

Universal Criminal Jurisdiction and an International Criminal Court

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Questions of Implementing a Code of Offences Against the Peace and Security of Mankind

The work of the United Nations International Law Commission on the Draft Code of Offences against the Peace and Security of Mankind has revived debate on the proper application of the Code in international practice. The recognition that states must cooperate if they are effectively to combat international crimes has, in recent decades, led to the conclusion of numerous conventions incorporating the principle of universal criminal jurisdiction: universal jurisdiction is meant to guarantee the prosecution and punishment of the offences defined in the conventions. Many states believe this is the only realistic way to implement the Draft Code of Crimes against the Peace and Security of Mankind. Others, however, view the effective implementation of the Code to be dependent not upon universal criminal jurisdiction, but rather upon the establishment of an international criminal court.

This polarization of views is not new. Changed international circumstances should, however, now make it possible to find a way to combine the advantages of universal criminal jurisdiction with the guarantees of legal protection that an international criminal court can provide. In this connection one should realize that recognition of both universal criminal jurisdiction and the competence of an international criminal court will ultimately only curtail concepts of sovereignty which are basically already outdated under the existing order of international law. This is true, at any rate, insofar as offences against the peace and security of mankind are concerned; acts constituting offences of this kind are international matters lying outside the area of state sovereignty. Accordingly, if states are to strengthen the international legal order, they must create as effective a mechanism as possible for the international prosecution of these offences.

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The UN and an International Criminal Court

The identification and prosecution of international offences led to proposals for the creation of a permanent international criminal court early on, most notably after the First World War, when the permanent International Court of Justice was established. Interest was then rekindled after the Second World War, when the Nuremburg and Tokyo international military tribunals were created.¹

The Tokyo and Nuremburg tribunals were created on the basis of states' criminal jurisdiction over the main war criminals.² The joint exercise of individual jurisdiction undoubtedly had considerable influence on the juridical quality of the trials and the corresponding verdicts, making their probative value indisputable. The Tokyo and Nuremburg tribunals, which amounted to the joint exercise of national criminal justice of first instance on the basis of universally punishable acts, have had a lasting influence on both the definition of the elements of international offences against the peace and security of mankind and on the responsibility of states for international offences. Due to the cold war, however, utilization of this experience got bogged down.

In the years following the Nuremburg and Tokyo proceedings, there was an unmistakable desire to generalize the experience gained from the *ad hoc* jurisdiction of the international military tribunals, as evidenced by the UN General Assembly's statement confirming "the principles of international law recognized by the Nuremburg Tribunal and in the judgment of the Tribunal."³ In fact, the UN General Assembly directed the UN Committee on Codification of International Law to treat the formulation of the Nuremburg principles – either in the form of a general codification of offences against the peace and security of mankind or in the form of an international criminal court – as a particularly urgent task.⁴ At the same time, the International Law Commission (ILC) was asked to formulate the Nuremburg princi-

¹ On the history of these proposals see M.C. Bassiouni, *A Draft International Criminal Code and Draft Statute for an International Criminal Tribunal* (1987) 1; M.C. Bassiouni, *International Criminal Law* (1986) at 3, and his survey of the numerous official and unofficial texts at 187; M.C. Bassiouni, *International Criminal Law: A Draft International Criminal Code* (1980); B.B. Ferencz, *An International Criminal Court – A Step Toward World Peace – A Documentary History and Analysis* (1980); Bloom, 'Introduction to Various Drafts Concerning an International Criminal Court', in J. Stone & R.K. Woetzel (eds.), *Toward a Feasible International Criminal Court* (1970) 159; which also contains a survey of the proposals since the First World War by J. Graven entitled *La Première Tentative Consécutive à la Guerre de 1914-1918* at 96, and the subsequent Chapters 11, 12 and 13 (at 96-141); see also the Historical Survey of the Question of International Criminal Jurisdiction compiled by the UN General Secretary in UN Doc. A/CN.4/7/Rev.1, New York 1949.

² Resolution 95 (I) of 11 December 1946, reprinted in P. Klein, *Die UNO* (1966) 191.

³ Resolution 177 (II) of 21 November 1947.

⁴ See P. A. Steiniger, *Der Nürnberger Prozeß*, Vol. I, (1957) 51; P. A. Steiniger, *Fall 3, Der Juristenprozeß* (1969) 13.

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ples and to prepare a draft code of offences against the peace and security of mankind based on those principles.

In addition, the question of an international criminal court was raised during the drafting of the Convention against Genocide.⁵ Unfortunately, however, the discussion was from the beginning confined to the question of whether the prosecution of crimes encompassed by the Convention should fall under the national jurisdiction of the state in which the offence was committed or under the competence of an international criminal court.⁶ The compromise finally reached, today embodied in Article VI of the Genocide Convention, provides that the competent courts are those of the state on whose territory the offence is committed or "an international criminal court which can dispense justice for those states party to the convention that have recognized its jurisdiction."⁷ This formula replaced the language of the original draft bearing a reference to the competence of an international criminal court. It should be noted, however, that many states which voted against an international criminal court in the context of the Genocide Convention subsequently declared that in principle they had nothing against the establishment of such a court; they claimed they did not vote for it at the time because it was a mere hope, not a possible reality.⁸

In light of this debate, the General Assembly concluded that "the development of the international community will lead to a growing need for an international judicial body competent to judge certain crimes under international law," and called on the International Law Commission "to study the desirability and possibility of establishing an international judicial organ for the trial of persons charged with genocide or other crimes over which jurisdiction will be conferred upon that organ by international conventions".⁹ At the center of the discussion on an international criminal court were such major names as Donnedieu de Vabres, Pella, Graven and Sottile.¹⁰

At its very first meeting, the International Law Commission appointed two rapporteurs to study these questions, R.J. Alfaro and A.E.F. Sandstrøm. Alfaro regarded the creation of an international criminal court as desirable and possible.¹¹ Sandstrøm, however, was of the opinion that this sort of court could not be effective in

⁵ On this, see Historical Survey, *supra* note 1, at 30.

⁶ See *id.* at 36.

⁷ See text reprinted in *Völkerrecht, Dokumente Teil 1* (1980) 220.

⁸ Historical Survey, *supra* note 1, at 41.

⁹ Resolution 260 B (III) 9 December 1948.

¹⁰ Donnedieu de Vabres, 'De l'organisation d'une juridiction criminelle internationale', *Revue internationale de droit pénal* (1949) 3; V. Pella, *Memorandum sur l'établissement d'une Cour criminelle internationale*, doc.A/JAC.48/3, 17 July 1951; V. Pella, 'Towards an International Criminal Court', *AJIL* (1950) 37; Graven, 'La juridiction pénale internationale', *Revue de droit international des sciences diplomatique et politique* (1951) 363; Sottile, 'Le Problème de la Création d'une Cour pénale internationale', *Revue de droit international des sciences diplomatique et politique* (1951) 115.

