemovic case, the Trial Chamber turned to the declarations of Security Council members at the time Resolution 827 was adopted, in May, 1993. These show, according to the Trial Chamber, "that they saw the International Tribunal as a powerful means for the rule of law to prevail, as well as to deter the parties to the conflict in the former Yugoslavia from perpetrating further crimes or to discourage them from committing further atrocities. Furthermore, the declarations of several Security Council Members were marked by the idea of a penalty as proportionate retribution and reprobation by the international community of those convicted of serious violations of international humanitarian law". The Trial Chamber continued: "The International Tribunal's objectives as seen by the Security Council - i.e. general prevention (or deterrence, reprobation, retribution (or "just deserts"), as well as collective reconciliation - fit into the Security Council's broader aim of maintaining peace and security in the former Yugoslavia. These purposes and functions of the International Tribunal as set out by the Security Council may provide guidance in determining the punishment for a crime against humanity".

Much of the struggle for international justice, and the battle against impunity, is a search for truth. As United States permanent representative Madelene Albright told the Security Council at the time of the adoption of the Statute for the Yugoslav tribunal, in May 1993: "Truth is the cornerstone of the rule of law and it will point towards individuals, not peoples, as perpetrators of war crimes. And it is only the truth that can cleanse the ethnic and religious hatreds and begin the healing process". The eternal contribution of the Nuremberg judgment is not so much the individual punishment of the handful of accused, most of whose names have been long forgotten by all but the experts, but rather in its affirmation of the facts of Nazi atrocities. The jurisprudence of Nuremberg and the subsequent national military tribunals remain the most authoritative argument against revisionists who attempt to deny the existence of the gas chambers at Auschwitz and the other horrors of Nazi rule. Yet once the truth is determined and guilt or innocence pronounced, the court's work is not completed. It must also render an individualised sentence, one that fits the crime. The precedents set by the post-Second World War tribunals, as well as general principles derived from comparative criminal law, provide some guidance in this respect.

At Nuremberg and Tokyo, and in the various successor trials of the national military tribunals, retribution played a major role in the fixing of sentences, as is shown by the widespread use which was made of the death penalty. The statements by Churchill and Roosevelt of October 25, 1941 focused exclusively on retribution as the objective of war crimes prosecutions. As the Trial Chamber notes in Erdemovic, retribution was also a major factor in the sentence of death handed down by the Supreme Court of Israel in the Eichmann case. Historically, retribution derives from the lex talionis: "If a man injures his neighbour, what he has done must be done to him: broken limb for broken limb, eye for eye, tooth for tooth. As the injury inflicted, so must be the injury suffered".

Retribution is synonymous with vengeance. Accompanying the new focus of human rights law upon the battle against impunity, the significance of retribution as an objective in sentencing is heard with disconcerting frequency. Activists whose social vision is normally pervaded by tolerance and forgiveness become, in the name of retribution, militant advocates of severe punishment. It is often said that society cries out for punishment, of "justice". Subsidiarily, retributive theorists argue that if the authorities fail to punish, then individual self-help will take over, and vigilante action will become the rule.

But while it may be important to recognise the danger of such developments, surely a human rights approach must aim at combating these tendencies in society, which run counter to the rule of law and the protection of individual rights. In the Security Council, when the Statute of the International Tribunal for Rwanda was being adopted, New Zealand's representative Keating stated: "We do not believe that following the principle of 'an eye for an eye' is the path to establishing a civilised society, no matter how horrendous the crimes the individuals concerned may have committed". At best, the retributive sentiments of victims and their families, and of the public in general, must be taken into account in developing appropriate policies to deal with punishment for gross human rights abuses. But their encouragement may have unwanted and unhappy side effects, particularly where society is concerned with rebuilding and reconciliation. It should not be forgotten that many of the most appalling crimes in both the former Yugoslavia and Rwanda were committed in the name of retribution for past grievances.

Punishment is also expected to fulfil an objective of rehabilitation. This seems to be of great significance in the context of human rights violations, where reconstruction and reconciliation are paramount. The Security Council resolution creating the Rwanda tribunal expresses the view that prosecutions will contribute to "the process of national reconciliation and to the restoration and maintenance of peace". That punishment must take this goal into account can also be discerned with reference to human rights norms. Article 10(3) of the International Covenant on Civil and Political Rights states that "[t]he penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation". The United Nations Human Rights Committee, in its second general comment on article 7 of the International Covenant on Civil and Political Rights, has stated that "[n]o penitentiary system should be only retributory; it should essentially seek the reformation and social rehabilitation of the prisoner".

Rehabilitation's importance in criminal sentencing is also recognized in the Standard Minimum Rules for the Treatment of Prisoners. The American Convention on Human Rights states: "Punishments consisting of deprivation of liberty shall have as an essential aim the reform and social readaptation of the prisoners". In the Document of the Moscow Meeting of the Conference on the Human Dimension of the CSCE, the Participating States undertake to "pay particular attention to the question of alternatives to imprisonment". It is of considerable significance that Judge Jorda,

in the Erdemovic sentencing decision, considered the condemned man to have a *personalite amendable*. It may be difficult or impossible for society to reconcile and rebuild without serious efforts at rehabilitation undertaken within the context of effective action against impunity.

