JURA GENTIUM

Rivista di filosofia del diritto internazionale e della politica globale
Journal of Philosophy of International Law and Global Politics

War, Law, and Global Order

Anno 2007

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Journal of Philosophy of International Law and Global Politics
http://www.juragentium.org
Segreteria@juragentium.org

ISSN 1826-8269

Vol. IV, numero monografico: *War, Law, and Global Order*, Anno 2007

Redazione

Comitato scientifico

War, Law, and Global Order

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Foreword

Sara Benjamin and Elisa Orrù

Each year the Milan-based Giangiacomo Feltrinelli Foundation, a leading center for scholarly research on modern social, political and economic thought and history, organizes and hosts the *Cortona Colloquium*, a three-day interdisciplinary forum held in the beautiful Tuscan hill-town of the same name. The event provides the opportunity to a small group of PhD candidates and junior researchers, selected from around the world through a Call for Proposals, to present and discuss their research with prominent scholars in their field.

The 18th edition of the *Cortona Colloquium*, entitled *War, Law and Global Order*, took place from 19-21 October 2007. It was organized in cooperation with the *Jura Gentium* research center and the University of Florence's Department of Theory and History of Law, and was coordinated by a scientific committee headed by Danilo Zolo, *Jura Gentium*'s president and professor of the philosophy of law and the philosophy of international law at the University of Florence.

Antonio Cassese, first president of the International Criminal Tribunal for the former Yugoslavia and professor of international law at the University of Florence, opened the Colloquium. In his keynote lecture, entitled *The New Wars and International Order*, Cassese described with clarity and effectiveness the various models of war that have evolved in modern and contemporary times, demonstrating how contemporary war is increasingly total and asymmetric. War today, that is, increasingly ignores the distinction between civilian objectives and military ones, and is more and more frequently an uneven clash between major military powers and small states with vastly inferior military, political and economic resources. Cassese underlined both the difficulties and the opportunities that international law faces as it attempts to circumscribe and regulate war-related violence within this new international context.

On the second day of the Colloquium, Cassese led a round table focused on the future of international criminal justice. With him were Flavia Lattanzi, *ad litem* judge for the International Criminal Tribunal for the former Yugoslavia and professor of international law at the University of Rome 3; Umberto Allegretti, professor of constitutional law at the University of Florence; Massimo Iovane, professor of international law at University Federico II of Naples; Giuseppe Palmisano, professor of international law at the University of Camerino; and Andrea Lollini, scholar of comparative constitutional law at the University of Bologna.

The Colloquium comprised five thematic workshops, each of which was chaired by two senior scholars. After being introduced by the former, two junior scholars gave presentations on their most recent research, heard the observations of the senior scholars, and fielded questions from the group.

The first session, led by Professor Massimo Iovane (University of Naples) and Carlo Galli (University of Bologna), focused around the topic of *The New Wars and the National and International Protection of Human Rights*. Sara Trovato (University of Milan-Bicocca) proposed a redefinition, in a participatory and democratic sense, of state decisions to go to war - a redefinition based on the centrality of the right to self-preservation. She was followed by Teresa Degenhardt (Ulster University, Northern Ireland), who demonstrated how war is often presented - and justified - in the contemporary political debate as a sort of collective punishment in the international sphere, something similar to the function played by the punishment within the state.

Umberto Allegretti (University of Florence) and Andrea Lollini (University of Bologna) moderated the second session, which dealt with *The Problem of Peace and the Function of International Criminal Justice*. Silvia D'Ascoli (European University Institute) analyzed the sentences of the international criminal tribunals, showing how the purposes of these institutions has yet to be clearly defined. Following her was Pablo Eiroa (University of Florence), who examined the limits and possibilities of the international criminal tribunals in promoting justice, reconciliation and peace,

comparing them with alternative solutions such as amnesties and truth and reconciliation commissions.

The third session focused on the question of *wars of aggression*, and was led by Giuseppe Palmisano (University of Camerino) and Lucia Re (University of Florence). Cristina Villarino Villa (European University Institute) presented and analyzed the various attempts, from the end of WWII to the present, to prosecute and punish at the national level those responsible for crimes of aggression. Stefano Pietropaoli (University of Florence) reviewed the history of the concept of the war of aggression in international law, pointing up the ongoing tension between a "minimalist" option that seeks to limit war violence and broader attempts to define which wars are just and which unjust - and hence illegal - based upon their grounds.

In the fourth session Flavia Lattanzi (University of Rome 3) and Gustavo Gozzi (University of Bologna) discussed the presentations of Matteo Tondini (IMT Institute for Advanced Studies, Lucca) and Myra Williamson (University of Waikato, New Zealand) related to the topic of *Terrorism and International Law*. The first presentation examined the consequences of the application of the paradigm of the "law of the enemy" in the fight against terrorism, while the second reviewed the development of the concept of terrorism from Cicero and St. Augustine on through the United Nations *Draft Convention on Terrorism*, drawing parallels between the historical figure of the pirate and the contemporary one of the terrorist.

In the fifth and final session, Alessandro Colombo and Alessandro Vitale (both of the University of Milan) discussed *The Palestinian Question as the Epicenter of the Wars in the Middle East, and the Impotence of the International Community*. Hilly Moodrick-Even Khen (Sha'arei Mishpat College of Legal Studies, Israel) presented her work on the concept of "direct participation in hostilities" according to Israel's Supreme Court. Finally, Marcella Simoni (University Ca' Foscari, Venice) analyzed the role of European institutions, national governments and civil society in the current Israeli-Palestinian conflict.

In conclusion, the Colloquium provided an occasion for scholars from different fields and areas to engage together in a dialogue at the highest scientific level. The range of viewpoints expressed gave Colloquium participants a broad and multifacted look into the topics discussed.

State and citizen, war and justice: the right to Self Preservation

Sara Trovato

The right that I am going to deal with, the right to Self Preservation, is a minor right, for the role that it has played in political thought and in political history.

As compared to other fundamental rights - such as the right to dignity, the right to equality, freedom of religion, the right to vote - the right to Self Preservation

1. counts as unsociable, as it does not relate to any activity that men and women can share in the social and political sphere.
2. presents a petty connotation, narrowly self-concentrated, un-heroic and historico-politically passive (at least if we look at history with a mainstream view, outside of alternative historiographical views such as *Ecole des Annales* or micro-history),
3. and, to today's ear, it even presents a conservative meaning, restrictive of gender rights, because today its "standard" formulation, as a right to Life, amounts to an anti-abortion claim: right-to-life as opposed to right-to-choose.

My intention is to draw all possible consequences from this right on the basis of philosophical, historical, factual premises.

My topic is going to be the intervention that the international community, taking up a role set by 1948 UN Charters, starts whenever violations of human rights occur.

Such violations of human rights may take the form of open warfare as in new wars, as Mary Kaldor (1) defines them, or just the "classical" form of a tyrannical abuse of power by political leaders.

In both cases, the interventions of the international community may be, in turn, wars, which are then called humanitarian wars.

Countries that pick up the role of actively defending human rights are usually Western countries.

The goal of humanitarian wars should be, in the prevailing rhetoric, the removal of human rights violation. But it is a fact that, during humanitarian wars, human rights are violated.

My paper aims at showing how deep this paradox is: so deep that it reaches the very foundations of the State, as laid down in a political theory that is still central in today's political thought.

1. Hobbes, to start with

As it is known, in Modern history one and the same political process has led to

1. new strength for the State: by forbidding violence, the state monopolises the use of force. It becomes absolute.
2. a crucial passage for fundamental rights: they pass from a status of oughts to the status of State laws.
3. the beginning of a new movement of thought both claiming and providing justification for the State's legitimacy in front of its citizens - contractualism.

This would later contribute to the birth of Modern democratic Constitutions.

In the history of philosophy, and what counts more, in the history of political justification, these three moves occur in the thought of Thomas Hobbes (2). Hobbes is able to encompass all three movements at once, as Norberto Bobbio has noticed (3).

In such a crucial moment for political thought, an inextricable, triangular connection occurs between state of nature, absolute State and a natural right to Self Preservation.

Bridge between the state of nature and absolute State is the social contract, that is founded on natural laws: the first and most important among natural laws prescribes self preservation. Under these conditions, social contract is rational and the State is justified. The whole building, therefore, stands on only one pillar: the right to Self Preservation.

Without this triangulation no social contract stands: I stress it, social contract is cancelled, and Hobbes was aware of this.

When dealing with death penalty, he couldn't but write:

> If the Soveraign command a man (though justly condemned,) to kill, wound, or mayme himselfe; or not to resist those that assault him; or to abstain from the use of food, ayre, medicine, or any other thing, without which he cannot live; yet hath that man the Liberty to disobey (Leviathan, Chapter XXI).

And, when it comes to civil war, Hobbes clearly states that civil war is death for Leviathan:

> ... that great Leviathan called a Common-Wealth, or State, (in latine Civitas) which is but an Artificiall Man; though of greater stature and strength than the Naturall, for whose protection and defence it was intended; and in which, the Soveraignty is an Artificiall Soul, as giving life and motion to the whole body; ... Concord, Health; Sedition, Sicknesse; and Civill War, Death (Leviathan, Introduction).

In order to say that the State of Nature is true, Hobbes says that civil war is an example of State of Nature. So, civil war is conceptually alternative to the State, and without fallacy we can conclude that it cancels the contract.

But the step between civil war and war altogether is very thin: so thin that, with the arguments that Hobbes uses, he cannot avoid it. If the goal was self preservation, it concerned ceasing of fight, any fight, as fight *in itself* endangers safety. From this viewpoint, it is difficult to distinguish between civil war and war altogether: it cannot be the fear of being staggered *specifically* by one's neighbour that makes reasonable the decision to alienate one's force, one's will and one's rights: it must be the fear to get killed *tout court*.

It is almost a trick to forget the disruptive implications that would come from the removal of a right to Self Preservation, in a Hobbesian framework. It is particularly important to notice that this argument is so central in Hobbes' philosophy, that it invalids any other assertion that Hobbes may make (and that, as a matter of fact, does make, in the *Leviathan*) to justify war. Every such assertion amounts to a contradiction, so that, *either* his whole philosophy stands, *or* his assertion concerning war being allowed stands.

2. The right to Self Preservation, and its influence

A

Today the right to Self Preservation ranks significantly first in the 1948 UN "Universal Declaration of Human rights", in the 1950 "European Convention on Human rights" and in the "European Constitution".

I would even say it ranks *logically* first.

It belongs to those that René Cassin (4) has called "personal rights", that in nowadays charters of rights have been placed first, and not by chance. Personal rights come before relational rights, civil liberties and political rights, economic and social rights.

In 1966 the "International Covenant on Civil and Political rights" has defined right to life as a "supreme right" (art.6). I would say it is the basic of individual rights.

B

Still, when we go to observe the institutional history of the right to Self Preservation, we see that, as compared to other rights (as, for instance, the right to property) it has taken its place (its highly ranking place) in modern Charters of rights only very late.

It indeed appeared in the American "Declaration of Independence". Its Preamble claims the right to Self Preservation and clearly echoes the argument that it is just to cancel the social contract, when fundamental rights are not respected.

But the French "Declaration of rights of Man and the Citizen" does not mention this right.

C

Most modern political thinkers did not include it in their lists of natural rights.

Not only those thinkers who did not agree with Natural rights theory, but also the most notable Natural rights' theorists of Modern Era: the right to Self Preservation is not notable for Locke (who holds it, but considers it less important than the right to property), and for Kant (liberty is the only innate right, he would write in the *Metaphysics of morals*).

Only defenders of the right to Self Preservation will be Spinoza (who bases it on *conatus essendi*), Pufendorf (laying its foundations in self-interest), Rousseau (still an important reason for the social contract), and --a reason for consolation--Voltaire, who, in his *opposition* to a universalistic view on rights, held that only the horror in front of murder and the respect of pacts are universal.

As a result, the right to Self Preservation has not been included in contemporary Western Constitutions. Very few representative constitutions in Western cultural "families" of law contain it: in Great Britain, it did not appear in the 1688 *Bill of Rights*: in Great Britain it became a right only in the 1998 "Human Rights Act".

It did not appear in the American 1791 "Bill of Rights" (nay, the 5th Amendment defends death penalty).

In France, it is absent from the 1789 "Déclaration des Droits de l'Homme et du Citoyen": it became a right only in the 1958 "Constitution de la V^{e} République".

It is not a right in the 1948 Italian constitution, but it appears in the 1949 German Constitution.

One can see that, if it appears in contemporary constitutions at all, it does so only in the very last years (and this is also a reason why talking about this right is very interesting).

3. Absent: why?

Why was the right to Self Preservation absent?

My hypothesis is as follows: the right to Self Preservation appears connected to a pivotal aspect of the citizen's relation to his / her State: the State's presence in the international sphere. The international sphere is often represented as the "state of nature" pushed further and outside the boundaries of the State.

By the three-folded move made by Hobbes, in fact, legality (and with it, demandable rights) is conquered as if by pushing further a frontier. The state of nature *steps back* to the international sphere.

Antonio Cassese (5) has written that the international "state of nature" looks rather like Locke's state of nature, than like Hobbes', owing to the presence of some rules: the meta rule of reciprocity, and few other rules.

This may be true, but upon two conditions:

1. provided that one accepts that primary subjectivity passes from the individual to the State. Bearers of rights are not "organisms", but "super-organisms", Leviathans, as in Hobbes, and as in Grotian international right.
2. provided that peace occurs, and not warfare.

Instead, when both (1.) *the viewpoint of the subject/citizen is adopted* and (2.) *warfare takes place*, a very dangerous state of nature persists, very much like in Hobbes, and this obviously creates a problem, for the foundational "statics" of the State.

This is a possible reason why the right to Self Preservation has been included so hardly and so late in the list of constitutional rights.

As long as the State preserves "civility" inside its boundary, only by pushing "incivility" outside of them, it cannot cancel *its own* right to act according to the state of nature, i.e., to fight *for its own self preservation.*

But Leviathans, which are metaphors and not living beings, cannot fight unless human beings do. And human beings, in war, risk their lives.

In other terms, as long as States are to wage war, the right to Self Preservation is strongly contentious. Individuals and States dispute it with each other.

Such is the situation, until super-national authorities step in, that can arbitrate between States and citizens and enforce individual rights in front of a State abuse: then, new spaces and new potentialities for the right to Self Preservation will arise.

4. Democracy and citizenship

We do not live in absolute monarchies any more, and there is no reason why we should remain attached to the spirit of a Hobbesian social contract. Modern State has evolved towards democracy.

A

When we come to war, however, democracy complicates things.

It has been observed that today the enemy has become an ideological enemy, someone contemptible as it had been only during the crusading Middle Ages. This change has taken place during French Revolution, and in the subsequent Napoleonic wars, up to WW1 and especially WW2.

Instead, during the mercenary (ideologically aseptic) Modern wars, the enemy was *conventionally* killed, he was someone who might be a soldier as well in this country's army as in that.

B

In addition, with WW1 and WW2 *citizens* are involved in war, and become targets.

From WW1 on, no war seems possible without involving the heaviest casualties among civilians.

The estimation circulates, that the proportion between military and civilian casualties was, at the end of 19th century, 8 to 1, while, at the end f 20th century, it has become 1 to 8. But more precise estimations evidence an even higher load of death on civilians.

C

But if we all, *as citizens*, have to become targets, then the obvious counterpart is that we can have our say, *as citizens*.

In other words, democracy can become a way to redress our unattended question, that is still pending between the citizen and the state, the question of the right to Self Preservation.

As long as democracy in not practised at an universal level, in the framework of cosmopolitanism (not by chance, cosmopolitanism was proposed in a book entitled *Perpetual Peace*, that many in our globalised world start considering a topical book), democracy will go on taking place inside the State: the old place where citizens demand -to the State- the enactment of their individual rights.

5. Alienable?

As long as a right is so fundamental, I believe a strong claim can be made, in its exercise. But how can such a right be exercised?

It has been discussed whether fundamental rights can be alienated at all.

All in all, they were called "inalienable rights".

It appears reasonable to say that fundamental rights belong strongly to the individual.

So, the right to Self Preservation may be considered such that nobody can take it away from me if I do not want to yield it, but that I *can* alienate it, provided that I *freely* choose to.

For instance, in Italy I have a constitutional right to the inviolability of my domicile: but I *can* let someone in my house, if I *freely* choose to, it is a normal exercise of my right, as long as there is no pending threat or blackmail or state of need influencing my decision.

Similarly, I can decide to commit suicide. Or I can opt for euthanasia. Or I can choose that my State takes part in a war, or to personally take part in my State's war.

Then, also the right to Self Preservation can be considered alienable.

Since the right to Self Preservation is strictly individual, its alienation should, in parallel, be strictly individual. Individually mine is the right, individually mine is the decision to alienate it, but:

1. not once and for all: "social contracts" should come up with every new decision to alienate the right to Self Preservation
2. not through political representation, but through forms of more direct democracy, that are nearer to *individual* choice.
3. its alienation should be bound to precise political directions
4. it should happen on the double level
    a. of a political decision that involves the entire State
    b. and of an individual decision (in case citizen's choice is different from majority choice). I am talking here of conscientious objection.
5. it should take place in the ordinary exercise of democracy.

Therefore, this right *demands* stronger democratic modalities.

6. Technology and war

No historian of war would ever neglect considering the decisive influence of technology on the evolution of war.

Effectiveness demands indeed that new technology and new techniques may never be left behind in this field.

Fire-powder, aircrafts, the radar ..., mark the ways in which war history is divided into periods.

And not only technology, but technical expertise: from ancient Roman testudo formation, to Clausewitz war of attrition and war of manoeuvre (6). Or to Clausewitz considerations on the importance of prevailing forces in the battlefield, that would prove decisive for the passage to 20th century world wars, where alliances would make a difference.

But international alliances proved decisive also for the evolution of international politics and even the organization of the international community.

Not the same can be said of democracy. Does democracy explore new technologies and techniques? Does it influence historical evolutions in international politics so decisively?

North American elections are still made today respecting a timing necessary for horses to carry voted ballots throughout the country.

Everywhere in the world, after the ballots, politicians must resort to political sociologists' interpretations, to be able to sort out which sectors of society expressed such and such choice, which votes moved to and from rising and declining political parties, and why this happened.

In fact, technical possibilities exist today much more refined than a "yes" or "no": opinion polls appear to be largely ahead of vote, in precision and detail, when representing citizens' preferences.

And *indeed*, opinion polls are used to clarify and explain the vote, a vote which is much too skinny, and much too bound into preset alternatives.

Statistics and sociological survey techniques have reached today a level of scientific quality, such that they can avoid manipulation of questionnaires and misinterpretation of results in a rather satisfying way.

Let us take a look at an opinion poll on Iraq war.

We can say that this opinion poll

1. tells very clearly what the political will of citizens is (it is against Iraq war)
2. overcomes the effect of the moods of the instant, that is a root for distrust in public opinion (as in Habermas, for instance), because it is repeated in time, and shows that citizens' opinions are very constant.
3. has a potentiality for preventing the so-called "disaffection" of citizens for politics, that some consider a sign of "mature democracy", but others prefer to call a crisis in representation.

7. Summarizing

1. We are identified through our State citizenship both in our ideological choices, and in our physical vulnerability.

2. A feeling of impotence, if not openly bad conscience, is broadly felt, when we are faced with atrocities and disasters happening abroad. Let us briefly stop on this.

a. This is a consequence of the difference in valuing human life.

b. But the human rights of far away people are unreachable for me, as an individual, unless I resort to political ways.

Violations of human rights *are* extraordinarily atrocious, and still so ordinary.

I do not think that Westerners should feel guilty for their passivity. Because they do know what international law experts experience every day in their work: i.e., that the international sphere is a "state of nature" that is not yet been ruled out, but only pushed away to the borders.

So, for the ordinariness of human rights violations, it is important that political action may not take the ways of mobilization, of exceptional participation, of people rising. But rather, political choices should be an everyday exercise of democracy.

c. So, I will try to provide a device based on a right of citizens "whose life's worth is high", that has a potentiality to become a means for the protection of other's lives, those of citizens of foreign States, that are "worth less" owing *both* to offence on the part of their own States, *and* to the "carelessness" by which my State wages humanitarian wars.

3. political representation appears to take up forms that limit the spectrum of choices offered to those who vote.

And here finally, is my proposal.

The solution I propose consists in looking for *institutional* instruments, that may connect the will of people (the will of individuals) to the protection of their own right to Self Preservation, by the way of a transmission belt that works all the time that the democratic machine is on and running.

8. Democracy and technology

So, we are talking of innovating the institutional modes of democracy. We are talking of voting in the form of an opinion poll.

My proposal is to bind both the decision on war intervention and the goals of intervention, to democratic choice, in order to give new means to political responsibility and to democratic participation.

A problem might arise with defensive wars.

A largely accepted principle in international law (after the 1945 San Francisco "Charter of the United Nations"), is that defensive war has a different status from actively waged war.

Of course, what would fall into our direct consideration would be

actively waged wars: that is, both attack wars (those ruled out by San Francisco Charter), and humanitarian wars:.

It is not technically impossible to define precise goals, but still broad enough as to be object of politics:

Here are some topics on which such an opinion poll could focus:

- effective protection of human rights,
- relief for local population in their primary necessities,
- no taking side with local forces that violate human rights,
- fostering divisions or appeasing the conflict's virulence
- supporting local civil society and democratic life
- is my State allowed to make profits of war, during its intervention?

1. As it always happens in democracy, the power to carry out such preferences will be given to a government (and a military command) that chooses, on the basis of its competence, the strategies to reach goals.
2. This proposal gives a chance to turn September Elevens (that are pleading US politics, its way of life, its feeling of what legality and rights are) from an asset for patriotic propaganda, to an asset for the enactment of our own individual rights.
3. in addition, citizens can easily identify their governments' success or their failure, and this will have the consequences of a more precise judgment of our institutional leaders, when we go back to vote, next time.

If the principle "no taxation without representation" has been able to move history forward, as a historicist philosopher would put it, so could be the principle "no endangering of the right to Self Preservation without direct choice". Otherwise said, "no war, of whatever nature, without direct, individual choice".

9. Effective?

The question arises on the effectiveness of the device I propose, that is, the limitation in the offence of human rights during humanitarian wars.

I will end up by listing a series of previous polls, concerning humanitarian wars of the recent past.

The Poll we saw before by ABC News /Washington Post was made in the USA.

Now we will see some Polls made worldwide.

Here is one poll by Gallup, the question is: "Are you in favor of military action against Iraq?", the poll was diffused in 2003, before the second Iraq war started.

Here is one poll by BBC: You see there is also a question on George Bush. I inserted it not because I want to talk about George Bush, but because in the question his re-election is connected to peace and security in the world.

And now a final comment.

As we saw, my proposal concerns indeed not only humanitarian wars, but all attack wars, that are covered by my argument. I will leave the word to Noam Chomsky:

> The way they say it is, "all options are on the table", meaning, "we want to attack them, we can attack them." That's almost the entire political spectrum, but what does the population think? Well, about 75% of the population is opposed to any threats against Iran and wants to enter into diplomatic relations with them. But that's off the spectrum, in fact, it isn't even reported. But it's not part of the discussion. It's the same way with Cuba. Every since polls began in the 1970s, a considerable amount of the population wants to enter into normal diplomatic relations with Cuba and end the economic strangulation and the terror ...

Notes

1. Mary Kaldor, *New and Old Wars: Organised Violence in a Global Era* Polity Press, Cambridge, 1999.

2. Thomas Hobbes, *Leviathan*.

3. Norberto Bobbio, *Thomas Hobbes* Einaudi, Torino, 1989.

4. René Cassin was one of the authors of the "Universal Declaration of Human rights". I quote from Antonio Cassese, *I diritti umani oggi*, Laterza, Bari, 2005.

5. *Ibidem*.

6. Martin van Crefeld, *The Transformation of War*, New York, The Free Press, 1991.

The use of war as punishment in the international sphere

Teresa Degenhardt

Introduction

Since 9/11, discourses, rationalisations and justifications of war have merged with those of crime in such a way that the pursuit of military conflict is often represented in terms of punishment by a plurality of sources. Both the war in Afghanistan and the war in Iraq were represented by the US administration and the UK Prime Minister Tony Blair as a form of punishment for the events of 9/11, and as a fight against terrorism. Both George W. Bush and Tony Blair depicted war as a way to "to bring terrorists to justice" or "eliminate the threat that they pose". Further, the Bush Doctrine labelling some states as "rogue" has further facilitated this understanding of war as a means of sanctioning defiant behaviour and imposing order in the international sphere.

This representation of war as punishment has become increasingly common in recent times. The Israel campaign against Lebanon in July 2006 was portrayed as a response to Hezbollah's actions, and the US bombardment of Somalia in January 2007 was also meant to be directed against Al Qaeda groups. This is not to say that since 9/11 the ways in which wars are fought and launched have dramatically changed. There are elements of continuity with previous military campaigns that similarly incorporated punitive aspects. The Kosovo campaign, for instance, sought to punish Slobodan Milosevic for violations of human rights. Similarly the 1991 Gulf War was a response to the illegal occupation of Kuwait. However, with the emergence of the threat of terrorism, and what some identified as the figure of the "global criminal", this narrative and representation of war as punishment has become more easily available (Slaughter and Burke White, 2002).

This association between war and punishment has been utilised in other respects by scholars seeking to demonstrate how these military campaigns pursue the imposition of a new world order as promoted by the US administration. Many have suggested, following the influential work of Hardt and Negri on Empire, that the US is using war as a way to punish those countries who are not complacent to their leading role at international level (Zolo, 2000; Douzinas, 2002; Callinicos, 2002; Mann, 2003; Mandel, 2004). (1) However, the notion of punishment was also utilised by some journalists, who defined military operations as "collective punishment" for the populations of Iraq and Afghanistan. In this different sense, the notion of punishment was used in association to that of war to describe either the unjust killing of innocent civilians as a form of capital punishment, or to record the level of brutality displayed by allied forces towards whole populations (see Jamail, Pilger, Cockburn, Steele, Monbiot on Fallujah). It is thus possible to note that in these last diverse instances, rather than legitimising war, the association between war and punishment has been used to discredit the military operations and reveal their blatant illegality. How can this be explained?

This paper will firstly demonstrate how the notion of punishment has entered political discourses on the war in Afghanistan and in Iraq. Secondly, it will give an overview on the changes in forms of punitive reaction and the function that these are called to fulfil. Thirdly, it will expose the effects of current forms of penality and its consequences. At this point it will explain how the practices of punishment and war are strongly interrelated thus showing how their elements and functions can overlap or follow similar paradigms. Adopting a social constructivist perspective, it will then suggest that institutions and practices are not stable entities and they are constantly re-created and re-shaped. Therefore, it will focus on the possible consequences of current practices and their structuring of our international sphere. It is at this point that some questions will be posed as useful platform for a dialogue. The suggestion is that a proper dialogue on the different models of international justice should be initiated instead of maintaining that our current form of international law constitutes a consensual institution. To this end, the possible effects of current practices will be highlighted to suggest that it is from these known unwanted effects that we should start thinking of the ways in

which we seek to shape our emergent global community and global justice rather than only from a normative point of view.

This paper will run along the boundaries within which the disciplines of criminology and international relations are constructed. In an attempt to overcome these disciplinarian limits, this work seeks to analyse alternative forms of punishment to those usually covered by the discipline of criminology, thus expanding the traditional boundaries of the discipline to cover forms of punishment within the international sphere organised by a plurality of states and agencies. At the same time, it will draw upon learning from both criminology and the sociology of punishment in order to show how specific actions could have dangerous effects when applied to the international sphere and when utilised against communities.

The representation of war as a form of punishment

By way of introduction to my argument, I will briefly review how especially political leaders, have represented war as a means of punishment, looking in particular at the ways in which the two wars have been represented by the US President George W. Bush and the UK Prime Minister Tony Blair.

The attack against Afghanistan was the first battle in the so called "war on terror". It was launched in response to 9/11, on the basis of the fact that the Taliban regime had collaborated in staging the event, sheltering and giving safe haven to Osama bin Laden and Al Qaeda. Further, Afghanistan had been considered a 'rogue state' and a dangerous regime even by previous analyses, so it was possible to claim that military action was needed to halt human rights violations. The armed campaign was designed firstly to "bring terrorists to justice", comprising the capture of Osama bin Laden and his followers, believed to be hiding in Tora Bora, and delivering appropriate punishment for involvement in 9/11 to both the Regime and those involved; secondly, military forces were meant to liberate women from sexist oppression, and change the life of Afghan people by transforming the regime into a democratic form of government.

Similarly, the Iraqi campaign was staged as part of the so called "war on terror", to establish order and security in the international sphere. This time the problem was constituted by the alleged possession of weapons of mass destruction by the Iraqi regime and its untrustworthy nature. On many occasions George Bush referred in his discourse to the "tragedy" of 9/11 as evidence that there was a need to control various sources of danger to prevent future attacks. In this way he was implicitly invoking punitive feelings against those who had killed so many people and, by calling for punitive actions, re-enforcing popular fear of possible incoming tragedies. In addition, military operations against Iraq were represented as a means of enforcing United Nations resolutions on the retention of weapons of mass destruction, thus attempting to portray the action as legal. Further, it was strongly underlined how Saddam Hussein was a "murderous tyrant" who had killed thousand of his own citizens. Hence, it was claimed that armed forces were the only appropriate instrument to free Iraqi people from cruel oppression, transforming their poor lives and bringing them democracy.

In their speeches both the US President and the UK Prime Minister Blair recalled the 9/11 tragedy and invoked the need to "bring terrorists to justice". In the US President's words: "our military action is designed to drive terrorists out and bring them to justice" (Bush, 2001). The UK Prime Minister echoed: "we must bring bin Laden and Al Qaeda leaders to justice and eliminate the threat that they pose" (Blair, 2001). In these statements, made in support of the military campaign in Afghanistan there is a sense that war would be a proportionate response to the murder of so many. This implicitly refers to the retributive function of penal policies by which it is believed that punishment will ultimately restore justice (Hudson, 1993). Similarly with the Iraq campaign, the two political leaders represented war as a means of law enforcement and an instrument to incapacitate a "murderous tyrant", "homicidal dictator", and a "menace for the whole world". The US President judged the Iraq dictator in these terms: "[the] Iraq regime has violated all ... obligations", "he should be held accountable" (Bush, 2002). The UK Prime Minister pointed out the need to "act within the terms set out in resolution 1441" and of enforcing international norms: "who will believe us [next]? What price our credibility with the next tyrant? (Blair, 2003). Again, in these statements it is

possible to see how war is portrayed as a mechanism of law enforcement and of deterrence against future acts. Further, it was claimed that both actions would help bring democracy and freedom to oppressed people, thus implicitly suggesting that war would have helped reform in both countries. In both cases, the legitimation of violence was achieved by mimicking a criminal process by the two political leaders that led the Coalitions (see Mégret, 2002). The concepts of responsibility and guilt were invoked, it was argued that evidence had been found, and the evil and criminal nature of Osama bin Laden, Mullah Omar and Saddam Hussein was condemned before a global audience.

Both campaigns were constructed as punitive because the notion of crime had entered the discourse of war. War was designed to pursue international terrorists, who are mainly individuals organized in groups with no special reference to a state or territory. Some heads of state, primarily Saddam Hussein, were considered criminal, defined as "murderous tyrant", and the discourse of war called on the world to take action against him and his like. Finally some states were defined as "rogue", for their being a "threat" to the whole of humanity in light of their defiance of human rights or of the US. The logic of crime and that of war were blurred in these circumstances. As Jacques Derrida observed: labelling a state "rogue" is already calling for some sort of punishment (Derrida, 2005). Further, war used to be considered an instrument of defence of the collectivity as a whole and directed against states, beyond national borders, whereas these military operations were and are instruments to protect individual's physical integrity (Bigo, 2005). The fact that they are directed against specific states is mainly a strategy to "re-territorialise war" (Galli, 2005). As some scholars have pointed out, these were punitive wars, meant to establish some sort of order in the international sphere (Zolo, 2000; Mann, 2003; Douzinas, 2002; Mandel, 2004). The rationale of both military campaigns against terrorism was one of reaction against tragic harmful events. Armed forces were sent abroad to assert the ability to control and protect national populations from future danger. War was aimed at pursuing, controlling and limiting the behaviour of antagonistic groups and individuals, imposing and enforcing specific norms both within and outside state territory. In this function, it seems that war is no longer only fulfilling the traditional function of defence outside the state, but it is also taking on the role of the criminal justice system.

The practice/institution of punishment

The assumption on which this work rests is that the ways in which punishment was administered, its utility calculated, or its various justifications illustrated have changed according to historical periods and social organizations (Foucault, 1977). Generally punishment consists of infliction of unpleasant situations on people as a response to their infringement of social/legal rules (Easton and Pipe, 2005: 4). The infliction of pain is considered justified by the function it retains in relation to the social group, and in particular in relation to a normative system it seeks to enforce. Punishment aims to restore the violated order according to specific values by means of symbolic moral condemnation for the wrong done, before the whole social group and in a public way. In so doing, the offender is rendered docile and no longer dangerous for the community through the infliction of pain and shame (Easton and Pipe, 2005), which also helps restore community values (Durkheim). This complex process requires five substantive component parts: a breach of rules, aimed at protecting essential values of a community; a subject responsible for an offence; an accepted authority to deliver pain according to accepted rules; moral condemnation; and finally infliction of pain (Lacey, 1988; Hudson, 1996).

These requirements are not only the product of rationale processes, they are the result of specific material practices. Nietzsche highlighted that punishment, rather than being just a simple response to harm or a form of repressive action, is meant to construct the truth about an event. In particular, Nietzsche underlined that the use of violence is functional to the development of a system of norms and to their understanding by the population. In this sense, punishment works as "mnemotechnique": a way through which norms are inscribed through the pain of the body within individual's and collective's memory (Nietzsche, 1995). The ways in which we conceive of responsibility and guilt are the actual results of the application of violence and not their necessary requirements. The sense of responsibility is the effect of the application of pain on the person's body. Foucault, following in

Nietzsche's footsteps contended that varying of punitive techniques is reflected in different notions of the subject and these mirror a change in the form of power (Foucault, 1977). Therefore, what we perceive to be essential requirements of punishment have been developed and rationalised with the evolution of specific material practices in determined locations.

However, despite the fact that punishment constructs our understanding of norms, guilt, responsibility and subjectivity, it is also structured according to our sensibilities, mentalities and the culture of the time (Garland, 1990; Spieremburg, 1984). At times, greater emphasis is placed on the principle of formal equality, at other times the focus is on the material conditions of the particular individual involved. In certain societies persons are evaluated on the basis of their context and environment and in others on the basis of their free will. As Spieremburg demonstrated, changes within the criminal justice system are mirroring changes in social relations, notions of freedom and sensibilities. However, punitive techniques are part of a process of social conflict and change, and as such they are the product of struggle, conflict and compromise between specific cultural forms (Spieremburg, 1984). Hence, discourses and social relations shape the forms that punishment takes and vice versa different practices of punishment structure our social relations, sensibilities and discourses differently. It is in this way that we conceive of punishment as a complex institution, both the cause and the symptom of this shaping of social relations; a social and cultural artefact which embodies the social need and cultural meanings of a particular time and specific place.

In this sense the problem of accountability for the production of crime and harm at global level is particularly challenging. Since the current system of international law has been so many times challenged, can we still refer to it as really reflecting the values and norms of the whole world? However, the violence that war entails implicitly defines norms by way of military capacity, and in doing so it constructs a particular style of authority/power and enables specific forms of subjectivity and social relations. Further, these wars and their rationalities are the product of a specific cultural way of thinking and material conditions while at the same time seeming to structure a future global community through these actions. What are the meanings that this form of penalty is transmitting? What sort of global sphere is this form of penalty shaping? Are these values going to be solid foundations upon which to construct an increasingly dependent world? Before answering these questions I would like to step back and explore the ways in which contemporary penalty has developed. This will show how these are producing divided societies and bring about unwanted effects.

Trajectories of the punitive system in late modernity

Contemporary criminological research in the US and the UK has highlighted a major shift in the ways in which penality is conceived and acted upon. Scholars have highlighted an increase in demand for punitive measures to be taken against criminality and a tendency to focus on whole categories of people rather than on single individuals. This change is believed to be related to the fundamental and structural transformation broadly defined as late modernity. The spread of capitalism, technological advancement, the shrinking of space, changes in the forms of production, growing urbanization, and the demise of the welfare state are all elements that contribute to this shift. It is believed that the sentiment of reform and progress typical of the sixties has left space for intransigent exclusive policies directed against "suitable enemies", either the blacks and Latinos in the US or immigrants in Europe, who are permanently excluded from our societies (Wacquant, 2002; De Giorgi, 2000; 2006; Melossi, 2000; 2003). Emblematic of this shift is the huge increase in incarceration rates in most countries. It reaches 2 million people in the US, 1,5 in China and almost a million in Russia (Franko Aas, 2007). Many commentators have coined new phrases to illustrate these changes: "massive incarceration", "society of control", "actuarialism", "new punitiveness", "new authoritarianism" or "post-modern penalty". The emphasis is on grand intransigence towards deviance.