¹¹ UN Doc. A/CN.4/15.

the given international circumstances and therefore was undesirable.¹² Following exhaustive discussion, the International Law Commission, by a large majority, came to the finding that creation of such an organ was desirable and possible.¹³

Virtually simultaneously, J. Spiropoulos submitted his first report on the proposed code of offences against the peace and security of mankind. He discussed the problem of its implementation¹⁴ and, in principle, set forth two possibilities: the creation of an international criminal court or, alternatively, prosecution by national courts. After discussing the pros and cons of both possibilities, he recommended that the model of the Genocide Convention be followed. Prosecution should be incumbent upon the state on whose territory the crime had been committed and other states should be obliged to extradite. In cases of dispute there should be mandatory competence for the International Court of Justice in order to guarantee control over the functioning of the system.¹⁵

The General Assembly then decided to sever the direct link between discussions surrounding the potential establishment of an international criminal court and discussions on the proposed Code and to set up a Committee on International Criminal Jurisdiction to study questions regarding the court.¹⁶ However, only a few states responded to the Committee's report which, in its annex, included draft statutes for an international criminal court.¹⁷ Nevertheless, the report was exhaustively discussed at the Seventh General Assembly. Then, after considering whether or not to defer the matter, the General Assembly set up a new committee to study the circumstances and consequences of creating an international criminal court and to examine the proposed court's potential relationship to the United Nations.¹⁸ This committee's report, which contained thoroughly re-worked draft statutes, was submitted to the General Assembly in 1954¹⁹ to be considered along with two other documents the International Law Commission's second draft for a code of offences against the peace and security of mankind²⁰ and the report of the committee dealing with the definition of aggression, which had come to no result.²¹ In the end, the Assembly decided

12 UN Doc. A/CN.4/20; on this, see Graven, 'La Décision Positive de la Commission du Droit International sur L'Institution d'une Cour Criminelle Internationale', in J. Stone & R.K. Woetzel (eds.), *Toward a Feasible International Court* (1970) 168 and the following chapters 17 and 18 (at 168-222).

13 See YbILC (Vol. II) (1950) 15.

14 See YbILC (Vol. II) (1950) 253. A/CN.4/25.

15 *Id.* at 276.

16 UN Doc. Resolution 489 (V) of 12 December 1950.

17 UN Doc. A/2136.

18 UN Doc. Resolution 687 (VII) of 5 December 1952.

19 UN Doc. A/2645.

20 See YbILC (Vol. II) (1954); see also the text reprinted in *The Work of the International Law Commission* (New York 1988) at 141.

21 UN Doc. A/2638.

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only to continue efforts at consensus on a definition of aggression;²² work on statutes for an international criminal court and work on the Draft Code of Offences against the Peace and Security of Mankind was postponed.²³

This brought work on an international criminal court under the UN almost to a standstill. And although work on a code for offences against the peace and security of mankind was resumed in 1981 – after the 1974 adoption of a definition of aggression – the debate concerning statutes for an international criminal court was not resumed. In the meantime, however, the question of international criminal jurisdiction had been raised in another context – in connection with work on the Convention on the Suppression and Punishment of the Crime of Apartheid.²⁴ In 1972 a Human Rights Commission working group submitted a study on apartheid and international criminal law.²⁵ Article V of the Anti-Apartheid Convention kept open the possibility that in the future, in addition to the principle of universal criminal jurisdiction to be applied by all states' domestic courts, there would be an international criminal court with jurisdiction over crimes of apartheid. In this it went further than the Convention against Genocide, since it set universal criminal jurisdiction and jurisdiction of an international criminal court side by side. The international criminal court remained, however, a mere possibility in this context as well. Serious attempts to set up any such criminal court were never made. In 1980, in its programme for the second half of the Decade of the Struggle against Racism, the UN General Assembly directed the Human Rights Commission to prepare statutes for an international criminal court²⁶ to support implementation of the Anti-Apartheid Convention's provisions regarding the prosecution of the crime of apartheid. Later that year a draft prepared by Bassiouni was submitted to member states for comment.²⁷ But work in the UN context again abated.

Meanwhile, during the 1970s, non-governmental international organizations put forward several proposals for an international criminal court.²⁸ Then, in 1979 the ILA, reworking prior proposals, presented a complete draft for an international commission of investigation and an international criminal court;²⁹ a revamped version of this draft was adopted in Paris in 1984.³⁰

22 Resolution 895 (IX) of 4 December 1954.

23 Resolution 898 (IX) of 14 December 1954.

24 The text in *Völkerrecht, Dokumente Teil 3* (1980) 886.

25 See UN Doc. E/CN.4/1075 of 15 February 1972.

26 See Resolution 34/24, Annex para. 20, of 15 November 1979.

27 See UN Doc. E/CN.4/AC/22 CR at 19/Rev.1.

28 See, e.g., Draft Statute for an International Criminal Court, Foundation for the Establishment of an International Criminal Court, Wingspread 1971 and 1973; Draft Statute for an International Criminal Court, World Conference on World Peace through Law, Abidjan 1979.

29 See Report of the 59th Conference, Belgrade 1980, London 1982, at 400.

30 See Report of the 61st Conference, Paris 1984, London 1985, at 257; see also the Draft Statute of the International Tribunal in M.C. Bassiouni, *A Draft International Criminal Code and Draft Statute for an International Criminal Tribunal* (1987) 217.

In sum, the question of an international criminal court has repeatedly arisen in the UN in connection with the debates on the Code of Offences against the Peace and Security of Mankind. The International Law Commission, however, has never been given a mandate to draw up statutes.³¹ But in 1988, after the International Law Commission in effect adopted the principle of universal jurisdiction as a basis for the Code – though without ruling out the possibility that in the future an international criminal court would be created³² – the General Assembly took note of “the approach currently envisaged by the International Law Commission in dealing with the judicial authority to be assigned for the implementation of the provisions of the draft code, and encourage[d] the Commission to explore further all possible alternatives on the question.”³³ This has encouraged efforts to rethink the various possibilities for implementing a code of offences against the peace and security of mankind.

Sovereignty and Criminal Jurisdiction

The question of the prosecution of international offences has been, and still is, very closely bound up with issues of state sovereignty. This is true with regard to both the recognition of universal criminal jurisdiction for particular offences and the creation of an international criminal court for prosecution of particularly grave international crimes. Both options seek to overcome the traditional limitations placed on states’ criminal jurisdiction, limitations tied to issues of territory and citizenship; thus both aim to draw criminal law more closely under the protection of common international interests.

Now that the prohibition on the use of force and the obligation of peaceful international cooperation are having an increasingly greater influence on the shape and content of the sovereignty principle, and in light of the growing interdependence of states, there is an increased need to find effective ways to protect, through criminal use, the international norms essential for the peaceful coexistence of peoples. Accordingly,

- many international treaties now provide for universal criminal jurisdiction for offences that endanger the international order;
- there is increased recognition of the fact that offences against the peace and security of mankind are punishable even where they are not treated as crimes under national law;
- a culprit’s official position as government official or head of state no longer removes criminal responsibility; immunity therefore cannot be claimed.