The recognized principles of punishment - foremost among them deterrence and retribution - are derived from criminal law, and are applicable generally, not just to the context of human rights violations. Human rights law has its own contribution to make to the debate, by its prohibition of punishment which is "cruel, inhuman and degrading".

Although this is a norm which remains subject to a degree of vagueness and imprecision, and one which is also liable to evolve over time, clearly punishment which is disproportionate or arbitrary is inadmissible. Certain punishments, notably corporal punishments and the death penalty, are also difficult to reconcile with the prohibition of cruel, inhuman and degrading punishment. It is no doubt for this reason that most of the draft provisions on sentencing for the permanent Criminal Court have excluded all forms of punishment that violate the offender's physical integrity, specifying that punishment shall be limited to imprisonment". This represents enormous progress since the Nuremberg tribunal, whose Statute provided: "The Tribunal shall have the right to impose upon a Defendant, on conviction, death or such other punishment as shall be determined by it to be just".

Exclusion of the death penalty is a significant benchmark in its progressive abolition, which has been a theme of both criminal and human rights law since the end of the Second World War. In the debates in the International Law Commission, the Sixth Committee and the PrepCom show, there have only been a few, isolated calls for employment of the death penalty. Despite suggestions that Singapore and other retentionist States intend to make a fight on the point, their chances would seem remote.

Although Singapore and its allies have occasionally succeeded, in the past, in obstructing abolitionist resolutions within international bodies using procedural gambits, this is a rearguard fight. They have never dared make an aggressive, proactive pitch in favour of the death penalty, and any effort along these lines seems assured of ignominious rejection. Thus, the adoption of the penalty provision for the new International Criminal Court will also be an important stage in international recognition of the goal of abolition of the death penalty.

The issue of life imprisonment seems more problematic. During debates in the International Law Commission, several members took the view that life imprisonment without possibility of parole or other mitigation of sentence constituted punishment which is cruel, inhuman and degrading. However, they eventually compromised on this point. The Convention on the Rights of the Child forbids "life imprisonment without possibility of release", but of course the provision is only applicable to offenders under the age of eighteen or for crimes committed beneath that age. Life imprisonment without possibility of release effectively excludes the possibility of rehabilitation which is not only a legitimate goal of sentencing but one which is dictated by human rights law. Therefore, it seems particularly important that the statute of the International Criminal Court contemplate the possibility of provisional release or parole.

The elimination of the death penalty is already an important step away from retributive punishment. Although the ad hoc Tribunals are probably entitled to impose sentences of life imprisonment without violating the nulla poena sine lege principle, serious thought should be given to the wisdom of such a course, except in the rare cases where offenders are so disturbed that protection of the public against recidivism overrides all other sentencing considerations. As a general rule, they should never lose sight of rehabilitation, conscious of its close relationship to the social imperative of reconciliation in a wartorn country. If parole or some other form of release cannot be assured, then life sentences should not even be considered.

3. Conclusion

The establishment of the permanent International Criminal Court draws upon three distinct but related areas of law: international criminal law, international humanitarian law and international human rights law. It is the presence of this third area that sets it apart from its predecessors. An early effort at international justice, proposed in the 1919 Versailles Treaty but never effectively implemented, was concerned essentially with punishing individual leaders for their responsibility in the breaches of international treaties by sovereign states. International human rights law was in its infancy when the allies planned the Nuremberg tribunal, in August 1945, and to the extent that human rights abuses were punished, this was only on the condition that they were related, as crimes against humanity, to the armed conflict. Lest we forget, this seminal experiment in justice for humanity was entitled the

"international military tribunal". Thus, until the 1990s, international justice addressed primarily the laws of armed conflict. Yet it was because of the danger of legitimising armed conflict that the United Nations originally chose to remain aloof from the field of international humanitarian law. War was outlawed by the Charter, and an area of law whose purpose was only to regulate the waging of war could hardly be compatible with the aims of the Organization.

Our new models eschew the nexus with illegal war. Moreover, they muddle the classic dichotomy between international and non-international armed conflict, a distinction rooted in the specifics of humanitarian law but one which is irrelevant from a human rights standpoint. To be sure, international criminal justice in the 1990s bears the imprimatur of its legal predecessors, notably in the somewhat anachronistic preoccupation with infractions whose recognition dates to 1945. Indisputably, however, the new court is fundamentally interested in massive violations of human rights which we continue to label violations of the laws and customs of war, or grave breaches of the humanitarian law conventions, or crimes against humanity, out of concern for the nullum crimen principle.

As a human rights tribunal, the permanent International Criminal Court will provide a model of enlightened justice. Judges around the world, sitting in the most mundane criminal cases, will be influenced by its approaches to criminal law. Hopefully, the Court will draw on the best elements of the major legal systems, particularly in terms of criminal procedure. Also, international justice should provide an example of an enlightened and progressive approach to sentencing of offenders. Lessons learned in this system will without doubt percolate back down into national systems, to the benefit of all.