Scholars suggest that this is the result of the rhetoric of "war on crime" which had been widely used in public debates to call for a new radical approach to crime. According to these analyses public

preoccupation with the rise in crime was linked to the civil unrest of the sixties and seventies, manipulated by political commentators through a call for a "war" against crime and deviance in a desperate attempt to re-gain political control (Beckett, 1997; Parenti, 2001). Indeed, the metaphor of war allows extreme measures to be authorised against those who are defined as public enemies. The obvious result of launching wars against crime is the militarization of the police (Kraska, 2001), and a blurring of the distinction between the two system of defence, as well as "scapegoating" (Young, 1999) as a means of exorcising the new social anxieties against "suitable enemies" (Wacquant, 2002).

This new form of penality is believed to have caused a radical shift in paradigm whereby groups and aggregates of people are targeted instead of individuals. It is also focused on the prevention of crime through the notion of risk of delinquency. Categories of people are thus ranked by their likelihood of dangerousness, assessed in relation to a set of characteristics extrapolated by profiling techniques. These classes of population are the underclass, constructed and reproduced through these practices. The aim of the new penality is not re-integrating such communities, it is to segregate them in specific locales, as in ghettos or slums, condemning them to a situation of "advanced marginality" and total exclusion (Wacquant, 2002; 2006; 2007; Davis, 2006). These people are the ones that society includes through values diffused by the media and then are "vomited", as in a process of "bulimia", making them redundant (Young, 1999). They are defined as beyond integration. They are so different as to represent the monstrous others of our imagination. Instead of directing reformative measures towards them, the practices of late modernity tend to incapacitate them in secluded spaces.

Some criminologists have underscored the strict relationship between these modalities of penalty and the aim of governance (Garland, 1996; 2001; Simon, 2007). In these analyses the inadequacies of the criminal justice system typical of liberal states in governing their populations is made clear and it seems that it has reached a point of rupture or epochal transformation. After years of analyses demonstrating the ineffectiveness of the mechanisms of the criminal justice system, and indeed how they contributed to the reproduction of deviance instead of limiting its impact, it seems that the capacity of our designed system of control has reached breaking point. Contemporary penalty reveals how the system is dysfunctional, basically producing a divided society often on the basis of racial lines. Prison populations have increased in most countries to the point that some states have already devolved the function of managing prisons to private corporations, and new prisons are being built. And yet there is increased need to construct new forms of exclusion that go beyond the strict national borders, such as the temporary camps for migrants or the various Guantanamo around the world, segregating those who are defined as the new threat (Franko Aas, 2007). The criminal justice system demonstrates the limits of the liberal states and the paradigm of defence on which they are based. To what extent does war follow the same logic and rationale of late modern system of penalty? If so, what would the consequences be of utilising war as a form of punishment? What can the discipline of criminology tell us about this? If so, how is this impacting on our understanding of sovereignty and political authority? To try to shed some light on these matters, we will now look at how the concept of punishment can be related to that of war.

Points of encounter between the notion of punishment and that of war

The rhetoric used by the US President and the UK Prime Minister rests on assonances existing between the features of punitive actions and elements utilised to legitimate current wars. The essential elements of punishment (breach of rules, authority, responsibility, moral condemnation and infliction of pain) in some way converged with the natural connotations of war and their attributed aspects. In the table below I have schematised this convergence. Breaches of rules, emphasised by political leaders in the two military campaigns, were indeed met with pain typical of war. In the case of Afghanistan there was a crime to be responded to, in the case of Iraq, the UN Resolution had not been complied with. In these cases, military action would forcefully signify the wrongfulness of the deeds and would represent an expression of moral condemnation of those under attack by the global community. Authority was represented by the decision on the part of the US administration to launch military campaigns in response to these problems, represented as the will of the global community

(2). The element of responsibility resonated with the link drawn between Osama bin Laden, Al Qaeda, Mullah Omar and the Taliban Regime for the events of 9/11, in the case of Afghanistan, and in the case of Iraq, with the fact that Saddam Hussein was considered culpable for violating UN Resolutions, for having links with Al Qaeda, and through being defined as a "dangerous" and "murderous tyrant".

PUNISHMENT RELATED CONCEPTS	WAR RELATED MANIFESTATIONS
Breach of rules	Mass murder/WMD UN Resolution 1441 (2002)
Authority	US and UK
Responsibility	Osama bin Laden, Mullah Omar/Saddam Hussein
Moral Condemnation	Express judgement and reprobation
Pain Delivery	Death, wounding, destruction, forfeiture of property, etc

Table 1: Encounters between the elements of punishment and current wars

Even the function of war, evidenced in the language used by both the US President and the UK Prime Minister, was fulfilled by some of the characteristics of current wars. Retribution was implicitly satisfied by wars as a form of response to the harm caused on 9/11. Deterrence was achieved by showing that similar actions would no longer be tolerated, and that war was meant to enforce international rules. The incapacitative function is well replicated by military force as it is self explanatory that the power to kill utilised could be seen as the best way to eliminate a perceived threat from the social world. And finally the rehabilitative function could be presented as a variation of the notion of regime change. Indeed bringing democracy to Afghans and Iraqis was meant to change the social and cultural conditions in which these people lived. A table below schematises these assonances.

FUNCTIONS OF PUNISHMENT	JUSTIFICATIONS OF WAR
Retribution	9/11/ international terrorism
Deterrence	Law enforcement
Incapacitation	Self-defence/ pre-emption
Rehabilitation	Regime change

Table 2: Encounters between the functions of punishment and the justification of current wars

This overlapping of functions and elements shows how the two forms in which legitimate violence - punishment and defence - can be delivered by the sovereign are related and show the similarity between what used to be conceived as two different systems of defence. This is the reason why the notion of violence has been widely used to represent these two wars, both in political, academic and journalistic discourses.

In the next section I will follow the social constructivist perspective, and show what the meanings and representations of the use of war as punishment are likely to be with reference to the above schematised associations. This reading will give us the chance to pose some important questions for a possible understanding of a form of punishment in the international sphere. The idea behind it is

that the practice of war and its being conceived as a response to responsibility for wrongdoing is likely to change our understanding of these elements, practices and of the institutions that underlie it, and these modifications can be dangerous way of trying to design a form of global justice.

Refracting effects: constructing norms, authority, responsibility

As we have seen, these two wars were constructed as response to breaches of rules. In the case of Afghanistan, it was 9/11 which was conceived of as crime against humanity, in the case of Iraq, it was the defiance of UN Resolution. Thus, they depicted the idea that shared rules had been broken. This element presents us with the problem of the very existence of shared norms within the international community. In the case of state-based punishment, it is assumed that the rules being enforced are those of the criminal law and that these refer to fundamental values and interests shared by the majority of the population within a given territory (Lacey, 1988). In the international sphere the existence of such a body of rules is more contested. Can we really say that there is one effective system of international law? Or due to the frequent challenges to this system, should we argue that none exists? This would reinforce the idea that there is no shared notion of the "common good" in the global community (Huysmans, 2006).

Further, the problem of authority emerges. The US, UK and their allies appeared to be taking on the function of a global authority. However, they do not have the legitimacy to do so. The legitimacy is based precisely on the need to restore security at a time of great danger and their authority is constructed around this fear of harm and their military power (3). Thus, it is this association of the two notions of war and punishment which produces authority and establishes it, rather than being an element of it. However, the two different coalitions sought to exercise power in the global sphere as if they were the ultimate authority, thus making evident the centrality of the problem and the need for authority. But before calling for a global sovereign we should evaluate whether there can in fact be a sovereign at global level. Paraphrasing Huysmans (2006), is it possible to reduce the "radical plurality" of the globe to just one form of authority?

Importantly, this association transforms our notion of responsibility in relation to a specific event. War as an instrument to punish implies an idea of culpability based on group identity. Establishing a country as "rogue" or, some people as "terrorists" tends to criminalise whole groups of people on the basis of their belonging to a specific territory, originating in a particular geographical location, or belonging to a specific creed. The dangerousness, or perceived dangerousness, is established on the basis of proximity to the figure of the criminal/terrorist. In doing so, war erodes the standard concept of responsibility from one of a proven culpability in the planning or carrying out of massacres or crimes towards one of mere dangerousness or proximity to the dangerous, either real or regarded as such by the authority. It crystallizes an idea of responsibility that can be presumed a priori on the basis of someone's identity (whether this is considered in relation to a state of belonging or to ascribing to a specific religion or to a network of people). This is exemplified by the logic followed in many incarceration and rendition flights as practices of the current war on terror. It also resonates with techniques typical of the new penology in which there is a tendency to focus on groups instead of individuals and presumes specific dangerous behaviour from sets of characteristics that can be traced from one's identity. It should be made clear that this is not to deny that specific crimes may be the result of collectively shared ideas or ideologies belonging to specific groups, it is rather to point out the complexity of such cases. It is not only the notion of responsibility for a shared idea that appears problematic (how do you stop an idea?), but it is also the problem of its evaluation (is it cultural? Is it the obvious outcome of material conditions? Or is it criminal?), and of its adjudication (who is going to be responsible for it?).

In relation to the element of moral condemnation, which evidences the fact that punishment is essentially a form of communication, similar issues arise. How is it possible to convey a single shared message (i.e. that something is wrong in itself rather than is wrong because specific groups of people practice it instead of others?) And what about the procedures for the condemnation of the production of harm: is it possible to find common ones (need to use retributive/incapacitative

violence vs. need to be civilised)? Further, what can be conceived as adequate punitive mechanisms to deter crimes of such a vast scale and in cases when even death would not be enough for those who are ready to commit suicide?

Finally, the element of the infliction of pain. How can a scale of painful consequences be determined at the global level given that living conditions vary so greatly? Further, is pain the adequate mechanism to communicate that something is wrong and deter future crimes? Or is it not rather creating more reasons to drift into deviance?

Despite similarities and interrelations, important dissonances and diffractions are produced when punishment is played out at international level through war. These are related basically to the fact that while punishment has been constructed as a practice to control individuals, war has always been a collective practice directed against states or groups. Studies demonstrated that humans tend to follow what the majority of people think is right and to adjust to the environment into which they are inserted (see Milgram's, or Zimbardo's experiments). The notion of individual responsibility at the basis of the adjudication of punishment would need to be re-thought and developed for the international context, as would any possible form of international justice (Norrie, 2007). The idea that there are specific dangerous ideas and ideologies that enable the commission of human rights violation is also partly disproved by sociological and criminological investigations. Ideas and cultures are the ways people adopt and respond to structural conditions of inequality and power (Cohen, 2004). They are ways to negotiate social positions. Their criminalization is mainly a response that powerfully manipulates public perceptions and consensus around specific conflicts. So one should ask: can there be a form of punishment in the international sphere if the living conditions vary so greatly? How can a message that something is wrong be conveyed justly? How can it be conceived in a way that truly respects different ways of social organizations? And, obviously, who is to establish what is wrong and how? The problem of international justice more than ever raises the classical critical question "whose justice and whose rules?" It seems that to state that there are "universal rules/values" common to all humans is a way to deny that those who commit such tragedies are indeed "humans" as the others who are suffering from these events and that there is not a special category of people who can easily be defined as "natural criminal" as often mainstream narrative and rhetoric portray (4). This is not to claim that there should not be an attempt to control and limit harmful behaviour, rather it is to question whether it would be appropriate to simply transpose our system of thinking about deviance to a global level. In the next section, we will describe, using criminological theory, the effects of punitive action in the international sphere.

Labelling rogue states: criminalising communities and the construction of identity and social relations

Criminologists such as Lemert, Becker and Sutherland have stressed the fact that crimes are not ontological reality, but rather the product of the reaction to these specific acts and their labelling as crimes. Criminality and deviance do not pertain to determined behaviours, rather they are dependent on the reaction to specific acts believed to be dangerous or challenging to specific social arrangements. However, these scholars have also pointed out that the reactive process eventually leads to the very acceptance by the subject of the status of criminal. The subject is likely to finally accept and internalise the image that the others have of her/him and structure their subjectivity around this representation (Mead, 1918). The study of deviance has stressed how not only is what is criminal is defined differently by different societies, but also how this is essentially constructed by social processes and can shape the individual's perception of him/herself, crystallizing in true identity and eventually amplifying deviance. Although most of these studies concentrated on individual's reaction to the process of labelling, there has also been some consideration of group dynamics, most notably perhaps the work of Stanley Cohen on the case of the Mods and the Rockers in Britain. In this study, Cohen shows how media processes of demonization and construction of deviance of the group's activities in Brighton resulted in amplification of deviance and

reinforcement of the stereotype (Cohen, 2004[1972]). What appears clear is that the individuals and groups are likely to perceive themselves as outsiders to a specific society.

According to these studies then, social practices are particularly important because they become powerful signifier to normatively define people as outsiders. The war on terror has so far labelled as dangerous radical Muslims and has targeted specific countries. In doing so it has stressed that terrorism had its origin in Islam and religious identity, or that people coming from determined countries and regions of the world are potentially dangerous. These practices and discourses are criminalising whole sections of the global population on the basis of the territory of origin or of religious belief. Instead of producing normalization, these practices are likely to stimulate a process of internalisation of this identity and the image of deviance. As a result, people who are defined as dangerous through practices and discourse may adopt the straightjacket of nationality, or origin, or religion and become the very danger their ascribed image suggests. In doing so, war is also partly following the rationality of the new penology by which sets of populations are identified on the basis of the risk that they pose and are segregated in places of "advanced marginality" or incapacitated for being beyond integration. If this is partly re-establishing the link between some territory and their populations, as Agamben claims, it is also potentially creating a stigma of territory or religion that can convey a sense of their being inferior/outsiders. Targeting specific territories and communities is likely to brand some people as dangerous and deviants; this defines them as outsiders in the global community on the basis of the territory inhabited or the religion practiced, ultimately amplifying these forms of identification and their ostracism from the so called West and the US leadership.

Blurring of borders: constructing global sovereignty or the proliferation of borders?

The impact of these practices on the notion of sovereignty and political authority is difficult to predict. What can be stated is that there are contradictory tendencies. We have seen that wars are currently directed outside states but for the protection of individual's physical integrity and the rationale of creating order. I have suggested that states are no longer the exclusive authority within a fixed territory. Indeed, some military actions can target organizations within other states' territories, and foreign and international police forces can act more or less freely in other states. Interference is allowed within borders by different authorities and police forces. Borders are no longer sealed and people living within a territorial state often originate in different regions/states. Thus, it seems that the notion of sovereignty is unsustainable in light of these current developments.

On the other hand, this phenomenon by which the traditional distinction between internal and external mechanisms of defence has been blurred has prompted numerous scholars to call for a global sovereign, some sort of political authority at global level. This, it is believed, will finally solve problems of crime and accountability in the international sphere. Against this view, Rob Walker stresses that this would not be possible because the ways in which subjectivities are shaped are inextricably linked to the existence of the state and the structure of order on which it is based (Walker 2006). Walker argues that the form of belonging upon which the state is built is necessarily constituted on specific notions of space/territory and time in relation to other states and territories. Thus, it will not be possible to re-articulate current forms of subjectivity and authority at a global/imperial level. According to him, we need to re-think the ways through which we organise political life in an entirely new modality.

Through the analysis of war as punishment, contradictory tendencies have been highlighted. On the one hand the current exhibition of power is an attempt to control people and re-constitute their relations with and subordination to a specific state authority (see also Agamben, 1998; 2005). On the other, the US's display of violence and power is branding entire populations as deviant and potential terrorists. In so doing, it is likely to produce the very terrorist/criminal it is trying to exorcise. Further, military global campaigns conducted in different territories at the hands of different agencies are defining borders and structuring relations in contradictory and overlapping ways. The selection of people on the basis of their belonging to a territory or their religion is inevitably

interpreted differently by those in power. The Northern Alliance searched for foreigners on Afghan soil, and President Musharraf does not attempt to identify sympathizers of terrorism in certain areas of his constituency. Put another way, a religious fundamentalist will be identified by different criteria in Pakistan or Egypt from in Italy or Spain. Further, the characteristic of religious identity overlaps and contradicts that of nationality, signalled as possible indicators of danger. Therefore, instead of the production of new form of global order defining the borders of inclusion and exclusion, these differences are potentially giving life to an even larger plurality of sources of power and identification. The dividing lines that define the included and the excluded, along which these wars operate, are inevitably furthering the crisis of the system of sovereignty and enabling new understandings of political authority. If war is currently being used to solve the problem of order in the international sphere, this is potentially destroying the very system upon which that order is meant to rest.

Conclusion:

Understanding war as punishment has been useful to underline how the two systems of internal and external defence are implicated one into the other. The aim of this paper was to demonstrate the need to engage in a dialogue between disciplines to try to re-think the ways in which a possible global sphere should be constituted. At the moment, punitive military practices are primarily creating more disorder than they are solving and are determining a hierarchical order in which the outsiders are determined on the basis of the territory they inhabit or the religion they identify with. It has signalled the impact that punitive practices have in shaping a political community. Thus, I hope that political theorists will take advantage of the study of the effects of punitive practices in determining future imaginative ways of sharing space and time together. The many questions and doubts left open in this middle of the argument should form a starting point from which this future dialogue could be launched. They are necessary questions we should address if we are to construct any form of global justice. What I hope I have demonstrated is that war is an inadequate mechanism to establish justice. Although military campaigns can satisfy some of the expressive and symbolic functions of punishment, they are likely to produce more problems than they can actually solve. What appears clear is that the current system of order, national and international, which used to be based on the notion and practice of sovereignty, is under great stress and this is further aggravated by the global war on terror. Instead of pushing for a re-articulation of the state based model at global level we may need to think differently about ways of living together without drawing borders. More politics and dialogue is needed to open up different cultural landscapes, otherwise we are left with nothing but some words of Leonard Cohen's song: everybody knows that the boat is leaking, ...and every body knows that it's me or you.....

Notes

1. It needs to be said that Hardt and Negri were not suggesting that the US was taking on this role. They actually argued that a form of Empire was emerging as result of the complex implications of network of states, corporations, NGOs and the likes. However, since the publication of Empire, this world has gained fortune in many other scholars' works.

2. This was possible on the basis that many countries took part in the two different campaigns in various composition. Further, many newspapers showed solidarity and support for the war on terror the day after 9/11 exhibiting claims such as "we are all Americans!" in French, Italian, and other languages.

3. In this sense, very interesting is a piece by Alan Norrie (1984) which shows how the Leviathan is built on fear and not on rational agreement as it is believed.

4. See in this sense Amnesty International's slogan: Protect the human!.

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Justice, Reconciliation, Peace
If and Why Punish through International Criminal Tribunals

Pablo D. Eiroa

1. Introduction

In the aftermath of the Nuremberg and Tokyo trials, two international ad hoc tribunals (ICTs) as well as a permanent court (ICC) were established in the '90s as a response to the large-scale and systematic violations of human rights in the context of serious ethnic and national conflicts. The idea that emerges from the analysis of legal instruments and judicial sentences is that of achieving peace by doing justice and promoting reconciliation. If so: are trials and punishments really needed in order to rebuild and maintain peace? What can we learn from the examples of restorative justice like that of the South African Truth and Reconciliation Commission (TRC)?

The first problem is to specify the meaning of the goals at the basis of the creation of the international jurisdictions, that is doing justice, reconciliation and peace.

Secondly, this paper seeks to clarify the meaning of the punishments imposed by the ICTs. Then, it tries to theorize which effects such punishments can produce and which model of justice they actually promote. Particularly, it poses the question of the legitimacy of this model of justice, first of all by considering if it is able in the end to reach its goals.

Thirdly, it tries to single out the reasons why the TRC was preferred to punitive justice at the end of the Apartheid regime. It deepens the fundamental issues and purposes of the TRC.

To conclude, I will seek to build up a theory about the goals that should be pursued through the punishment inflicted by international tribunals, and consider if non-punitive mechanisms of justice are conceivable, that are both consistent with United Nations law and aid social pacification. If it is possible, how such mechanisms can coexist with the ICC.

2. The aims of international jurisdictions

2.1. Justice

The conception of justice as "punitive justice", namely, the prosecution and punishment of crimes, is at the base of the creation of international jurisdictions. Putting an end to impunity is one of the most common propositions in the preparatory sessions of the ICTs and of the ICC, as well as in their foundational instruments; in fact, there is firm belief that punitive justice can contribute to peace and reconciliation. (1)

But the ITCs' judicial sentences, considering punitive justice insufficient to reach reconciliation and peace, have singled out also different objectives that should be pursued. For example, it was stated by the International Criminal Tribunal for the Former Yugoslavia (ICTY) in the *Plavšić*'s sentence (2), that retributive and exemplary punishment is not the only way to reach reconciliation and peace; other means, such as ascertaining the truth, can be used instead, and are viewed as no less than the first step towards these objectives (3). This criterion seems to prevail in the ICTY sentences subsequent to this one (4).

Moreover, in the context of the Conference of Rome the introduction of norms, specifically focussing on the protection of victims' interests, was accepted, following the idea that also a reparative justice model and not only the punitive one, can provide a big contribution to the reconciliation of individuals and to the rebuilding of society (5). This trend to consider reparative justice as necessary as the punitive one is in compliance with the current International Law standards (6), which view as essential components of victims' right to justice not only the punishment of the

guilty, but also the opportunity for the victims to participate in the process, to get to know the truth, and to get a reparation for the harm suffered.

2.2. Reconciliation

The instruments establishing the ICTs and the international sentences refer to "reconciliation" as a recognized aim of international criminal jurisdiction, but the term's exact meaning is not clarified by them, in either their preparatory sessions or even in the preparatory sessions of the ICC. However, the term "reconciliation" is often qualified by adjectives such as "individual", "collective", "national" (7). This "quantitative" distinction of the phenomenon of reconciliation does not at all seem to be a superfluous one, for it can affect the meaning of the concept, as well as the choice of the concrete ways of achieving it, and the criterion to monitor its success (8).

As the experiences of the Former Yugoslavia and Rwanda have taught us, the crimes under the jurisdiction of international tribunals are acts of massive violence perpetrated by members of one group of people against another, as they perceive "the others" as a threat to their own existence or more generally as a hindrance to enjoying their rights and/or realizing their interests (9). In these contexts, "individual reconciliation" could be defined as recovering or acquiring reciprocal trust between members of different groups, intended "trust" as the expectation that the others maintain a non-violent or in other ways tolerable behaviour, which is an essential condition to live together in peace.

But the same thesis is not acceptable when facing the reconciliation between great human groups that must cohabit in the same country, like Hutus and Tutsis in Rwanda, or in neighbouring countries, like those who must share the territory of the Former Yugoslavia, or even countries not sharing a border and farther away from one another.

It does not seem realistic to think that racial, ethnic, religious, political or other kinds of groups can be capable of sharing peacefully the same national territory on the basis of mere tolerance and avoiding any kind of contact which is likely to cause conflicts that are then solvable only by keeping cooperative relations (10). In this sense, national reconciliation involves the restoring or the establishing between previously conflicting groups of a relationship of cooperation. Such a relationship should be understood as the conclusion and respect of agreements aimed at reconciling the interests of the parties, so that they can live together in peace. Moreover, such a relationship needs not only the expectation of reciprocal non-violent or in other ways tolerable behaviour, but also the trust that the others will act coherently with the established agreements. Therefore, national reconciliation should be defined here as the recovering or the acquiring of the reciprocal trust needed to let different groups keep relations of tolerance and cooperation. Consequently, the achievement of democratic institutions and governance and/or of mechanisms for the pacific resolution of controversies should entail the successful national reconciliation.

Today, the same could be argued about reconciliation between different countries. In the globalized world, the functional interdependence of economic, technological, cultural and environmental factors makes illusory any idea of pacific cohabitation that does not involve the establishment of international organizations and/or agreements aimed at achieving common goals. In the face of this scenario, it is obvious that it becomes more and more unavoidable and urgent need to strengthen the relations of cooperation, both at the national and at the international level (11).

2.3. Peace

In the framework of the United Nations, at least since 1992, the prevailing idea emerging is that peacemaking and peacekeeping interventions have to be followed by actions of peacebuilding, in order to achieve a lasting peace (12). In the Secretary-General's "Agenda for Peace" that year, post-conflict peacebuilding was described as "actions to identify and support structures which will tend to strengthen and solidify peace in order to avoid a relapse into conflict" (13).

Coherently, inherent literature defines *peacebuilding* as a dynamic process, where political direction and will, rather than the technical competence needed to realize a static programme, are relevant. It depends critically on domestic or indigenous initiative, capacity and political will, while requiring international support to facilitate the process. The purpose of this process is that of creating and consolidating the bodies and structures needed to preserve peace (for instance, a responsible police force); but also that of building a peace capable of reducing the risks of new conflicts; that is to say, to fight against the economic, social, political and cultural roots of conflicts in order to recover or establish cooperative relations between the parties (14).

To conclude, we should differentiate between "negative" and "positive" peace, the first meaning the absence of war and violent conflicts as salient connotation of the considered society, the second requiring the absence of the causes of both, that is to say the roots that give birth to structural and cultural violence (15).

3. The purposes of punishment

The ICTs and ICC Statutes make reference to punishment to prescribe the type of sanction allowed and the general criteria that must be followed to asses the sanction; i.e., they tell the judges how to punish. However, they give hardly any indication about the justification for the punishment; i.e., why punish (16).

The ICTs preparatory documents do not add a lot more to what is prescribed in the resolutions of the Security Council, in which the prevailing expressions are "ending impunity", "reprobation", "retribution", "national reconciliation" (17), the meanings of which are not clarified (18).

The fourth paragraph of the Rome Statute states that the most serious crimes of concern of the international community as a whole must not go unpunished. At the same time, the fifth paragraph confirms that States Parties are determined to put an end to impunity and thus to contribute to the preventing of such crimes. This way the aim of retribution as that of intimidation and deterrence seem to prevail (19).

The same aims prevail even in the jurisprudence of the ICTs, but here emphasis is also put on the purpose of education and on the stigmatization of the guilty (20).

We will now try to build up the justice model that rises from a similar conception of punishment.

4. The justice model of international jurisdictions

The idea that a penalty should be retributive, deterrent, stigmatizing and educative presupposes a universal and necessary model of justice, the purpose of which is to uncover the truth and to inflict exemplary punishment to few people, and which tends to consider victims as possible, and not as necessary, parties of the process.

As is well known, the retributive conception of punishment confers upon penalties ethic or moral content, so that it seems widely accepted that universal consensus is met over the responses which should be given to international crimes. Thus, the model of retributive justice has been considered necessary since 1993: if local courts do not punish the most responsible for crimes against the code of humanity, an international jurisdiction must intervene (21), because there is no justice without punishment (22).

But retributive and exemplary justice is considered necessary also because it would be a decisive way to contribute to the prevention of new crimes; this idea stems from the effect of dissuasion attributed to such a justice by the normative instruments establishing international jurisdictions, as well as by the ICTs judicial sentences (23).

Moreover, the purpose of retribution leads to ignore the structural factors of criminality: desert theory is predicated on assumptions of free moral choice and ignores the social, political and economical context in which offenders act (24). In any case, criminal justice has never had the

aspiration to consider such factors, in so far as its purposes are actually much more limited ones, such as verifying the commission of a crime and the conditions of punishment (25).

In the same sense, the aim of stigmatization is not reconcilable with further investigation of elements that are not relevant for criminal law. A similarly limited view over facts leads inevitably to understand criminal deeds as rising exclusively from the cruelty or insanity of the perpetrators. Moreover, such a simplification of history has the considerable power of conforming, at least in the short term, opinions, perceptions and interpretations of facts which give rise to intense historical, political and sociological debate, also thanks to the wide diffusion given to international sentences by the media (26).

In addition, the aim of educating tends to single out a small number of guilty people, in preference political leaders, to sacrifice in the name of the whole community (27). Their fall and condemnation have a very significant effect, and keep the promise of contributing to the development of the sense of responsibility for serious violations of human rights (28). Consequently, the trend of the ICTs jurisprudence is that of prosecuting and punishing through exemplary penalties (29) exclusively the people who are politically most responsible or those most involved in the crimes committed (30), with the justification that diffusing atrocities were provoked by a small number of fanatic nationalist leaders, whose resentful propaganda has roused ethnic fury (31).

Coherently, the victims can play only the role of Prosecutor's witness or in any case that of possible, and not that of necessary, parts in the process; their main interest is supposed to be the retributive punishment of the guilty (32).

Can we consider this model of justice legitimate, that is to say necessary and adequate to reach the purposes which justify its existence?

"To put an end to impunity" is quite an unrealistic purpose when facing crimes of massive violence that are characterized by the criminally responsible participation of an extremely high number of people, as shown by the experiences of Former Yugoslavia and Rwanda. The ICTs have succeeded in condemning just a few dozens of people in more than ten years since their creation; so, hundreds of years would be necessary to judge everyone (33).

Concerning justice in the aspect of reparation, we have already said that in international jurisdictions victims are given only a secondary role; while the ascertaining of the truth regards only the facts of relevance for criminal justice and, among these, only those imputable to the few condemned subjects, who are most often part of the losing side of the conflict, or of the ethnic, religious or political group currently opposing to the one leading in the country considered.

It is thus difficult that this kind of trial actually help to achieve reconciliation and peace. In fact, a retributive, exemplary, stigmatizing and educative justice model is not compatible with the aim of opposing the perception of the other as an enemy, in order to consent to the rebuilding of relations of tolerance and cooperation. On the contrary, it leads to concentrating the energies against a scapegoat enemy, thereby generating an emotive solidarity that can turn into more intolerance, repression, secessions and sharper conflicts (34).

Political leaders who have been prosecuted by the ICTY, and above all the former president Milošević, are perceived by a large part of the Serbian population not only as morally irreprehensible and tragic characters, but also as highly representative. Conversely, at the end of the war of the Balkans, Milošević enjoyed low popularity and lost presidential elections in 2000, whereas his apparitions in front of the Tribunal doubled his endorsement and that of his party by the Serbian population, who felt itself judged just like him (35). On the 11 March 2006, 80 thousand people gathered to bid farewell to the former president like a national hero, who had deceased the day before in the prisons of the Hague. Moreover, every mediation so far attempted by the UN to give Kosovo independence has failed under the threats of the ultranationalists and of the socialists to start the fighting again (36).

In Rwanda, the implementation of retributive justice has also caused a dramatic situation, as about 125.000 people, which means 10 per cent of the Hutu adult male population, have been kept for years in local jails, while still considering themselves as prisoners of war and victims of the Tutsis, who now lead the country. Even the organizations of the victims and survivors have considered some decisions taken by the international judges outrageous and have thus ceased their cooperation with the ICTR (37). This situation together with the high levels of economic, political and cultural interdependence between Hutus and Tutsis, has further clarified that policies based on criminal proceedings and imprisonments can give hardly any contribution to promote justice and warrant reconciliation and peace (38).

Finally, it was observed that the criminal processes held at the end of World War II, just like the ICTY, have had practically no deterring power, if we look at the atrocities committed in the second part of the century, as well as during the war in Kosovo in 1999 (39).

The causes of this apparent failure seem to be mainly three: a) the legal punishment cannot remove political, economic, religious and social grounds which give rise to structural and cultural violence; b) the utilitarian notion that the fear of punishment leads individuals to take the rational decision that they will not commit criminal deeds becomes unrealistic when applied to individuals convinced of the necessity of the elimination of the groups different from theirs, because they fear for their life or dignity, or because they are driven to commit massive violence by their own government or group of power; c) that even if this notion could somehow prove realistic in this kind of contexts, we must remember, as the history of the last 25 years shows us, that the crimes under the jurisdiction of international tribunals are committed in third world countries mostly by state agents or paramilitary groups, with the aim of conquering or preserving a position of power, like the leadership of a country, which allows them to impede the action of international jurisdictions (40); otherwise, they are perpetrated while carrying out their armed intervention in foreign territories by the great international powers, who at the same time provide funds and assistance to the Tribunals, which as a consequence are not able to prosecute their soldiers and politicians (41).

5. The South African experience

So far, we have tried to show how the model of justice proposed by international jurisdictions can be inadequate and sometimes even counteracting to the purposes justifying their creation. The South African experience demonstrates that such model can also be considered unnecessary to the satisfaction and the reparation of victims, to the prevention of new crimes, and to the achievement of reconciliation and peace.

In February 1990 a process of political transition and democratization began in South Africa after almost fifty years of segregationist regime. Negotiations involved not only political actors, but also the different sectors of civil society until then opposed to one another and deeply divided, due to the former governing system (42). The approval of the Constitution in 1993, the first democratic elections in 1994, held with universal suffrage, and the definitive Constitution of 1996, represented the success of political negotiation (43).

During that negotiation, it became clear that the National Party (NP), who had institutionalized the racial segregation and governed the country since 1948, and was still controlling the economy, the police and the national army, would not have accepted the possibility of having its members judged and punished (44). A strict opposition by the liberation movements would have surely put the whole process of democratization and peace at risk. Even for this reason, the Parliament approved the law establishing the TRC (45), which had the power of giving criminal immunity only to people who, asking for it, would confess the whole truth about the facts and admit their guiltiness (46). But the TRC, like international jurisdictions, was aimed at obtaining justice, reconciliation and peace.

The TRC model chose a reparative conception of justice, in conformity with the local cultural tradition (47); this was implemented mainly through four moments: victims' narration of the facts,

public and official recognition of their stories and of the unfairness of the apartheid, accountability of the perpetrators and of the accomplices, and reparation.

Victims and their testimonies have had the most crucial role in the process. The testimonies have been borne in hearings specifically thought to create a public space where they could tell their stories in a comprehensive and quiet environment; quite the opposite of ordinary hearings in tribunals, where the conflict is reconstructed to end with the official and definitive decision of a winner and a looser (48). It has also been noted that the hearings of the victims had a cathartic power, because those who had suffered crimes, violence and unfairness received for the first time public and official attention from the nation (49).

The public and official recognition of victims' stories was also made possible by the issue of the TRC final report. This report should gather the testimonies, as well as give recommendations to the government concerning the reparation and rehabilitation of victims, the creation of institutions for a fair and stable society, which should fully respect human rights, and the adoption of the administrative and legislative measures needed to prevent the reiteration of the same deeds in the future (art. 23-27 of the law 34/1995). There was a strong belief that these structural measures could have much more efficient deterrent effects compared with the criminal sanctions, whereas the conception of justice shared by majority of victims would first of all require the warrant of such public recognition (50). The process of making the authors and the accomplices of crimes responsible for them has been guaranteed through the public confession of people applying for amnesty (51). To this outcome we should add the results of the enquiries of the Investigation Units put at the disposal of the TRC, which gathered, together with the information coming from the victims and the perpetrators, other factual elements that have proved essential in the first place to corroborate the declarations made in the hearings, and, in the second place, for what concerned the responsibility of several authors and accomplices of the crimes who had not applied for amnesty (52).

Moreover, confessions have been indispensable to make the process of reconciliation and peace actually progress. First of all, they have permitted the ascertaining of the truth in many dubious cases, that would have otherwise remained unknown due to the lack of witnesses and to the destruction of the documentation dealing with them (53). Thus, the only way of giving satisfaction to the first demand of the victims and their families, i.e., that of establishing the facts and reclaiming of victims' dignity, was exactly that of making the people responsible for the facts tell the whole truth about them (54). Moreover, the confessions represented for the victims a *pre-condition* for reconciliation: failing these confessions, nothing similar could have even been imagined (55).

The TRC has examined 7115 applications for amnesty all together. 293 members of the security forces of the segregationist government have undergone self-accusation by casting light on 550 episodes that turned into 1583 crimes (56). 998 members and supporters of the African National Congress, the party leading the country since 1994, and which promoted the creation of the TRC, have applied for amnesty, thereby confessing a total of 1023 crimes (57). Finally, more than 20.000 testimonies of victims have been gathered. If we make a quantitative comparison using only these numbers, with the results of the ICTs, the South African experience reveals itself as a very innovative model.

We should also be reminded that, although the catastrophic forecasts that several analysts issued on the eve of negotiations (58), the democratic institutions seem fully consolidated and the country enjoys a lasting peace. Therefore, empirical surveys held so far not surprisingly reveal first of all, that more than a half of every racial group in South Africa, except Africans (37%), think they can trust an individual belonging to another racial group, which means that they do not consider them as a threat to their existence or for the preservation of their interests, at least within a threshold of tolerability (individual reconciliation). They also highlight how the wide majority of every racial group recognizes new institutions as legitimate, no matter the racial origin of who make decisions. Coherently, nearly the half of the Africans (45%) and the wide majority of every other racial group,

believe they should follow the law, not considering the composition of the government in charge (national reconciliation) (59).