³¹ UN Doc. A/38/10, para. 69c.

³² UN Doc. A/43/10, at 174.

³³ Resolution 43/164, para. 2.

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These developments correspond with the characterization and increasing importance of peremptory rules in international law, the distinction between international delicts and international crimes in the context of the international responsibility of states, and the extension and fleshing out of the principle that states have a responsibility for activities originating on their territory and encroaching on the security of other states.³⁴ At the same time, however, these developments raise difficult questions and meet with considerable obstacles in the area of criminal law, and – though they may try – states cannot minimize the difficulties by referring to outdated concepts of sovereignty.

For a long time, the question of international implementation of criminal law was approached from the viewpoint of the need to prevent possible interference with state sovereignty and not from that of the need for coordinated struggle and cooperation in the fight against international crimes. Thus, states either cited the sovereignty principle as justification for objecting to the extension of universal criminal jurisdiction or as justification for rejecting the establishment of an international criminal court. This situation continues to exist today, though in a different fashion; there is increasing recognition that national security is at present achievable only by way of international cooperation. In this context, however, one cannot underestimate the importance of the fact that states are the essential structural elements of today's international legal order, that they represent the effective political organizational form of peoples and that they have particular protective functions which they actually exercise. However compelling the precept of cooperation may be, all states want to insure that other states will not be permitted to use criminal law to interfere with their sovereignty or to achieve goals incompatible with the interests of the international community and peoples' right to self-determination.

To date, the industrially strong Western powers have decisively opposed universal criminal jurisdiction in the context of a code of offences against the peace and security of mankind fearing that they might thereby lose rights of diplomatic protection for their citizens or be forced to recognize criminal judgments of states whose legal systems they do not wish to respect as being of equivalent right. Fundamentally, the Western powers base their position on the principle of sovereignty, that is sovereignty *vis-à-vis* the criminal jurisdiction of other states. They cite the principle to justify their non-recognition of foreign criminal judgments, their refusal to extradite their own citizens, and their attempts to claim immunity for persons who were acting as state agents when they committed international crimes. The Western powers do not wish national courts to be empowered to judge the conduct of foreign governments.³⁵ This essentially means removing recognition of the international nature of the crimes defined in the code.

³⁴ See Graefrath, 'Zur neuen Qualität des Souveränitätsprinzips', 34 *Neue Justiz* (1980/9) 395.

³⁵ See, e.g., Belgium UN Doc. A/43/525, at 3.

In addition, states use the sovereignty principle to justify their objections to the competence of an international criminal court. The underlying fear here is that criminal jurisdiction over crimes committed on one's own territory, where the victim is a citizen or national interests are at stake, will be at the mercy of an international system of criminal justice controlled by others. Thus, although the Soviet Union and other socialist countries emphatically support international cooperation of states to coordinate criminal prosecution of crimes against peace and humanity, from the outset they have repeatedly rejected the creation of an international criminal court as a supra-national institution.³⁶ Following the example of Nuremberg, they have always advocated the creation of *ad hoc* courts whose competence could be based on the existence of joint national criminal jurisdiction, decisively opposing attempts to create an international criminal court which would have the competence to act side by side, or in place of national criminal jurisdiction. They have regarded it as impossible for states to hand over their own citizens to an international court for punishment or to refrain from criminal prosecution of offences committed on their territory.³⁷ It is, however, noteworthy that they have never objected to universal criminal jurisdiction for grave international crimes, that is, to the notion that other states, or all states, obtain a right to prosecute particularly heinous offences committed on their territory or by their citizens. This is true despite the fact that universal jurisdiction for grave international crimes can also be regarded as an interference with sovereignty.

Rejection of, and skepticism about, an international criminal court is not in any way a typically socialist attitude or a position confined to the socialist states. Britain in particular, but the US too, has opposed creation of an international criminal court. Vehemently opposed to the proposal set forth by the International Law Commission, Fitzmaurice stated that the ILC had failed to establish that states regarded creation of any such institution as at all desirable.³⁸ Obviously he was right. The debate on the Genocide Convention clearly showed that the majority of states did not favor an international criminal court.³⁹ To date, no viable majority in the UN has been found to favour the creation of such a court.

Nor, however, have most states openly opposed the idea of an international criminal court. For instance, the Nordic states in the past have explained their preference for universal jurisdiction by pointing out that⁴⁰ the international legal regime did not yet merit the creation of an international criminal court; not only was the idea of

³⁶ See, e.g., UN Doc. A/C.6/SR.98, at 8. Therefore they did not take part in the work of the Committee on International Criminal Jurisdiction either in 1951 or 1953. See also Romaschkin, 'Les projets des Nations Unies pour l'institution d'une justice pénale internationale', *Revue internationale de droit pénal* (1964/1-2) 42.

³⁷ See, e.g., UN Doc. A/C.6/SR.98, at 7, 9, 19.

³⁸ See UN Doc. A/C.6/SR.240, para. 13, and the reticent position of the US, paras. 44.; see also the position of Belgium, at para. 68.

³⁹ See Graven, *supra* note 12, at 221; see also Historical Survey, *supra* note 1, at 36.

⁴⁰ See UN Doc. A/C.6/43/SR.32, para. 33.

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such a court impractical, it had no prospects of success. They therefore regarded it as premature for the International Law Commission to draft statutes for an international criminal court and, like the socialist and many other states, supported application of the principle of universal criminal jurisdiction of national courts for the punishment of crimes defined in the Draft Code of Offences against the Peace and Security of Mankind. In a very carefully worked out position paper, Australia likewise declared that creation of an international institution to handle disputed cases might entail considerable risks, that it was questionable whether the institution would be used, and that an international criminal court would increase the costs and complexity of the international system of criminal jurisdiction and might draw attention away from the appropriate exercise of national jurisdiction that would normally be applied in such cases. In Australia's view, it was in any case not advisable to include provisions on an international criminal court in the proposed code.⁴¹

France also expressed doubts, even though it had strongly advocated creation of an international criminal court in the late 1940s.⁴² At the start of the work in 1984, Reuter, the French member on the ILC, counselled caution. An international criminal court did not yet exist; while options could be studied, the Code should not be made dependent on the creation of an international criminal court.⁴³ In 1986 Italy's member on the ILC likewise doubted that it would be possible to convince sovereign states to accept the creation of an international criminal court; for the moment, the only possible way was universal criminal jurisdiction, but even that was seen to be achievable only step by step.⁴⁴ The Italian member later qualified his statement, explaining that there was a point at which both methods, universal criminal jurisdiction of national courts and an international criminal court, faced the same difficulties.⁴⁵ Finally, Balanda (Zaire) pointed out practical difficulties that might arise in setting up an international criminal court: questions of preservation of evidence, of extradition to the court, of enforcement of judgments, etc.⁴⁶ None of these were new questions. They had been raised repeatedly over the years and differing solutions had been put forward.