6. Conclusions

Following the outlined analysis, it is possible to find certain limits intrinsic to the international criminal jurisdictions, intended as a means to put an end to impunity, ascertaining the truth, prevent new crimes, provide reparation for victims and reconciliation. Among these: the strong agonistic nuance assumed by the criminal process; the reconstruction of a truth bounded to a small part of the criminal facts; the necessity of holding just a limited number of guilty people responsible for the facts; the fact of reducing victims to mere sources of proof or to possible parts of the proceedings; the inadequacy of criminal sanctions for the prevention of international crimes. In addition, we have highlighted how the negative consequences on peace that can rise from such criminal processes are not contained but emphasized by conceiving punishment as a means of retribution, deterrence, stigmatization and education.

In my opinion, international tribunals and criminal sentences should be aimed respectively at the resolution of controversies in the framework of the due process (60) and the containment of punitive response in the forms established by International Human Rights Law (61).

The aim to put an end to impunity should be removed as illusory and unrealistic, while its exaltation can only generate frustration, as it can only result in feeble outcomes.

The ascertaining of the truth, in the model of due process (62), is not the aim but the guarantee of the right to defence of the accused against arbitrary charges and sentences. And, if punishment is not intended to stigmatize or educate, it makes no sense considering the judiciary truth as something other than the mere subjective opinion of the judge about the plausibility of the Prosecutor's hypothesis. In this way it becomes possible to refuse the false and dangerous thesis that considers criminal justice a necessary means for the reconstruction of the truth and the consolidation of the memory, as they did in every international trial from Nuremberg to the Hague (63). The demonstration that such a thesis is false was brought, as we have seen, by the experience of the TRC. Moreover, such a thesis is dangerous because promotes a unique version of the facts which does not help to understand the complex reasons of mass crimes, while only lets the memory of the pains suffered consolidate. It is unlikely that such a restricted version of facts can actually contribute to reconciliation and peace.

Not considering either the punishment or the trial as means for retribution, deterrence or reparation, as a consequence enforces the conception of international criminal law as *ultima ratio*, promotes the idea prevailing in the United Nations of the necessity of the implementation in poor countries of peace-building measures, claims that diplomacy remains the first and unavoidable tool for the prevention of great powers' crimes and finally reduces the incidence of heavy penalties, such as life imprisonment, which are against International Human Rights Law (64) and any purpose of reconciliation.

The South African experience, as well as that of Mozambique (65), achieves the falseness of the thesis that considers there is an universal consensus about the meaning of justice, relying on the judgement and punishment of the people responsible for these crimes. Moreover, it confirms that political compromise between the conflicting parties is an adequate tool for providing lasting peace; this, of course, with the condition that it is aimed at victims' satisfaction and at the reconstruction of society, by providing it with the organisms and structures needed to warrant peace, both in its negative and positive meaning. Finally, it shows how the logistic and even more the financial support given by international institutions in order to facilitate, consolidate and make this compromise effective, can be of great relevance to prevent new crimes and warrant peace.

In the case that victims or people charged with their representation put at the first place, among their demands, the effective implementation of a political agreement concerning the reparation of damages and the reconstruction of society in the above mentioned way, and including the realization

of a non punitive model of local justice, or otherwise the opportunity to avoid criminal action for the enforcement of these objectives, the "international community" would be forced not to impose the ICC, but to support a successful negotiation and/or the compromise reached through logistic and above all financial backing. As the former Secretary of the United Nations has stated, the Rome Statute is intended to censure "that mass-murderers and other arch-criminals cannot shelter behind a State run by themselves and their cronies, or take advantage of a general breakdown of law and order. No-one should imagine that it would apply to a case like South Africa's, where the regime and the conflict which caused the crimes have come to an end, and the victims have inherited the power." (66).

This should be the criterion for the Prosecutor of the ICC to decide whether or not to initiate or to continue an investigation or prosecution. The ICC Statute namely provides for the Prosecutor's option not to initiate or to suspend an investigation or a prosecution if they do not serve the interests of justice [art. 53, par. 1 (c) and 2 (c)]. To serve the interests of justice means to give contribution to the satisfaction and reparation of victims, to the prevention of new crimes, and to reconciliation and peace. If the ICC's intervention was not necessary or possibly put these objectives at risk, it would then find no justification and prove illegitimate, although there have been reasons to suspect the commission of crimes of its competence that have not been judged by local jurisdictions. The opposite conclusion would instead represent a feature of all authoritarian political cultures, which support the idea of a self-founding and self-justifying criminal law as a value; it ends by being itself the purpose and not the means (67)(68).

Notes

1. See Schabas W.A., "Penalties", in Lattanzi F. (editor), *The International Criminal Court. Comments on the Draft Statute*, (Napoli: Editoriale Scientifica, 1998), 273, at. 281-284; Id., "The Penalty Provisions of the ICC Statute", in Shelton D. (editor), *International Crimes, Peace and Human Rights: The Role of the International Criminal Court*, (New York: Transnational Publishers: 2000), 104, at. 107; Id., "Penalties", in Cassese A., Gaeta P, Jones J.R.W.D. (editors), *The Rome Statute of the International Criminal Court: A Commentary*, vol. II, (Oxford: Oxford University Press: 2002), 1497, at. 1502.

2. *Prosecutor v. Plavšić*, Case IT-00-39 & 40/1-S, 27 February 2003, par. 22-25.

3. See par. 73-74 of the sentence, *supra* note 2. For what concerns the ascertaining of truth as "fundamental step" towards reconciliation, see also par. 66 of the *Erdemović* sentence (*Prosecutor v. Erdemović*, Case IT-96-22-T, 29 November 1996).

4. See Combs N.M., "Prosecutor v. Plavšić, Case No. IT-00-39 & 40/1-S", in *The American Journal of International Law*, 97 (2003), 4, 929, at. 929-935.

5. See Muttukumaru C.P.J., "Reparations for Victims", in Lattanzi F., Schabas W.A. (eds.), *Essays on the Rome Statute of the International Criminal Court*, I, (Teramo: il Sirente: 1999), 303-310; Donat-Cattin D., "The Role of Victims in ICC Proceedings", *ibidem*, 251-277.

6. See McKay F., "Are Reparations appropriately addressed in the ICC Statute?", in Shelton D. (editor), *International Crimes, Peace and Human Rights: The Role of the International Criminal Court* (New York: Transnational Publishers, 2000), 163, at. 170.

7. For instance, in the resolution 955 of the Security Council establishing the ICTR, the creation of the Tribunal has the main purpose of prosecuting and punishing the perpetrators of the atrocities committed in Rwanda to promote, *inter alia*, *national* reconciliation. However, in the *Erdemović* sentence the ICTY asserted that one of its objectives, indicated also by the Security Council, is to contribute to *collective* reconciliation (see *Prosecutor v. Erdemović*, *supra* note 3, par. 58). Finally, even the plenipotentiaries who took part to the Conference of Rome made reference to the objectives of individual reconciliation and of society reconstruction, in order to back the inclusion in the ICC

Statute of norms defending specifically the interests of victims (See Donat-Cattin D., *supra* note 5, 251-277).

8. See Grovier T. & Verwoerd W., "Trust and the problem of National Reconciliation", in *Philosophy of the Social Sciences*, 32 (2002), 2, 178, at. 179-196.

9. See Bassiouni C.H., "Searching for Peace and Achieving Justice: The Need for Accountability", in *Law and Contemporary Problems*, 59 (1996), 9, at. 25-26.

10. See Grovier T. & Verwoerd W., *supra* note 8, 199.

11. See Ferrajoli L., "Democracia y derechos fundamentales frente al desafío de la globalización", in Filippi A. (dirección), *Norberto Bobbio y Argentina. Los desafíos de la democracia integral* (Buenos Aires: Universidad de Buenos Aires, 2006), 159.

12. See Grovier T. & Verwoerd W., *supra* note 8, at. 197.

13. See Mani R., *Beyond Retribution. Seeking Justice in the Shadows of War* (Cambridge: Polity Press, 2002), 12.

14. See Lederach J.P., *Building Peace: Sustainable Reconciliation in Divided Societies* (Tokyo: United Nations University Press, 1997), 20, 63-72; Cockell J., "Conceptualising Peacebuilding: Human Rights and Sustainable Peace", in Pugh M., *Regeneration of War-torn Societies* (Basingstoke: Macmillan, 2000), 15-34.

15. See Mani R., *supra* note 13, 15.

16. See art. 24, Statute of the ICTY (UN Doc. S/25704 (1993)), art. 23, Statute of the ICTR (UN Doc. S/RES/955 (1994)), Chapter VII, Statute of the ICC (A/CONF.183/9 (1998)), Rule 101 of the Rules of Procedure and Evidence of the ICTY (UN Doc. IT/32/Rev. 19, (2001)), Rule 101 of the Rules of Procedure and Evidence of the ICTR (UN Doc. ITR/3/Rev. 6, (2000)), Rules 106, 145, of the Rules of Procedure and Evidence of the ICC (ICC-ASP/1/3 (2002)).

17. This is noticed by the TPIJ itself in the *Erdemović* sentence, *supra* note 3, par. 58.

18. See Manacorda S., "Les peines dans la pratique du tribunal pénal international pour l'ex-Yougoslavie: l'affaiblissement des principes et la quête de contrepoids", in Fronza E.-Manacorda S. (sous la direction de), *La justice pénale internationale dans les décisions des tribunaux ad hoc* (Milano: Giuffrè, 2003), 169, at. 173-177.

19. See Triffterer O., "Préambule", in Id. (ed.), *Commentary on the Rome Statute of the International Criminal Court* (Nomos Verlagsgesellschaft: Baden-Baden, 1999), 12; King F.P. and La Rosa M., "Penalties under the ICC Statute", in Lattanzi F., Schabas W.A., *supra* note 5, 311, at 330.

20. The ICTY, in particular, refers also to the aim of rehabilitation of the condemned, but subordinating it to deterrence and retribution as the main purposes of sentencing in the *ad hoc* tribunals. See Henham R., *Punishment and Process in International Criminal Trials* (Aldershot: Ashgate, 2005), 150.

21. See Orentlicher D.F., "'Settling Accounts' Revisited: Reconciling Global Norms and Local Agency", in *The International Journal of Transitional Justice*, 1 (2007), 10, at. 18.

22. See Bassiouni M.C., *Introduction au droit pénal international* (Bruxelles: Bruyllant, 1999), 301-302; Id., "International Criminal Justice in the Age of Globalization", in *International Criminal Law: Quo Vadis?*, special issue, *19 Nouvelles études pénales*, (2004), 79, at. 91-101.

23. See Fronza E. and Tricot J., "Fonction symbolique et droit pénal international: une analyse du discours des tribunaux pénaux internationaux", in Fronza E. and Manacorda S. (eds.), *La justice pénale internationale dans les décisions des tribunaux ad hoc* (Milano: Dalloz-Giuffrè, 2003), 299.

24. See Zedner L., "Reparation and Retribution: Are they Reconcilable?", in *The Modern Law Review*, 57 (1994), 2, 228, at. 230.

25. See Osiel M.J., "Why Prosecute? Critics of Punishment for Mass Atrocity", in *Human Rights Quarterly*, 22 (2000), 118, at. 144-147.

26. See Garapon A., *Crimini che non si possono né punire né perdonare. L'emergere di una giustizia internazionale* (Bologna: il Mulino, 2004), 88-89.

27. See Zolo D., *La giustizia dei vincitori. Da Norimberga a Baghdad* (Roma-Bari: Laterza, 2006[2]), 156-157.

28. See Damaška M., "L'incerta identità delle Corti penali internazionali", in *Criminalia. Annuario di scienze penalistiche*, 1 (2006), 9, at. 15.

29. As Zolo points out, the inflicted punishments are exemplary because of their graveness (several times it is a matter of penalties of life-long or nearly 50 years imprisonment), of the solemn formality of rites, and finally due to the relevance of the mass-media communication and its spectacular character. See Zolo D., *supra* note 27, 156.

30. See Stahn C., "Complementary, Amnesties and Alternative Forms of Justice: Some Interpretive Guidelines for the International Criminal Court", in *Journal of International Criminal Justice*,3 (2005), 695, at. 707. It's a trend perfectly coherent with the criteria followed by the Nuremberg and the Tokyo Tribunals, as pointed out by Zolo D., *Chi dice umanità. Guerra, diritto e ordine globale* (Torino: Einaudi, 2000), 158-159.

31. See Damaška M., *supra* note 33, 13.

32. The Statutes of the ICTs do not foresee the participation of victims to the process, except as witness (art. 2 of the Statute of the ICTY and 21 of the Statute of the ICTR). Moreover, Rule 106 of the Rules of Procedure and Evidence of both Tribunals refers the matter of reparation of the damage to the competence of local jurisdictions, who will be therefore those who decide whether to recognize to the victim the right of reparation, and how to satisfy it. The Rome Statute specifically foresees victims' reparation and their opportunity to have their interests realized (see art. 53, par 1 (c), 65, par 4, 68, 75). However, the necessary parties in the process are as always the prosecutor, the accused and the defence.

33. See Drumbl M.A., "Sclerosis. Retributive Justice and the Rwandan Genocide", in *Punishment and Society*, (2000), 2, 287-308.

34. See Garland D., *Punishment and Modern Society. A Study in Social Theory* (Oxford: Clarendon Press, 1990), 77-78.

35. Wood N. and Dempsey J., "Death Poses Challenges as Serbia Faces Past and Future", in *The New York Times*, March 13, 2006.

36. See Visetti G., "La Serbia stremata sulla tomba di Milosevic", in *la Repubblica*, March 10, 2007.

37. See Graybill L.S., "Pardon, punishment, and amnesia: three African post-conflict methods", in *Third World Quarterly*, 25 (2004), 1117, at. 1122.

38. See Drumbl M.A., *supra* note 35, 287-308.

39. See Zolo D., *supra* note 27, 157-158.

40. See Nino C.S., *Radical Evil on Trial* (Pennsylvania: Yale University Press, 1996), vii-xii; Drumbl M.A., "Punishment, Postgenocide: from Guilt to Shame to *Civis* in Rwanda", in *New York University Law Review* (2000), 75, 1221, at. 1253-1254; Damaška M., *supra* note 28, 35-36.

41. See Zolo D., *supra* note 27, VII-XI, 30-44, 149-154.

42. See Berat L. and Shain Y., "Retribution or Truth-Telling in South Africa? Legacies of the Transitional Phase", in *Law and Social Inquiry* (1995), 163, at. 171-173.

43. See Lollini A., *Costituzionalismo e giustizia di transizione. Il ruolo costituente della Commissione sudafricana verità e riconciliazione* (Bologna: il Mulino, 2005), 46, 87-121, 149-152.

44. See Lollini A., "La Commissione sudafricana per la verità e la riconciliazione: la costruzione di una memoria collettiva tra 'ipertrofia della storia' e 'ipertrofia della sentenza'", in *Critica del diritto*, 1999, 383, at. 385.

45. N. 34 of 1995: "Promotion of National Unity and Reconciliation Act".

46. See *Truth and Reconciliation Commission of South Africa. The Final Report*, vol. 6, (Johannesburg: The Commission, 2003), Sec. 1, Ch. 1, 5-7.

47. See Tutu D.M., *Non Future without Forgiveness* (New York: Doubleday, 1999), 32.

48. See Krog A., *Country of my Skull* (London: Jonathan Cape, 1999), 26-56.

49. See Bozzoli B., "Public ritual and private transition: the Truth Commission in Alexandra Township, South Africa 1996", in *African Studies*, 57 (1998), p. 167; Stanley E., "Evaluating the Truth and Reconciliation Commission", in *Journal of Modern African Studies*, 39 (2001), 525, at. 529-530; Lollini A, *supra* note 43, 168.

50. See Flores M., *Verità senza vendetta. L'esperienza della Commissione Sudafricana per la verità e la riconciliazione* (Roma: manifestolibri, 1999), 25.

51. See du Toit A., "The Moral Foundation of the Truth Commissions. Truth as Acknowledgement and Justice as Recognition", in Robertg R.I. and Thompson T. (eds.), *Truth v. Justice. The Morality of Truth Commissions* (Princeton: Princeton University Press, 2000), 122, at. 132-135.

52. See Lollini A., *supra* note 43, 170-172.

53. See Llewellyn J.J. and Howse R., "Institutions for Restorative Justice: The South African Truth and Reconciliation Commission", in *The University of Toronto Law Journal*, 49 (1999), 355, at. 382; *Truth and Reconciliation Commission of South Africa. The Final Report*, vol. 1 (London: Macmillan, 1998), Ch. 8.

54. See Boraine A., "Alternatives and adjuncts to criminal prosecutions" (Bruxelles, 1996).

55. Centre for the Study of Violence and Reconciliation (CSVR), "Memorialisation and Reconciliation in Transitional Southern African Societies" (South Africa, 2005).

56. See *Truth and Reconciliation Commission of South Africa. The Final Report*, vol. 6, *supra* note 46, Sec. 3, Ch. 1, 181-186.

57. *Truth and Reconciliation Commission of South Africa. The Final Report*, vol. 6, *supra* note 46, Sec. 2, Ch. 2, 265.

58. See Gibson J.L., "Overcoming Apartheid: Can Truth Reconcile a Divided Nation?", in *The Annals of the American Academy* (2006), 82, at. 95.

59. See Gibson J.L., *supra* note 58, 90-93.

60. As is well known, "due process" means, essentially, independence and fairness of the tribunal and warrant of the right to defence. See Stahn C., *supra* note 30, 712

61. See Schabas W. (2002), *supra* note 1, 1501-1506.

62. See Ferrajoli L., *Diritto e ragione. Teoria del garantismo penale* (Roma-Bari: Laterza, 2004[8]), Ch. 1; Guzmán N., *La verdad en el proceso penal. Una contribución a la epistemología jurídica* (Buenos Aires: del Puerto, 2006), 63-89.

63. See Pastor D., *El poder penal internacional. Una aproximación jurídica crítica a los fundamentos del Estatuto de Roma*(Barcelona: Atelier, 2006), 123-128.

64. See Schabas W.A. (2002), *supra* note 1, 1519.

65. See Graybill L.S., *supra* note 37, 1124-1128.

66. Secretary-General of the United Nations, Kofi Annan, Speech delivered at the University of Witwatersrand, Johannesburg, Graduation Ceremony, 1 September 1998. See Goldstone R. and Fritz N., "In the Interests of Justice' and Independent Referral: The ICC Prosecutor's Unprecedented Powers", in *Leiden Journal of International Law*, 13 (2000), 655, at. 667.

67. Ferrajoli L., *supra* note 62, 894.

68. I would like to thank Danilo Zolo, Emanuela Fronza and Alejandro Chehtman for their comments and suggestions to improve this paper.

International Sentencing and the Undefined Purposes of International Criminal Justice

Silvia D'Ascoli

1. Introduction

The carrying out of atrocities during armed conflicts, acts of genocide and crimes against humanity are well known phenomena of recent human history. The international community has tried to respond to such atrocities in different ways, one of these being the recourse to accountability mechanisms and judicial prosecution through the institutions of International Criminal Justice (ICJ). The system of ICJ can be considered a global and common undertaking which consists of, and links together, a number of international and national institutions (*i.e.* the UN ad hoc Tribunals, the International Criminal Court, the various systems of national criminal justice, etc.) which are meant to work *jointly* and often *complementarily* in order to achieve effectiveness and individual accountability for international crimes, to maximize the opportunities of enforcing international criminal law, and to contribute to the promotion and maintenance of peace.

A proper system of ICJ, conceived as a reaction by the international community to the commission of atrocities amounting to international crimes, is nowadays a more concrete reality than in the past, although still a developing one. This developing nature appears clear especially if looking at the process of sentencing and the sanctioning phase of international proceedings. Despite the recognisable growing importance of international sentencing, it is noticeable that it is a part of international criminal law which remains yet rather young and embryonic, certainly still under construction and not regulated in many details, especially when compared to the law of sentencing at the domestic level. In fact, the current *status* of international sentencing presents a panorama which is not characterised by exact norms and pre-defined principles. The International Military Tribunals (IMTs) of Nuremberg and Tokyo (and the following trials held by various national military tribunals) left few sentencing guidelines applicable to cases of war crimes and crimes against humanity; concerning legislative provisions, Statutes of past and existing Tribunals/Courts (such as the ICTY, ICTR and ICC) only contain few norms on the application of penalties and do not provide for detailed sentencing principles. This *status quo* leaves open numerous possibilities of interpretation when meting out penalties, favours inconsistencies in sentencing between similar cases, and does not foster the development of a unite policy of international sentencing. One of the least developed areas is the one of the purposes of the overall system of ICJ and, more specifically, international sentencing. In fact, none of the provisions of international tribunals/courts addresses the issue of the purposes of punishment and the objectives of the ICJ system. Commentators agree upon the fact that the current praxis of international sentencing reveals a certain degree of obfuscation in the penal justifications of punishment. (1)

This appears clear especially when comparing the two systems of national and international criminal justice. National systems of criminal justice are overtly concerned with preservation, restoration and improvement of the public order, and also pursue an important educational function in their attempt to achieve the goals of rehabilitation and social re-integration of individual offenders. All these goals and functions are performed through numerous and long-standing social and political structures. The international system has not yet developed similar structures and, until recently, did not have permanent and recognised accountability mechanisms, having mainly acted on ad hoc bases. Consequently, purposes and functions of international sentencing and ICJ are neither settled nor clear. ICJ can be in theory characterized by a great variety of purposes: retribution and punishment of individuals responsible for the most serious crimes, deterrence and prevention of future atrocities, reconciliation, recognition of historical facts and the re-establishment of international peace and security.

This paper deals with the problem of identifying the appropriate purposes for international sentencing and international criminal justice, stressing the importance of achieving a clearer statement of objectives and functions of ICJ, on the one hand, and purposes of punishment for the individual sentencing process on the other hand. Furthermore, it seeks to reflect upon the relation between purposes of punishment and ICJ especially in the perspective of the connections between justice and peace.

Given that the scope of analysis of the purposes of punishment is quite broad and cannot be fully addressed herein, the paper will not deal in depth with all the various theories of purposes of penalty, but will mainly focus on the way international tribunals/courts have dealt with them. A first part of the paper is thus dedicated to the ad hoc Tribunals, namely the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR), which - in fact - constitute a unique empirical basis to evaluate how the purposes of punishment have been considered and applied by organs of the international criminal justice's system. A second part takes into account the recently established International Criminal Court (ICC), addressing the role that the ICC should take on with regard to the purported objectives of penalty. Finally, the conclusive part of the paper draws some conclusions as to the relationship between international courts and purposes of punishment, on the one hand, and ICJ and international peace on the other hand.

2. The International Criminal Tribunals for the Former Yugoslavia and Rwanda

A. The objectives of the UN SC in Resolutions and Reports leading to the establishment of the ICTY and ICTR

At the beginning of the 1990s, the UN triggered a renaissance of international criminal law through the judicial mechanisms activated to halt serious violations of international humanitarian law in the territories of the former Yugoslavia and, later on in 1994, Rwanda. The two international criminal tribunals were created by the SC as organs and 'special measures' to *maintain and restore international peace and international security*.

The establishment of both the ICTY and the ICTR was a gradual process. (2)The decision to create the ICTY was taken in Resolution 808(1993), and the tribunal was then finally established pursuant to Resolution 827(1993). The SC - acting under Chapter VII of the UN Charter - having determined that ' ... widespread and flagrant violations of international humanitarian law occurring within the territory of the former Yugoslavia ... constitute a threat to international peace and security', decided that - in the particular circumstances of the former Yugoslavia - the establishment of an ad hoc tribunal '*would contribute to the restoration and maintenance of peace*'. (3)It was the opinion of the SC that, in view of the atrocities committed, long-term stability in the former Yugoslavia could only be achieved if military measures were accompanied by punishment of the perpetrators of crimes under international law.

The process leading to the establishment of the ICTR was similar. (4)The SC, following reports by the Secretary-General indicating that acts of genocide and other flagrant violations of international humanitarian law were occurring in Rwanda, (5)and expressing its gravest concern for the situation in the country, adopted - on 1 July 1994 - Resolution 935, by which it requested the establishment of an independent commission of experts to further investigate grave violations occurring in Rwanda. The first interim report of October 1994, and the final one of December 1994, submitted by the Commission, confirmed that genocide and other widespread and systematic crimes had been committed in Rwanda, and recommended that offenders be brought to justice before an international tribunal. (6)The SC - acting again under Chapter VII - thus decided to establish the ICTR by Resolution 955(1994), whose language explicitly convey the importance of the role of the ICTR in bringing peace and reconciliation in Rwanda.

In sum, in the wording of the relevant SC Resolutions (n. 808, 827 of 1993, 955 of 1994), and the two Reports of the Secretary-General on the establishment of the ICTY and ICTR, (7)clear elements indicate that the establishment of the ad hoc Tribunals had the aim of both prosecuting offenders and deterring further atrocities, thus trying to contribute to the restoration of peace in those devastated countries. In the Preambles of the aforementioned Resolutions, the SC expressed its conviction that the establishing of an international tribunal would enable the aim to halt atrocities to be achieved, and that the prosecution of persons responsible for such acts would contribute to the process of national reconciliation and to restoration and maintenance of peace. In addition, it should be recalled that the ICTY's First Annual Report noted that the threefold purposes of the Tribunal, laid down in Resolutions 808 and 827 of 1993, were '*to do justice, to deter further crimes and to contribute to the restoration and maintenance of peace*'. (8)

All things considered, it cannot be doubted that, in the particular circumstances of the former Yugoslavia and Rwanda, the SC - compelled to take immediate action and unprecedented measures - acted to achieve *peace* and *security* in those territories through the deterrence of further crimes.

In all the above mentioned documents it is possible to appreciate an expressed link between justice and peace showing that the ad hoc Tribunals were undoubtedly characterised by the goal of promoting peace and foster reconciliation amongst the populations involved in the atrocities committed in the former Yugoslavia and Rwanda.

B. The purposes of penalty as recognized through the ICTY and ICTR jurisprudence

In the absence of any guidance in their founding Statutes, Chambers of the ad hoc Tribunals have examined the purposes of penalties in the light of precedents in international as well as national law. Moreover, the aims identified from the SC Resolutions establishing the two Tribunals (namely, retribution, deterrence, national reconciliation and restoration of peace) also provided some guidance to Trial Chambers in determining the most appropriate sentence.

A handful of various goals were taken into account, although *retribution* and *deterrence* were deemed the most important objectives, (9)both by ICTY (10)and ICTR (11)Chambers.

Judges assumed that the objectives envisaged by the Security Council when creating the Tribunal, namely *deterrence, reprobation, retribution* and *collective reconciliation*, could be taken into account also for sentencing purposes. Yet no attempt was made to define the identified purposes or to try and explain their meaning in the trial context.

The purpose of deterrence has even been considered by the *Delalic* Trial Chamber as the most important aim of punishment. (12) Conversely, in the *Tadic* case the Appeals Chamber found that deterrence is a factor which '*must not be accorded undue prominence in the overall assessment of the sentences to be imposed*'. (13)

In some cases, judges acknowledged that the principal purpose for the establishment of the Tribunal was to deter future crimes and to combat impunity. (14)

The *Jelisic* Trial Chamber went so far as to affirm that - in order to achieve the objectives of retribution, deterrence and restoration of peace - Trial Chambers 'must pronounce an *exemplary penalty* both from the viewpoint of punishment and deterrence'. (15) Nevertheless, it must be recalled that the call for retribution was constantly interpreted not in the sense of pure 'revenge' but as justified in order to reassert the fundamental values of humanity detained by the international community. (16)

In some cases, the ICTR Trial Chambers seemed to give some sort of priority to the objective of deterrence, considering it '*over and above*' the purpose of retribution. (17) ICTR Chambers have also frequently implied, like in the *Serushago* case, (18)that there is a direct link between the objective of putting an end to impunity and the moral justification for retributive and deterrent sentencing.

With regard to other purposes, in some cases punishment was also considered to fulfil an objective of rehabilitation. In the *Erdemovic* sentencing judgement, for instance, judges of the ICTY recognised that international principles of punishment may also include purposes like rehabilitation and reconciliation. (19) This appears consistent with the fact that national reconciliation and maintenance of peace were mentioned by the SC in the founding Resolutions of the ad hoc Tribunals. There is no uniform approach, however, to the purpose of rehabilitation by ICTY and ICTR Chambers. While in some cases, especially recent ones, rehabilitation was recognised as an important goal of sentencing, (20)in other cases it did not have any particular influence, conversely it was affirmed that such a purpose should not be given undue weight. (21) For instance, the Appeals Chamber in the *Delalic et al.* case acknowledged the significance of rehabilitation but, at the same time, stressed the fact that such factor should not '*play a predominant role*' in the decision-making process and that must be subordinated to deterrence and retribution as main purposes of sentencing within the system of the ad hoc Tribunals. (22) In any case, no attempt is recognisable by the ad hoc Tribunals to comment upon and to define the possible meaning of rehabilitation in the context of international justice and international crimes. As to statutory provisions, an explicit reference to rehabilitation is only found in Rule 125 RPE (Rule 126 ICTR RPE) on general standards for granting pardon or commutation of sentences. (23)

Respect of the rule of law, national reconciliation, restoration of peace, and protection of the society are among the other objectives which were considered by some Chambers as being relevant in determining the appropriate sentence. (24)

In sum, a multiplicity of purposes for international sentencing should certainly be recognized; in particular, it appears that - in accordance with the main purposes of their founders - the ICTY and ICTR mainly recognised the objectives of retribution and deterrence as the most important ones in sentencing. A critical remark should be made with regard to the way in which Chambers of the ad hoc Tribunals addressed sentencing principles. It appears they have failed to consistently tackle sentencing aims and to explore their meaning at the international level. The adopted justifications of punishment remain unclear and vague; there is no effort towards systematization or a consistent examination of the rationales for punishment in international adjudication. In a majority of cases, Chambers of both the ICTY and the ICTR limited themselves only to general references to the purposes of punishment, without attempting to develop any consistent theory. (25)

In any case, the purported aims recognised by judges of the ad hoc Tribunals appear to be in line with the 'mandate' of the Tribunals as enshrined in the SC Resolutions establishing the ICTY and the ICTR.

3. The International Criminal Court

The Rome Treaty of 17 July 1998, establishing the permanent International Criminal Court (ICC) is one of the most important achievements of the international community in the area of international justice in recent years.

For the object of this paper, it is interesting to look at the Preamble of the Rome Statute, which summarises the aims and purposes of the ICC.

The Preamble begins by recalling, in its paragraph 2, that '*during this century millions of children, women and men have been victims of unimaginable atrocities that deeply shock the conscience of humanity*' and that '*such grave crimes threaten the peace, security and wellbeing of the world*' (para.3), that is fundamental values of the international community.

The aim of paragraph 4 to guarantee that '*the most serious crimes ... must not go unpunished*' seems to lead to the following paragraph 5, where the purpose of deterrence is enshrined through a determination '*to put an end to impunity for perpetrators ... and thus to contribute to the prevention of such crimes*'.

Overall considered, the Preamble of the Rome Statute seems to encompass mention of the purposes of *retribution* and *general prevention* within the main aims and mission of the ICC.

Some commentators have put emphasis on the purpose of general deterrence, arguing that "to prevent crimes under international criminal law is the main purpose and the mission of the Court, in order to guarantee 'lasting respect for the enforcement of international justice'". (26)

However, the recognition of such aims contained in the Preamble is a statement not comparable to a provision suggesting a specific sentencing policy, provision which one should expect to find in the body of norms of the Rome Statute.

This expectation is not met because, besides the vague and brief mention of such purposes in the Preamble, it seems that no other provisions of the Rome Statute are devoted to the spelling out of purposes that should be pursued in meting out sentences within the ICC system. The Statute is virtually silent with regard to the purposes and principles that should inform the imposition of sentences before the Court. As some commentators suggested, probably this is largely due to the lack of a substantive debate on the issue during the Rome Conference for the establishment of the ICC in 1998. (27) It should be recognized that the omission of the part dealing with objectives and principles of international justice constitutes a significant failure in the ICC system, in light of the fact that the drafting of the Rome statute represented an incomparable occasion to finally address similar fundamental issues.

Moreover, it appears that there is no mention at all in the Rome Statute of the *rehabilitative* and *re-socializing purposes* of punishment. It is questionable, however, whether rehabilitation is completely outside the scope of the Court's competence. In fact, some references to the *rehabilitative character* of punishment are recognizable in the provisions devoted to the execution of penalties. For instance, Article 110 of the Rome Statute gives importance - in the reduction of sentences - to the subsequent good conduct and cooperation of the convicted person and to 'factors establishing a clear and significant change of circumstances sufficient to justify the reduction of sentence'; furthermore, Rule 223 RPE establishes that judges - when deciding upon a request for reduction of the penalty to be executed - must take into account also the prospect of the *re-socialization* and successful resettlement of the convicted person.

In any case, the ICC system surely aims at ending what former Prosecutor ICTY/ICTR Louise Arbour called the "entrenched 'culture of impunity' where enforcement of humanitarian law is the rare exception and not the rule". (28) One of the objectives of a retributive and deterrent approach to sentencing in the context of the ICC practice is certainly to ensure that in the future there exists no justification for serious violations of human rights and humanitarian law. Whether the ICC will become an effective court and will make a difference in achieving a more peaceful and just world depends on a number of factors and on the way its provisions will be applied.

4. The purposes of punishment. Which purposes for international sentencing and ICJ?

Purposes of punishment are indeed amongst the most influential factors on the sentencing decision-making process; therefore, pursuing one goal instead of another acquires its significance and exercises a certain impact on the final penalty meted out. Goals of punishment are essential to any system of criminal justice in so far as they determine the character of the legal system and its effectiveness, the severity of the sentences and the process of execution of sentences. At the domestic level, for instance, each legal system has its own goals assigned to the sentencing policy and decided at the national level through legislation (constitutional charters, penal codes, etc.). Nevertheless, as specified above, the system of ICJ has not yet agreed about the purposes which should characterise and lead its actions. Although the 'traditional' rationales of sentencing (*i.e.* deterrence, retribution, rehabilitation, social defence, fight against impunity, restoration and maintenance of peace) have been upheld by international tribunals, yet the question of which are the main objectives to be pursued in the sentencing process and, overall, by the ICJ system remains

open. What is at stake is the precise relevance of each purpose both in the sentencing process and, more in general, for ICJ. Commentators are divided on the issue.

With regard to the ICJ system, preservation of the world order and maintenance of international peace and security have been considered (rightly, in my opinion) amongst its primary goals. (29)If punishment of perpetrators responsible of international crimes is deemed fundamental to the world order and justice, then the same punishment should basically be *retributive*, with a view towards future general deterrence. (30)

Furthermore, as for criminal law at the national level, ICJ should be considered a mean to contribute to the protection of the international public order. Administering genuine international justice should serve such relevant 'social' purpose. In this perspective, other significant objectives of the system of ICJ are *reconciliation* and *promotion of peace*. For instance, in contexts like those that brought to the creation of the ad hoc Tribunals, '*to do justice*' also implies to contribute, through all the appropriate means of criminal justice, to the reconciliation of the local communities involved in the atrocities of war. (31) The goal of promoting peace is certainly an important feature of international justice and, in order to achieve it, key aspects are those related to the quality of trials, the penalties imposed, the specific goals promoted through the trial process, and the link between these goals and the promotion of peace more generally.

Moving to other more specific functions of international criminal trials, namely deterrence and retribution, commentators maintain that *deterrence* should have a central function, considering its dual role of specific deterrence of powerful elites and of a broader 'socio-pedagogical' deterrence addressing the whole international community. (32) Consequently, it is argued, punishment of war criminals should be motivated primarily by its deterrent effect. I believe that deterrence should only be pursued in conjunction with retribution and fight against impunity, and not *per se* as the main goal of international criminal trials and sentencing. In fact, a first evaluation of the *sole* deterrent effect of the ad hoc Tribunals seems to be a negative one, especially in the case of the ICTY. (33) Moreover, it is not realistic to assume that institutions like international courts/tribunals be able to deter crimes instantaneously, especially when considering the particular situations of devastation and interethnic conflicts in which they operate. Deterrence is very often elusive and inherently hard to 'measure'. (34) Nevertheless, when linking together deterrence, prosecution, retribution and fight against impunity, the long term result can be effective and transformative upon society. The fact of trying perpetrators has a stigmatizing and educational function and sanctions appear to be essential for the credibility of ICJ.

Another purpose that is considered relevant for international sentencing, especially in more recent times, is that of rehabilitation: penalties should match the 'social dangerousness' of an offender as well as take into account the evolution of his/her personality, for instance through providing for flexibility and alternative remedies to imprisonment in the course of the implementation of the assigned penalty. However, as previously specified, so far the purpose of *rehabilitation* has been treated only as a subsidiary rationale, and the ad hoc tribunals have failed to articulate more strongly the necessity for rehabilitation and reconciliation in the international justice context. In truth, the question at stake is whether convicted persons before international tribunals/courts have a specific right to rehabilitation and what weight, if any, should be assigned to this purpose in international sentencing. (35) Consideration of the requirement of individualization of penalties is an element which might contribute to the submission that rehabilitation plays an important role at the sentencing stage. (36) For instance, the fact that the Statutes of the ad hoc Tribunals require that the individual circumstances of the convicted person be taken into account implies that the sentence must be designed for the accused, rather than for the objectives of the whole system of ICJ. This legitimates further more the need to distinguish between the purposes of the individual punishment or of international sentencing, and the objectives of the overall system of ICJ.

On the other hand, rehabilitation *per se* considered as a general goal of international penalties may prove problematic, being a process linked to a specific social environment that seems difficult to be implemented at the international level, where the execution of sentences is outside the control of

tribunals and courts. (37) Another element that could speak against rehabilitation as a main purpose of international punishment is that perpetrators of international crimes are a particular category of offenders, often occupying pretty high ranks in the civilian or military structure, and therefore not in need to be 're-socialised' or 're-educated', at least not to the same extent as in national jurisdictions. The probabilities that such a type of offenders will commit crimes again, and in the same context, are very low.

It seems anyhow not possible to conclude that - at this stage of development of ICJ - rehabilitation, and the right to receive rehabilitating treatment, are considered rights of the convicted person.

This is, in sum, the vast and confusing panorama that international justice still offers nowadays with regard to its principal aims and objectives in meting out punishment. Purposes of international sentencing are certainly spelled out but remain - even after the establishment of the ICC - still largely vague and approximate. A number of various purposes are mentioned and in theory taken into account by international judges when meting out penalties, but there is neither common agreement nor comprehensive statement about the main objectives that should lead international sentencing and animate international criminal justice.

5. Conclusions

Considering that the international sphere of justice involves numerous and different interests (punishment of individuals responsible for the most serious crimes, fight against impunity, deterrence and prevention of future atrocities, reconciliation, reconstruction of historical facts, re-establishment of international peace and security, maintenance of peace), it seems opportune to distinguish between, on the one hand, the objectives of the whole system of ICJ which are by their nature more directed to the entire international community as a whole and, on the other hand, objectives or purposes of international punishment - *i.e.* punishment when meted out by international courts or tribunals - which are more related to individual criminal responsibility and the appropriate penalty to impose to individual offenders. In the first sense, it seems that general deterrence and retribution, fight against impunity, reconciliation and maintenance of peace are amongst the primary goals of ICJ and the most appropriate objectives that the ICJ system should pursue; in the second sense, rationales such as individual deterrence, retribution, proportionality and rehabilitation are at stake.

A preliminary assessment upon the appropriate functions of ICJ and international sentencing is that only a combination of different functions and aims of punishment may result effective; thus only a mixed theory of punishment may be appropriate for the international justice system, a theory not oriented to a sole major purpose (like *only/mainly* deterrence or *only/mainly* retribution) but to a combination between retributive concerns and the notions of rehabilitation, reconciliation and restorative justice.

Furthermore, it is believed that the process of international justice and punishment should be somehow anchored to the context in which it has to or will operate. The whole debate about the most appropriate purposes for international sentencing could thus be properly inserted into the broader reflection - which has acquired increasing importance nowadays - upon the role of the international community with regard to atrocities, the bases for collective action against international crimes, and the relation between international justice and promotion/maintenance of peace. (38)

Two other specific functions of international trials and ICJ should be emphasized: the function of acknowledgment and truth-finding, and that of accountability. In fact, in contexts where human rights violations are typically denied, the determination of a crime is in itself an important and far-reaching achievement. Judicial determination that crimes occurred, and consequent convictions, represent official acknowledgement of past injustices and the sufferings of victims, and prevent falsification of history. The determination of individual accountability is clearly also important for victims and survivors.

In conclusion, the overall aim of ICJ is essentially to deter crimes and help restoring international peace and security by punishing those responsible for international crimes. International criminal law is, among other things, an essential instrument to protect human rights: it responds in fact to massive violations of fundamental rights. The broad concept of peace upon which ICJ is based also conveys the connection between respect of human rights, justice and peace. Justice is certainly related to peace and it is also fundamental to human rights development. In fact, I believe there can be no development without peace and no genuine peace can co-exist with injustice. A world committed to promoting peace and human rights has to promote justice at the same time.

Notes

1. See, for instance, R. Henham, 'The Philosophical Foundations of International Sentencing', *Journal of International Criminal Justice*, 1 (2003), 64-85, at 69; D. Zolo, 'Peace through Criminal Law?', *Journal of International Criminal Justice*, 2 (2004), 727-734, at 728-729.

2. For an in-depth analysis of the circumstances leading to the establishment of the two Tribunals see, for instance: M.C. Bassiouni, *The Law of the International Criminal Tribunal for the Former Yugoslavia*, Transnational Publishers, 1996; Morris, Scharf, *An Insider's Guide to the International Criminal Tribunal for the former Yugoslavia*, vol.I, Transnational Publishers, 1995, p.22-35; Morris, Scharf, *The International Criminal Tribunal for Rwanda*, vol.I, Transnational Publishers, 1998, p.29 et sq.; Stromseth, *Accountability for atrocities*, Transnational Publishers, 2003, p.39-133.

3. S.C. Resolution 808(1993), 22 February 1993, p.2.

4. See: S.C. Resolution 918(1994); S.C. Resolution 925(1994); *Preliminary Report of the Independent Commission of Experts Established in Accordance with Security Council Resolution 935(1994)*, UN Doc. S/1994/1125, para.41, 146-152; *Final Report of the Commission of Experts Established pursuant to Security Council Resolution 935(1994)*, U.N. Doc. S/1994/1405, 9 December 1994.

5. S.C. Resolution 918(1994); S.C. Resolution 925(1994).

6. *Preliminary Report of the Independent Commission of Experts Established in Accordance with Security Council Resolution 935(1994)*, UN Doc. S/1994/1125, para.41, 146-152; *Final Report of the Commission of Experts Established pursuant to Security Council Resolution 935(1994)*, U.N. Doc. S/1994/1405, 9 December 1994.

7. *Report of the Secretary-General pursuant to paragraph 2 of Security Council Resolution 808(1993)*, U.N. Doc. S/25704, 3 May 1993; *Report of the Secretary-General pursuant to paragraph 5 of Security Council Resolution 955(1994)*, U.N. Doc. S/1995/134, 13 February 1995.

8. *First Annual Report of the International Criminal Tribunal for the Former Yugoslavia*, 29 August 1994, U.N. Doc. A/49/342 - S/1994/1007, para.11.

9. R. Henham observes that sentences issued so far by the ad hoc Tribunals have been inspired by the paradigm of the *retributive* and *stigmatizing* function of punishment. Cf., R. Henham, 'The Philosophical Foundations of International Sentencing', *JICJ*, *supra* note 1, pp.66-69.

10. Cf. *Prosecutor v. Tadic*, Case No.IT-94-1-T*bis*-R117, Sentencing Judgement, 11 November 1999, para.7-9; *Prosecutor v. Erdemovic*, Case No.IT-96-22-T, Sentencing Judgement, 29 November 1996, para.58, 64; *Prosecutor v. Kupreskic*, Case No.IT-95-16-T, Trial Judgement, 14 January 2000, para.848; *Prosecutor v. Blaskic*, Case No.IT-95-14-T, Trial Judgement, 3 March 2000, para.762; *Prosecutor v. Aleksovski*, Case No. IT-95-14/1-A, Appeal Judgement, 24 March 2000, para.185; *Prosecutor v. Delalic, et al.*, Case No.IT-96-21-A, Appeal Judgement, 20 February 2001, para.806; *Prosecutor v. Kunarac*, Case No.IT-96-23-T, Trial Judgement, 22 February 2001, para.838; *Prosecutor v. Stakic*, Case No.IT-97-24-T, Trial Judgement, 31 July 2003, para.900-902; *Prosecutor v. Deronjic*, Case No.IT-02-61-S, Sentencing Judgement, 30 March 2004, para.142-150; *Prosecutor v. Blagojevic and Jokic*, Case No.IT-02-60-T, Trial Judgement, 17 January 2005,

para.817; *Prosecutor v. Strugar*, Case No.IT-01-42-T, Trial Judgement, 31 January 2005, para.458; *Prosecutor v. Limaj et al.*, Case No.IT-03-66-T, Trial Judgement, 30 November 2005, para.723; *Prosecutor v. Oric*, Case No.IT-03-68-T, Trial Judgement, 30 June 2006, para.718; *Prosecutor v. Krajisnik*, Case No.IT-00-39&40-T, Trial Judgement, 27 September 2006, para.1134; *Prosecutor v. Zelenovic*, Case No.IT-96-23/2-S, Trial Chamber, Sentencing Judgement, 4 April 2007, para.31.

11. *Prosecutor v. Kayishema and Ruzindana*, Case No.ICTR-95-1-T, Trial Judgement, 21 May 1999, para.2 'Sentence'; *Prosecutor v. Akayesu*, Case No.ICTR-96-4-T, Trial Judgment, 2 September 1998, para.2-19; *Prosecutor v. Kambanda*, Case No.ICTR-97-23-S, Judgement and Sentence, 4 September 1998, para.28, 58-59; *Prosecutor v. Ruggiu*, Case No.ICTR-97-32-I, Judgement and Sentence, 1 June 2000, para.33; *Prosecutor v. Elizaphan and Gerard Ntakirutimana*, Case No.ICTR-96-10/96-17-T, Trial Judgement, 21 February 2003, para.882.

12. *Prosecutor v. Delalic et al.*, Trial Judgement, Case No.IT-96-21-T, 16 November 1998, para.1234. Subsequently recalled by *Prosecutor v. Blaskic*, Case No.IT-95-14-T, Trial Judgement, 3 March 2000, para.761.

13. *Prosecutor v. Tadic*, Case No.IT-94-1-T and IT-94-1A*bis*, Appeals Judgement, 26 January 2000, para.56. The *Aleksovski* Appeals Chamber concurred with this finding (*Aleksovski*, 24 March 2000, *cit.*, para.185). Also sharing those findings: *Prosecutor v. Kordic & Cerkez*, Trial Judgement, Case No.IT-95-14/2-T, 26 February 2001, para.847; *Prosecutor v. Delalic, et al.*, Appeal Judgement, Case No.IT-96-21-A, 20 February 2001, para.801; *Prosecutor v. Kunarac et al.*, Trial Judgement, Case No.IT-96-23-T & IT-96-23/1-T, 22 February 2001, para.840.

14. *Erdemovic*, 29 November 1996, *supra* note 8, para.58.

15. *Prosecutor v. Jelisic*, Trial Judgement, Case No.IT-95-10-T, 14 December 1999, para.116, emphasis added.

16. Cf., for instance, *Prosecutor v. Aleksovski*, Case No. IT-95-14/1-A, Appeal Judgement, 24 March 2000, para.185; *Prosecutor v. Blagojevic and Jokic*, Trial Judgement, Case No.IT-02-60-T, 17 January 2005, para.819: '...within the context of international criminal justice, retribution is understood as a clear statement by the international community that crimes will be punished and impunity will not prevail.' See also *Prosecutor v. Oric*, Case No.IT-03-68-T, Trial Judgement, 30 June 2006, para.719: 'According to the jurisprudence of the Tribunal, retribution is not to be understood as fulfilling a desire for revenge but as duly expressing the outrage of the international community at these crimes. It is meant to reflect a fair and balanced approach to the exaction of punishment for wrongdoing. This means that the penalty must be proportionate to the wrongdoing; in other words, the punishment must fit the crime.'

17. See *Prosecutor v. Musema*, Trial Judgement, Case No.ICTR-96-13-T, 27 January 2000, para.986; *Prosecutor v. Serushago*, Sentencing Judgement, Case No.ICTR-98-39-S, 5 February 1999, para.20.

18. *Prosecutor v. Serushago*, Case No.ICTR-98-39-S, Sentencing Judgement, 5 February 1999, para.19-20.

19. *Erdemovic*, 29 November 1996, *supra* note 8, para.21.

20. *Kupreskic*, 14 January 2000, *supra* note 8, para.849; *Delalic*, 20 February 2001, *supra* note 8, para.1233; *Kayishema*, 21 May 1999, *supra* note 9, para.2 'Sentence'; *Serushago*, 5 February 1999, *supra* note 11, para.39; *Ntakirutimana*, 21 February 2003, *supra* note 9, para.887; *Prosecutor v. Momir Nikolic*, Case No.IT-02-60/1-S, Sentencing Judgement, 2 December 2003, para.93; *Prosecutor v. Galic*, Case No.IT-98-29-T, Trial Judgement, 5 December 2003, para.757; *Prosecutor v. Obrenovic*, Case No.IT-02-60/2-S, Sentencing Judgement, 10 December 2003, para.48-49; *Prosecutor v. Cesic*, Case No.IT-95-10/1-S, Sentencing Judgement, 11 March 2004, para.27; *Deronjic*, 30 March 2004, *supra* note 8, Separate Opinion of Judge Mumba, para.2-3; *Prosecutor v. Mrdja*, Case No.IT-02-59-S, Sentencing Judgement, 31 March 2004, para.18-19; *Prosecutor v.*

Babic, Case No.IT-03-72-S, Sentencing Judgement, 29 June 2004, para.43; *Blagojevic and Jokic*, 17 January 2005, *supra* note 8, para.817.

21. *Delalic, et al.*, 20 February 2001, *supra* note 8, para.806; *Prosecutor v. Banovic*, Case No. IT-02-65/1-S, Sentencing Judgement, 28 October 2003, para.35; *Zelenovic*, 4 April 2007, *supra* note 8, para.35. See, in particular, the *Kunarac* case, where it was thus stated: "The Trial Chamber fully supports rehabilitative programmes, if any, in which the accused may participate while serving their sentences. But that is an entirely different matter to saying that rehabilitation remains a significant sentencing objective. The scope of such national rehabilitative programmes, if any, depends on the states in which convicted persons will serve their sentences, not on the International Tribunal. Experience the world over has shown that it is a controversial proposition that imprisonment alone - which is the only penalty that a Trial Chamber may impose - can have a rehabilitative effect on a convicted person. The Trial Chamber is therefore not convinced that rehabilitation is a significant relevant sentencing objective in this jurisdiction" (*Kunarac*, 22 February 2001, *supra* note 8, para.844).

22. *Delalic*, Appeals Judgement, *cit.*, para.806.

23. Cf. Rule 125: 'In determining whether pardon or commutation is appropriate, the President shall take into account, inter alia, the gravity of the crime or crimes for which the prisoner was convicted, the treatment of similarly-situated prisoners, the prisoner's demonstration of rehabilitation, as well as any substantial cooperation of the prisoner with the Prosecutor.'

24. *Tadic*, Case No.IT-94-1-T, Sentencing Judgement, 14 July 1997, para.7; *Delalic*, Case No.IT-96-21-T, Trial Judgement, 16 November 1998, para.1232; *Kupreskic*, 14 January 2000, *supra* note 8, para.848; *Kayishema and Ruzindana*, 21 May 1999, *supra* note 9, para.1 "Sentence"; *Prosecutor v. Rutaganda*, Case No.ICTR-96-3-T, Judgement and Sentence, 6 December 1999, para.455; *Prosecutor v. Dragan Nikolic*, Case No.IT-94-2-S, Sentencing Judgement, 18 December 2003, para.245; *Prosecutor v. Barayagwiza et al.*, Case No.ICTR-99-52-T, Trial Judgement, 3 December 2003, para.1095; *Prosecutor v. Kamuhanda*, Case No.ICTR-95-54A-T, Trial Judgement, 22 January 2004, para.753; *Prosecutor v. Blaskic*, Case No.IT-95-14-A, Appeals Judgement, 29 July 2004, para.678; *Prosecutor v. Nzabirinda*, Case No.ICTR-2001-77-T, Trial Chamber, Sentencing Judgment, 23 February 2007, para.49.

25. Some other judgements do not even consider at all - in their sentencing part - the purposes of punishment, which are neither recalled nor mentioned. See, for instance, *Prosecutor v. Strugar*, Case No.IT-01-42-T, Trial Judgement, 31 January 2005, para.457 *et sequ.*; *Prosecutor v. Bagambiki et al.*, Case No.ICTR-99-46-T, Trial Judgement, 25 February 2004, para.808 *et sequ.*

26. O. Triffterer, 'The Preventive and Repressive Functions of the ICC', in Politi M., Nesi G., *The Rome Statute of the International Criminal Court - A challenge to impunity*, Ashgate, Dartmouth, 2001, p.143.

27. W. Schabas, *An Introduction to the International Criminal Court*, 2nd ed., Cambridge University Press, 2004, p.140.

28. L. Arbour, 'Access to Justice - The Prosecution of International Crimes: Prospects and Pitfalls', *Washington University Journal of Law and Policy*, vol.1, 1999, p.23.

29. M. C. Bassiouni, 'International Criminal Justice in the Age of Globalization', *International Criminal Law: Quo Vadis?* -Proceedings of the International Conference held in Siracusa, Italy, 28 November/3 December 2002, on the Occasion of the 30th Anniversary of ISISC, Erés, Ramonville Saint-Agne, 2004, p.86.

30. M. C. Bassiouni, *Introduction to International Criminal Law*, Transnational Publishers, NY, 2003 pp.689, 697.

31. See, for instance, D. Zolo, 'Peace through Criminal Law?', *JICJ*, *supra* note 1, p.729-730.

32. See P. Akhavan, 'Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities?', *American Journal of International Law*, vol.95 (Jan.2001), pp.7-31.

33. Mass atrocities were in fact committed well after the establishment of the ICTY: the Srebrenica genocide took place in July 1995, when the Tribunal was fully operative; the ethnic cleansing undertaken by Serbia against the Kosovo-Albanians occurred in 1998/99.

34. In fact, to *measure* the number of crimes that *did not* happen is a very difficult task. The success of the preventive function of ICJ is thus hard to identify, being marked by the *absence* of an event.

35. It should be considered, for instance, that in the agreements between the United Nations and States willing to execute sentences of the ad hoc Tribunals there is no reference to a right of the convicted person to rehabilitative treatment, or to rehabilitation more generally.

36. See S. Zappalá, *Human Rights in International Criminal Proceedings*, Oxford University Press, 2003, p.206-207.

37. International tribunals or courts can simply recommend that attention be given to the rehabilitation aspect of a penalty by the States where sentences of the Tribunals will be executed, but they do not have at their disposal other more powerful tools such as the possibility of ordering and implementing specific programmes for the inmates, and so on.

38. For instance, in its Report of December 2001 (*The Responsibility to Protect*, Report of the International Commission on Intervention and State Sovereignty, Ottawa, December 2001), the International Commission on Intervention and State Sovereignty (ICISS) recognized the existence of a special and primary *responsibility to protect* the rights and safety of citizens of the international community. When a State is unable or unwilling to fulfil its responsibilities of protecting its citizens, then the duty would shift to the international community. Accordingly, the concept of *responsibility to protect* represents a legitimate basis for collective action against international crimes and symbolizes the link between justice and peace (promotion/maintenance).

Defining evil. The war of aggression and international law

Stefano Pietropaoli

" ... the supreme international crime differing only from other war crimes in that it contains within itself the accumulated evil of the whole".

1. War and aggression from the doctrine of just war to classic international law

The dominant international doctrine categorises the war of aggression as a "fundamental crime" (1). However, said crime is lacking a recognized definition and thus does not fall under the competence of any international court or tribunal. In this essay I shall attempt to trace the fundamental stages of the process that has led to this paradox. In particular, I will try to trace the history of the concept of aggression and the attempts that have been made at defining it. I shall begin with an examination of the medieval doctrine of *bellum justum*.

The teachings of the Church of Rome played a fundamental role in the development of the concept of war. The irenical paleochristian attitude that had characterized the teachings of Tertullian, Origen and Lactantius, according to which war was the antithesis of the evangelical message was replaced already in the 4th Century by a doctrine which regarded Christians resorting to war as an act that was all but sinful. Once the era of martyrdom was over, Christianity became the religion of the Empire. Within a few years some amongst the key thinkers of the Church (Athanasius of Alexandria of Egypt, Basil of Cesarea and especially Ambrose) began to claim that war - under certain conditions - was not a sin but a necessity. With Augustine Christian theory definitively moved on from ancient concepts and so doing elaborated a model - that of the just war - that would be destined to last for more than a thousand years.

According to the doctrine of *bellum justum*, war is not always a sin. In some cases it is legitimate, morally right, insofar as it is an act of peace, inspired by a *recta intentio bellandi*. In order to be just, wars must have a just cause (*justa causa*). Augustine, Gratian, Thomas and all the great medieval theologians up until Francisco de Vitoria, inserted lists of *justae causae belli* in their own works. Analogous lists were compiled, symmetrically, in order to define the grounds that rendered a war unjust (*injustae causae belli*), such as *libido dominandi*, *aviditas adipiscendae laudis humanae*, *imperii amplificatio*, *diversitas religionis*, *principis gloria propria* and many more. However the just cause we may call "aggression" (2) was missing from amongst these.

The medieval doctrine of just war distinguished between *bellum inter catholicos* and *bellum contra inimicos fidei*. War within the *respublica christiana* could not be allowed unless there was an ethical and legal purpose that could not be achieved other than through war. But with respect to the enemies of faith, be these heretics or those belonging to a different religious persuasion (the "Saracens"), the war of aggression - the *bellum romanum* of Henry of Segusio - was entirely justified (3). The act of defending oneself from the war of aggression of the Christians was an unjust act, contrary to justice: "is qui gladio utitur juste facit, et per consequens is qui defendit se temerarie se defendit" (4). War, even in the form of war of aggression, was therefore not considered an absolutely illegitimate act, and no or a minimal amount of attention was given to the concept of aggression itself by medieval theological doctrine.

With the birth of classical international law, which may be established as coming about towards the end of the 16th Century (5), the concept of war acquired an entirely legal dimension, and all theological medieval connotations disappeared. In the new European system formed by States that

recognised a reciprocal dignity, war was a legitimate prerogative of the sovereign. The problem of *justa causa* was removed at the core. The justness of war was "a pure question of personal conscience" (6). Each State had the right to commence a war, thus war between States was always 'just' (in a formal legal sense), independently from the value of the ethical, political and legal positions of the parties involved. The adversary, no longer being the defender of an unjust cause, could now be considered a "just enemy" *justus hostis*), and not a criminal or an absolute enemy to be exterminated. Thus it became possible to elaborate a system of norms (*jus belli* (7)) rested on a 'non discriminatory' concept of war, which allowed for the limitation of warlike violence (8).

In classical international law therefore, there was no norm that might establish the illegitimacy of war in predetermined cases. To the contrary, there was a norm that recognised the power of each sovereign to legitimately conduct war. The grounds, reasons and aims of the war had no legal relevance. The concept of aggression was totally unrelated to the *jus publicum europaeum*. A declaration of war was not an act of aggression but, to the contrary, it was an act that conformed to the law of war.

Since general international law did not comprise any ban on using force, States would ever more often pose limits through specific treaties. The term "aggression" would frequently appear in these texts, but as a synonym of "attack", "war" or "armed attack", without there being a precise definition or a conceptual dimension to the term.

2. Aggression as a wrongful act and aggression as a crime. The uncertainties of the Treaty of Versailles and the Covenant of the League of Nations

The First World War was the last war of the *jus publicum europaeum* or, more precisely, it began as a war regulated by international modern European law, but was concluded under the heading of an entirely new international legal system (9). As George L. Mosse highlighted, the war that was fought between 1914 and 1918 was "a different kind of war" (10). The use of asphyxiating gases, airships, planes and submarines made the Great War an episode that could not be compared to the wars that had been fought up until then. Thirteen million people died in the course of that war, more than twice as many as the sum of all the dead in the largest armed conflicts fought between 1790 and 1914.

The destructive potential of the new instruments of war left a profound impression on the civilian population whose exposure to the risks of war had been - even though only partially - limited during the course of the last three centuries, and it now felt irrevocably vulnerable. The idea that the "war of the Kaiser" as the greatest crime that had ever been committed quickly became accepted in public opinion in England, France and the United States, also thanks to the attitude of their respective governments (11).

During the inter-ally summit of the 2nd of December 1918, Clemenceau, Lloyd George and Vittorio Emanuele Orlando agreed to bring the Kaiser to trial. Before the opening of the Conference of peace (12), Lloyd George proposed the establishment of a commission which would have the purpose of examining the question of responsibility in war, which found a large consensus amongst the representatives of the victorious sides. During the preliminary conference of January 25th 1919 - only a week from the opening - the establishment of a body whose task it was to ascertain the responsibility of the instigators of war was decided.

After two months of secret meetings, the Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties, chaired by the American representative Robert Lansing, presented its report on the 29th of March 1919 which was then supplemented on the 4th of April by two *memoranda* containing the reservations expressed by the United States and Japanese representatives (13). The opinion of the Commission showed a clear detachment from the international system of the *jus publicum europaeum*. Germany was considered to be responsible for the war for having violated not only the laws and customs of war, but also "the laws of humanity"

and "the clear dictates of humanity". Thus arose the possibility of attributing responsibility to a single State for having infringed, not an agreement-type or customary norm, but a no better defined "law of humanity", the violation of which did not require the acquirement of the relative probationary elements ("The facts are established. They are so numerous and so vouched for that they admit of no doubt and cry for justice").

The central point of the report was, however, another: the question for the personal criminal liability of the authors of the war. According to the Commission, all persons belonging to enemy States, independently from rank, should be subject to criminal proceedings if they are guilty of having contravened the laws and customs of war and the laws of humanity. An international tribunal was to be established in order to try the guilty. On the question of the competence of the Court, the report distinguished between two possible types of crime: the acts that had caused the war and that had been done at the beginning of the war; the violation of the laws and customs of war and the laws of humanity. Only the latter, essentially termed "war crimes", were to be given attention by the Tribunal. The former denoted a different *genus* of crime: the "crime of the war", or better, the "crime of the aggressive war". But this crime, according to the Commission, was of a different nature than the others, as it belonged to a moral sphere of rather than a legal sphere. In a strictly legal sense, the war of aggression could not be considered to be against international law (14). The Commission formed the following conclusions even though it recognised that Germany had infringed the treaties of neutrality in existence with Belgium and Luxembourg (15)and had violated the borders of France and Serbia before war had been declared: "The acts which brought about the war should not be charged against their authors or made the subject of proceedings before a tribunal". The immediate recommended action was a "formal condemnation" of the acts that led to the war by the Conference. But, in a way that is totally incongruent with its conclusions, the Commission also recommended that special measures be taken, such as the setting up of extraordinary enquiry commissions aimed at ascertaining responsibility for the war.

The final text of the Treaty of Versailles moved away from the indications of the Commission. The famous article 227, announcing the incrimination of the Kaiser "for supreme offence against national morality and the sanctity of treaties", affirmed the existence of individual criminal liability in international law for the first time in the history of law of nations. A special tribunal (formed by five judges representing the United States, Great Britain, France, Italy and Japan), was to try Wilhelm II driven "by the highest motives of international policy, with a view to vindicating the solemn obligations of international undertakings and the validity of international morality". But from a legal point of view, article 227 did not clarify which crime on the basis of which the Kaiser was to be held criminally liable. In particular, no reference was made to the "crime of aggression" as the legal basis of the accusation. Political justice, and not international justice, as the nature of the provision is also expressed by the reference to "international policy" rather than to "international law".

The eighth part of the Treaty however, refers to the concept of aggression. This section is dedicated to redress and collective sanctions. The reparations were certainly not a novelty introduced at Versailles (Germany itself had imposed heavy reparations on France in 1871). But as well as reparation in the real sense, that is to say the request for compensation for losses deriving from actions that were not in conformity with the law of war, the Treaty contained a "war guilt clause" at article 231 (16). The war had begun "because" of Germany. The latter had imposed the war on others through an act of aggression and thus had to accept responsibility for it. Carl Schmitt maintained that the demands made under article 231 were not "reparations of war in the old sense, but formal demands for compensation on the basis of the legal liability of the defeated" (17). Based on the new concept, Germany still had to limitlessly cover all losses insofar as these were derived from an unjust war of aggression (18).

Although the Treaty of Versailles did not mark the definitive overcoming of the concept of non discriminatory war that is characteristic of the *jus publicum europaeum*, it did introduce elements of profound discontinuity with the classical international legal system (the concept of personal criminal liability of international law; the idea of the establishment of a criminal international court). In 1919 the war of aggression was not considered to be an international crime in the criminal sense of the

term. Only a few jurists - particularly Louis Le Fur (19) -went so far as to foresee a criminal-judicial ban on the war of aggression, thereby bringing back the concepts of just war and unjust enemy and applying these to the case of the war against Germany.

The Covenant of the League of Nations did not present any great differences with respect to the Treaty. Article 10 referred to the ban on the members of the League to resort to "external aggression". The text did not supply a manifest definition of "aggression". However, one can assume from the article that the term "aggression" was used to denote a violent action aimed at the violation of the territorial integrity and the political independence of a member State. The qualification of the aggression as "external" indicated that the aggression must be perpetrated by a State in relation to another State (with the express exclusion therefore of internal conflicts). Articles 12, 13 and 15 stated that should a controversy arise, the States would submit the question for arbitration or to the Council of the League, without allowing them to resort to the use of force before three months had passed from the decision (a 'cooling off' mechanism). The use of war was precluded should the adversary put into practice the outcome of the arbitration or if it came into line with the recommendations of the Council. Article 16 stated that the violation of articles 12, 13 and 15 would constitute an *ipso facto* "act of war", committed against all the members of the League of Nations, without using the term "aggression".

The Covenant deemed a State that did not act in accordance with a determined procedure before taking up arms as a violator of the peace. Article 10 linked the concept of aggression to that of territorial integrity, presenting itself as a clause of guarantee armed with the *status quo* defined in the Treaty of Versailles. It was however immediately made clear that in practice no State would be willing to refer the question of verifying whether an aggression had taken place (and therefore also as to the duty to intervene) to the Council of the League. The tension between State individualism and (asserted) League universality was reconciled in favour of the sovereign prerogatives. As is generally known, neither the Assembly nor the Council of the League of Nations were able to operate as collective bodies, nor did they prevent or sanction the episodes of aggression that repeatedly took place in the years that followed (such as the Italian occupation of Corfu or the Japanese invasion of Manchuria and China). The prudent strategy of peace keeping planned at Versailles turned out a complete failure.

In general, it may be maintained that the 'system of Versailles' was lacking the concept of the criminalization of war as such. However, the concept of aggression brusquely became the centre of political and judicial debates in the west after the end of the First World War. Although the idea of each State having the right to resort to war insofar as that State is sovereign *superiorem non recognoscens* was still too strong to be overcome, there was an increasing tendency to perceive aggression as an international wrongful act.

3. The criminalization of war. The undesirability of a definition

In the years that immediately followed the First World War a number of attempts will be made to resolve the question of aggression. The Treaty of Mutual Assistance of 1923 did not give a positive definition of the term. Arguing *a contrario*, the Treaty established that war led a by a State which, being part of an international trial, had itself accepted the recommendation of the Council of the League of Nations, the verdict of the Permanent Court of International Justice, or an arbitration with the other party in the dispute, was *not* to be considered a war of aggression. Such a proposal was reiterated by the Permanent Advisory Commission of the League of Nations which affirmed that the system of mutual assistance could not have a preventative function aimed at avoiding armed conflicts in that "under the condition of modern warfare it *would seem impossible to decide, even in theory, what constitutes a case of aggression*" (20). Subsequently the Special Committee of the Temporary Mixed Commission confirmed this thesis: it was not possible to identify an act of aggression *a priori* ("it is clear that no simple definition of aggression can be drawn up, and that no simple test of when an act of aggression has actually taken place can be devised"). In the case of conflict the Council would have had to invite the parties to submit the case to the same Council or to

the Court: the party that would refuse to fulfil such a request would be considered to be the aggressor. These attempts were associated with the idea that it was not possible to define what constituted an act of aggression. The only way to get out of the situation was to confer the power of deciding on a case by case basis which party was to be considered the aggressor to the Council.

The frailty of such a solution was immediately made clear. Notwithstanding the declarations of principle, no State was willing to submit itself to the discretion of the Council. A partial correction was found in the Geneva Protocol of the 2nd of October 1924 (*Protocol for the Pacific Settlement of International Disputes* (21)), which may be considered to be the first internationally renowned act in which war is expressly defined as a crime, and not simply as a wrongful act (22). The Protocol was derived from the initiative of the American international jurist, James Shotwell, whose project, "The Outlawry of Aggressive War", considered the war of aggression as an international crime (art. 1: "The High Contracting Parties solemnly declare that aggressive war is an international crime"), but at the same time, it reaffirmed the responsibility of the individual State for the acts committed (art. 2). From the moment that it is true that *societas delinquere non potest*, the crime to which Shotwell's project made reference could not be understood in a criminal sense. The text of the Protocol confirmed the theoretical uncertainties of the project. Unlike the *Treaty of Mutual Assistance*, the Protocol established a kind of "presumption of aggression" in relation to the parties in the case conflict, unless there was a unanimous decision of the Council to the opposite effect. The Protocol provided for a procedure for the pacific resolution of controversies that could lead to war, but did not define any criteria that could indicate when a State was resorting to war, nor did it propose a definition of "war of aggression". The Protocol also placed the concept of international crime to that of international wrongful act, thereby interpreting the war of aggression as a crime committed by a State. This position was reiterated in the provision requiring the aggressor State to pay economic sanctions that were not meant to cause damage to neither its territorial integrity, nor its political independence (art. 15 of the Protocol, which recalls art. 10 of the Covenant).

Once it had been approved in the fifth meeting of the Assembly of the League of Nations, the Protocol was signed by 19 States but, as it was severely opposed by England, only Czechoslovakia ratified it. Notwithstanding the theoretical ambiguities and its practical failure, the Protocol may be considered as having been a crucial moment in the history of international law insofar as it put the spotlight for the first time on the concept of the "war of aggression", and not only on aggression as an unjust armed attack. However, it did not consider the war of aggression as a crime in the real sense. A few days after the approval of the Geneva Protocol, one of the greatest American legal thinkers, Quincy Wright, maintained that "under the existing international law, wars of aggression between nations are perfectly lawful" (23).

In the presence of the failure of the Shotwell project the League of Nations looked for new solutions. In the meeting of the assembly in 1927 the war of aggression was unanimously reiterated to be an international crime and the Committee of Arbitration and Security was charged with the study of strategies for a general disarmament. But, as was the case of the Protocol of 1924, without the effective collaboration of governments, the declaration was destined to remain "a pious wish" (24).

In the presence of the inability of the League of Nations to solve the problem, many States chose to enter into bilateral or multilateral agreements with which they reciprocally gave up their right to resort to war. The clearest example of this tendency is definitely the *Treaty of Mutual Guarantee between Germany, Belgium, France, Great Britain and Italy* in 1925, more commonly known as the Locarno Pact (25), which was the first of many "non-aggression pacts".

The Kellogg-Briand Pact (or Pact of Paris) in 1928 was initially created as a bilateral pact between France and the United States, but was immediately opened to the unconditional adherence of all other countries. Unlike the Geneva Protocol, 63 States - almost all States in the world, with the exception of the European micro-States and a few Asian States - ratified the Pact. In the period between the two world wars, no pact had more signatories than the Pact of Paris (26). The reasons for this "success" may be found in a substantial open-endedness of the provisions of the Pact. In article 1 the signatories declare that they condemn the use of war as a solution to international

controversies and that they renounced the use of this national political instrument in their reciprocal relationships. According to article 2, the signatories recognised that the regulation or resolution of all disputes or conflicts should only ever be undertaken by pacific means. On the surface, such provisions seem to qualify war as an illegal act. But the absolute lack of sanctions that condemn the violation of the provision made ratification seem attractive. The signatory States did not run the risk of losing that which had, up until then, their prerogative *par excellence*.

The Pact therefore left open three fundamental questions (27): Firstly, it did not give any definition of "war", nor did it make any reference to the concepts of "aggression" and "legitimate self-defence". As regards the latter of these, Kellogg himself declared that it was not foreseen in the Pact in that it is an implicit principle in international law. The signatory States therefore had the unconditional right to resort to legitimate self-defence in any case they deemed it necessary. Secondly, the Pact did not contain any procedure for the identification of cases in which a State commences an illegal war or defended itself illegally. Finally, article 2 did not contain any indication of the leans of pacific resolution of the controversies. Although the majority of jurists continued to interpret the Kellogg-Briand agreement as a multilateral treaty (28), the elements recalled above induced a number of authors to see the Pact as a declaration with political value rather than a legally binding act (29).