In the end, all of these arguments can be reduced to concern over sovereignty. This is true whether the concern was voiced directly and openly or whether it was raised indirectly by pointing out that states were not ready to accept the jurisdiction of an international criminal court, that the world was not yet ripe for it, or there were too many practical difficulties. Clearly, under present international conditions most states are neither ready to abandon criminal jurisdiction on important questions nor to take on general extradition obligations.

⁴¹ See UN Doc. A/C.6/43/SR.32, para. 93.

⁴² See Historical Survey, *supra* note 1, at 38.

⁴³ See YbILC (Vol. I) (1984) 14, para. 8.

⁴⁴ See YbILC (Vol. I) (1986) 124, paras. 65-70.

⁴⁵ See YbILC (Vol. I) (1986) 152, paras. 26-30.

⁴⁶ See YbILC (Vol. I) (1986) 152, para. 22.

The Code and an International Criminal Court

Many states advocate the creation of an international criminal court, claiming that an international court is necessary if the Draft Code of Crimes against the Peace and Security of Mankind is to be implemented effectively. These states assert that the establishment of an international court is the only way to guarantee objective, impartial jurisdiction, which is particularly important and, at the same time, particularly hard to achieve.⁴⁷ In addition these states often point out that the creation of an international criminal court is the only way to avoid differing punishment by individual states.⁴⁸ But while these questions are certainly of central importance to the international criminal legal regime, it is not convincing to argue that the only solution to these problems is to transfer criminal jurisdiction from states to an international criminal court.

Although reference to an international criminal court is often used as an argument for not expanding the principle of universal criminal jurisdiction to crimes against the peace and security of mankind, it is unclear whether states voicing this view ultimately desire either a code or an international criminal court. A typical example is that of Britain. Early on, Britain spoke openly and decisively against an international criminal court. It regarded it as impossible in the then present circumstances in international relations for states to accept the jurisdiction of this sort of criminal court. But the British member of the International Law Commission and representative to the Sixth Committee of the General Assembly also spoke strongly against universal criminal jurisdiction of national courts. He put forth the view that a code of offences against the peace and security of mankind could be effectively realized only with the help of an international criminal court; since it was not possible to create an international criminal court⁴⁹ this simply meant that a code of offences against the peace and security of mankind was illusory.

⁴⁷ See, e.g., Japan, UN Doc. A/C.6/41/SR.42, para. 67.

⁴⁸ See, e.g., Guinea, UN Doc. A/C.43/SR.32, para. 2; Ireland, UN Doc. A/C.43/SR.32, para. 52; Brazil, A/C.6/42/SR.43, para. 32.

⁴⁹ See, e.g., Ian Sinclair in *YbILC* (Vol. I) (1986) 141, paras. 53-57: "He could not agree that universal jurisdiction, in the sense in which that concept was used in article 4, paragraph 1, should stand as a general principle applicable to all the offences that might be included in the draft code... He was wholly unable to accept the notion of universal jurisdiction, at least in regard to crimes against peace and crimes against humanity, and he had serious reservations about its applicability to war crimes... The Commission's mandate was ... to produce a code of offences against peace and security that was capable of being effectively and impartially enforced. An international criminal jurisdiction was therefore the best method for effective and impartial implementation... Even as an interim measure pending the establishment of an international criminal jurisdiction, universal jurisdiction was not acceptable... He for one was convinced that the code could be made effective only if an international criminal court was vested with jurisdiction to try offences under the code. He was well aware of the political and other objections to the establishment of such a court; but if the international community was

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US arguments sound very similar. The US representative to the Sixth Committee voiced doubts as to whether the International Law Commission had made any progress in working out the Draft Code. Fundamental questions were still unclear, particularly those regarding the jurisdiction of an international criminal court. "An international criminal tribunal," he noted, "would be a way of dealing with the question of international jurisdiction free of the vagaries and wishes of national approaches. This is not to say that an international tribunal [i]s a good or a bad idea."⁵⁰ In other respects, he made it clear that the US regarded it as an error to have resumed work on the Code, even though the situation had changed considerably since 1947.⁵¹ The West German representative also declared that the International Law Commission's work on the Draft Code of Offences against the Peace and Security of Mankind would be realistic only if "the prosecution of such crimes was left to an international court."⁵² The answer to the question of whether the creation of an international criminal court could be expected in the foreseeable future was, however, left open. Thus, the very states that regarded work on the Code as untimely or senseless were the same states which called for the creation of an international criminal court, and, in some instances, those which said the success of the Code depended on it. Hence, one cannot avoid the impression that the call for an international criminal court has served only to obstruct or delay the drawing up of the Code.

At the Forty-third General Assembly of the United Nations, however, it became clear that the overwhelming majority of states regarded work on the Code as important and urgent. This was expressed *inter alia* in the vote, 137 to 5 with 13 abstentions, which kept the Code as a separate agenda item.⁵³ Many states also explicitly spoke against linking work on the code with the question of an international criminal court if such a move would delay work on the Code.⁵⁴ After all, a picture of the substantive criminal law is necessary before decisions regarding the proper procedures for applying it can be made.

not prepared to contemplate such a course, it should not call on the Commission to formulate a code of offences that would be offences only on paper." See also YbILC (Vol. I) (1983) 15, para. 29.

⁵⁰ UN Doc. A/C.6/SR.34, para. 2.

⁵¹ UN Doc. A/C.6/43/Sr.34, para. 13; see also earlier UN Doc. A/C.6/41/SR.42, paras. 72-73; McCaffrey, UN Doc. A/CN.4/SR.2054, at 10.

⁵² See UN Doc. A/C.6/43/SR.34, para. 33; see also UN Doc. A/C.6/42/SR.37, para. 4, where an international criminal court was even termed a "prerequisite for the acceptance of substantive provisions of criminal law" in a code of offences against the peace and security of mankind. Likewise McCaffrey: "The only way in which the proposed Code could be implemented was with the aid of an international criminal tribunal having compulsory jurisdiction." UN Doc. A/CN.4/SR.2054, at 10.

⁵³ See Resolution 43/164 of 9 December 1988.

⁵⁴ See, e.g., Poland, UN Doc. A/C.6/43/32, para. 76; Australia, *op. cit.*, para. 93; GDR, UN Doc. A/C.6/43SR.34, para. 74; Ukrainian SSR, UN Doc. A/143/525/Add.1, at 5; USSR, UN Doc. A/43/525/Add.1, at 6; Chile, UN Doc. A/43/525, at 3; Norway, UN Doc. A/43/525, at 4.

Fears expressed by some members of the ILC that application of the principle of universal criminal jurisdiction to offences against the peace and security of mankind would lead to chaos⁵⁵ are obviously unfounded. Practice to date has resulted neither in chaos nor double punishment in the prosecution of war crimes and crimes against humanity. On the contrary, the difficulties clearly continue to lie in securing prosecution and just punishment due to lack of effective cooperation among states.