Notwithstanding the very serious incongruities that characterized the Kellogg-Briand Pact, the debate that it gave rise to was unprecedented in quantity and quality of contributions. It had Anglo-American doctrine at its base, particularly American doctrine. Thus, English took on the role of the 'common language' of international law, like and more than French. The Pact became a symbol, the fate of which would be consecrated at the Nuremberg Trials.

The project submitted by Nicolas Politis to the General Commission of the League of Nations within the Conference on disarmament in 1932 had an altogether different fate. Taking up a proposal advanced by the representatives of the Soviet Union (which adopted the definition in the treaties stipulated in 1933 with Afghanistan, Estonia, Latvia, Persia, Poland, Romania, Yugoslavia, Czechoslovakia and Turkey (30)), Politis formulated a definition of aggression which confronted the problem pragmatically in comparison with the previous attempts, without deferring the question *a priori* to an international body. Politis abandoned the strategy of avoiding a 'preventive' definition of aggression and surpassed the generic deferral by traditional doctrine to 'mobilization' and 'frontier violation' as constitutive elements of aggression. A State that committed one of the following actions should be considered an aggressor State: "declaration of war upon another State; invasion by its armed forces, with or without a declaration of war, of the territory of another State; attack by its land, naval, or air forces, with or without a declaration of war, on the territory, vessels, or aircraft of another State; naval blockade of the coasts or ports of another State; provision of support to armed bands formed in its territory which have invaded the territory of another State, or refusal, notwithstanding the request of the invaded State, to take in its own territory all the measures in its power to deprive those bands of all assistance or protection". Politis' definition thus introduced a temporal criterion in order to identify the aggressor ("which *first* commits one of the following acts") and identified a stringent list of cases of aggression. In this way a State was deprived of the right to resort to war, but a number of criteria were introduced that would allow - at least in theory - the easy identification of acts that constituted an aggression, without making it necessary to refer to an *ex post* decision of an international body. Also, the project provided that no political, military, economic or other consideration could be adopted as a justification of the acts mentioned above. No reference was made even to legitimate self-defence: since the aggressor is the first State to resort to violence, legitimate self-defence was implicitly allowed (with the exclusion of preventative legitimate self defence).

Politis' definition could have diverted the danger of a return to the concept of "just cause". The question of liability for war was resolved 'juridically', without reference to political and economic factors, and was not inclined towards the criminal direction of international personal liability of the authors of war of aggression. The subjects of international law will still exclusively the States.

4. Justice at Nuremberg. An unsolved issue

When, after the Second World War, the allies decided to set up an international tribunal for the punishment of the Nazi war criminals, the question of aggression as an international crime came up once again. As is known, the Statute of the Tribunal of Nuremberg established the punishment of crimes committed by the major Nazi war criminals, classified as "crimes against peace", "war crimes" and "crimes against humanity". Aggression came into the first category: "Crimes Against Peace: namely, planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing" (art. 6, letter a). The Statute of the Tribunal clearly established the personal criminal liability of those on trial, but did not give a definition of aggression.

The Chief of Counsel for the United States, Robert Jackson, in his *Opening Address* (31), put forward a proposal for the introduction of a definition of aggression that repeated Politis' one to the letter, but that could be differentiated from it in two ways. Firstly the shipping block and the support of armed groups formed on the State's territory for the purpose of invading another State were removed from the list of acts of aggression. Secondly, a 'discriminatory clause' was expressly introduced: "exercise of the right of legitimate self-defence, that is to say, resistance to an act of aggression, or action to assist a State which has been subjected to aggression, shall not constitute a war of aggression". With these amendments, the scope of Politis' definition of 1932 was deeply modified. Jackson declared: "Any resort to war - to any kind of a war - is a resort to means that are inherently criminal. War inevitably is a course of killings, assaults, deprivations of liberty, and destruction of property. An honestly defensive war is of course, legal and saves those lawfully conducting it from criminality. But inherently criminal acts cannot be defended by showing that those who committed them were engaged in a war, when war itself is illegal. The very minimum legal consequence of the treaties making aggressive wars illegal is to strip those who incite or wage them of every defence the law ever gave, and to leave war-makers subject to judgment by the usually accepted principles of the law of crimes" (32).

The American perspective was accepted. One of the more well-known passages of the Tribunal's decision reads: "War is essentially an evil thing. Its consequences are not confined to the belligerent States alone, but affect the whole world. To initiate a war of aggression, therefore, is not only an international crime; it is the supreme international crime differing only from other war crimes in that it contains within itself the accumulated evil of the whole".

The ruling of Nuremberg signalled a turn round of perspective with respect to classical international law. The war was no longer considered to be a right of the State. Those who fought wars that were not purely defensive were criminally liable for the acts committed (an extension of the traditional concept of "war crimes"), and did not have any legal justification for their actions. These principles became the principles at the basis of the new international organization, the United Nations. But, in a way that might seem surprising, they were not included directly in the text of the Charter, but were adopted through a subsequent resolution of the General Assembly (33).

Contrary to what the *Covenant* of the League of Nations had done, the United Nations Charter expressly bans the use of force by the States. In article 1 the Charter addresses the objectives of the UN, amongst these the "suppression of acts of aggression or other breaches of the peace". The term "aggression" is only mentioned twice however (art.s 39 and 53), and in neither of these cases is the term defined. The term "war" appears only once, in the preamble, where it is declared to be an affliction that humanity must rid itself of forever.

Paradoxically, the charter of the international institution that was created in order to maintain universal and stable peace through use of force against aggressors (by means of the instruments listed in Chapter VII, which has mostly not been applied), does not define the concept of aggression and does not provide for any explicit sanction for the violators of the ban on the use of force. In this way, as has already been said in reference to the League of Nations, the decision on the subsistence

of a case of aggression is in fact deferred to a collective body. But the difference between the Council of the League of Nations, which was rendered inoperative by the rule of unanimity, the Security Council of the UN has a great number of powers vested in it as established in art. 39. Due to the decisional mechanisms contained in the Charter (*cross veto policy*), the five powers that were victorious in the Second World War became the absolute arbitrators of the decision of what constituted aggression and who could be classified as an aggressor, and therefore of when force is used legitimately or not. For the same reasons, it is obvious that none of the five States may be considered to be the aggressor.

In this way, the objective of ensuring peace has automatically become unattainable. As history following the Second World War shows, the Security Council has been blocked by the veto, thus giving way to the war-like initiatives of the super powers, or has carried out a legitimating function, in the sense that the aggressions perpetrated by the permanent members has been fully justified.

This set up, that seems inevitably to forecast the failure of the policy to ensure a stable and universal peace, has given rise to numerous amendment proposals. Already in 1950, the General Assembly (resolution 378/B (V) of the 17th of November 1950) assigned the task of examining the problem of the definition of aggression to the International Law Commission. After extenuating debates and bitter disputes, the Commission adopted the point of view of its Special Rapporteur, Jean Spiropoulos, who, taking from the already mentioned views of the Permanent Advisory Commission and of the Special Committee of the Temporary Mixed Commission, declared that "the notion of aggression is a notion *per se*, a primary notion, which, by its very essence, is not susceptible of definition" (34). In particular, defining aggression through a categorization of acts of aggression is considered to be "undesirable", in that no list could be exhaustive. The resolution number 599 (VI) of the 31st of January 1952 ("[it is] possible and desirable to define aggression by reference to the elements which constitutes it"), which would however, receive no comment.

Subsequently, with resolutions 688 (VII) 1952 and 859 (IX) 1954, the General Assembly established two special committees charged with defining aggression, but no accepted proposal emerged from either of these. The same fate was shared by an analogous committee created by the Assembly with resolution no. 1181 (XII) 1957. However, the Special Committee established with resolution no. 2230 (XXII) of the 18th of November 1967 was able to bring its task to term, and on the 14th of December 1974, the General Assembly approved resolution no. 3314 (XXIX).

Resolution 3314 distinguishes itself from the previous attempts through some of the results obtained. Apart from giving a general definition of aggression in article 1 ("Aggression is the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations, as set out in this Definition"), the resolution indicates a number of cases that must be considered acts of aggression (art. 3). The importance of the resolution must however be reconsidered in light of the following considerations: at article 2 the resolution establishes that, *prima facie*, the aggressor must be considered to be he who uses armed force the first time, but also states that the Security Council has the power to correct this presumption on the basis of the evaluation of other relevant circumstances; finally, at article 4 the resolution states that the list of the cases of aggression contained in article 3 is not exhaustive and that the Security Council may determine which other acts may constitute aggression. Notwithstanding the good intentions, therefore, even resolution 3314 leaves the prerogatives of the Security Council substantially intact. Also, the resolution does not deal with the problem of personal criminal liability in international law, reasoning in terms of the international responsibility of the State.

New material was brought to the discussion by the work that led to the institution of the International Criminal Court. Unlike the Tribunals of Nuremberg and of Tokyo and the *ad hoc* international Tribunals for ex-Yugoslavia and Ruanda, the ICC was not created upon initiative of the world super powers and was not established *ex post.* These positive elements were not however translated into a project of real emancipation from the *cross veto policy* of the Security Council.

The *Rome Statute* of the 17th of July 1998 lists amongst the crimes that are of the competence of the Court the crime of aggression, but the second paragraph of article 5 establishes that the Court "shall exercise jurisdiction over the crime of aggression once a provision is adopted in accordance with articles 121 and 123 defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime. Such a provision shall be consistent with the relevant provisions of the Charter of the United Nations". This agreed definition has not yet been arrived at yet, and it is improbable that it ever shall be. Moreover, the Statute provides for the possibility of the Security Council of the United Nations to suspend the initiatives of the Court's prosecution service at its own discretion, thus reducing the real autonomy of the ICC.

Conclusions

That aggression is an international crime is something which has been repeated for the whole century. However, international law was not able to identify a clear and agreed definition of the concept. The legal dimension and the political implications of the concept of aggression are so solidly linked that it has been impossible to attain such an objective. However, legal science cannot abandon the search of new solutions of the problem, unless it is to abdicate its own role and leave it to the upholders of the theory that international law does, in fact, not exist.

In a realist vision, international law cannot be defined simply as 'the law of the international community', with reference made exclusively to the subjects whose actions it is aimed at regulating. It is first and foremost a legal system that has as its primary, although not exclusive, function, the control of the use of violence on a large scale. From this prospective, the proof of the existence of international law is its capacity to produce functional normative design in order to limit the more destructive elements of violent warfare.

In order to allow the international legal system to carry out an effective containment of the use of force, it is however necessary that no subject of the system consider itself to be *legibus solutus*. But the current structure of the highest international institution, the UN, seems to be unable to prevent a similar *extra ordinem* occurrence, and in fact seems to function in a way that conforms to the hegemonic expectations of some international players.

The pathway to a reform of the United Nations seems to be blocked, due to the fact that the only subjects that could give life to an effective reform of the organization are also the most loyal protectors of the *status quo*. And also the experience of an institution like the ICC, that seemed to be destined to mark a new era of international law, is showing itself to be a failure.

It is not possible to find a theoretical solution to escape from the *empasse* that has been created by the world order planned at Dumbarton Oaks in 1944. However, it is possible to imagine new scenarios, before which international law could and would give final answers.

Classical international law, forgotten too soon after the First World War, had managed to elaborate a system of limitation of war which, although extremely problematic, had obtained some excellent results that cannot be ignored. The ban on resorting to certain types of arms, the obligation to respect a number of fundamental rights of prisoners, the ban on turning armed conflict towards the civilian population, are only a few principles established by classical international law. The First World War eliminated the all-too-fragile enthusiasm of the Hague Conference of 1899 and 1907, and led jurists to concentrate their attention on the problem of prevention of war rather than on that of the implementation of the law of war. The horrors of the new technological war, of shrapnel and mustard gas, of tanks and air combat, seemed so intolerable as to indicate that there was no other way of escape other than banning war altogether, resulting in the criminalization of war of aggression.

Some, such as Joseph Kunz (35), did not overlook the fact that 'forgetting' the so-called *jus in bello* would lead to dire consequences. Heading in the same direction, Carl Schmitt diagnosed that all attempts to abolish war, legally banning it, "would result in giving life to new types of war, possibly worse types, such as civil war or other types of war of annihilation" (36).

The system of the United Nations banned war only in the context of legal lexicon. The clear distinction between war and peace, characteristic of classical international law, was thus lost. Terms like "cold war", "humanitarian war", "war on terrorism", "humanitarian intervention", "peace-keeping operation" are the sign of a deep mutation in the concept of war. These denote large-scale military interventions that involve the killing of persons, yet they are not "wars". The failure of the international institutions in reaching the objective of ensuring a stable and universal peace has had the perverse effect of globally legitimating the use of force in the name of humanity, of freedom and democracy. Thus the notion of just war re-emerged with a moralistic and 'para-theological' connotation, in which the contenders are not on the same level. In modern discriminatory war enemies are absolute enemies, are considered to be reciprocally barbaric or disloyal, and they are assigned no rights.

Due to the removal of the concept of war, it became possible to interpret acts of warfare as acts of justice or of international policing. The universal prospective of post-classical international law allows us to consider the enemy as a criminal, an enemy of humanity against which the use of any means is justifiable. As Carl Schmitt maintained, in this war that becomes merely a punitive act in character, "the enemy becomes simply a criminal and the subsequent step - that is to say depriving the adversary of his rights and his depredation, as in the destruction of the formal concept of the enemy which based itself on the idea of *justus hostis* - is practically accomplished by itself" (37).

The only figure that in classical international law was considered to be *hostis generis humani* was that of the pirate. In the undefined space that was the open sea, the pirate carried out his own predatory intentions indifferently like any State. For this reason it was thought that all States should combat pirating. Action taken against pirates was not a "war", but a punitive act of justice or a measure put in place by the international maritime police. The latter was "apolitical" in that it did not consider the pirate as a *justus hostis*, but as an absolute enemy. Instead in "universal international law" each *hostis* is an 'enemy of humanity'. In the name of universal peace and faith in humanity, the limitation of war is sacrificed. The enemy is an inhuman monster that must not simply be defeated, but must be destroyed. Each war that is fought in the name of humanity is a war in which one contender tries to appropriate for himself a universal concept in order to be able to identify himself with it, at the expense of the enemy, with the awful pretence that the enemy must lose his qualification of man, that he must be declared *hors-la-loi* and *hors l'humanité* and therefore the war must be brought to the pinnacle of inhumanity (38). But "humanity as such cannot carry out any war, since it has no enemies, at least not on this planet" (39). Even the worst enemy does not cease to be a man due to the fact that he is the worst enemy.

The objective of international law should be today that of unshackling itself from the moral, political and theological problem of elimination of war, and recover the legal dimension of the problem of war, that is to say the problem of its limitation. It is urgent to take up the discussion that was cut short, that of the procedural guarantees with which international law had attempted to reduce the more devastating consequences of armed conflict. In this direction, the problem of aggression remains central. Such a question must be examined in light of the net distinction between "war of aggression" and "aggression". Rather than "defining evil", international law should aim to define acts of aggression, picking up where Nikolas Politis left off, trying at the same time to break free from the management and control of the Security Council. In this way, what could be called the international law of armed conflicts or humanitarian international law could be re-launched necessarily based on a concept of non discriminatory war, and avoid the difficult concept of *justa causa*, or of just war in substance and of the responsibilities of war. The question of aggression as armed attack is more easily solvable than that of the justness of war, being an attack a substantial case which differs from the abstract problem of culpability (40). As much as it may seem questionable on a moral level, the definition of "legal war" would serve peace much better than the legal abolition of war. A *bellum legale* that attempts to define the illegality of resorting to war on the basis of the violation of a formal requirement is preferable to a *bellum justum* which has the same objective whilst resorting to the concept of intrinsic injustice in aggression (41).

From a realist point of view, the indispensable condition in order for this itinerary to be followed is the overcoming of the current world order by the new multi-polar model. International law may be able to do little to aid such a process. But it can contribute to the creation of that which Hedley Bull defined a "minimal political order", in which the States give up part of their sovereignty in favour of a 'polycentric regionalization' of international law, which is less violent and more 'humane' than the current universal unipolarism.

Notes

1. A. Cassese, *Lineamenti di diritto internazionale penal*e, I. *Diritto sostanziale*, il Mulino, Bologna, 2005, p. 145 and following.

2. On the subject please refer to F. Buzzi, *Il tema de iure belli nella Seconda Scolastica*, "Scuola Cattolica", 133 (2005), pp. 77-132.

3. On this point please see P. Bellini, *Il gladio bellico. Il tema della guerra nella riflessione canonistica della età classica*, Giappichelli, Torino, 1989.

4. Henricus de Segusio cardinalis Hostiensis, *Summa aurea*, tit. *De tregua et pace*, par.3 *Quid sit justum bellum*, Damiano Zenaro, Venezia, 1574, p. 356.

5. Here I adopt the breakdown of the epochs of international law as proposed by W.G. Grewe, in *Epochen der Völkerrechtsgeschichte*, Nomos, Baden-Baden, 1984; eng. tr. *The Epochs of International Law*, de Gruyter, Berlin-New York, 2000. Grewe States that it is correct to speak of an "antique international law" and a "medieval international law", but concentrates on modern international law which he subdivides into classical international law and post-classical international law. Within the category of classical international law - which corresponds to the epoch of *jus publicum europaeum* - Grewe further distinguishes between *jus inter gentes* (1494/1648), *droit public de l'Europe* (1648/1815) and *International Law* (1815/1919). After 1919, according to the proposed scheme, post-classical modern international law began.

6. "Une pure question de conscience personnelle", writes Antoine Pillet in *Les conventions de La Haye du 29 juillet 1899 et du 18 octobre 1907. Etude juridique et critique*, Pedone, Paris, 1918, p. 1.

7. Commonly, today we distinguish between *jus ad bellum* - the law (in a subjective sense) that legitimates a subject to conduct a war - and *jus in bello* - the law (in an objective sense) that regulates the use of force in warfare. These two terms may be useful for didactic purposes but one must highlight the fact that these are entirely unrelated to the tradition of classical international law. Unlike what is usually supposed, the concepts of *jus in bello* and *jus ad bellum* (which are not a pair of terms that are affirmed as being conceptually at the centre of roman law) are not connected to medieval theology and philosophy. These terms only became a part of international legal jargon in the nineteen hundreds.

8. Notwithstanding the fact that the little data we have effectively seems to confirm this reconstruction, it must be remembered that such a limitation of war was applicable only to wars between European States fought on a sole European territory, thereby excluding colonial and maritime wars (Cf., D. Singer, M. Small, *The Wages of War. A statistical handbook*, Wiley, New York, 1972).

9. On this point please see C. Schmitt, *Der Nomos der Erde im Völkerrecht des Jus Publicum Europaeum*, Duncker & Humblot, Berlin, 1950, pp. 232-255.

10. G.L. Mosse, *Fallen Soldiers: Reshaping the Memory of the World Wars*, Oxford University Press, New York, 1990.

11. Humoured in satirical publications in France and England, object of ridicule in popular songs (like the famous song *We're Going to Hang the Kaiser Under the Linden Tree*, Kendis & Brockman Music Co., New York 1917), renamed "The Berlin Butcher" and "Guillaume le Ravageur", Wilhelm II of Hohenzollern was quickly identified as the main person responsible for the conflict. The

English and the Americans - obviously not the French - likened the Kaiser to Napoleon. But if in 1815 Napoleon had been defined as "an enemy of the tranquility of the world", one century later the Kaiser was something more: a criminal, an enemy of the whole of mankind. Thus, the cry "William to Saint Helena!" soon changed into the more macabre "Hang the Kaiser!".

12. The Conference of Paris was officially opened on the 18th of January 1919 and ended on the 21st of January 1920.

13. Cf., *Violation of the Laws and Customs of War. Reports of Majority and Dissenting Reports of American and Japanese Members of the Commission of Responsibilities, Conference of Paris 1919*, Carnegie Endowment for International Peace, Division of International Law, Pamphlet No. 32, Clarendon Press, Oxford, 1919 (here I quote from the reprint in the "American Journal of International Law", 14, 1 (Jan.-Apr., 1920), pp. 95-154. Composed of 15 members (some of which were or were to become judges of the Permanent Court of International Justice - Adatci and Rolin-Jaequemins - or members of the Institut de Droit International - Rolin-Jaequemins, Scott, de Lapradelle), representing ten States (in their capacity of " great Powers", United States, the British Empire, France, Italy and Japan had two members each; the States with "special interests", Belgium, Greece, Poland, Romania and Serbia had one each), the Commission was conferred the task of deciding the following points: The liability of the authors of war; the violations of the laws and customs of war committed by the German forces during the conflict; the degree of responsibility of a number of persons in the enemy forces, including those with high ranks in the army and those who were "highly placed"; the establishment and the process of a special court for such violations.

14. *Violation of the Laws and Customs of War. Reports of Majority and Dissenting Reports of American and Japanese Members of the Commission of Responsibilities*, cit., p. 118, infra.

15. More precisely, Germany and Austria were accused of violating the Treaty of London of the 19th of April 1839, in which Belgium was recognised as a "perpetually neutral State", and in the Treaty of London of the 11th of May 1867, with which Prussia and the Austro-Hungarian Empire had undertaken to guarantee the neutrality of Luxembourg.

16. Art. 231: "The Allied and Associated Governments affirm and Germany accepts the responsibility of Germany and her allies for causing all the loss and damage to which the Allied and Associated Governments and their nationals have been subjected as a consequence of the war imposed upon them by the aggression of Germany and her allies".

17. "Es handelt sich um finanzielle und wirtschaftliche Forderungen der Sieger, die nicht Kriegesentschädigungen im alten Stil, sondern Schadenersatzansprüche sind, d. h. rechtliche Forderungen, die aus einer rechtlichen Verantwortung des Besiegten abgeleitet werden" (C. Schmitt, *Der Nomos der Erde*, cit., p. 241).

18. In this sense, it seems significant that the German government contested the injustice of the reparations demanded, with the exception of the provisions at article 232 regarding the damage inflicted on Belgium. Germany thus admitted its own international responsibility, but in a limited fashion when it came to the violation of the Treaty of London 1839, with which it had undertaken to respect and defend the neutrality of Belgium.

19. See, for example, L. Le Fur, *Guerre juste et juste paix*, "Revue générale de droit international public", 24 (1919), pp. 9-75, 268-309, 349-405.

20. Cf. the text of the opinion quoted in J. Spiropoulos, *The Possibility and Desirability of a Definition of Aggression*, in the "Yearbook of the International Law Commission", 1951, vol. II, p. 63.

21. The text is contained in the *Protocol for the Pacific Settlement of International Disputes*, "American Journal of International Law", Vol. 19, No. 1, Supplement: Official Documents. (Jan., 1925), pp. 9-17.

22. On the subject, cf. J.W. Garner, *The Geneva Protocol for the Pacific Settlement of International Disputes*, "American Journal of International Law", Vol. 19, No. 1. (Jan., 1925), pp. 123-132; J.F. Williams, *The Geneva Protocol of 1924 for the Pacific Settlement of International Disputes*, "Journal of the British Institute of International Affairs", Vol. 3, No. 6. (Nov., 1924), pp. 288-304.

23. Quincy Wright, *Changes in the Conception of War*, "American Journal of International Law", Vol. 18, No.4 (Oct., 1924), p.755.

24. J. W. Garner, *Arbitration and Outlawry of War at the Eighth Assembly of the League of Nations*, "American Journal of International Law", Vol. 22, No. 1. (Jan., 1928), p. 134.

25. Article 2 of the Pact referred to a problem that was destined to become of central importance, that of legitimate self-defence, which I may not discuss here. The parties to the agreement agreed not to attack each other, to not invade each other and not to engage in wars with each other. Such a norm was subject, however, to three exceptions: in the case of legitimate self defence; in the case of action taken under art. 16 of the Covenant; in the case of action being taken under a decision of the Assembly or the Council of the League of Nations. On the subject see W.R. Bisschop, *The Locarno Pact. October 15-December 1, 1925*, "Transactions of the Grotius Society", Vol. 11, (1925), pp. 79-115.

26. The only exception was probably the Universal Postal Union, which could however count on the adhesion of colonies as separate members from their mother States.

27. On this point see B. Roscher, *The "Renunciation of War as an Instrument of National Policy"*, "Journal of the History of International Law", 4, 2 (2002), pp. 293-309.

28. See, for example, M. Gonsiorowski, *The Legal Meaning of the Pact for the Renunciation of War*, "American Political Science Review", Vol. 30, No. 4. (Aug., 1936), pp. 653-680.

29. Amongst these, albeit for opposing reasons, we find Carl Schmitt and Hans Kelsen. Schmitt saw the removal of the right of each State to engage in war as an attack on the limitation of war introduced by the *jus publicum europaeum*, with the consequent risk that a new concept of discriminatory war would be devised. Kelsen, on the other hand, advocated the inexistence of such a law and the existence of a ban on the State to resort to war, but went so far as to denounce the illegitimacy of the Pact insofar as it did not provide for any sanction in the case of violation of such a ban (except for mention in the preamble of the possible loss of the benefits originating from the Pact itself).

30. The text of the treaties, which include Politis' definition at art. 2, is quoted in *Convention Defining Aggression*, "American Journal of International Law", Vol. 27, No. 4, Supplement: Official Documents. (Oct., 1933), pp. 192-195.

31. The text may be found in *Nazy Conspiracy and Aggression*, Office of the United States Chief Counsel for Prosecution of Axis Criminality, United States Government Printing Office, Washington 1946, Vol. I, Ch. VII, pp. 115-174.

32. Ivi, p. 164.

33. Resolution of the General Assembly 95(I) of the 11th of December 1946, Affirmation of the Principles of International Law recognized by the Charter of the Nuremberg Tribunal.

34. J. Spiropoulos, *The Possibility and Desirability of a Definition of Aggression*, op. cit., p. 69.

35. J. Kunz, *Plus de lois de la guerre?*, "Revue générale de droit international public", vol. 41, 1934, p. 22 and following.

36. Cf. C. Schmitt, *Der Nomos der Erde*, op. cit., p. 219 ("[...] eine Abschaffung des Krieges ohne echte Hegung nur neue, wahrscheinlich schlimmere Arten des Krieges, Rückfälle in den Bürgerkrieg und andere Arten des Vernichtungskrieges zur Folge hat").

37. C. Schmitt, *Der Nomos der Erde*, op. cit., p. 93 ("[...] der Feind wird einfach Verbrecher, und das Weitere, nämlich die Entrechtung und die Plünderung des Gegners, d. h. die Zerstörung des formal immer noch einen *justus hostis* voraussetzenden Feindbegriffes, ergibt sich dann praktisch von selbst").

38. *Ibid*.

39. C. Schmitt, *Der Begriff des Politischen*, Archiv für Sozialwissenschaft und Sozialpolitik, LVIII (1927), 1.

40. On this point see, cf. C. Schmitt, *Der Nomos der Erde*, pp. 248-255.

41. Here I have borrowed some observations of J.L. Kunz, *Bellum Justum and Bellum Legale*, "American Journal of International Law", Vol. 45, No. 3. (Jul., 1951), pp. 528-534.

Beyond the Law of the Enemy

Recovering from the Failures of the Global War on Terrorism through Law

Matteo Tondini

1. Introduction

> *War is neither the aim nor the purpose nor even the very content of politics. But as an ever present possibility it is the leading presupposition which determines in a characteristic way human action and thinking and thereby creates a specifically political behaviour.*
> Carl Schmitt (1)

The 9/11 terrorist attacks caused a clear involution of criminal law on a global scale. The first legal consequence of the post-9/11 so-called Global War on Terrorism (GWOT) is in fact the worldwide prosecution of terrorist suspects under criminal statutes especially designed to tackle the phenomenon. Labelled as 'enemies', terrorist suspects may be either killed or prosecuted before courts or even before special military bodies. Such individuals are thus no longer regarded as enjoying a protected status under international and domestic law, but are merely portrayed as competitors to be defeated. On the domestic stage, this widespread criminalization is confirmed by the wave of measures, restricting civil liberties, adopted by western countries in response to the terrorist threat. Conversely, year by year, month by month, a new trend seems to arise, due to the failures reported in the GWOT. The scarce outcome of the wars in Iraq and Afghanistan, the growing rate of terrorist attacks in the world, coupled with the low number of convictions by domestic courts and, above all, the lack of a political solution to this global crisis after the evident breakdown of the military option, suggest a radical change or a return to the situation *ex ante*.

The article attempts to study these issues by briefly analysing the meaning and the legal consequences of the GWOT at the international and domestic level. The first part illustrates the theory of the so-called 'criminal law of the enemy', followed by a paragraph that shows how such theory may explain the use by governments of special measures in order to fight international terrorism. There then follows a study of the limited results achieved by the GWOT, which precedes some conclusive remarks on the need to opt for non-ideological choices in order to succeed in the struggle against this criminal phenomenon.

2. The Law of the Enemy

The theory of criminal law in legal systems governed by the rule of law is characterised by both the principles of legality and non-retroactivity, as well as the prohibition of vagueness in criminal statutes. (2) Criminal law defines specific conducts as offences and provides corresponding penalties, which in turn have to be proportionate to the seriousness of the crimes committed, i.e. to the harm posed or the 'legal goods' offended. Constitutional limits guarantee that criminal offences created by statute correspond to the fundamental principles and rules of the legal system in force. However, it is not seldom that criminal law is used for symbolic impact. In such cases, the relationship between the concrete harm posed by the conduct concerned and the punishment provided by law is disproportionate, as for instance in the case of instigation (*apologie*) to commit serious crimes (e.g. genocide), or incitement to anti-social behaviours (e.g. racial and religious hatred (3)). In addition, such a 'symbolic' criminal law (4) is not simply directed towards the punishment of a single unlawful act, but mainly towards a specific perpetrator of a crime. The latter in the end is punished for not taking part in the social identity which characterizes the society as a whole. Yet, the stiff criminalisation of such conducts is rooted in the legal values of a political

community. As a consequence, within the members of such community arises an expectation of punishment, to which the political leadership has to give a prompt and firm response in order to gain public consensus. (5) This model of criminalisation for symbolic purposes applies to different situations: e.g. it is commonly diffused in post-conflict 'transitional justice' periods, (6) though it also practically affects traditional Islamic societies (7), business criminal law, (8) and even law provisions on human biotechnology, (9) whereas the violation of the rules concerned is perceived as indispensable for the socio-economic system to sustain. As was sharply noted, 'it is because [someone] is guilty of transgressing a taboo that the criminal must be punished [...] Taboos thus create order.' (10) In this respect, criminal law becomes a powerful tool to protect society by normalising, separating or even eliminating those whose status is judged 'abnormal'. When taken to the extreme, sociological templates are used to portray potential adversaries of the political community. This happens when the reason of state (*raison d'état*) clashes with the rule of law (*raison juridique*), i.e. '[i]n time of war or other public emergency threatening the life of the nation.' (11) Moreover, since the enemy's representation is subject to the current political situation (the enemy of today is not necessarily the enemy of tomorrow), (12) the list of potential enemies must be updated in order to comply with the political interests of the state.

In such situations, historically, the US common-law doctrine have developed a branch of law called the 'law of the enemy'. (13) Here, the 'enemy' is deprived of his constitutional rights for violating the law of war: sabotages, (14) slaughters, (15) insurrections, (16) attacks after the official end of hostilities, (17) and violations of Executive military orders, (18) have been repressed through extrajudicial bodies applying pure non-statutory criminal law. Ordinary courts have limited the judicial review of such cases to the legal sufficiency of the charges: they have not pronounced on the merits or on the reliability of evidentiary findings, practically giving a high level of deference to political determinations. (19) In time of war, acting pre-emptively, restrictive measures have been also imposed by both British and US Executives against enemy nationals, presumed to be potentially dangerous as saboteurs or spies, and also their property. (20) However, formal nationality alone was a poor indicator of the potential danger posed by such individuals. While 'this observation led Britain to intern fewer people, it led Americans in the opposite direction [...] The concept of an enemy race thus became a substitute for the concept of an enemy nationality.' (21) An example is offered, during the World War II, by the Latin American governments' practice of abducting citizens of Japanese origin and then turning them over to US authorities. The latter could either intern them or even exchange them with US citizens interned in Japan. (22) Still in Latin American countries (particularly in Colombia), martial courts were initially used in the 'sixties and 'seventies to try members of anti-government guerrilla movements, though afterwards such tribunals also started to condemn civilians who did not have anything to do with the armed conflict taking place. (23)

The presence of either individuals who do not pose any threat to the society or persons who are instead perceived as being a source of harm, creates a *de facto* subdivision in the applicable criminal law. Functionalist legal scholars like the German Günther Jakobs theorize the existence of both a criminal law applied to 'ordinary' citizens (*Bürgerstrafrecht*) and a 'criminal law of the enemy' (*Feindstrafrecht*), specifically designed to neutralize potential public enemies. (24) The main features of such a theory have been recently evoked (and heavily criticized) by the Spanish Supreme Court in a case concerning international terrorism: (25) *a)* the defendant is criminalized solely for the potential threat posed by his/her status of terrorist; *b)* the due process guarantees are limited or cancelled; *c)* the penalties are so severe and disproportionate such that they 'lie outside the call for reflection, moderation and control, typical of the rule of law and more concretely the criminal law.' (26) Since it is a type of law specifically intended to neutralize enemies, once they are identified, the punishment intervenes pre-emptively. Such penalties mostly concern deportation or solitary/secret confinement (27) (incommunicado) and might even have no fixed term.

Therefore, the theory of the criminal law of the enemy presupposes the existence of a well-defined political community to draw on, which in turn would be united in refusing and contrasting the 'enemy.' Such a community has to rally around a few single values which are seemingly put at risk by the 'enemy'. In this respect, the rise of a global society, or at least the assumption of its existence,

shift the issue to a higher stage. (28) The accused individuals would be thus convicted according to supranational rules or decisions and before international or domestic bodies (judicial or not), enforcing such supranational determinations. Moreover, while at national level the decision over the status of enemy is a prerogative of the Executive and can be thus regarded as a mere political assessment, (29) on the international level, at least a supranational authority, in charge of such allegations, would be required for this criminal law system to operate. Therefore, as a global society calls for a global criminal law, (30) a 'global law of the enemy' requires the existence of enemies of the global society. (31) Nevertheless, this shift also implies a further mixing of the concepts of war and peace. Just as the existence of a criminal law of the enemy entails a state of emergency (and vice versa) at the domestic level, a law of the enemy at the international stage implies a planetary state of emergency. The 'enemy' is no more a traditional international actor, recognised by the international (political) community (a state or a legitimate armed group), but a single individual or organization challenging the only possible global order. This worldwide state of emergency would allow profound derogations in the application of human rights law: as a result, the use of force against alleged individuals would practically result in the overlapping between the law of armed conflict and this risk-based criminal law. (32) However, while traditionally military means are used to stop the enemy at the border, this pre-emptive penal law would rather attempt to individuate and neutralise the enemy within the state's boundaries. (33)

3. The War on Terror and the Birth of a Global Public Enemy

Bearing in mind this theoretical construction, it appears rather easy to affirm that the GWOT, waged by the US after the 9/11 terrorist attacks, is *prima facie* a form of law of the enemy on a global scale. (34) First of all, it blurs the boundaries between peace and war, as the state of war on the external level couples with an inner state of peace. (35) It also militarises domestic criminal law, which becomes a mere tool to neutralise the terrorist enemy. (36) War becomes a criminal punishment as terrorism turns into a war crime to be contrasted with 'all necessary and appropriate force', (37) including the denial of those guarantees provided by both human rights law and international humanitarian law, (38) the use of torture, (39) the abduction and indefinite confinement of suspects (so-called 'extraordinary renditions'). (40) In sum, the general distinction between war and 'ordinary' crimes is abandoned in favour of a third hybrid model based on 'noncriminal detention' (41) of terrorist suspects. This novel criminal law system was defended by the US Administration's lawyers and surprisingly gained the approval of some prominent law professors. (42) Indeed, framing the logic of the fight against terrorism in terms of us vs. them implies that the terrorist enemy is, by definition, a non-national. (43) This might explain why, at least initially, international terrorism has been fought with the legal tools provided by immigration law. (44) The reality ends when it is ideologically read under the Schmittian lens of the couple friend/foe. This might be misleading as proven e.g. by the July 2005 terrorist attacks in the UK or the recent foiled plot to explode the JFK Airport in New York, all carried out by home-grown terrorist cells. (45) The discriminatory character of new antiterrorism laws was also established by the House of Lords in a 2004 ruling. (46)

The same rationale of eliminating potential opponents who rise to the status of enemies of the whole international society, is at the basis of the latest US-led military interventions in Afghanistan and Iraq. Besides, the strategy of preventive war, as highlighted in the 2002 US National Security Strategy, (47) resembles on the international level a national criminal law to be applied to foreign aliens, suspected of being members of terrorist organizations, (48) as both of them merely rely on the logic of pre-emption. (49) However, this trend may be regarded as having started even before, with the end of the cold war and the birth of armed conflicts initiated on the basis of moral and ethic reasons, under a *bellum iustum* perspective. (50) Nevertheless, the war in Iraq may be considered as the culminating point of such a trend: once the weapons of mass destruction, which constituted the original *casus belli*, have not been found, the whole Saddam Hussein's regime has been criminalised through the creation of a Special Tribunal which

> reproduces the logic of stigmatization and vengeance that presided over the Nuremberg Trial. The lawlessness and lack of legitimate power in Iraq, brought about by the war, are such that the trial risks turning into a circus, with overtones of propaganda. It might end up serving the objectives of hiding the victors' misdeeds, dehumanizing the enemy and legitimizing its treatment as an enemy of humanity. (51)

On the other hand, the Taliban regime in Afghanistan had been considered unlawful by the international community since the 'nineties, through the non-recognition by the overwhelming majority of the UN member states, as well as the adoption of several Security Council Resolutions, establishing a kind of embargo against the regime as well as third parties linked with it. (52)

The second macro-effect of the GWOT is that 'terrorism' becomes the global public enemy number one. Indeed, assuming that the entire international community is rallied around the new Leviathan, being the US, an attack on it amounts to an aggression towards the only existing and legitimate political community. As a consequence, the enemies of the US become the enemies of the whole international society, under the logic of being 'either with us or with the terrorists'. (53) According to this dichotomist policy, the US has elaborated a financial sanctioning regime under which, for instance, bank accounts of foreign banks in the US may be blocked if the countries of origin refuse to cooperate in blocking accounts in their own territory, generating a form of indirect jurisdiction abroad. (54) In this regard, notwithstanding the long lasting liberal tradition and respect for the rule of law, the vast majority of countries allied to the US have deeply contributed in the GWOT. Apart from sending national contingents to participate in US-led military interventions abroad, immediately after the 9/11 attacks most of the US Allies passed anti-terrorist laws restricting civil liberties (55) and generally aided the US in carrying out unlawful practices, as the above-mentioned 'extraordinary renditions'. (56) In general, such anti-terrorist laws, on the one hand strengthen the police powers held by governments, (57) on the other hand often provide for deportation (58) and extrajudicial detention measures (59) for terrorist suspects. In order to prosecute individuals suspected of being terrorists or of supporting, sustaining, promoting terrorist activities or organisations, states have been obliged to either adopt new criminal provisions punishing specific acts, (60) or otherwise merely refer to blacklists compiled domestically (61) or by international organisations, as the UN (62) or the EU. (63) In the latter case, critics argue that simply proscribing certain individuals or organisations may be operationally useless. In the first instance, such tool would be only reactive and would lead to unpredictable results, with some groups being proscribed and others not. Secondly, an organisation could avoid proscription by simply changing its name. (64) Although governments attempt to tackle the problem by reviewing the blacklists periodically, (65) this does not solve the issue of a general definition of the count of international terrorism. Moreover, it risks creating a *carte blanche* for governments to surreptitiously legislate in criminal law matters, by simply amending the lists. (66) However, the practice of blacklisting suspected organisations or individuals is the only feasible option to fill this normative gap on the definition of international terrorism. While it seems relatively easy to prosecute at the domestic level individuals attempting to carry out an attack against state institutions, it has proved rather difficult to legally establish the prosecution of the same individuals planning acts of violence against third states. This is primarily due to the lack of a single global order, universally recognised by all states, which would constitute the authentic 'legal good', put at risk by international terrorism. Such considerations may explain why numerous countries, instead of trying foreign suspects themselves, opt for deporting them to their countries of origin, despite the risk of torture: (67) 'It is much easier to deport non-citizens on "national security" grounds than it is to convict them on criminal charges associated with terrorism'. (68) As a result, on the one hand, blacklists 'create' *de facto* international terrorism, while on the other hand they represent the only effective tool to fight it. The same rationale applies to criminal proceedings governed by the use of classified evidence and lack of judicial guarantees for the defendant, whereas simple intelligence information may be used as legal proof against terrorist suspects, without their origin being disclosed in courtrooms. (69) With regard to this, the recent adoption of the Military Commissions Act 2006 (hereafter MCA) has left the situation unchanged, since 'The MCA still leaves the door open for admissible evidence to be obtained through varying

degrees of coercion prohibited by the Geneva Conventions and gives the [P]resident the discretion and power to approve some problematic interrogation methods based on his own interpretation of Geneva Convention obligations.' (70) On the British front, in 2005, a ruling of the House of Lords (reversing the judgement of a Court of Appeal) was necessary to finally clarify the prohibition for domestic courts to consider evidence potentially collected through torture. (71) Such practices evidently cast a shadow on the effectiveness of judicial investigations in verifying the initial allegations 'beyond a reasonable doubt'. As was argued by a scholar: 'we are not only afraid of terrorism; we need to believe in it.' (72) In other words, within a fragmented global society, only a blacklist may represent the *Grundnorm* of international terrorism as a legal concept. Once again, the confusion generated by the couple enemy/criminal grants political authorities the power to extend criminal liability to specific individuals, without referring to general criteria. (73) Carl Schmitt's lesson on war and enmity seems evocative in this respect:

> The friend, enemy, and combat concepts receive their real meaning precisely because they refer to real possibility of physical killing. War follows from enmity. War is the existential negation of the enemy. It is the most extreme consequence of enmity. It does not have to be common, normal, something ideal or desirable. But it must nevertheless remain a real possibility for as long as the concept of the enemy remains valid. (74)

Eventually, in order to overcome all the legal problems caused by attempting to prosecute an inherent international criminal phenomenon through single national jurisdictions, terrorist links have been often portrayed as 'conspiracies' before domestic courts. (75) Following the rationale of considering terrorism as a war crime, the crime of conspiracy was acknowledged as being a war crime as well. However, this interpretation was further rejected by the US Supreme Court in the *Hamdan* case, (76) although the subsequent MCA (re)-inserted conspiracy among the crimes that the 'unlawful enemy combatants' may be charged with, (77) thus practically bypassing the judicial decision in question. (78)

At this point, it is evident how all these measures result in an awkward attempt to fix the shaky foundations of this criminal law theory, frustrated by the impossibility of referring to a single global enemy - subject of international law - to justify a global repression through 'exceptional' judicial and military means. Where both this single 'global public enemy' and this US led 'global political community' really exist, a 'global law of the enemy' would be probably the right tool to deal with international terrorism, just as at the domestic level terrorism is fought through national criminal law and sometimes through the declaration of a state of emergency. However, this idealistic oversimplification of reality clashes with the complexity of a multifaceted transnational phenomenon, (79) since, in the end, criminal law loses its social grounds to become a mere product of ideology, i.e. a useless instrument to order social life. As a result, the concept of war is emphasised solely for domestic consumption, in order to mobilise supporters. (80)

4. The Fall of the Gods: The Failures of GWOT

This special criminal justice system was probably doomed to fall since its establishment, given that, as reported above, it only stands on ideological legal basis. Nevertheless, we have been awaiting for about five years to see the first signs of yielding (81) and about six years to draw up a first assessment. At the time of writing, the failures of the GWOT are pretty evident: the US-led wars, waged after 9/11, have reached a stalemate; the blacklisting practice is increasingly criticised; the judicial results of this worldwide criminal prosecution are fairly poor, and in addition some national legislators are stepping back from passing new ineffective anti-terrorism laws, in favour of a return to an 'ordinary' system of judicial guarantees. Finally, the GWOT has not only failed in defeating international terrorism, (82) but has only achieved the opposite result of generating an increasing resentment against the US and its allies. (83) Within this scenario, national judicial authorities have been often the last line of defence in protecting the rule of law against the overwhelming authority of Executives. (84)

a) The critical situation in Afghanistan and Iraq

Actually, the situation 'on field' in Afghanistan and Iraq is not encouraging: ongoing military operations (85) and a creeping civil war (86) respectively, are seriously putting at risk the stabilization of the two countries. According to reliable sources, following the military intervention in Iraq, there have been around 75,000 civilian losses (87) as well as more than 4,000 Coalition soldiers and 1,000 contractors killed. (88) The political situation is hopeless, as all the ministers from the largest Sunni bloc withdrew from the cabinet during the summer 2007. (89) The difficult situation in the country was lastly portrayed by the Iraq Study Group report, co-chaired by James Baker and Lee Hamilton and released in early December 2006, which augmented pessimism among the public opinion on the final solution of the Iraqi crisis. (90) In Afghanistan, the failure of Coalition forces to neutralize the Taliban and al-Qaeda bases (also located in Pakistan) has made the Afghans sceptical of the guarantees of stability offered by the internationals. (91) The delays in the reconstruction of rural areas and the urgency of international donors to achieve quick results have led in turn to the formation of a 'political enclave' in Kabul, more responsive to international authorities than to society as a whole. (92)

b) Increasing Criticism against Blacklists

The practice of blacklisting individuals and groups allegedly considered 'terrorist', has been recently challenged by two recent decisions of the EC Court of First Instance. (93) In both cases, the applicants challenged their inclusion in the EU anti-terrorism blacklist, compiled after the adoption of the Security Council Resolution 1373 (2001). Deciding on the merits, the Court noted that individuals or groups registered in the '1373 blacklist' are entitled to judicial rights and safeguards, i.e. the right of defence, the right to effective judicial protection, together with the obligation for the European authorities to state reasons on which inclusion in the list is based (as provided in art. 253 of the EC Treaty). (94) The Court also remarked that the decisions, under which the applicants were included in the list, had been adopted in the context of procedures in which the right of defence of the individuals concerned was not observed. As a result, the Court itself was unable to review the lawfulness of those decisions. (95) However, the same Court had previously ruled for the lawfulness of the Community's decisions in cases concerning the freezing of funds of persons and entities linked to Osama bin Laden, Al-Qaeda and the Taliban and individuated by the Sanctions Committee, established pursuant to the Security Council Resolution 1267 (1999). (96) According to the Court, in the latter cases, the EC institutions had merely transposed at Community level binding UN decisions, without the Community institutions having any discretionary power for the re-examination of individual situations. (97)

Indeed, the first criticisms against the '1267 list' initially came just from the UN. The Report of the High-Level Panel, established by the UN Secretary General, noted how the way entities or individuals are included into the list, as well as the absence of review mechanism, raises serious accountability issues and potentially violate fundamental human rights norms and conventions. (98) More recently the same list has been strongly deplored by Senator Dick Marty - *Rapporteur* of the CoE committee investigating on the 'extraordinary renditions' in Europe - for constituting a 'flagrant injustice to many persons against whom there is no proof of any wrongdoing.' (99) Other censures have been recently expressed by Italian judges and prosecutors in several cases. (100)

c) A few convictions

The most worrying factor which is undermining the criminal side of the GWOT is the low number of convictions for the crime of international terrorism registered worldwide. For instance, in the UK, police authorities revealed that, from 9/11 to June 2006, of the 1,047 people who have been arrested as terrorist suspects, only 158 have been charged with offences under the Terrorism Act 2000. 174 have faced other charges (some involving serious allegations), while 69 have been dealt with under immigration law. As a result, more than 600 individuals, mainly Muslims, have been released without charge. (101) In Italy, until the adoption of the Law No. 155/2005, (102) it seemed almost

impossible to charge anyone with the crime of international terrorism. According to the Ministry of Interior, (103) between 2001 and 2005, 203 persons have been arrested and charged with terrorism related offences. However, in the same period, only two defendants had been convicted, (104) while, up until January 2005, on a total of 180 persons arrested for terrorism, there had been only one conviction (by plea) and 54 acquittals. (105) Things improved with the adoption of the new anti-terrorism law, expanding the crime of international terrorism. In late 2006, the anti-terrorism prosecutor of Milan Armando Spataro stated that, since 9/11, 78 individuals had been condemned for terrorism-related offences, while 14 of them had been specifically convicted for the crime of international terrorism. (106) Finally, during the whole 2006, nine defendants were sentenced to jail for the same offence. (107)

However, it is in the US that we find the most surprising results, as both the 'ordinary' criminal law system and that administered through military commissions resulted rather ineffective in convicting indicted persons. With regard to the latter system, so far there has been only one conviction (by plea), (108) while two more cases have been dismissed without prejudice, the defendants being considered mere 'enemy combatants' by the military judge, without being 'unlawful', as requested by the MCA to come within the commissions' jurisdiction. (109) On the other hand, within the 'ordinary' criminal law system, reliable sources (110) report that up until September 2006, of the 510 defendants, initially indicted for terrorism, only 163 were further charged with the same count, leading to the meagre number of 47 convictions (29 percent). At the same time, only four defendants have been convicted of federal crimes of terrorism *per se*, while no individuals affiliated with radical Islamic groups have been charged with offences related to the possession of non-conventional weapons. Remarkably, the 510 defendants have been charged with a total of 104 different counts: this reflects the absolute difficulty of coming to a single definition of terrorism *ex lege*. On the other hand, just the poor performances of the new anti-terrorism legislation led the Canadian Parliament to vote on 27 February 2007 against its renewal. (111)

5. Conclusive Remarks: Finding Peace through (Criminal) Law

It seems rather clear by now that misusing and mixing the categories of war and criminal justice has frustrated all the expected results in succeeding over terrorism. The overlap between the international and domestic level has only led to an ideological representation of reality, which both international and criminal law can hardly order. Such an ideological portray also consists in the product of a culture of communication fostering a climate of fear and uncertainty. (112) Nevertheless, it could be rapidly redrawn if only international terrorism returned as being considered a mere criminal phenomenon, (113) not involving authentic international actors (so far called 'terrorist' *tout court*), like liberation movements and non state organizations exercising quasi-government powers over large portions of territory.

On the contrary, this revival of the 'law of the enemy' on a global scale may only put at risk the effective contrast of terrorism. Besides, as was authoritatively stated, (114) the criminal law system does not distinguish between friends and enemies, but only between innocent and guilty individuals. The end never justifies the means, since the means, i.e. the rules of criminal procedure, preside over the 'judicial truth' and the freedom of individuals, whereas the end does not mean succeeding at all costs over the enemy, but consists in the same 'judicial truth', which is to be achieved through such rules and may be jeopardized by their neglect.

Notes

1. C. Schmitt, *The Concept of the Political* 34 (1996) (Chicago/London: University of Chicago Press). Original title: *Begriff des Politischen* (1932) (Berlin: Duncker und Humblot).

2. See J. Hall, *General Principles of Criminal Law* (2nd ed., 2005) (Clark, NJ: The Lawbook Exchange), at 35, 39, 58. For a critical appraisal of such principles in a comparative perspective see P. Westen, 'Two Rules of Legality in Criminal Law', 26(3) *Law and Philosophy* 229 (2007).

3. 'Hate crimes laws re-criminalize or enhance the punishment of an ordinary crime when the criminal's motive manifests a legislatively designated prejudice like racism or anti-Semitism' (J. B. Jacobs and K. Potter, *Hate Crimes: Criminal Law & Identity Politics* (1998) (Oxford/New York: Oxford University Press), at 6). A current example is offered by the Racial and Religious Hatred Act 2006, extended to England and Wales, under which the mere incitement is punishable by imprisonment for a term up to seven years (see Public Order Act 1986, sec. 29L, as inserted by the Racial and Religious Hatred Act 2006).

4. On 'symbolic' criminal law see J. C. Müller, 'Die Legitimation des Rechtes durch die Erfindung des symbolischen Rechtes', 25(2) *Kriminologisches Journal* 82 (1993); J. L. Díez Ripollés, 'El derecho penal simbólico y los efectos de la pena', 35(103) *Boletín Mexicano de Derecho Comparado* 63 (2002).

5. S. S. Beale, 'Federalizing Hate Crimes: Symbolic Politics, Expressive Law, or Tool for Criminal Enforcement?', 80(5) *Boston University Law Review* 1227 (2000), at 1249-1250.

6. R. Teitel, 'Transitional Jurisprudence, The role of law in political transformation', 106(7) *Yale Law Journal* 2009 (1997), at 2036.

7. Traditional Islamic law might be represented as the result of a combination between the religious and the legal phenomenon. In such a holistic context, contravening religious provisions means betraying the ethical deal between the individual and the community of believers. Under this concept, for instance, the felony of apostasy represents a challenge to the social order imposed and legitimised by the religion, and for this reason the apostate is put to death (M. Tondini, 'The Role of Italy in Rebuilding the Judicial System in Afghanistan', 45 (1-2) *Revue de droit militaire et de droit de la guerre* 79 (2006), at 93).

8. R. Hefendehl, 'Enron, WorldCom, and the Consequences: Business Criminal Law Between Doctrinal Requirements and the Hopes of Crime Policy', 8(1) *Buffalo Criminal Law Review* 51 (2004), at 61.

9. C. M. R. Casabona, 'Human Biotechnology, Transculturality, Globalization and Symbolic (Criminal) Law', in N. Knoepffler, D. Schipanski and S. L. Sorgner (eds.), *Human biotechnology as Social Challenge: An Interdisciplinary Introduction to Bioethics* 57 (2007) (Aldershot: Ashgate).

10. M. Delmas-Marty, *Towards a Truly Common Law: Europe as a Laboratory for Legal Pluralism* (2002) (Cambridge: Cambridge University Press), at 10.

11. European Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, 4 November 1950, art. 15.1.

12. A. Aponte, 'Krieg und Politik - Das politische Feindstrafrecht im Alltag', in 7(8-9) *Höchstrichterliche Rechtsprechung Strafrecht* 297 (2004), at 300.

13. For a brief account of the use of special criminal legislation in the US, see J. A. E. Vervaele, 'The Anti-Terrorist Legislation in the US: Inter Arma Silent Leges?', 13(2) *European Journal of Crime, Criminal Law and Criminal Justice* 201 (2005), at 208-210.

14. *Ex Parte Quirin*, 317 U.S. 1. (1942).

15. *In Re Yamashita*, 327 U.S. 1 (1946).

16. *Ex Parte Milligan*, 71 U.S. 2 (1866).

17. *Johnson* v. *Eisentrager*, 339 U.S. 763 (1950).

18. *Korematsu* v. *United States*, 323 U.S. 214 (1944).

19. N. A. Kacprowski, 'Stacking the Deck Against Suspected Terrorists: The Dwindling Procedural Limits on the Government's Power to Indefinitely Detain United States Citizens as Enemy Combatants', 26(3) *Seattle University Law Review* 651 (2003), at 656, 662.

20. See M. B. Carroll, 'Legislation on Treatment of Enemy Property', 37(4) *American Journal of International Law* 611 (1943).

21. M. Kagan, 'Destructive Ambiguity: Enemy Nationals and the Legal Enabling of Ethnic Conflict in the Middle East', 38(2) *Columbia Human Rights Law Review* 263 (2007), at 275.

22. N. T. Saito, 'Justice Held Hostage: U.S. Disregard for International Law in the World War II Internment of Japanese Peruvians: A Case Study', 40 (1) *Boston College Law Review* 275 (1998), at 290-297.

23. Aponte, *supra* note 12, at 299.

24. G. Jakobs, 'Bürgerstrafrecht und Feindstrafrecht', in 5(3) *Höchstrichterliche Rechtsprechung Strafrecht* 88 (2004); reprinted in 21 *Ritsumeikan Law Review* 93 (2004). Jakobs' initial work on the concept of the criminal law of the enemy is dated back to 1985 (G. Jakobs, 'Kriminalisierung im Vorfeld einer Rechtsgutverletzung', 97(3) *Zeitschrift für die gesamte Strafrechtswissenschaft* 751 (1985). Among his most recent contributions on the matter see 'Terroristen als Personen im Recht?', 117(4) *Zeitschrift für die gesamte Strafrechtswissenschaft* 839 (2005); 'Feindstrafrecht? - Eine Untersuchung zu den Bedingungen von Rechtlichkeit', 7(8-9) *Höchstrichterliche Rechtsprechung Strafrecht* 289 (2006); with M. Cancio Meliá, *Derecho penal del enemigo* (2nd ed., 2006) (Madrid: Civitas); 'Diritto penale del nemico? Una analisi sulle condizioni della giuridicità', in A. Gamberini and R. Orlandi (eds.), *Delitto politico e diritto penale del nemico* 109 (2007) (Bologna: Monduzzi).

25. Tribunal Supremo (Sala de lo Penal) 20 July 2006, Decision No. 829/2006, Case No. 1188/2005.

26. *Ibid.*, para. 6. Author's translation. The original text states: 'que desbordan la idea de ponderación, mesura y límite anudados a la idea de derecho, y más concretamente de derecho penal.'

27. Jakobs, *Bürgerstrafrecht*, *supra* note 24, at 90.

28. For a comparative analysis between the rising global civil society and the domestic civil society see B. Bowden 'Civil society, the state and the limits to global civil society', 20(2) *Global Society* 155 (2006).

29. See on the matter R. Hefendehl, 'Organisierte Kriminalität für ein Feind - oder Täterstrafrecht?', 25(3) *Strafverteidiger* 156 (2005). See also the House of Lords decision of 16 December 2004 in the case *A&X* v. *Secretary of State for the Home Department*, where the Law Lords accept the political nature of the decision on the social dangerousness of individuals, as individuated by the Executive ([2004] UKHL 56, para. 29, reprinted in [2005] *Human Rights Law Review* 1, at 20).

30. This rationale is also on the basis of Prof. Zolo's criticism of international tribunals and courts: see D. Zolo, 'Peace Through Criminal Law?', 2(3) *Journal of International Criminal Justice* 727 (2004); *Ibid*, 'Who is Afraid of Punishing Aggressors?: On the Double-track Approach to International Criminal Justice', 5 *Journal of International Criminal Justice* (2007) (forthcoming).

31. See on the point e.g. the call for the International Criminal Court to become 'an international forum for the incapacitation of the "enemies of mankind", a sort of sanitary necessity for a more peaceful world' (I. Tallgren, 'The Sensibility and Sense of International Criminal Law', 13(3) *European Journal of International Law* 561 (2002), at 578).

32. We have already developed the issue of the application of human rights law in times of armed conflict or public emergency in M. Tondini, 'UN Peace Operations: The Last Frontier of the Extraterritorial Application of Human Rights', 44(1-2) *Revue de droit militaire et de droit de la guerre* 175 (2005), at 179-183.

33. S. Krasmann, 'The Enemy on the Border: Critique of a Programme in Favour of a Preventive State', 9(3) *Punishment & Society* 301 (2007), at 309.

34. M. Delmas-Marty, 'The Paradigm of the War on Crime: Legitimating Inhuman Treatment?', 5(3) *Journal of International Criminal Justice* 584 (2007), at 585-586.

35. G. de Vergottini, *Guerra e Costituzione. Nuovi conflitti e sfide alla democrazia* (2004) (Bologna: Il Mulino), at 99-100.

36. Delmas-Marty, *The Paradigm*, *supra* note 34, at 586.

37. This is to paraphrase the text of the US Congress' Authorization for Use of Military Force (S.J. Resolution 23, 18 September 2001, sec. 2(a)), which conferred the war powers to the President. See on the point D. Stoelting, 'Military Commissions and Terrorism', 31(3) *Denver Journal of International Law & Policy* 427 (2003); C. A. Bradley and J. L. Goldsmith, 'Congressional Authorization and the War on Terrorism', 118(7) *Harvard Law Review* 2047 (2005).

38. See *a contrario* the arguments used by the US Supreme Court in the *Hamdan* case to extend basic humanitarian law guarantees to the prisoners of GWOT (*Salim Ahmed Hamdan* v. *Donald H. Rumsfeld et al.*, 126 S.Ct. 2749 (2006), para. IV(d)(ii), at 2756-7).

39. See on the matter P. Gaeta, 'May Necessity Be Available as a Defence for Torture in the Interrogation of Suspected Terrorists?', 2(3) *Journal of International Criminal Justice* 785 (2004); T. Thienel, 'The Admissibility of Evidence Obtained by Torture Under International Law', 17(2) *European Journal of International Law* 349 (2006).

40. See on the point the recent reports on the 'extraordinary renditions' of terrorist suspects, issued by the Council of Europe and the European Parliament respectively (See CoE Parliamentary Assembly, *Secret Detentions and Illegal Transfers of Detainees Involving Council of Europe Member States: Second Report*, Doc. 11302 rev., 11 June 2007; European Parliament - Temporary Committee on the alleged use of European countries by the CIA for the transportation and illegal detention of prisoners, *Report on the alleged use of European countries by the CIA for the transportation and illegal detention of prisoners*, Doc. A6-9999/2007, 26 January 2007). Among the literature on the matter see D. Weissbrodt and A. Bergquist, 'Extraordinary Rendition: A Human Rights Analysis', 19 *Harvard Human Rights Journal* 123 (2006); John T. Parry, 'The Shape of Modern Torture: Extraordinary Rendition and Ghost Detainees', 6(2) *Melbourne Journal of International Law* 516 (2005); M. L. Satterthwaite, 'Rendered Meaningless: Extraordinary Rendition and the Rule of Law', 75 *George Washington Law Review* (2007) (forthcoming).

41. T. Yin, 'Ending the War on Terrorism One Terrorist at a Time: A Noncriminal Detention Model for Holding and Releasing Guantanamo Bay Detainees', 29(1) *Harvard Journal of Law & Public Policy* 149 (2006), at 182.

42. The debate is summarised in M. E. O'Connell, 'Enhancing the Status of Non-State Actors Through a Global War on Terror?', 43(2) *Columbia Journal of Transnational Law* 435 (2005), at 453-455.

43. N. T. Saito, 'Beyond the Citizen/Alien Dichotomy: Liberty, Security, and the Exercise of Plenary Power', 14(2) *Temple Political & Civil Rights Law Review* 389 (2005), at 390.

44. In the US, this approach began in the 'nineties, through the approval of the Antiterrorism and Effective Death Penalty Act of 1996 (P.L. No. 104-132), sec. 411-443, followed by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (P.L. No. 104-208), sec. 501-507. Concerning the UK, see the role of the Special Immigration Appeals Commission (SIAC) as judge of appeal in special terrorism trials under sec. 25-27 of the ATCSA.

45. A. Faiola and S. Mufson, 'N.Y. Airport Target of Plot, Officials Say', *Washington Post*, 3 June 2007, at A01.

46. *A&X* v. *Secretary of State for the Home Department*, *supra* note 29, para. 68, at 44. See on the case S. Shah, 'The UK's Anti-Terror Legislation and the House of Lords: The First Skirmish', 5(2) *Human Rights Law Review* 403 (2005).

47. The National Security Strategy of the United States of America, Washington DC, September 2002. This document has been recently replaced by the *National Security Strategy 2006* (The White House, *National Security Strategy of the United States of America*, Washington, DC, March 2006).

48. Since 2001, the US adopted several anti-terrorist statutes, which have progressively shaped a renewed and special criminal law system serving as a legal point of reference for the GWOT. The most important may be considered the USA Patriot Act (P.L. No. 107-56), the Intelligence Reform and Terrorism Prevention Act of 2004 (IRTPA) (P.L. No. 108-408), the Detainee Treatment Act 2005 (DTA) (included in the Department of Defense Appropriations Act 2006, P.L. No. 109-148), the USA Patriot Improvement and Reauthorization Act of 2005 (Patriot Act II, P.L. No. 109-177) and the Military Commissions Act of 2006 (P.L. No. 109-366). Among the Presidential Orders may be mentioned the Military Order of 13 November 2001 (Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism) and the Executive Order 13425 of 14 February 2007 (Trial of Alien Unlawful Enemy Combatants by Military Commission).

49. Vervaele, *supra* note 13, at 252.

50. See on the point A. Burke, 'Just War or Ethical Peace? Moral Discourses of Strategic Violence After 9/11', 80(2) *International Affairs* 329 (2004), esp. at 349-350.

51. D. Zolo, 'Back to the Nuremberg Paradigm?', 2(2) *Journal of International Criminal Justice* 313 (2004), at 318.

52. See e.g. UN Doc. S/RES/1267 (1999), 15 October 1999, para. 4.

53. One might refer to the President Bush's famous statement of 20 September 2001: 'Every nation, in every region, now has a decision to make. Either you are with us, or you are with the terrorists' (*Address to a Joint Session of Congress and the American People*, Washington, D.C.). However, the same statement had been made a few days before by Sen. Hillary Clinton: 'Every nation has to either be with us or against us. Those who harbour terrorists or who finance them are going to pay a price' (New York, 13 September 2001).

54. Vervaele, *supra* note 13, at 235.

55. The UK adopted the Anti-Terrorism, Crime and Security Act 2001 (ATCSA), the Prevention of Terrorism Act 2005 (PTA), the Racial and Religious Hatred Act 2006, the Terrorism Act 2006, the Immigration, Asylum and Nationality Act 2006 and the Police and Justice Act 2006; Italy passed the Law No. 431 of 14 December 2001, the Law No. 438 of 15 December 2001 and the Law No. 155 of 1 August 2005; Germany issued the *Terrorismusbekämpfungsgesetz* of 9 January 2002, the *Luftsicherheitsgesetz* of 14 January 2005 and the Supplement of the *Terrorismusbekämpfungsgesetz* of 5 January 2007, together with some amendments to the Federal Constitution (Constitutional Reform of 28 August 2006); Canada adopted the Anti-Terrorism Act 2001, the Immigration and Refugee Protection Act 2001 (IRPA) and the Public Safety Act 2002; France passed the *Loi relative à la sécurité quotidienne* (No. 2001-1062), the Loi du 18 mars 2003 pour la sécurité intérieure (No. 2003-239), the *Loi portant adaptation de la justice aux évolutions de la criminalité* or *Loi Perben* (No. 2004-204), the *Loi relative à la lutte contre le terrorisme et portant dispositions diverses relatives à la sécurité et aux contrôles frontaliers* (No. 2006-64).

56. See on the matter the Council of Europe and the European Parliament reports, quoted *supra* note 40. As for Italy, see the *Abu-Omar* case, concerning the kidnapping of an *imam* in Milan by CIA agents, with the support of Italian secret service officials. See on the case D. L. Altheide, 'The Mass Media, Crime and Terrorism', 4(5) *Journal of International Criminal Justice* 982 (2006), at 985-986; V. Patané, 'Recent Italian Efforts to Respond to Terrorism at the Legislative Level', 4(5) *Journal of International Criminal Justice* 1166 (2006), at 1168 (note 5).

57. As for the UK, see the control orders issued by the Secretary of State for the Home Department on the basis of sec. 1 et seq. of the PTA, as well as the interception warrants provided by sec. 32 of the Terrorism Act 2006. Concerning Italy, see the 'preventive' wiretapping powers, as well as the provisional arrest powers contained in the Law No. 155/2005 (art. 4 and art. 13, respectively). Moreover, see the 'investigative hearings' inserted by the Anti-Terrorism Act 2001 into art. 83.28 et seq. of the Canadian criminal code.

58. See Canada: IRPA, art. 44 et seq.; UK: ATCSA, sec. 22; Italy: Law No. 155/2005, art. 3.

59. See IRPA, art. 55 et seq. and art. 83.3(4) of the Canadian criminal code, concerning the arrest without warrant (as provided by the Anti-Terrorism Act 2001). See also ATCSA, sec. 21 et seq. (part IV) and the Terrorism Act 2006, sec. 23-25.

60. Concerning France, see Law No. 2001-1062, art. 33: as for Italy, see Law No. 438/2001, art. 1 and Law No. 155/2005, art. 15 (which amends art. 270 bis and inserts articles 270 ter-sexies into the criminal code).

61. With regard to the UK, see Terrorism Act 2000, sec. 3; ATCSA, sec. 21; Terrorism Act 2006, sec. 21-22. As for the US, see the Executive Order 13224, issued by the President of the United States on the basis, *inter alia*, of the International Emergency Economic Powers Act (IEEPA - 50 U.S.C. § 1701) and the National Emergencies Act (50 U.S.C. § 1601).

62. See the '1267 list', so-called because of the number of the Security Council Resolution establishing it (UN Doc. S/RES/1267 (1999), 15 October 1999). The list currently includes 362 individuals and 125 companies or organisations. On the other hand, the Security Council Resolution 1373 (UN Doc. S/RES/1373 (2001), 28 September 2001) provides for a general obligation to freeze assets and economic resources of persons and entities suspected of terrorist activities. Unlike resolution 1267 (which concerns exclusively the Taliban, al-Qaeda, as well as persons and groups associated with them), Res. 1373 does not require the Security Council to establish a list. It rather asks member states to take their own actions to freeze assets and economic resources of terrorists groups.

63. As for the implementation of the SC Res. 1373 (2001) within the EU territory, see the Common Position 2001/931/CFSP on the application of specific measures to combat terrorism (OJ 2001 L 344, at 93, lastly amended by Common Position 2007/448/CFSP - OJ 2007 L 169, at 69) as well as the Council Regulation (EC) No. 2580/2001 and the Council Decision 2001/927/EC on specific restrictive measures directed against certain persons and entities with a view to combating terrorism (OJ 2001 L 344, at 70 and 83), amended at last by Council Decision 2007/445/EC (OJ 2007 L. 169, at 58). The text of the SC Res. 1267 (1999), as progressively amended by Resolutions 1333 (2000), 1390 (2002), 1452 (2002), 1455 (2003), 1526 (2004), 1617 (2005), 1735 (2006) included a blacklist which has been implemented within the EU by a number of Common Positions and Regulations, taking into account further amendments of the list. They include, *inter alia*, Common Positions 1999/727/CFSP (OJ 1999 L 294, at 1) and 2002/402/CFSP (OJ 2002 L 139, at 4), as lastly amended by Common Position 2003/140/CFSP (OJ 2003 L 35, at 62), as well as Council Regulation (EC) No. 881/2002 (OJ 2002 L 139, at 9), amended at last by Commission Regulation (EC) No. 1025/2007 (OJ 2007 L 231, at 4). See on the topic I. Cameron, 'European Union Anti-Terrorist Blacklisting', 3(2) *Human Rights Law Review* 225 (2003), at 227-228, and generally T. Andersson, I. Cameron and K. Nordback, 'EU Blacklisting: The Renaissance of Imperial Power, but on a Global Scale', 14(2) *European Business Law Review* 111 (2003).

64. F. Davis, 'The Fight Against global Terrorism - How Can the Law Respond to "New" Terrorism?', in D. Lewis (ed.), *Global Governance and the Quest for Justice* 21 (2006) (Oxford/Portland: Hart Publishing), at 31-32.

65. See for instance the amendment powers granted to the Secretary of State for the Home Department under the Terrorism Act 2006, sec. 22.

66. See the famous statement by judge O'Connor in the *Hamdi* case, decided by the Supreme Court: 'A state of war is not a blank check for the President when it comes to the rights of the Nation's citizens' (542 U.S. 507, at 536). Concerning Italy, see Corte di Cassazione, Sez. I pen., 19 September 2006, Decision No. 30824 (reprinted in [2006] *Diritto e giustizia* 82) and Sez. I pen., 17 January 2007, No. 1072, on the prohibition for the judge to consider the sole inscription of individuals or organisations in a blacklist as the legal proof of their guilt.

67. Delmas-Marty, *The Paradigm, supra* note 34, at 594.

68. N. T. Saito, 'Symbolism Under Siege: Japanese American Redress and the "Racing" of Arab Americans as "Terrorists"', 8(1) *Asian Law Journal* 1 (2001), at 17.

69. For the use of classified evidence in US terrorism trials (before the adoption of the MCA 2006) see Vervaele, *supra* note 13, at 239-240.

70. J. M. Beard, 'The Geneva Boomerang: The Military Commissions Act of 2006 and U.S. Counterterror Operations', 101(1) *American Journal of International Law* 56 (2007), at 58. The MCA prevents military commissions from considering testimony obtained through interrogation methods that amount to cruel, inhuman, or degrading treatment. However, such prohibition is limited to acts performed after the adoption of the Detainee Treatment Act of 2005 (P. L. No. 109-148), namely 30 December 2005 (MCA, sec. 3; 10 U.S.C. § 948r (d)). As for other evidence collected through coercive interrogation methods that fall short of cruel, inhuman, or degrading treatment, their use in criminal proceedings is still allowed. Moreover, under Section 6(a) of the MCA the US President retains the power 'to interpret the meaning and application of the Geneva Conventions and to promulgate higher standards and administrative regulations for violations of treaty obligations which are not grave breaches of the Geneva Conventions.' (see note 20). Eventually, on 20 July 2007 the US President issued a new Executive Order on the Interpretation of the Geneva Conventions Common Article 3 as Applied to a Program of Detention and Interrogation Operated by the Central Intelligence Agency.