Again, the objection that states are not prepared to extradite responsible politicians to other countries for punishment if they are accused of offences against peace, war crimes or crimes against humanity is not an argument in favour of an international criminal court. To the extent that the objection is relevant, it applies just as much to the creation of an international criminal court as it does to the extension of universal jurisdiction. The issue does not really concern questions of procedure, but rather whether it is either reasonable or expedient to agree on a rule that can be applied only with difficulty and only through the municipal courts of foreign jurisdictions.

This essentially brings us back to the sovereignty question, specifically to the question of the actual content and limits of the sovereignty principle in present-day international law. The point is not whether states are prepared to abandon particular rights of sovereignty. It is instead much more the extent to which just punishment of war crimes and crimes against humanity can be refused or obstructed by appealing to sovereignty in present-day international law. This question arises today in relation to many crimes. It applies to particularly heinous forms of environmental pollution, drug-trafficking, and the use of mercenaries as well as to torture and hostage-taking. In connection with offences against peace, it essentially arises in relation to the prohibition on the threat or use of force in international relations, as clearly brought out by the Nuremberg trials and the arguments of the defence therein.

The Draft Code of Offences against the Peace and Security of Mankind covers offences directed against the fundamental interests of the international community in peaceful international cooperation. These are offences that threaten, injure or curtail the guaranteeing of the basic principles of present-day international law, particularly the prohibition of force, sovereign equality of all states and the equal rights and rights to self-determination of peoples. Taking the long-term perspective, all states have an interest in preventing and punishing such crimes. The responsibility of individuals for such offences arises "under international law." That is to say, neither individuals nor their home countries can oppose punishment on grounds that they have acted as a state organ and thus are entitled to claim immunity, nor may they claim immunity on grounds that the act was not punishable by their national law.

⁵⁵ See McCaffrey, *YbILC* (Vol. I) (1983) 39, para. 22; Tomuschat, *YbILC* (Vol. I) (1986) 153, para. 32.

In present-day international law, sovereignty cannot be asserted in order to cover up crimes against the peace and security of mankind.⁵⁶

The Code Needs an Effective Implementation Mechanism

If states are to join together to protect particular values through norms of criminal law, punishable conduct must be defined and various methods for implementing penal provisions must be investigated and agreed upon. As soon as states agree as to the best means of implementing the substantive law, the objection of sovereignty will necessarily fall and an individual will no longer be able to avoid punishment by referring to sovereignty, nor will states be able to claim that procedures be prevented or stopped due to a reference to sovereignty. This applies equally with respect to both universal criminal jurisdiction and an international criminal court.

To date, states' reluctance to admit universal criminal jurisdiction for particular crimes has been the primary obstacle to the development of international criminal prosecution. There is little willingness to recognize the validity of foreign criminal judgments and to accept general duties of extradition for particular crimes. In fact, extradition of one's own nationals has as a rule been refused, even where the cases are unambiguously ones of crimes of an international character. In general, states keep punishment of their citizens and the criminal prosecution of offences committed on their territory to themselves.⁵⁷ This is evidenced by the laborious and ultimately unsuccessful attempts to apply the *ne bis in idem* principle internationally. Even agreements within the European Community aimed at this objective have not really been effective.⁵⁸

Therefore, an effective implementing mechanism for any code of crimes against the peace and security of mankind must be based on cooperation among states. Thus, states cannot merely agree on the elements of the various individual offences that form a basis for international criminal prosecution; rather, alongside of the substantive law, they must lay down rules for effective cooperation in criminal prosecu-

⁵⁶ On this, see Graefrath, 'Völkerrechtliche Verantwortlichkeit für internationale Verbrechen', in *Probleme des Völkerrechts* (1985) 89; Art. 2 of the Draft Code of Offences Against the Peace and Security of Mankind of the ILC in UN Doc. A/42/10, at 24 and Art.11 in UN Doc. A/43/10, at 184.

⁵⁷ See, e.g., the reservations by Sweden and Norway on the European Convention on the international validity of criminal judgments of 28 May 1970 in 249 *Bundesgesetzblatt für die Republik Österreich* (1980) 1990.

⁵⁸ On this, see Graefrath, 'Verbrechen gegen den Frieden und die Sicherheit der Menschheit und das Verbot der Doppelbestrafung', *Neue Justiz* (1988/2) 60; Herdegen, 'Die Achtung fremder Hoheitstrechte als Schranke nationaler Strafgewalt', 47 *Zi. f.a.ö.R.u.VR* (1987/2) 221; Schermers, *non bis in idem*, in C.D. Capotorti & J. Ehlermann *et al.* (eds.) *Du Droit international au droit de l'intégration* (1987) 601; Paridaens, 'Negative Effects of Foreign Criminal Judgments in Europe', 6 *Netherlands Quarterly of Human Rights* (1988/3) 35; Entscheidung des BVerfG vom 31 März 1987, in *EBVerfG*. (Vol. 75) (1987) 1.

tion, including rules regarding states' obligations to implement the provisions of the Code in national law, mutual rights and duties in criminal prosecution, the preservation of evidence, the right to extradition, and, above all, the means of guaranteeing objective trials and just punishment. The sovereignty of states must be used to accomplish this urgent task, not to oppose it.

There are substantially better conditions for this today than there were forty-five years ago. Awareness of the existence of universal values, their recognition, and their central importance to peaceful international relations among peoples is far more developed today. This is expressed not only in the recognition of *jus cogens* rules, but also in the distinction states make between international delicts and international crimes and states' increased sense of responsibility to, and renewed respect for, the UN security system.

In addition, the fact that the principle of criminal prosecution or extradition – the basis for universal criminal prosecution of war crimes adopted in 1949 for the criminal prosecution of grave breaches of the Geneva Conventions⁵⁹ – is applied today in somewhat modified form in all universal agreements on the criminal prosecution of international crimes should not be overlooked. It is important to note that the principle is applied irrespective of whether the agreements involve aeroplane hijackings, hostage-takings, torture or the protection of diplomats. Thus, what was not possible in 1948 for the Convention against Genocide has in the interim become standing international practice. Moreover, the list of crimes that can no longer be regarded as political crimes for the purpose of extradition, that is, those crimes now falling within the obligation to extradite, is becoming ever longer. This is true even with respect to current US state practice.⁶⁰

One simply cannot overlook that where there is a resolve to prosecute international crimes international practice is taking the path of universal criminal jurisdiction of national courts. Referring to this practice, a number of states have recommended that this example be followed in the case of the criminal prosecution of offences against the peace and security of mankind too.⁶¹ For example, the spokesman for the Nordic states on the Sixth Committee of the General Assembly pointed to this trend when stating:

The international community has on many occasions adopted the approach of an indirect responsibility of the individual through the creation of an extraordinary jurisdiction on the part of states (the principle of so-called universal jurisdiction). ...All these conventions have aimed, not at defining crimes to be dealt with by an interna-

⁵⁹ See, e.g., Art. 146/147 of the IV Geneva Convention of 12 August 1949 and the Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949 (1987) 973.

⁶⁰ See, e.g., the list accompanying the USA/FRG extradition treaty in 81 *AJIL* (1987/4) 935.

⁶¹ See, e.g., the GDR's position in UN Doc. A/37/325, at 9, para. 14; Bulgaria, UN Doc. A/C.6/36/SR.60, para. 26 and A/C.6/37/SR.54, para. 67; Poland, UN Doc. A/C.6/SR.62, para. 41.

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tional criminal court ... but at intensified international cooperation with a view to ensuring that individuals committing serious offences are brought to justice and, upon conviction by a competent court of national jurisdiction, suffer appropriate penalties.⁶²

But, if international practice combines recognition of universal criminal jurisdiction with an obligation to cooperate in preservation of evidence and criminal prosecution it is not because it is the optimum variant but because it is a practicable one. The extension of states' criminal jurisdiction beyond the traditional jurisdictional bases of territory and nationality has become both practice and necessity where crimes against the existence of the state or particularly heinous international crimes are involved. In such cases states recognize the principle of universal jurisdiction because they have an interest in doing so. The increasing awareness of global problems is accompanied by the realization that it is necessary to fight international crimes that endanger all through reinforced international cooperation.

At the same time, however, there is a clear recognition that the extension of universal criminal jurisdiction cannot solve all problems. Questions concerning the objectivity and uniformity of criminal prosecution and the harmonization of adjudication among states remain. The amount of weight to be afforded these concerns no doubt differs depending on the crimes and states involved, a fact repeatedly pointed out in debates on measures for implementing the Draft Code of Crimes against the Peace and Security of Mankind. These problems are not, however, confined to the area of the Code, but rather arise with respect to all international conventions based on universal criminal jurisdiction. They merely obtain greater political weight in the context of the Code because of the nature of the offences.

Universal Criminal Jurisdiction and an International Criminal Court Are Not Mutually Exclusive

The question of the best possible way to implement the Code is being carefully reconsidered by many states in connection with recent international developments.⁶³ It seems to me important here to get away from the sterile thoroughly unproductive approach of setting up an alternative between universal criminal jurisdiction of national courts and criminal jurisdiction of an international criminal court. This approach, which led I. Sinclair to declare, "it is implied that there are two alternatives: universal jurisdiction or an international criminal jurisdiction,"⁶⁴ has been the posi-

⁶² See UN Doc. A/C.6/43/SR.32, para. 34.

⁶³ See, e.g., Ushakov, YbILC (Vol. I) (1983) 21, para. 30; Canada, UN Doc. A/C.6/43/SR.33, para. 19; Poland, UN Doc. A/C.6/43/SR.32, para. 76; Brazil, UN Doc. A/C.6/42/SR.43, para. 33; GDR, UN Doc. A/C.6/43/SR.34, para. 74; Ukraine, UN Doc. A/C.6/43/SR.35, para. 93.

⁶⁴ See YbILC (Vol. I) (1986) 141, para. 55.

tion assumed by many states in the past.⁶⁵ In fact, even the special rapporteur gave vent to this approach in his explanation of Article 4 of the International Law Commission's draft code, stating: "The problem of competent jurisdiction was most serious, since it involved a choice between creating an international jurisdiction and extending the competence of national courts to cover such crimes."⁶⁶

There is no real reason, however, to see the system of universal criminal jurisdiction and the power of an international criminal court as mutually exclusive. Ushakov expressed this idea in 1983 when he stated: "The creation of an international criminal court in addition to (universal) jurisdiction is conceivable."⁶⁷ Moreover Cuba,⁶⁸ the Sudan,⁶⁹ Guatemala,⁷⁰ the GDR,⁷¹ Egypt,⁷² Nigeria,⁷³ Venezuela,⁷⁴ Morocco,⁷⁵ Jamaica,⁷⁶ as well as both the USSR⁷⁷ and USA⁷⁸ have pointed out that the question of universal criminal jurisdiction of states and international criminal jurisdiction should not be seen as alternatives, but that complementary solutions could very well be found.

In fact, most drafts for an international criminal court are reconcilable with this position; most do not provide the international criminal court with court exclusive criminal jurisdiction for particular crimes. The notion that states would be prepared to delegate their sovereignty over crimes committed on their territory, against them, or by their citizens to an international criminal court is so far from reality that it has hardly been seriously defended.

Thus, Article 26 of the 1953 draft statute for an international criminal court provided that the transfer of jurisdiction to the international criminal court would not require states to give up their criminal jurisdiction over these crimes.⁷⁹ Similarly, Article 23 of the ILA's 1984 draft on an international criminal court explicitly pro-

⁶⁵ See, e.g., Arangio-Ruiz, *op. cit.*, at 153, para. 29; Tomuschat, *op. cit.*, para. 33.

⁶⁶ See UN Doc. A/C.6/43/SR.32, para. 42.

⁶⁷ YbILC (Vol. I) (1983) 21, para. 30. See Barsegow, UN Doc. A/CN.4/SR.2057, at 21.

⁶⁸ UN Doc. A/C.6/36/SR.62, para. 34.

⁶⁹ UN Doc. A/C.6/36/SR.54, para. 72.

⁷⁰ UN Doc. A/C.6/43/SR.35, para. 43.

⁷¹ UN Doc. A/C.6/43/SR.34, para. 74.

⁷² UN Doc. A/C.6/43/SR.36, para. 32.

⁷³ UN Doc. A/C.6/42/SR.44, para. 27.

⁷⁴ UN Doc. A/C.6/42/SR.46, para. 5.

⁷⁵ UN Doc. A/C.6/42/SR.42, para. 29.

⁷⁶ UN Doc. A/C.6/42/SR.39, para. 7.

⁷⁷ USSR, UN Doc. A/43/525 Add.1, para. 6.

⁷⁸ UN Doc. A/C.6/41/SR.42, para. 69.

⁷⁹ "1. Jurisdiction of the Court is not to be presumed. 2. A state may confer jurisdiction upon the Court by convention, by special agreement or by unilateral declaration. 3. Conferment of jurisdiction signifies the right to seize the Court, and the duty to accept its jurisdiction subject to such provisions as the state or states have specified. 4. Unless otherwise provided for in the

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vided that "a state is at liberty to decide whether to try its suspect in a national court or to refer him to the international criminal court."⁸⁰ Concurrent jurisdiction was taken as a given. The state would be able to decide, case by case, whether it would exercise criminal jurisdiction itself or transfer it to the international criminal court. We need not here go into whether this is either a happy or desirable solution to questions concerning criminal jurisdiction. To me the important thing is that these drafts do not set up universal criminal jurisdiction and an international criminal jurisdiction as alternatives.