71. *A and Others* v. *Secretary of State for the Home Department*, [2005] UKHL 71, paras 51-52 (per Lord Bingham of Cornhill), paras 70-79 (per Lord Nicholls of Birkenhead); paras 86-97 (per Lord Hoffmann); paras 110-114 (per Lord Hope of Craighead), paras 137-138 (per Lord Rodger of Earlsferry); paras 148-150 (per Lord Carswell), paras 164-165 (per Lord Brown of Eaton-under-Heywood), reprinted in [2006] *Human Rights Law Review* 6, at 119). See on the point T. Thienel, 'The Admissibility of Evidence Obtained by Torture Under International Law', 17(2) *European Journal of International Law* 349 (2006), at 350. Remarkably, the Law Lords' decision provides that the information gathered through torture or cruel, inhuman, or degrading treatment may be lawfully collected by the Government.

72. G. P. Fletcher, 'The Indefinable Concept of Terrorism', 4(5) *Journal of International Criminal Justice* 894 (2006), at 895.

73. As was argued by Kenneth Anderson, 'the determination that someone is an *enemy* of the United States, and therefore subject to this forum for trying their alleged criminality - is a political, not a judicial, decision. Judges determine who is guilty of a crime. Political authorities determine the identity of our nation's enemies.' (K. Anderson, 'What to do with Bin Laden and Al Qaeda Terrorists?: A Qualified Defense of Military Commissions and United States Policy on Detainees at Guantanamo Bay Naval Base', 25(2) *Harvard Journal of Law & Public Policy* 591 (2002), at 634).

74. Schmitt, *supra* note 1, at 33.

75. A. Fichtelberg, 'Conspiracy And International Criminal Justice', 17(2) *Criminal Law Forum* 149 (2006), at 160-161. For a definition of the crime of conspiracy in common law systems see J. R. Acker, W. A. Logan and D. C. Brody, *Criminal Law* 570 (2001) (Gaithersburg, MA: Aspen Publishers).

76. See *Hamdan*, *supra* note 38, at 2785.

77. See 10 U.S.C. § 950v (b) (28).

78. See on the point Beard, *supra* note 70, at 60-61.

79. L. Ferrajoli, 'Il "diritto penale del nemico" e la dissoluzione del diritto penale', 2006(4) *Questione giustizia* 797, at 811.

80. A. M. Slaughter, 'Beware the Trumpets of War: A Response to Kenneth Anderson', 25(3) *Harvard Journal of Law & Public Policy* 965 (2002), at 972.

81. We have already attempted to give a preliminary assessment on the failures of GWOT in M. Tondini, 'Il diritto del nemico. Se la guerra diventa ideologia', 2007(1) *Diritto pubblico comparato ed europeo* 244.

82. At the time of writing, there is clear evidence of a tremendous increase in terrorist attacks worldwide. Among independent reports see P. Bergen and P. Cruickshank, 'The Iraq Effect: The War in Iraq and its Impact on the War on Terrorism', NYU School of Law - Center on Law and Security, February 2007. According to the report, 'globally there was a 607 percent rise in the average yearly incidence of attacks [...] and a 237 percent rise in the average fatality rate.' Even excluding terrorist attacks that occurred in both Afghanistan and Iraq, 'there has still been a significant rise in jihadist terrorism elsewhere - a 35 percent increase in the number of jihadist terrorist attacks outside of Afghanistan and Iraq, from 27.6 to 37 a year, with a 12 percent rise in fatalities from 496 to 554 per year' (p. 2). On the other hand, we know that the same US authorities are aware of the phenomenon. Initial attempts to forge data on global terrorism (see B. Krueger and D. D. Laitin, '"Misunderestimating" Terrorism', 83(5) *Foreign Affairs* 8 (2004)) further led the US Department of State to abort the publication of the 'Patterns of Global Terrorism' annual reports, replaced by the 'Country Reports on Terrorism'. Nevertheless, according to the 2006 Report:

> Approximately 14,000 terrorist attacks occurred in various countries during 2006, resulting in over 20,000 deaths. Compared to 2005, attacks rose by 3,000, a 25 percent increase in 2006 while deaths rose by 5,800, a 40 percent increase. [...] Of the 14,000 reported attacks, 45 percent - about 6600 - of them occurred in Iraq where approximately 13,000 fatalities - 65 percent of the worldwide total - were reported for 2006. Violence against non-combatants in eastern and sub-Saharan Africa [...] rose 65 percent in 2006, rising to 420 from the approximately 253 attacks reported for 2005. The 749 attacks in Afghanistan during 2006 are over 50 percent more than the 491 attacks reported for 2005 as fighting intensified during the past year. (see National Counterterrorism Center: Annex of Statistical Information).

83. Data on worldwide increasing anti-Americanism are reported in Pew Research Center, *Trends 2005*, Washington, DC, 2005, at 105. In 2004, a survey conducted in Saudi Arabia, Egypt, Jordan, Lebanon, Morocco and the United Arab Emirates revealed an impressive anti-Americanism resentment, fuelled by the war in Iraq (see D. Linzer, 'Poll Shows Growing Arab Rancor at U.S.', *Washington Post*, 23 July 2004, at A26).

84. Canada offers a remarkable example of such protective trend. See on the point the decisions of the Supreme Court of Canada in *Suresh* v. *Canada*, 11 January 2002 [2002] S.C.C. 1 (on the definition of the crime of terrorism); *R. v. Mentuck*, 15 November 2001, [2001] S.C.C. 76 (on the obligation for the police to disclose its operational techniques); *Vancouver Sun (Re)*, 23 June 2004, [2004] S.C.C. 43 (on the open court principle); *Application under s. 83.28 of the Criminal Code (Re)*, 23 June 2004, [2004] S.C.C. 42 (exhorting federal courts to cautiously apply the new anti-terrorism legislation); *Charkaoui* v. *Canada*, 23 February 2007, [2007] S.C.C. 9 (on the unconstitutionality of the so-called 'security certificates', on the basis of which a foreign national could be arrested pending deportation).

85. G. Jones, 'Averting Failure in Afghanistan', 48(1) *Survival* 111 (2006), at 116.

86. T. Dodge, 'The Causes of US Failure in Iraq', 49(1) *Survival* 85 (2007), at 89. See also on the point K. M. Pollack, 'The Seven Deadly Sins of Failure in Iraq: A Retrospective Analysis of the Reconstruction', 10(4) *Middle East Review of International Affairs* 1 (2006).

87. See the Iraq Body Count database.

88. See the Iraq Coalition Casualty Count database.

89. M. Greenwell, '3 Secular Iraqis in Cabinet to Formally Resign', *Washington Post*, 25 August 2007, at A12.

90. See Dodge, *supra* note 86, at 85.

91. B. R. Rubin and H. Hamidzada, 'From Bonn to London: Governance Challenges and the Future of Statebuilding in Afghanistan', 14(1) *International Peacekeeping* 8 (2007), at 16.

92. J. Goodhand, 'Afghanistan in Central Asia', in M. C. Pugh, N. Cooper and J. Goodhand, *War Economies in a Regional Context: Challenges of Transformation* 45 (2004) (Boulder, CO: Lynne Rienner), at 76.

93. See *Organisation des Modjahedines du peuple d'Iran* v. *Council of the European Union*, Case No. T-228/02, 12 December 2006 (hereafter *OMPI*); *Sison* v. *Council of the European Union* and *Stichting Al-Aqsa* v. *Council of the European Union*, Cases No. T-47/03 and T-327/03, 11 July 2007 (hereafter *Al-Aqsa*), The Court of Justice of the European Communities.

94. *OMPI*, paras 108-110; *Al-Aqsa*, paras 155-157.

95. *OMPI*, para. 172; *Al-Aqsa*, para. 242.

96. As for the differences between the obligations imposed on UN member states by SC Res. 1267 (1999) and SC Res. 1373 (2002), see *supra* note 62.

97. *OMPI*, para. 100; *Yusuf* v. *Council of the European Union*, Case No. T-306/01, 21 September 2005, para. 328; *Kadi* v. *Council of the European Union*, Case No. T-315/01, 21 September 2005, para. 258; *Ayadi* v. *Council of the European Union*, Case No. T-253/02, 12 June 2006, para. 116; *Hassan v. Council of the European Union*, Case No. T-49/04, 12 July 2006, para. 92, The Court of Justice of the European Communities.

98. *A More Secure World: Our Shared Responsibility*, Report of the High-Level Panel on Threats, Challenges and Change, UN Doc. A/59/565, 2 December 2004, para. 152.

99. CoE Parliamentary Assembly - Committee on Legal Affairs and Human Rights, *UN Security Council black lists*, AS/Jur (2007) 14, 19 March 2007, para. 16.

100. See the cases listed *supra* note 66. In a motion to dismiss, issued in a case concerning the freezing of funds belonging to two bankers whose names were included in the '1267 list', three magistrates of the *Procura della Repubblica* in Milan stated that blacklists are the product of 'decisions adopted exclusively on the basis of suspects and subsequent political choices, although taken by qualified international institutions' (L. Ferrarella, '"Solo politica": i pm bocciano le "black list" di ONU e UE', *Corriere della Sera*, 24 July 2007, at 17. Author's translation).

101. I. Wilkinson, N. Britten and J. Steele, 'Fugitive Briton arrested in Pakistan over jet bomb plot', *Telegraph*, 12 August 2006.

102. See *supra* note 55.

103. Ministero dell'Interno, *Rapporto sullo stato della sicurezza in Italia*, August 2005, at 60.

104. C. Bonini and G. D'Avanzo, *Il mercato della paura: La guerra al terrorismo islamico nel grande inganno italiano* 47 (2006) (Torino: Einaudi).

105. P. Biondani and L. Ferrarella, 'Arrestati in 180, solo una condanna per la Jihad', *Corriere della Sera*, 2 February 2005, at 5.

106. D. Stasio, '"Già 78 condanne per terrorismo islamico"', *Sole 24 ore*, 18 October 2006, at 13.

107. Ministero dell'Interno, *Rapporto sulla criminalità in Italia*, 20 June 2007, at 392.

108. This is the case of the Australian David Hicks, who was captured in Afghanistan and sentenced to nine months in jail, to be served in Australia. Remarkably, contrary to his earlier allegations, in the plea deal Hicks declared he had not been treated illegally by US officials.

109. *United States of America* v. *Omar Ahmed Khadr*, Order on Jurisdiction, 4 June 2007; *United States of America* v. *Salim Ahmed Hamdan*, Decision and Order - Motion to Dismiss for Lack of Jurisdiction, 4 June 2007.

110. New York University School of Law, Center on Law and Security, *Terrorist Trial Report Card: U.S. Edition*.

111. R. Gillies, 'Canada's House Scraps Terrorism Measures', *Washington Post*, 28 February, 2007.

112. See gen. G. Mythen and S. Walklate, 'Communicating the Terrorist Risk: Harnessing a Culture of Fear?', 2(2) *Crime, Media, Culture* 123 (2006). Concerning the way communication spreads a culture of fear and enmity, see the results of the recent report of the *Pew Research Center* on global trends (Pew Research Center, *Global Opinion Trends 2002-2007*, 24 July 2007. According to the report, only 5 percent of US citizens nowadays name Al-Qaeda among the greatest threats to the US, while 44 percent say Iran presents a major threat to their country (at 47-48). This might be the result of the ongoing anti-Iran political campaign launched by the US Administration and echoed by the media.

113. See Slaughter, *supra* note 80, at 971; O'Connell, *supra* note 42, at 456-457.

114. Ferrajoli, *supra* note 79, at 812.

The Meaning of "Terrorism"

An Analysis of Developments from Cicero, St Augustine and the Pirate, to the United Nations Draft Convention

Myra Williamson

> What's in a name? that which we call a rose
> By any other name would smell as sweet;
> So Romeo would, were he not Romeo call'd,
> Retain that dear perfection which he owes
> Without that title. Romeo, doff thy name,
> And for that name which is no part of thee
> Take all myself. (1)

Introduction

What is in a name? That which we call a rose, by any other name would smell as sweet. These famous words uttered by Juliet Capulet in a Shakespearean play set in an Italian town have come to represent the notion that what matters most is what something *is*, not what it is *called*. Although that assumption may apply to roses and star-crossed lovers, its validity is more arguable when applied to subjects such as that which we are discussing during this session of the 2007 Cortona Colloquium. This paper addresses the meaning of terrorism. It is premised on the assumption that, as opposed to the abovementioned Shakespearean interpretation of the importance of a name, when it comes to defining terrorism the name is *all* important. The question of which actions deserve to be daubed with the pejorative term "terrorism" is currently a live issue in international law and debate continues as to how the term "terrorism" should be defined, especially in light of the efforts to achieve an international comprehensive convention against terrorism. In this sense, the question "what's in a name", must be answered with a response of, "everything is in the name".

This paper is divided into three parts. Part I focuses on the use of force by non-state actors in antiquity and seeks to show that the use of force against civilians to instil fear in order to achieve political or ideological objectives is not the exclusive domain of the twenty-first century. A brief examination of some non-state actors of antiquity, namely pirates, will be undertaken in order to provide some historical perspective for the latter stages of this paper. Part II summarises the attempts that have been made within various domestic jurisdictions to define "terrorism" and, by analysing some of those definitions, it becomes clear that defining a "terrorist act" is an apparently more achievable legislative task than defining "terrorism" *per se*. Part III then addresses the question of whether it is possible to achieve an international comprehensive convention which includes a universally acceptable definition of terrorism. One of the conclusions that will be reached towards the end of the paper is that there is still a great deal of disagreement between states as to how "terrorism" should be defined and that despite the continuing efforts at achieving consensus on a definition, the outcome may well represent an unsatisfactory compromise at the expense of genuine consensus.

Part I - Terrorism in historical context: Cicero, St Augustine and the Pirate

> For it was a witty and a truthful rejoinder which was given by a captured pirate to Alexander the Great. The king asked the fellow, 'What is your idea, in infesting the sea?' And the pirate answered, with uninhibited insolence, 'The same as yours, in infesting the earth! But because I do it with a tiny craft, I'm called a pirate: because you have a mighty navy, you're called an emperor. (2)

Any discussion about the meaning of the term "terrorism" requires reference to a breadth of disciplines. The inquiry can encompass historical, political, religious, sociological, psychological, philosophical and legal (international, domestic and comparative) perspectives. The main focus of this paper is legal, yet that perspective cannot be considered in isolation. Ascertaining the legal definition to be accorded to this term must be premised by briefly touching upon some of these other disciplines.

The above extract from St Augustine's *City of God* draws upon the story of Alexander and the pirate from Cicero's *De Re Publica*. (3) The point, which St Augustine thought was a "witty and truthful rejoinder", was that the pirate and Alexander the Great were both engaged in essentially the same enterprise: the only difference being that the pirate's endeavours were considered undesirable, unjustifiable and unlawful, whereas Alexander and his army's endeavours were inherently just and acceptable since they were carried out in the name of the state.

Piracy is perhaps the first of all international crimes. (4) Literature from ancient Greece shows that since antiquity, states have faced the threat or use of force from non-state actors. Although there is some scholarly debate as to where the earliest genuine references to "pirates" occurs, (5) it seems accepted that pirates were referred to in the writings of Livy, Plutarch and Cicero. (6) Whether the ancient Greeks and Romans regarded "pirates" as common criminals, that is robbers or brigands, or as enemies of all mankind, (7) that is, legal enemies against whom war could be waged, is an academic moot point and a resolution of it will not be attempted here. (8)

Several interesting observations arise from an analysis of pirates as non-state actors of antiquity, three of which are touched upon here. Firstly, pirates were historically regarded as being the enemies of all communities. (9) Since they were not subject to the law of the universal society, there was, according to Cicero, no legal obligation to keep an oath made to pirates. (10) Secondly, the *modus operandi* of the historical pirates and that of the modern day "terrorists" suggest some similarities. Pirates who were active during the sixteenth to eighteenth centuries intended to create fear in their victims so that their reputation would spread beyond the immediate targets of their plundering. Accounts of pirates such as the notorious English pirate Blackbeard, who preyed on ships in the Caribbean in the early eighteenth century, suggest that a conscious effort was made to instil fear in their victims in order to maintain their reputation. (11)

A third point of similarity between the "pirates" of the past and the "terrorists" of the present relates to the role played by the state. Pirates eventually came to be defined by scholars of international law as exclusively non-state actors. (12) Despite the fact that piracy included various types of acts, the defining characteristic was the fact that the pirate was acting *without the authority of a sovereign* and as such, it was "impossible or unfair to hold any state responsible" (13) for their actions. That was and remains an essential feature of the definition of piracy. (14) However, during the sixteenth century, piracy emerged as "an essential, though unsavoury, tool of statecraft". (15) Queen Elizabeth I of England viewed English pirates as adjuncts to the royal navy and regularly granted them "letters of marque" to harass Spanish trade. (16) Thus, it became common for private individuals to be granted an official warrant of commission from a government authorising them to search, seize or destroy specified assets or personnel belonging to another state. A ship operating under a "letter of marque" was often known as a "privateer". Letters of marque were issued by England (then Great Britain and later the United Kingdom) to such famous recipients as Sir Francis Drake, Sir Walter Raleigh and Sir Henry Morgan. Despite the fact that states permitted individuals to engage in piracy, their actions were not in fact "piracy" because piracy, by definition, was restricted to actions which were not sanctioned by a sovereign. (17) In terms of drawing a modern parallel it is interesting to observe that just as states actively engaged in what would otherwise have been known as acts of "piracy", but were referred to as "privateering", states in the twentieth and twenty-first centuries have likewise engaged individuals to act on their behalf and engage in what would usually be regarded as "terrorism". (18) Thus, the argument is advanced that "privateering" was essentially "state-sponsored piracy".

The similarities between piracy and privateering, and between each of them and terrorism, have been noted by scholars. (19) Winston notes that there was very little difference in practice between pirates and privateers, especially for their victims, but a considerable discrepancy between their respective fates. (20) Burgess argues that the motivations of modern-day "terrorists" are virtually identical to the privateers in the employ of Queen Elizabeth I: harass the enemy, deplete its resources, terrify its citizens, frustrate its government and remain above the fray. (21) Bolton, too, argues that modern "terrorism" is the current equivalent of the "piracy" of an earlier age. (22)

If the parallel that has been advanced here is able to be sustained, and that the historical practice of "state-sponsored piracy" (that is, privateering, the issuing of letters of marque and reprisal) is arguably analogous to the modern notion of "state sponsored terrorism", then one final observation may be made. Despite the obvious differences between piracy and terrorism, such as the motivation of the individuals concerned, (23) lessons may be learnt from the way in which piracy and privateering were eventually brought under control. In 1856, a number of states signed the Declaration of Paris which declared for the first time in a multilateral treaty that: "privateering is, and remains, abolished". (24) The 1856 Declaration of Paris thereby ended, amongst its signatories, the widespread practice of states using privateers. It has been described as "a recognition of shared guilt" (25) in the sense that the signatories formally accepted that granting letters of marque and reprisal was nothing but state-sponsored piracy and that the practice of piracy in general could only be brought under control if *states* relinquished the right to partake in such a practice. The practice of privateering or, as it is being contended here, "state-sponsored piracy", was virtually eliminated within a decade of the signing of that multilateral treaty. (26) The Declaration of Paris is an example of the way in which states can help to eliminate a particularly undesirable practice by agreeing to forego its use amongst themselves.

Thus far, the origins of the use of force by non-state actors have been described within the context of piracy. As for the specific historical origins of *"terrorism"*, virtually all scholarly texts on terrorism begin with a statement that "terrorism is not a new phenomenon", (27) that "terrorism is as old as history itself" (28) or that "terrorism is as old as humanity". (29) It is virtually indisputable that less powerful non-state actors historically have always resorted to the weapons and means of their day to attack more powerful state actors. (30) Thus, terrorism is the current term attached to a practice that dates back centuries, even millennium. It is the manipulation of fear and terror, against civilians or non-combatants, in order to influence another party, usually a state government. Clausewitz famously wrote that "war is a continuation of politics by other means". (31) Some would extrapolate and conclude that "terrorism is a special type of war that is used to achieve a political goal." (32)

One of the earliest known examples of a terrorist-type movement was the *sicarii*, a highly-organised religious sect involved in the Jewish Zealot struggle in Palestine in around 66-73 AD. (33) There are some parallels between the *sicarii* and the current perception of "terrorists" in the sense that the *sicarii* were inclined to regard martyrdom as something joyful and that they seemed to have been aiming at a goal beyond their immediate targets. (34) Another historical antecedent of the modern "terrorist" was the group known as the "Assassins", who were active between the 11th and 13th centuries AD. They were a Shi'ite Ismaili sect based originally in Persia but which later spread to Syria, that targeted political and religious leaders. They were led and organised by the "Old Man of the Mountains", Hassan bin Sabbah. Another group worthy of mention were the Thugs of India who flourished in the thirteenth century and continued for up to 600 years. The Thug's instrument of terror was strangulation, the Zealot's was the dagger while the Assassins opted for either strangulation, cudgel or sword. (35) Although disparities existed between them, what they shared was the belief that their actions were justified in the name of their respective religions. (36)

The term "terrorism" is etymologically derived from the Reign of Terror which occurred during the French Revolution. Although modern English dictionaries still refer back to those origins, (37) the standard dictionary definitions no longer represent the common understanding of the term. (38) In contemporary terms, "terrorism" is not generally understood to refer to the use of force by a government. As the following part of this paper will allude to, the modern definition of "terrorism" is usually complex, sometimes convoluted, but more than anything else, disputed.

Part II: Defining "terrorism": examples from New Zealand, Canada, and the United Kingdom

> We must obviously do our best with the definition. However, having spent many hours looking at many different definitions, I can only agree with what was said by both the noble Lord, Lord Goodhart, and the noble Lord, Lord Cope; namely, that there are great difficulties in finding a satisfactory definition. Indeed, I was unable to do so and I suspect that none of us will succeed. As I say, we must do our best but I hope we will not spend too much time on the definition. (39)

In this part of the paper, some examples are drawn from selected jurisdictions' to illustrate the various ways in which those legislatures have attempted to define "terrorism". The apparent discrepancies between each legislature's definitions are probably to be expected given the variety of definitions that abound within the literature of political science. An oft-quoted and comprehensive study of "terrorism" conducted in 1983 by Alex Schmid discovered that there were at least 109 different definitions of "terrorism" and within them, there were 22 distinct elements. (40) The outcome of that research was, *inter alia*, that "terrorism" does not have one universally accepted meaning. (41) Although there are several elements which are more commonly cited than others, the only clear conclusion was that there was no consensus. Elements that occurred most often in the suggested definitions included the element of violence or force, (42) which was political, (43) which emphasised fear and terror, (44) including threats. (45) The respondents in Schmid's study were not especially concerned that the target must necessarily be a non-combatant or civilian, (46) nor did they consider the criminality element essential, (47) nor that demands necessarily be made on third parties. (48)

The conclusion reached by Schmid, and borne out in more recent scholarship, suggests that there is no universally accepted definition of "terrorism". In other words, "terrorism often lies in the eye of the beholder". (49) This confusion and lack of consensus is particularly frustrating for the drafters of legislation who seek to define and confine the term succinctly enough to criminalise it. Several examples are referred to below in an attempt to demonstrate that just as political scientists cannot agree on a definition, nor can individual legislatures

New Zealand

The term "terrorism" is not defined in New Zealand legislation. However, related terms such as "terrorist offence", (50) "international terrorist emergency" (51) and "terrorist act" are used and their definitions provide insight into the New Zealand Government's conception of what amounts to "terrorism". The most important piece of legislation which defines terms related to "terrorism" is the Terrorism Suppression Act 2002 in which the terms "terrorist act", "terrorist act in armed conflict" and "terrorist bombing" are all separately defined. (52)

In New Zealand, an act is a "terrorist act" if it is an act against one of the "specified terrorism conventions", (53) or if it is a "terrorist act in armed conflict" (54) or if it satisfies several essential elements. First, it must be intended to cause, in one or more countries, one or more of the outcomes specified in s 5(3). (55) Second, it must be carried out for the purpose of advancing an ideological, political or religious cause. Third, it must be carried out with the intention either to induce terror in a civilian population or to unduly compel or force a government or an international organisation to do or abstain from doing any act. (56)

There are two particularly interesting aspects of the New Zealand definition of a "terrorist act". The legislation clarifies the types of acts which it is *not* intended to cover by expressly excluding genuine protesters. (57) Secondly, the treatment of acts that occur in armed conflict is notable. Section 5(4) expressly states that a "terrorist act" does not include an act which occurs in a situation of armed conflict and which is, at the time and in the place that it occurs, in accordance with rules of international law applicable to the conflict. (58) However, that does not mean that all actions of the military during an armed conflict are automatically excluded. By virtue of s 4(1), the definition of a

"terrorist act in armed conflict" states that if an act occurs in a situation of armed conflict, and the purpose of that act is to intimidate a population, or compel a government or an international organisation to do or abstain from doing any act, and the act is intended to cause death or serious bodily injury to a civilian or other person not taking an active part in the hostilities in that situation, then (notwithstanding the fact that it occurs during an armed conflict) it is most likely to be considered a "terrorist act". (59) Therefore, even an act which occurs during an armed conflict can potentially be a "terrorist act". (60)

The final point made here regarding the New Zealand definition is that although the current definition of a "terrorist act" has been briefly outlined here, the current legislation curiously does not criminalise the act. However, this is subject to change, pursuant to the Terrorism Suppression Amendment Bill 2007 ("the Bill") which is currently being considered and which, if it becomes law, will deem it a criminal offence to carry out a "terrorist act". (61) The Bill will also, *inter alia*, create a new "nuclear terrorism offence" which provides further insight into the way in which the New Zealand Government perceives the notion of "terrorism" *per se*. (62)

Canada

As a result of the introduction of new anti-terrorism legislation in 2001, Canada provides a definition of "terrorist activity" in the Criminal Code 1985. The term "terrorist activity" means an act or omission that is committed in or outside Canada and that is proscribed by any one of ten United Nations conventions. (63) It also includes an act or omission, whether committed in or outside Canada that is committed in whole or in part for a political, religious or ideological purpose *and* in whole or in part with the intention of intimidating the public with regard to its security, or compelling a person, government or international organisation to do or restrain them from doing any act. (64)

Even between two jurisdictions that share as much common ground as do New Zealand and Canada, there are subtle but important differences in their respective definitions of a "terrorist act". Whereas New Zealand requires an intention to "induce terror in a civilian population", (65) Canada requires an intention to "intimidate the public, or a segment of the public". (66) In the New Zealand legislation, acts of genuine protest, advocacy or dissent are specifically excluded unless they meet the other requirements related to intention and outcomes, yet in Canada, such acts are not given any special protection from the application of the legislation. (67) Finally, acts/omissions committed during an armed conflict are dealt with differently: New Zealand provides a separate definition of a "terrorist act in armed conflict" (68) whereas Canada excludes acts/omissions committed during an armed conflict if it was in accordance with customary international law or conventional international law applicable to armed conflict. The Canadian provision also specifically excludes "the activities undertaken by military forces of a state in the exercise of their official duties, to the extent that those activities are governed by other rules of international law." (69) Arguably, the Canadian legislation is most unlikely to ever be invoked where the military forces of a state are concerned. (70) The apparent intention of the legislation is that the definition of a "terrorist act" ought to apply exclusively to non-state actors.

United Kingdom

The United Kingdom has defined "terrorism" in s 1 of the Terrorism Act 2000 (UK). (71) That legislation was the result of a seminal review of terrorism legislation carried out by Lord Lloyd of Berwick, whose expressed difficulty in attaining a definition of "terrorism" was noted at the outset of part II of this paper. (72) The Terrorism Act 2000 (UK) provides, *inter alia*, that "terrorism" means the use or threat of action where the action falls within subsection 2, (73) the use or threat is designed to influence the government or to intimidate the public or a section of the public (74) and the use or threat of action is made for the purpose of advancing a political, religious or ideological cause. (75)

Although this was an improvement on the existing legislation, (76) and although it is somewhat unusual because other Commonwealth jurisdictions typically do not even attempt to define "terrorism", (77) it has been the subject of criticism on the grounds that it is too broad (78) and the legislation has been the subject of recent review by Lord Carlile of Berriew Q.C. (79) Lord Carlile's first main conclusion is that "There is no single definition of terrorism that commands full international approval". (80) He suggests that the United Kingdom's definition of "terrorism" is generally sound and does not consider, for example, that the reference to a religious cause should be removed. However, Lord Carlile considers that the motive or design element is inconsistent to some degree, because it presently requires that the use or threat of action be designed to *influence* the government or *intimidate* the public. He considers that the word "influence" sets the 'bar' too low and that the word "intimidate" has a clearer meaning: the same standard of "intimidate" ought to be applied to both the government and the public. (81) He also believes that the motive should be broadened to include not only political, religious or ideological causes, but also philosophical, racial, ethnic and other similar causes. (82) Although the Home Office accepted most of Lord Carlile's conclusions, it did not accept that the bar was set too low by the use of the word "influence". (83)

Part III: International developments

The international community has long been concerned with the question of defining terrorism. (84) There are currently 30 instruments (16 universal and 14 regional) pertaining to the subject of international terrorism. (85) Since 1963, 13 multilateral international conventions regarding terrorism have come into force. (86) None of those conventions provides a comprehensive, generic definition of "terrorism" or a "terrorist act", although some conventions have come closer than others. (87) Efforts have been underway for a considerable period of time to achieve an international comprehensive convention on terrorism which would, *inter alia*, include a definition. This part of the paper briefly summarises the efforts to achieve an international definition of terrorism and offers an update as to the current position and a summary of the obstacles which presently exist to concluding a comprehensive convention.

The drive towards a comprehensive convention on terrorism has been part of a broader effort by the United Nations to engage with the problem of international terrorism on various levels. To that end, several resolutions, declarations and summits have been passed, made and held, with the apparent objective of building international solidarity and instituting meaningful measures to combat terrorism. Amongst the more notable measures are the Millennium Declaration, (88) the 2005 World Summit Outcome, (89) the UN Secretary-General's Report "Uniting Against Terrorism: Recommendations for a global counterterrorism strategy" (90) and the United Nations Global Counter-Terrorism Strategy. (91)

That an international comprehensive convention on terrorism is necessary, and that a common definition of "terrorism" is "necessary and indispensable" (92) seems to be a view that is fairly commonly held. (93) The problem has been in arriving at a consensus on what form that definition should take. Most of the recent progress has occurred under the auspices of the Ad Hoc Committee established by General Assembly Resolution 51/210 of 17 December 1996 ("the Ad Hoc Committee"). (94) The Ad Hoc Committee, membership of which is open to all States, (95) has a mandate to work towards a comprehensive convention on terrorism, among other things. (96) Under the terms of General Assembly Resolution 61/40 of 18 December 2006, the Ad Hoc Committee "shall, on an expedited basis, continue to elaborate the draft comprehensive convention" (97) and it shall also continue to discuss the question of convening a high-level conference under the auspices of the United Nations. (98) Although other bodies within the United Nations have been working towards combating terrorism, it is the Ad Hoc Committee, a law-making body, which has been charged with the task of resolving the legal issues regarding the drafting and adoption of a comprehensive convention.

The Ad Hoc Committee (99) has adopted the pattern of holding one session per year, early in the year, and then continuing its work in the framework of a Working Group of the Sixth Committee

later in the year, during the regular session of the General Assembly. (100) The original draft comprehensive convention on terrorism was submitted by India in 1996. (101) It has been subject to much discussion since its submission, and several of the original draft articles have been the subject of multiple written amendments and proposals. Most of the suggested amendments relate to the preamble, Articles 1, 2 and 18. (102)

The latest report from the Ad Hoc Committee (103) suggests that gradual progress is being made towards agreement upon a comprehensive convention and that states recognise the importance of reaching early agreement. However, several areas of dispute remain, notably, the definition of terrorism in Article 2 and the proposed exclusions from that definition in Article 18.

In relation to the issue of defining "terrorism", there appear to be three inter-related sources of difficulty. First, there is not yet a consensus on the exact wording of the legal definition of "terrorism". Second, a question remains as to whether recognition ought to be given to the difference between "terrorism" and the legitimate struggle of peoples for self-determination. Thirdly, a question remains over the relationship between state and non-state actors. The main issue discussed here pertains to draft Article 18 which concerns exclusions from the definition and the relationship between the proposed convention and other areas of international law. Reconciling the different perspectives with regards to this article would appear to be crucial in determining the outcome of the entire process, especially since the process is based on consensus and that nothing is agreed until everything is agreed.

Article 18: Exclusion of armed forces/military forces of a State

Since 2002, two alternative formulations of Article 18 have been the principal focus of consideration. (104) One proposal was drafted and circulated by the Coordinator ("the Co-ordinator's text") and an alternative was proposed by the Members of the Organization of the Islamic Conference (the "OIC text"). Both of the texts consist of four paragraphs. Paragraphs one (105) and four (106) are identical in both texts. The distinguishing features between the two texts are located in paragraphs two and three, as highlighted in the extracts below.

Article 18, paragraph 2

The Co-ordinator's text, if adopted, would mean that:

> The activities of **armed forces** during armed conflict, as those terms are understood under international humanitarian law, which are governed by that law, are not governed by this Convention.

The OIC's text, if adopted, would mean that:

> The activities of **the parties** during an armed conflict, **including in situations of foreign occupation**, as those terms are understood under international humanitarian law, are not governed by this Convention.

Draft Article 18(2) of the Co-ordinator's text seeks to address the activities of armed forces of both State and non-State actors in conflict situations and points to the applicable law in such situations, namely, international humanitarian law. The main difference between the texts is the term "armed forces" in the Co-ordinator's version as compared with the term "parties" in the OIC's version, as well as the OIC's reference to "situations of foreign occupation".

There is, as yet, no definition of "armed forces" in the draft convention, nor "parties". If the Co-ordinator's text is adopted and the term "armed forces" is not specifically defined in the convention, presumably the term would be given the definition which it is accorded in international humanitarian law. "Armed forces" is defined in Article 43 of Additional Protocol I 1977, and perhaps that definition would be applied in interpreting Draft Article 18(2) but a question remains as to how "armed forces" ought to be defined in relation to parties that have not ratified Additional Protocol I. Presumably, if the Co-ordinator's text is ultimately adopted, consideration may have to be given to

inclusion of a definition of "armed forces", but there is presently no suggestion that such a definition is being considered. Perhaps that is because some degree of "constructive ambiguity" may be deemed helpful, (107) or perhaps it is because any definition of "armed forces" would then have to address whether non-state parties to non-international conflicts, or national liberation movements, are to be exempted from the operation of the convention. (108) This would effectively only shift the focus of the debate from Article 18(2) to the definition of "armed forces". At that point, discussion would inevitably return to the OIC's proposal to exclude the actions of parties when they are in "situations of foreign occupation".

The difference between the texts is much more than mere semantics: it is clear that a number of states do not consider that the draft convention ought to apply to situations where people are fighting foreign occupation forces. Indeed, it was noted in the latest report of the Ad Hoc Committee that some delegations continue to reiterate the need to distinguish "terrorism" from the legitimate struggle of peoples for self determination. (109)

Article 18, paragraph 3

Article 18(3) addresses the activities of military forces of a State, in the exercise of their official duties, during peacetime. It acknowledges that "other rules of international law" apply to such activities. Thus, it is a choice of law provision, pointing to the applicable law in specific situations and is an attempt to delineate the precise scope of application of the Convention.

Both versions use the phrase "military forces of a State", a phrase which is defined. (110) However, there is a slight difference between the proposed texts of Article 18(3) in so far as the Co-ordinator's text would exclude from the convention the activities of the military forces of a State during a conflict "inasmuch as they are **governed by** other rules of international law", whereas the OIC's text would exclude those activities "inasmuch as they are **in conformity with** international law."

The apparent difference between those two versions is that the military forces of a State would only be exempt if their actions were **in conformity with** international humanitarian law (OIC's text) but under the Co-ordinator's text, the military would escape liability merely because their actions were **governed by** international humanitarian law. Thus, the military forces of a State could argue that they cannot be held personally liable under the proposed draft convention because all of their actions are **governed by** international humanitarian law, which then entails another level of inquiry as to whether they have indeed acted in conformity with it. But if they have not acted in conformity with it, no liability under the terrorism convention will ensue because the activities have already been placed beyond its scope by the mere application of the rules of international humanitarian law. The difference between the two texts reflects two differing perspectives, which were highlighted earlier in the paper, in the context of the New Zealand and Canadian legislation. (111)

It would seem that the OIC version maybe the more effective of the two texts that are currently being discussed because it would not allow the military forces of a State to escape liability through a legal loophole. It is submitted that the Co-ordinator's text may create a way for the military forces to escape liability, by simply pleading that their actions were **covered by** international humanitarian law (even though, upon closer inspection, it may be found that they were not in **conformity** with that law). One might argue that this analysis exposes no real concern, given that State responsibility is dealt with under other rules of international law. The point is that this convention would carry with it the possibility of prosecuting individuals for engaging in terrorism. Even such an accusation would carry political as well as legal weight. A criticism which could be levelled at the Co-ordinator's text is that, if it is adopted, no such charge of "terrorism" will ever be brought against members of the military forces of a State (so long as they can show that they were undertaking the exercise of their official duties) on the basis that such actions were "governed by" other areas of international law.