Again, in present international conditions, the attempt to establish *exclusive* jurisdiction for an international criminal court would meet with insurmountable theoretical and practical difficulties. Such a construction would neither do justice to existing conceptions of sovereignty nor meet the justified security interests of states. It would call for states to abandon criminal jurisdiction in cases touching the core of their political independence and territorial and personal sovereignty. Additionally, exclusive jurisdiction would meet with many practical difficulties. Not only would it demand the creation of an international criminal court, it would also necessitate the establishment of an autonomous department of public prosecutions, the establishment of a prison system and the employment of police and enforcement officials. In addition, it either would require states to extradite the alleged criminal or to refer the case to the international court. All this would raise many complicated practical problems for which neither widespread political will nor material resources are available. An international criminal court conceived this way is no less illusory than a world government.

To date, these difficulties have led to recourse to universal criminal jurisdiction as the sole practical form of international cooperation of states in the coordination of criminal prosecution of international crimes. However, states have always been aware that a number of issues surrounding the prosecution of international crimes probably could not be solved solely by recourse to the principle of universal jurisdiction, or, if they could be solved in such a manner, they could only be solved with great difficulty. These concern *inter alia* questions of extradition, of the uniformity of adjudication and of the prohibition on dual punishment. These problems are greater the more the social and legal systems of the states involved differ. They become downright insoluble, however, where the affinity between political objectives and international crimes becomes so close that one side's freedom fighters are the other's terrorists. In such circumstances adjudication by national courts can lead to diametrically opposite results, which does not exactly contribute to the strengthening of the international legal order. And while it is clear that there are fewer difficulties with respect to cases involving war crimes, crimes against peace and some crimes against humanity, even in the narrow sphere of precisely defined war crimes

instrument conferring jurisdiction upon the Court, the laws of a state determining national criminal jurisdiction shall not be affected by that conferment." UN Doc. A/2645, at 24.

80 Cf. Report of the Sixty-First Conference, Paris 1984, at 262.

and crimes against humanity there are, as practice after the Second World War showed, considerable differences.

Largely in order to avoid political controversy, at least with respect to international criminal jurisdiction, in the past proposals⁸¹ suggesting that the international criminal court's material competence be regulated by reference to existing international conventions have been made. In addition, there have been efforts to keep the list of crimes for which the international criminal court would be competent flexible. States were, upon ratification, to be allowed to specify the offences they would recognize as being within the court's competence. This would enable more states to ratify a treaty establishing an international court, but at the same time mean that the court's competence would be considerably restricted. But while such a procedure would facilitate creation of an international criminal court, it would from the outset limit its central function and effectiveness for the international legal order in a way that would largely condemn it to insignificance. Consequently, proposals of this kind, although well meant, have had no real influence.

Another idea considered early on, that of bringing the international criminal court into some sort of direct relationship with the UN security system, has met a similar fate. One possibility which was suggested was to provide either the General Assembly or the Security Council with the power to bring or stay proceedings before the court.⁸² However, neither option appeared particularly promising since it is very hard to reconcile these proposals with notions of an independent jurisdiction.

In sum, questions relating to sovereignty have consistently overlapped with questions of international criminal jurisdiction in a manner which seemingly suggests that they are mutually exclusive. To get around this, the most recent ILA draft statutes for the creation of an international criminal court provides a list of offences confined to offences listed in existing conventions. It does not, for instance, contain the offence against peace. In addition, the ILA draft provides that the court's jurisdiction be prefaced on the condition that the relevant convention defining the offence has come into force among the states concerned. Moreover, the ILA draft permits states to restrict the court's competence to one of the conventions mentioned or even to individual offences among those defined in a convention. Additionally, it allows each state to decide, case by case, whether it will bring an accused party before its own courts or else hand the party over to the international criminal court of justice.⁸³ Moreover, the jurisdiction of the international criminal court would depend on whether the accused party was a national of a state recognizing the competence of

81 See, e.g., Art.3 of the Draft Convention of the Foundation for the Establishment of an International Criminal Court, reprinted in R.K. Woetzel (ed.) *The Establishment of an Int. Criminal Court* (1973); see also Art. 20 of the ILA Draft of 1984, Report of the Sixty-First Conference 1984, *supra* note 80, at 262.

82 See the Report of the Committee on International Criminal Jurisdiction 1953, in UN Doc. A/2645, at 16, para 107.

83 See Arts.1 and 23 in the 1984 ILA report, *supra* note 80, at 257.

the criminal court, whether the offence had been committed on the territory of such a state, or whether the offender was residing in such a state.⁸⁴ Whether an international criminal court reduced to this extent could still meet its function of integration and protection *vis-à-vis* an international legal order demanding lasting stabilization is extremely questionable. These restrictions evidence, however, the extent to which even advocates of an international criminal court are limited by states' sceptical attitude towards a project of this nature.

An International Criminal Court as a Corrective to Universal Criminal Jurisdiction

Some objections which have continually arisen in the context of universal criminal jurisdiction must be taken seriously. Though one need not fear that states with no specific interest in prosecution of an offence will arbitrarily punish a perpetrator or that chaotic hysteria for punishment will break out,⁸⁵ one cannot summarily reject doubts as to the extent to which national courts are appropriately objective. In addition, there are legitimate concerns about differing degrees of punishment in different states, and the possibility that a defendant will suffer dual punishment or be unfairly punished. It is not hard to find practical examples of these things in recent history.

All states convinced that a code of offences against the peace and security of mankind is a necessary and effective instrument for strengthening the international legal order should thus be interested in ascertaining both a precise definition of the grave international offences that threaten the peace and safety of mankind and the most effective means of implementing such a code. A code that remains on paper is no use to anyone. But this means that an implementing mechanism has to be developed which is achievable in practice, has a chance of being accepted and applied by most states and contributes to an institutional strengthening of the UN security system. There is not much sense in setting up institutions which may look good but are known to have no prospect of becoming effective in the foreseeable future.

Today there is a need to develop international standards aimed at insuring that the peaceful co-existence of states may be protected through criminal law. Over the last twenty years the number of agreements on universal criminal prosecution of international crimes has increased considerably; states now agree that sovereignty neither entitles states to cover up international crimes nor to hide behind the cloak of immunity. We are, however, now faced with the task of developing a means to com-

⁸⁴ See Art.21 in the 1984 report, *supra* note 80, at 262.

⁸⁵ Thus, for instance, Tomuschat feared that "to declare every state competent to try an alleged perpetrator of an offence against the peace and security of mankind would lead to chaos ... a race could well start to obtain the extradition of persons whom the state arresting them did not wish to try; or again a state on one continent might call for the extradition of persons charged with committing atrocities on another continent." YbILC (Vol. I) (1986) 153, para. 32.

bine the existing criminal jurisdiction of states with an international mechanism suitable for compensating for the shortcomings of a further extension of universal criminal jurisdiction. At the same time, we must develop a means of promoting international cooperation in the prosecution of international crimes in such a way as to strengthen the international legal order.

To attain this goal we should:

1. Take the existing and functioning criminal jurisdiction of states as a basis and strengthen it through universal application and recognition and through appropriate international cooperation in the preservation of evidence and in the arrest and extradition of offenders.
2. Set up an international criminal court which does not function in place of national justice or in competition with it, but rather provides the possibility for, and has the task of insuring, the objectivity and uniformity of adjudication. To this end it is necessary and sufficient for the international criminal court to be competent to review judicial decisions taken by national courts under the Code of Offences against the Peace and Security of Mankind on application by a state involved, and to take a final decision in the matter. The international criminal court should also be competent to hand down a binding legal opinion on application by a national court dealing with a case involving application of the Code. In this way, it could act in the interest of the sovereignty of all states and guarantee the functioning of the international legal order. It would limit or eliminate the arbitrary element inherent in national courts and hence the existing weaknesses in the present system of universal criminal jurisdiction. This would help both the implementation of the Code and the protection of states against unjustified interferences in their sovereignty.

As long ago as 1953, when the Committee on International Criminal Jurisdiction discussed the statutes of an international criminal court, some suggested that an international criminal court be used "to resolve conflicts in the decisions of national courts."⁸⁶ Such proposals were at the time, as Graven writes, rejected on rather unconvincing grounds.⁸⁷ Today these questions are arising in other circumstances and in a different context. And it is thoroughly worthwhile taking them up, since they are suitable for discussions aimed at developing a realistic model for implementing the Code of Offences against the Peace and Security of Mankind.⁸⁸

In accordance with the practice of states relating to international crimes, prosecution of crimes against the peace and security of mankind must be predicated on the notion that every state on whose territory a person suspected of having committed such crimes is to be found has the duty to try or extradite that person. The present Article 4 of the Draft Code of Crimes against the Peace and Security of Mankind stands for this proposition. This is in line with the system applied in recent agree-

⁸⁶ See UN Doc. A/2645, at 15, paras. 103-105.

⁸⁷ See Graven, *supra* note 12, at 204.

⁸⁸ See Graefrath, UN Doc. A/CN.4/SR.2101, at 11.

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ments on international offences. These agreements, however, generally proceed in the opposite direction. They start by specifying the usual bases for criminal jurisdiction and then require states to ensure that they have jurisdiction over the offences concerned, at least in cases where offenders are on their territory and they do not extradite them to another state. This practically guarantees universal criminal jurisdiction, as it is scarcely to be expected that states not directly concerned either through nationality or through the offence itself will have an interest in, or possibility for, criminal prosecution where the offender is not on their territory. In practice, the area of universal criminal jurisdiction of prime importance is covered by this restricted formula as long as states are obliged to cooperate in areas of information and securing of evidence; and recent treaties provide numerous examples of cooperation in information exchange and securing of evidence.⁸⁹ Particular reference should, however, be made in this connection to UN General Assembly Resolution 3074 (XXVIII) of 3 December 1973. It summarizes the most important principles that should apply to international cooperation in identifying, arresting, extraditing and punishing persons guilty of having committed war crimes and crimes against humanity.⁹⁰

When a criminal prosecution is brought under this system and a final verdict is handed down, there may be cases where an interested state – one whose citizen has been acquitted or condemned abroad, or one on whose territory the offence was committed – could raise objections if it viewed the results of the trial or punishment levied by another state's municipal courts as improper. In these cases it would be beneficial for an international criminal court to be able to review the case and take a definitive decision. This would necessarily lead to some harmonization of adjudication in these cases, something of importance to mankind as a whole. Even the mere possibility of review by an international criminal court would make national courts take particular care when adjudicating and would encourage them to orient themselves more strongly towards the implementation of international security interests.

Mock trials could be largely ruled out, thereby avoiding the possibility of the re-opening of such proceedings, something left open in Article 7(4) of the International Law Commission's draft.⁹¹ The system proposed here would promote international cooperation in prosecuting offences against the peace and security of mankind and help to break down mutual mistrust among states.

A system based on the universal criminal jurisdiction of states which sees the international criminal court as a supplemental review body would also have the advantage of building on, and developing, the international norms on the criminal prosecution of international offences now in force. The problem of amending or incorporating existing multilateral treaties and their specific criminal prosecution provisions

⁸⁹ See, e.g., the Convention on the Prevention, Prosecution and Punishment of Offences against Persons Protected in International Law, Including Diplomats, of 14 December 1973 in *Völkerrecht, Dokumente Teil 3* (1980) 893.

⁹⁰ See text in *Resolutionen zur Abrüstung und zur Kodifizierung des Völkerrechts* (1981) 318.

⁹¹ See UN Doc. A/43/10, at 178.

could largely be avoided, since the treaties are either based on the principle of universal criminal jurisdiction or could be so amended once the possibility of review of individual conclusive judgements by an international criminal court is available.

Only states involved should be eligible to be plaintiffs. These would be states whose nationals had been punished abroad or states on whose territory the offence had been committed or against which the offence was directed, where the offender had been acquitted or condemned in another country. In the bulk of cases this will be quite sufficient to ensure both just punishment of offenders and the objective and largely uniform judicial assessment of offences. For some cases, such as genocide, additional legal remedies will perhaps have to be created since no other state need be directly affected by the crime. But acceptable solutions can undoubtedly be found to these problems once there is a decision in principle for a combination of universal criminal jurisdiction and an international criminal court. Similarly, details such as the staffing of an international criminal court and other questions could be left to a later stage of discussion. Experience shows that they cause the least difficulties. Moreover, there is a great deal of serious preliminary work on this to which recourse can be had.

If universal criminal jurisdiction is combined with an international criminal court, an international prosecutorial department need not be set up. States involved will appear as prosecutors. It may be assumed that they will only prosecute cases in which they have a serious interest. Thus, the court would not be encumbered with an onslaught of cases. In addition, as a rule, it could rely on previously reviewed evidence that the parties would make available. Moreover, even if the international court were to hear the condemned, such hearings would not require extensive material or staff resources; the offender could be briefly brought before the court by the state having custody, or interrogated by a judge at the place of custody. In sum, if universal criminal jurisdiction is combined with the establishment of an international court, many of the practical problems usually associated with the creation of an international criminal court would largely cease to exist.

The combination of universal criminal jurisdiction of states and an international criminal court is a system which meets the criteria for effective implementation of the Code of Offences against the Peace and Security of Mankind. In present international circumstances, with our highly decentralized legal order of sovereign states that want to, and have to, protect a minimum of common values, joint jurisdiction is achievable in practice because it is based primarily on the existing criminal jurisdiction of states. An international criminal law regime predicated on the combination of universal criminal jurisdiction and an international criminal court would, on the one hand, facilitate effective criminal prosecution using existing machinery, and, on the other hand, considerably strengthen the legal security for all states and persons involved. It would make it possible to review national judicial decisions on matters pertaining to the Code.