Conclusion

It is apparent from the latest report of the Ad Hoc Committee that the general direction of the negotiations is towards excluding the activities of the military forces of States. That much is clear from the latest proposal which emerged towards the end of the latest Ad Hoc Committee meeting in February 2007. The new proposed preamble, taken directly from the Nuclear Terrorism Convention and the Terrorist Bombings Convention, seeks to emphasise that the activities of the military forces of States are governed by other rules of international law and are not intended to be covered by the draft comprehensive convention. (112) If this proposal is accepted, it would place the issue beyond doubt: military forces of States could not be accused of having engaged in "terrorism", if the activities were undertaken in the exercise of their official duties.

It is submitted that if this proposal is ultimately accepted it would be an unsatisfactory outcome because it would define terrorism in a way which would virtually curtail it to only applying to non-state actors. History shows that "terrorism" can just as easily be carried out by State as by non-State actors. To provide State actors with special protection, because their actions are supposedly already covered by other rules of international law, seems to send the wrong kind of signal. It also sits uncomfortably with the sentiments that have been expressed in various international forums to the effect that terrorism *in all its forms* ought to be denounced.

"Terrorism" should be defined according to what it is, not according to who carries out the acts. It should be condemned in whatever form it takes, by whatever actor, and not restricted to only the actions of non-state actors. Indeed, that has been the consistent message emerging from the United Nations: (113)

> The United Nations should project a clear, principled and immutable message that terrorism is unacceptable. Terrorists must never be allowed to create a pretext for their actions...terrorism cannot be justified. The United Nations must maintain the moral high ground in this regard.

It is contended that if the United Nations adopts a convention which effectively defines terrorism to exclude State actors, then it will not only be losing the moral high ground, but it will be providing some of the non-State actors with the very ammunition which they so desire: proof that the international system is skewed in favour of the militarily powerful states who make the law to protect themselves and to further their own agendas. It is contended that both State and non-State actors ought to be potentially liable to be exposed as having engaged in "terrorism" and that the current proposal to exclude the military forces of States ought to be reconsidered.

A parallel might be drawn between non-state actors discussed earlier in this paper, namely, the pirates who terrorised states particularly during the seventeenth and eighteenth centuries and the modern problem of "terrorism". One of the factors which contributed to the demise of piracy was the recognition by states that they would prohibit and outlaw privateering, which, as has been argued above, was tantamount to state-sponsored piracy, when they signed the Declaration of Paris in 1856. An opportunity now presents itself for all states to take a similar position with regards to terrorism: they have the option of defining it broadly enough so that they denounce all acts of terrorism, whether the actors involved be State or non-State and specifically provide that terrorist acts can be carried out in situations of armed conflict. If States accept that their agents may, theoretically, be exposed to accusations of terrorism if they carry out acts defined in Article 2, then that would not only send a strong signal to the international community that *all* forms of terrorism are unacceptable but it would create a greater chance of achieving the ultimate objective which is to reduce the threat to international peace and security posed by terrorism, in all its shapes and forms, committed by whoever, wherever, whenever.

One final note of caution with the current direction in which negotiations are headed relates to the recent announcement that the United States is intending to declare the Iranian Revolutionary Guard Corps (IRGC) as a "designated global terrorist force". (114) At the time of writing, (115) the designation had been hinted at but not yet officially made. If this occurs, it would be the first time

that a branch of a foreign sovereign government has been designated a terrorist entity. Such a designation would imply that at least the United States considers that the military forces of a State can, and do, engage in terrorist activity. It would be difficult to reconcile such a designation with the proposed draft comprehensive convention on terrorism which seeks to exclude the activities of the military forces of States from its application. It would be interesting to observe the way in which the US would reconcile its stance regarding the IRGC if it is ever given the opportunity to sign the proposed draft comprehensive convention on terrorism. If nothing else, this recent development demonstrates that despite years of debate and discussion, the definition of "terrorism" still appears to lie in the eye of the beholder.

Notes

1. Shakespeare, *Romeo and Juliet*, II, ii 1-2 (1594).

2. St Augustine, *De Civitate Dei* (*Concerning the City of God Against the Pagans*) (1467) Book IV, Chapter 5, H. Bettenson, trans., 1972, p. 139.

3. Cicero, *De Re Publica* (*The Republic*) (c.51 AD) Book III, xiv, C. Keyes, trans., Loeb Classical Library, 1966, p. 203.

4. See S. Davidson, "Dangerous Waters: Combating Maritime Piracy in Asia", (2004) 9 *Asian Yearbook of International Law* 3, who cites L. Sunga, *The Emerging System of International Criminal Law*, 1997 at p. 3, 253 and 338 and B. Dubner, *The Law of International Sea Piracy*, 1980 at p. 2. Davidson states that as early as the eighteenth century, the English and American courts considered pirates to be hostes humani generis - enemies of all mankind - and that universal jurisdiction could be exercised over any pirate who was captured.

5. Some scholars, such as Coleman Phillipson and Alfred Zimmern have asserted that the practice of piracy was explicitly mentioned and was regarded as being a creditable means of enrichment in ancient Greece, citing sources such as Homer's *Illiad* and *Odyssey*, and Thucydides' *History of the Peloponnesian War*, see C. Phillipson, *The International Law and Custom of Ancient Greece and Rome*, 1911, p. 370 and A. Zimmern, *The Greek Commonwealth*, 5th ed.,1931, Oxford ed. 1961, pp. 237-38. However, other scholars dispute that claim on the basis that in the sources cited by Phillipson and Zimmern, the Greek word "peirato" does not appear, nor do any of its derivatives: see A. Rubin, *The Law of Piracy*, 2nd ed., 1998, pp. 3-4.

6. For these references and others in the classical Greek and Roman works, see Rubin, *ibid.* at pp. 3-19.

7. The phrase "enemies of all mankind", translated from the Latin phrase "hostes humani generis" is not, as Rubin points out, actually used in Cicero's works. Cicero uses the phrase "communis hostis omnium" in *De Officiis* and in *Contra Verres* II, which literally means that pirates are the "enemies of all communities". Rubin notes that the source of the famous phrase hostes humani generis, which is so often misused and inaccurately attributed to Cicero, has not been found: Rubin, *ibid.*at p. 5 n. 19 and p. 17 n. 61.

8. For a discussion of the ancients' treatment of pirates, and common misconceptions and mistranslations, see Rubin, *ibid.* at pp. 1- 19.

9. Cicero, *Contra Verres*, II, iv, 21 and Cicero, *De Officiis*, III, 29.

10. Cicero, *De Officiis*, III, 29.

11. Blackbeard, whose legal name was Captain Edward Teach, was renowned for his frightening appearance. Daniel Defoe recalled that Captain Teach obtained his alias by virtue of "that large Quantity of Hair, which, like a frightful Meteor, covered his whole Face, and frightened America more than any Comet that has appeared there a long Time. This Beard was Black, which he suffered to grow of an extravagant length...In Time of Action [he] stuck lighted Matches under his Hat, which appearing on each side of his Face, his Eyes naturally looking fierce and wild, made him altogether

such a Figure, that Imagination cannot form an Idea of Fury, from Hell, to look more frightful.": C. Johnson, *A General History of the Robberies and Murders of the Most Notorious Pyrates* (1724), reproduced as D. Defoe, *A General History of the Pyrates*, M. Schonhorn, ed. (1972), pp. 84- 85.

12. See Bynkershoek, *Questionum Juris Publici Libri Duo* (*Two Books on Questions of Public Law*) T. Frank, transl., Classics of International Law, 1930, Book I, chapter XVII, para 122: "Those who rob on land or sea without the authorization of any sovereign, we call pirates and brigands. Hence we punish as pirates those who sail out to plunder the enemy without a commission from the admiral..."

13. W. Hall, *Treatise on International Law*, 8th ed., 1924, part II, chapter VI, §81 at p. 310.

14. Piracy in international law is defined in Article 15 of the Convention on the High Seas and Article 101 of the United Nations Convention on the Law of the Sea. Both conventions define piracy as, inter alia, any illegal act of violence, detention or depredation committed for private ends. An act can only be piratical in nature if carried out for "private ends", therefore, piracy cannot be carried out by warships or other government ships, except where the crew has mutinied: see discussion in I. Brownlie, *Principles of Public International Law*, 6th ed., 2003, pp. 228- 230.

15. D. Burgess, "The Dread Pirate Bin Laden: How thinking of terrorists as pirates can help win the war on terror", 2005, *Legal Affairs*.

16. "Letters of marque" are often referred to as "Letters of marque and reprisal".

17. See Hall, *supra* n. 13 at pp. 315- 17.

18. "State terrorism" is a term that refers to acts done by one state against another or its nationals, and done either by the state or commissioned or adopted by it. "State-sponsored terrorism" consists of a state sheltering, training, financing or supplying arms to enable terrorists to attack another state or its nationals. These definitions are from Aust, A Handbook of International Law (2005) at 284. Further discussion on these concepts can be found in, inter alia, Dupuy, P-M "State Sponsors of Terrorism: International Responsibility" in A. Bianchi, (ed) *Enforcing International Law Norms Against Terrorism*, 2004.

19. For instance, see N. Chomsky, *Pirates & Emperors - International Terrorism in the Real World*, 1986; Burgess, *supra* n. 15.

20. A. Winstone, *Pirates & Privateers*, 1972, p. 13: "The pirate was a dirty fellow, fathered by the devil and mothered by a sow; the privateer might be a gentleman born, an earl, the Lord Admiral himself. Pirates were the enemies of all and friends of none; privateers sailed with their country's blessing and returned to her cheers. The pirate's end was quick by noose or bullet if he was caught; the privateer was banqueted and decked with honours. The pirate was as empty of legality as the honest privateer was full. Both, however, shared one corrupting aim - plunder - and starved without it. No purchase (prize), no pay."

21. *Ibid*.

22. J. Bolton, "Maritime Order and the Development of the International Law of Piracy" (1983) 7(5) *International Relations*, p. 2335; J. Bolton, "Modern International Law of Piracy: Content and Contemporary Relevance" (1983) 7(6) *International Relations*.

23. Note that pirates are usually defined as being motivated by private ends whereas terrorists are usually defined as being motivated by political or ideological objectives rather than private ends.

24. Declaration of Paris, signed in Paris on 16 April 1856. The Declaration of Paris was signed by 51 parties including all of the major European maritime states but not the United States: see A. Rubin, *The Law of Piracy*, *supra* n. 4 at p. 198 n231.

25. Burgess, *supra* n. 15.

26. Privateering began in 1243, "when Henry III of England, unable to grieve the French in any other way, licensed a trio of private sea captains to do it for him." It ended in 1863: Winstone, *supra* n. 13.

27. Y. Elagab, *International Law Documents Relating to Terrorism*, 1995, p. iv.

28. Y. Alexander, (ed) *International Terrorism: Political and Legal Documents*, 1992.

29. M. Marshall, and T. Gurr, (eds) *Peace and Conflict*, 2005, p. 62.

30. Some publicists, however, maintain that terrorism is an entirely new and novel threat to international security, but they seem to be in the minority. For instance, see E. Gross, *The Struggle of Democracy Against Terrorism: Lessons from the United States, the United Kingdom, and Israel* (2006), p. 1: "Armed struggle between states and individuals or nonstate parties is a relatively new phenomenon for which international law is not yet prepared."

31. C. Von Clausewitz, *Vom Kreige* (*On War*) J. Graham, trans., 1873, Book VII, chapter 6, B.

32. A . Chaplin, *Terror - The New Theater of War - Mao's Legacy: Selected Cases of Terrorism in the 20th and 21st Centuries*, 2003, p. xx.

33. W. Laquer, *The Age of Terrorism*, 1987, p. 12. The sicarii used unorthodox tactics such as attacking their enemies by daylight, preferably on holidays when crowds congregated in Jerusalem. Their weapon of choice, from which their name derives, was the sica, a short sword which they kept hidden beneath their coats.

34. The sicarii believed that after the fall of Jerusalem, the sinful regime would no longer be in authority and God would reveal himself to His people and deliver them. What mattered most to the sicarii was not the action itself but the wider purpose behind it: see discussion in Laquer, *ibid*. at p. 335.

35. R. O'Kane, "Introduction: Theorizing Terrorism" in R. O'Kane, (ed) *Terrorism*, vol. 1, 2005, at pp. ix- x. As for religious justifications, the Zealots were Jews and their movement was Messianic; the Thugs were Hindus carrying out strangulation in the name of the goddess Kali and the Assassins were Shi'ite Muslims seeking martyrdom and entry into Paradise.

36. *Ibid*.

37. For instance, see *The Shorter Oxford Dictionary* which defines terrorism as deriving from the French "terrorisme" and meaning "A system of terror...Government by intimidation; the system of the 'Terror' (1793- 94)...A policy intended to strike with terror those against whom it is adopted; the fact of terrorizing or condition of being terrorized." Also, see the *Webster's New Twentieth Century Dictionary* which defines terrorism as "the use of terror and violence to intimidate, subjugate, etc., especially as a political weapon or policy."

38. For example, when people use the term "terrorism" today they are not intending to refer to the use of force in France in the late 1700s and although historically terrorism was a type of action perpetrated by governments against their citizens, it is now more commonly regarded as the use of force by individuals against governments. Furthermore, neither definition refers to what is generally considered to be a key element of "terrorism", namely, the targeting of civilians or non- -combatants.

39. Lord Lloyd of Berwick, *Inquiry into Legislation against Terrorism*, 1996, Cm 3420 as quoted in Lord Carlile of Berriew Q.C., *The Definition of Terrorism*, 2007, Cm 7052 at 4.

40. A. Schmid, *Political terrorism: A research guide to concepts, theories, data bases and literature*, 1983. Fifty social scientists answered a lengthy questionnaire on terrorism, including the question, "whose definition of terrorism do you find adequate for your purposes?". The most common response was that "there is no adequate definition": see Schmid, p. 73, Table IV.

41. The most popular response amongst the respondents was that "There is no adequate definition", a response provided by 10 out of the 45 respondents: *ibid.*

42. This element was cited by 83.5% of the respondents and was ranked 1st within the sample: see Schmid, ibid at 76, Table V. Three samples are referred to in Table V. Schmid suggests that the main attention should be directed at what he refers to as "sample 3" as that sample reflects the elements utilised in more than 100 definitions constructed over a 45 year time span (1936- 1981). Hence, all references below to "the sample" refer to "sample 3" in Schmid, *ibid.*, pp. 76- 77, Table V. Note also that the references to "rankings" refer to a ranking of 22 elements commonly cited by scholars in their suggested definitions.

43. This element was cited by 65% of the respondents and was ranked 2nd within the sample: *ibid*.

44. This element was cited by 51% of the respondents and was ranked 3rd within the sample: *ibid*.

45. This element was cited by 47% of the respondents and was ranked 4th in the sample: *ibid*.

46. The element of defining civilians, non-- combatants, non-- resisting, neutrals as victims was cited by 17.5% of respondents and ranked 13th in the sample: *ibid*.

47. This element was cited by 6% of the respondents and was ranked 22nd (and last) in the sample: *ibid*.

48. This element was cited by 17.5% of the respondents and was ranked 13th in the sample.

49. H. Mattox, *Chronology of World Terrorism*, *1901- 2001*, 2004, p. 5. This sentiment is often captured in the cliché that "one man's terrorist is another man's freedom fighter".

50. The Crimes Act 1961 states that a "terrorist offence" is any offence against sections 7, 8, 9, 12, 13 or 13A of the Terrorism Suppression Act 2002: Crimes Act 1961 (NZ), s312A. Thus, even the Crimes Act 1961 does not define terrorism, per se, as a crime.

51. The International Terrorism (Emergency Powers) Act 1987 (NZ) defines an "international terrorist emergency" as a situation in which any person is threatening, causing or attempting to cause (a) the death of, or serious injury or serious harm to, any person or persons; or (b) the destruction of, or serious damage or serious injury to a number of different targets including any premises, buildings, structures, installations, aircraft, ship, vessel, certain natural features, certain chattels and any animal, as set out in subparagraphs (i)- (v), in order to coerce, deter or intimidate either (c) the Government of NZ or any of its agencies, or (d) the Government of any other country or its agencies, or (e), any body or group of persons, whether inside or outside New Zealand, for the purpose of furthering, outside New Zealand, any political aim: s2(1). The last proviso of this section essentially excludes any actions which are designed to further a political aim solely within New Zealand. There have been no cases arising out of the application of this section and very limited academic comment in relation to it.

52. The interpretation section, s 4, refers to each of these terms. They are defined, respectively, in ss 5, 4(1) and 7. "Terrorism" is not defined.

53. Terrorism Suppression Act 2002 (NZ), s 5(1)(b). A "specified terrorism convention" is defined in s 4(1) by way of reference to any treaty specified in Schedule 3. Schedule 3 lists nine conventions but a bill currently before Parliament would amend Schedule 3 by adding conventions which New Zealand has recently become a party to.

54. Terrorism Suppression Act 2002 (NZ), s7.

55. Ibid, s 5(2). There are five outcomes mentioned in s 5(3)(a)- (e): the death of, or serious bodily injury to, one or more persons (other than a person carrying out the act); a serious risk to the health or safety of a population; destruction of, or serious damage to, property of great value or importance, or major economic loss, or major environmental damage, if likely to result in one or more of the outcomes specified in paragraphs (a), (b) and (d); serious interference with, or serious disruption to, an infrastructure facility, if likely to endanger human life; introduction or release of a disease-bearing organism, if likely to devastate the national economy of a country.

56. *Ibid*., s 5(2).

57. The fact that a person engages in any protest, advocacy or dissent, or engages in any strike, lockout or other industrial action is not, by itself, a sufficient basis for inferring that they have the required intention or that they intend to cause one of the specified outcomes: *ibid*., s 5(5).

58. *Ibid*., s 5(4).

59. *Ibid*., s 4(1), definition of a "terrorist act in armed conflict".

60. Note that the act must also not be excluded from the application of the International Convention for the Suppression of the Financing of Terrorism by virtue of Article 3 of that Convention: *ibid*.

61. Terrorism Suppression Amendment Bill, Government Bill 2007 No 105- 1. Clause 6 creates a new offence of committing a "terrorist act"; this is deemed necessary by the New Zealand Government as under the existing legislation there is no general offence criminalising the commission of a terrorist act. If the Bill is passed, a new s 6A will be inserted which will state that "a person commits an offence who engages in a terrorist act" and "a person who commits a terrorist act is liable on conviction on indictment to imprisonment for life or a lesser term."

62. The proposed definition of a "nuclear terrorism offence" would create a new offence in s 13E. The proposed definition would require an intention to "cause death or injury to any person or substantial damage to property or to the environment" with the intent to compel any person, international organisation or State to do, or refrain from doing, any act". Unlike the current definition of a "terrorist act" in s 5(2)(a), there is no requirement in the proposed definition of a "nuclear terrorism offence" that there be an intent to "induce terror in a civilian population". This seems unusual in the sense that a criminal act of nuclear terrorism does not require proof of an intent to cause terror. Postscript: subsequent to the presentation of this paper at the 2007 Cortona Colloquium, the Bill was passed into law amid significant controversy and criticism of the definition of terrorism. The New Zealand Prime Minister has suggested that the Terrorism Suppression Act ought to be referred to the Law Commission for review.

63. Criminal Code 1985 (Can) s 83.01(a)(i)- (x).

64. *Ibid*.

65. Terrorism Suppression Act 2002 (NZ), s 5(2)(a).

66. Criminal Code 1985 (Can) s 83.01(1)(b)(i)(B).

67. Terrorism Suppression Act 2002 (NZ), s 5(5), cf. Criminal Code 1985 (Can) s 83.01(1).

68. See Terrorism Suppression Act 2002 (NZ), s 4(1), definition of a "terrorist act in armed conflict". This provision means that the legislation may apply to situations of armed conflict if the purpose of the act, by its nature or context, is to intimidate a population or compel a government to act.

69. Criminal Code 1985 (Can) s 83.01(1)(b)(ii).

70. The New Zealand legislation seems to be more flexible and there is a greater possibility under the New Zealand definition that the military forces of a state could be held responsible for having committed a "terrorist act in armed conflict".

71. Note that "acts of terrorism" are defined in the Reinsurance (Acts of Terrorism) Act 1993 s2 (2) as "acts of persons acting on behalf of, or in connection with, any organisation which carries out activities directed towards the overthrowing or influencing, by force or violence, of Her Majesty's government in the United Kingdom or any other government de jure or de facto."

72. *Supra* n. 39.

73. Terrorism Act 2000 (UK), s 1(1)(a) states that the action must fall within subsection 2, which in turn sets out five actions, one of which must be satisfied: (a) involves serious violence against a person; (b) involves serious damage to property; (c) endangers a person's life, other than that of the person committing the action; (d) creates a serious risk to the health or safety of the public or a

section of the public, or (e) is designed seriously to interfere with or seriously to disrupt an electronic system.

74. *Ibid*., s 1(1)(b).

75. *Ibid*., s 1(b)(c).

76. The previous definition of "terrorism" in the Prevention of Terrorism (Temporary Provisions) Act 1989 was in s 20 and provided that "terrorism" was "...the use of violence for political ends, and includes any use of violence for the purpose of putting the public or any section of the public in fear."

77. Compare with New Zealand and Canada, discussed above, to which could also be added, inter alia, Australia, which define a "terrorist act" rather than "terrorism".

78. A. Blick, T. Choudhury and S. Weir, *The Rules of the Game*, a report by the Democratic Audit, Human rights Centre, University of Essex. This report claims that the legislation could be used to prosecute people who are active in legitimate social or political movements and who are exercising their rights.

79. Lord Carlile is the Independent Reviewer of Terrorism Legislation in the United Kingdom. He presented his 2006 annual report and a separate report on the definition of terrorism to the British House of Commons on 7 June 2007 (*The Definition of Terrorism*, 2007, Cm7052).

80. *Ibid* .at p. 4, 47.

81. *Ibid* .at p. 34.

82. *Ibid* at p. 37.

83. The Government Reply to the Report by Lord Carlile of Berriew Q.C. Independent reviewer of Terrorism Legislation, *The Definition of Terrorism*, Presented to Parliament by the Secretary of State for the Home Department, by Command of Her Majesty, 2007, Cmd 7058. The Home Office rejected the recommendation that the standard "intimidate" be applied to governments instead of "influence" but it stated that "this is an issue we will explore further with Parliamentary Counsel."

84. Although none of the current United Nations conventions on terrorism contain a definition of terrorism, there was a definition in Article 1(2) of the 1937 Convention for the Prevention and Punishment of Terrorism, wherein "acts of terrorism" were defined as "...criminal acts directed against a State and intended or calculated to create a state of terror in the minds of particular persons, or a group of persons of the general public.": Convention for the Prevention and Punishment of Terrorism, 19 League of Nations Doc. C.546M.383 1937 V; the Convention is also reproduced in Hudson, M International Legislation - A Collection of the texts of multipartite international instruments of general interest, Vol VII 1935- 37 (1972) 862- 78. This Convention was signed by 23 states but it was only ratified by one (India) and acceded to by one (Mexico) and thus it never entered into force.

85. The 16 universal instruments include 13 conventions and three recent amendments. For a list of these 16 universal and 14 regional instruments, and information on their corresponding status, see UNGA Doc. A/61/210, "Measures to eliminate international terrorism, Report of the Secretary-General", 1 August 2006, Sixty- first Session, part IV.

86. The latest of which is the International Convention for the Suppression of Acts of Nuclear Terrorism, UN General Assembly Resolution 59/290, 13 April 2005 [the "Nuclear Terrorism Convention"]. The Nuclear Terrorism Convention entered into force on 7 July 2007, that being the 30th day after the receipt of the 22nd instrument of ratification (from Bangladesh). For a list and/or discussion of the main instruments see, for example, O. Elagab, *International Law Documents Relating to Terrorism*, 1995; P. Van Krieken, (ed) *Terrorism and the International Legal Order - with special reference to the UN, the EU and Cross- border aspects*, 2002; H. Duffy, *The 'War on Terror' and the Framework of International Law*, 2005.

87. The 1999 International Convention for the Suppression of the Financing of Terrorism virtually provides a definition in Article 2(1) wherein it is provided that: "Any person commits an offence within the meaning of this Convention if that person by any means, directly or indirectly, unlawfully and wilfully, provides or collects funds with the intention that they should be used or in the knowledge that they are to be used, in full or in part, in order to carry out: (a) An act which constitutes an offence within the scope of and as defined in one of the treaties listed in the Annex; or (b) Any other act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organisation to do or to abstain from doing any act." The other international conventions tend to criminalise a particular act of terrorism in a particular situation.

88. The Millennium declaration was adopted at the end of the Millennium Summit in 2000: UN General Assembly Resolution A/Res/55/2 of 8 September 2000. Resolve was expressed therein to, inter alia, taking "concerted action against international terrorism, and to accede as soon as possible to all the relevant international conventions": paragraph II(9).

89. World leaders met in New York at UN Headquarters from 14-16 September 2005 and agreed to take action on a range of matters. One of the outcomes of the 2005 World Summit was the recognition of a need to reach an agreement on and conclude a comprehensive convention on international terrorism. "Terrorism" is discussed at paragraphs 81-91: UN General Assembly A/Res/60/1, 24 October 2005.

90. UNGA Doc A/60/825, 27 April 2006, Sixtieth Session.

91. It was adopted on 8 September 2006 and formally launched on 19 September 2006: UNGA Resolution A/Res/60/288, "60/288 The United Nations Global Counter-Terrorism Strategy", 20 September 2006, Sixtieth Session, 99th plenary meeting. According to the UN, the Global Counter-Terrorism Strategy "marks the first time that countries around the world agree to a common strategic approach to fight terrorism": UN Action to Counter Terrorism.

92. The question of whether or not a definition of terrorism is needed is discussed in Nesi, G International Cooperation in Counter- terrorism - The United Nations and Regional Organizations in the Fight Against Terrorism (2006) at 35- 36.

93. The delegations at the eleventh session of the Ad Hoc Committee "reiterated the importance they attached to the early conclusion of the draft comprehensive convention on international terrorism" and expressed the view that "such an instrument would constitute an important addition to the counter- terrorism legal framework established by the existing universal instruments": see UN Doc A/62/37, Report of the Ad Hoc Committee established by General Assembly resolution 51/210 of 17 December 1996, eleventh session (5,6 and 15 February 2007), UNGA Official Records, Sixty-second Session, Suppl. No. 37 (A/62/37), Annex, para B.3. See also UNGA Doc. A/60/825, "Uniting against terrorism: recommendations for a global counter- terrorism strategy", Report of the Secretary- General, 27 April 2006, Sixtieth Session, paragraph 12, wherein the Secretary- General urges Member States to conclude, as soon as possible, a comprehensive convention on international terrorism. Note that in the 19 paragraphs (9- 19) which denounce terrorism in all its forms as being unacceptable, there is no reference to the definition of the term.

94. The Ad Hoc Committee was established by the United Nations' General Assembly: UN Doc. A/Res/51/210, "Measures to eliminate international terrorism", 16 January 1997, 88th plenary meeting on 17 December 1996. The decision to establish an Ad Hoc Committee is referred to in paragraph 9. Its mandate was to elaborate an international convention for the suppression of terrorist bombings and, subsequently, an international convention for the suppression of acts of nuclear terrorism and thereafter to address means of further developing a comprehensive legal framework of conventions dealing with international terrorism.

95. When established by the General Assembly, it was decided that the Ad Hoc Committee would be "open to all States Members of the United Nations or members of specialized agencies or of the

International Atomic Energy Agency": see UN Doc. A/Res/51/210, "Measures to eliminate international terrorism", operative paragraph 22.

96. Since its establishment, the Ad Hoc Committee has negotiated several texts resulting in the adoption of three treaties: the International Convention for the Suppression of Terrorist Bombings, the International Convention for the Suppression of the Financing of Terrorism and the International Convention for the Suppression of Acts of Nuclear Terrorism.

97. UN Doc. A/Res/61/40, 18 December 2006, "Measures to eliminate international terrorism", operative paragraph 22.

98. Ibid.

99. Currently chaired by Dr Rohan Perera, the Legal Advisor to the Sri Lankan Ministry of Foreign Affairs. Dr Perera has been the Chairperson since his election to that position at the fourth session of the Ad Hoc Committee in 2000: see UN Doc A/55/37 "Report of the Ad Hoc Committee Established by General Assembly Resolution 51/20 of 17 December 1996", Fourth Session (14- 18 February 2000), General Assembly Official Records, Fifty- fifth session, Suppl No. 37 (A/55/37), paragraph 4.

100. See the Ad Hoc Committee's website: Information on the Ad Hoc Committee and access to both its reports and those of the Sixth Committee are available from the Ad Hoc Committee's website. The Ad Hoc Committee works on the understanding that all proposals remain on the table and nothing is agreed until everything is agreed.

101. UNGA Doc A/C.6/51/6, "Measures to Eliminate International Terrorism", 11 November 1996, UN General Assembly Fifty First Session, Sixth Committee, Annex.

102. For a list of the written amendments and proposals that were submitted at the sixth session of the Ad Hoc Committee, see UN Doc. A/C.6/57/L.9 "Measures to eliminate international terrorism", 16 October 2002, UN General Assembly, Fifty- seventh session, Sixth Committee. The actual text of the suggested amendments is found in UN Doc A/57/37 "Report of the Ad Hoc Committee established by General Assembly Resolution 51/210 of 17 December 1996", 11 February 2002, UN General Assembly, Fifty- seventh Session, Suppl. No. 37 (A/57/37).

103. The eleventh session of the Ad Hoc Committee was convened in New York at the United Nations' Headquarters on 5, 6 and 15 February 2007. The Ad Hoc Committee held two plenary meetings: the 38th on 5 February and the 39th on 15 February 2007. The Ad Hoc Committee adopted the report on its eleventh session during the 39th meeting: see UN Doc A/62/37, Report of the Ad Hoc Committee established by General Assembly resolution 51/210 of 17 December 1996, eleventh session (5,6 and 15 February 2007), UNGA Official Records, Sixty- second Session, Suppl. No. 37 (A/62/37).

104. These two versions are located in the Report of the Ad Hoc Committee established by General Assembly resolution 51/210 of 17 December 1996, Sixth Session (28 January- 1 February 2002), General Assembly Official Records, Fifty- seventh session, Supplement No.37 (A/57/37) Annex IV.

105. Article 1(1): "Nothing in this Convention shall affect other rights, obligations and responsibilities of States, peoples and individuals under international law, in particular the purposes and principles of the Charter of the United Nations, and international humanitarian law."

106. Article 1(4): "Nothing in this article condones or makes lawful otherwise unlawful acts, nor precludes prosecution under other laws."

107. Comment of a member of the Ad Hoc Committee, provided to the author on condition of anonymity, in response to a question regarding draft Article 18(2) and the author's suggestion that if the Co- ordinator's text is ultimately adopted, perhaps "armed forces" ought to be defined.

108. On this point, see discussion in H. Duffy, *The 'War on Terror' and the Framework of International Law*, 2005, p. 22.

109. See the Ad Hoc Committee Report, Eleventh Session, UN Doc A/62/37, supra n103, Annex, part B, para 5.

110. The "Military forces of a State" in Article 1(2) "means the armed forces of a State which are organized, trained and equipped under its internal law for the primary purpose of national defence or security, and persons acting in support of those armed forces who are under their formal command, control and responsibility.": A/57/37, Annex I.

111. Recall that the New Zealand legislation states that "terrorist act" does not include an act which occurs in a situation of armed conflict and which, at the time that it occurs, it is in accordance with the rules of international law applicable to that conflict, whereas the Canadian legislation only excludes an act in so far as it is governed by other international law: see discussion supra at fn58 and 69 respectively.

112. The proposed preamble reads: "Noting that the activities of military forces of States are governed by rules of international law outside the framework of this Convention and that the exclusion of certain actions from the coverage of this Convention does not condone or make lawful otherwise unlawful acts, or preclude prosecution under other laws,": UN Doc A/62/37 at 8.

113. UN General Assembly, "Uniting Against Terrorism: Recommendations for a global counter-terrorism strategy", Report of the Secretary- General, A/60/825, 27 April 2006, Sixtieth Session, paragraph 9.

114. *Times Online*, R. Beeston, "Revolutionary guards branded 'terrorists' as US turns screw on Iran", 16 August 2007.

115. 31 August 2007.

Payers" and "Players"

European Institutions, National Governments and Civil Society in the Israeli-Palestinian ongoing confrontation

Marcella Simoni

Introduction

Since the beginning of the Oslo process (1993) civil society associationism in Israel and in the Palestinian Authority (PA) territories has generally been viewed by various actors - European institutions, national and local governments, major and minor international non-governmental organizations (NGO), voluntary national and international bodies -as one of the main factors which could help transform the Israeli-Palestinian conflict, contributing substantially towards its resolution. In this respect, the last fifteen years have seen a great deal of expectation and emphasis placed on this social and political actor and on its presumed potential for conflict transformation. In various ways, civil society has been viewed as an instrument to promote governance and transparence in administration and reform in legislation; it has been conceived as a site where to enhance public participation in political processes and where to elaborate local responses to the emergency situation dictated by the continuation of the occupation and by the deterioration of the conflict itself, even during the years of the Second Intifada (2000-2004). In a potentially endless list of positive and progressive functions, civil society has also been seen as the place where social and economic development could be fostered, for example through contact with local administrations, and as a network to promote sustainability -whether in its narrower environmental definition or in a broader sense; last but certainly not least, civil society has become that collective entity expected to integrate from below the top-down approach towards conflict resolution of governments and diplomacies (1). In this respect, supra-national institutions as well as national and regional governments have generally invoked civil society as that instrument which could engrain and cement the so-called peace process into Israeli and Palestinian societies.

This civil society which has received so much attention and assistance - and on which so much hope has been placed - appears however to have been left altogether undefined and undetermined. On the one hand, policy makers and institutions only partially concerned themselves with the lively debate on the nature, structure and characteristics of civil society which has involved academics and scholars since the so-called "associationism revolution" of the 1980s (2), a revival which has turned civil society into a site for political mobilization as well as into an analytical framework. On the other hand, in the same decade and throughout the 1990s, civil society has appealed to those international financial agencies and developmental institutions such as the World Bank and the International Monetary Fund for its (real or presumed) potential to promote good governance and democratization (3).

While it is well known that no consensus exists over *one* definition of civil society (4), supra-national institutions, national governments and local administrations have increasingly made use of this term and concept in a narrow and restrictive way, without really addressing the question of a definition for such multi-faceted phenomenon and altogether avoiding its nuances and complexity, followed in this process of simplification by press, media and public opinion. Just to give an example taken from the field of EU diplomacy, civil society associationism has been brought into the framework of the 'European Neighbourhood Policy' (ENP) as a factor "bringing people together nationally and over the borders", as an element which encourages the "full participation of citizens" to political processes and as "a fundamental factor in promoting welfare, democracy and human rights" (5).

Although civil society certainly carries the potential for this kind of social and political transformation, it should not be automatically assumed that the whole range of the associations, institutions, organizations, groups that indeed qualify as civil society - for example for their being

organized along horizontal linkages of participation, for the homogeneity of the values they promote or for their capacity to negotiate with the State - belong to the progressive and constructive framework which civil society is believed to be. The Arab-Israeli ongoing conflict presents in fact quite a substantial number of horizontal networks and associations which indeed belong to civil society; however, many of them have contributed to amplify and to enhance the dimension of conflict both Israel and in Palestine, often defending conservative and traditional values and stressing the exclusive factors of the associationism they promoted, whether from a religious, cultural, ethnic or national point of view (6).

One of the reasons for the spreading of the idea of an altogether simplified, positive and constructive civil society is to be found in the progressive gaining importance and political space of non governmental organizations (NGO) -whether local or international -during the 1990s and especially after the end of the Cold War, a phenomenon which has been investigated for various countries and from different perspectives (7). In the case of Israel and of Palestine, the rise of civil society - mainly conceptualized as networks of NGOs -as a main character on the scenario of the conflict - and of its eventual resolution - is not only indirectly connected to the end of the Cold War and to the rise of the neo-liberal paradigm, as in other contexts; in a more direct way, it is strictly linked to the ways in which the Oslo process was originally negotiated and to those in which it was supposed to be implemented. Oslo itself was a product of Track II diplomacy (8); civil society - NGOs and grassroots cooperation projects in particular - received a substantial boost from the international financial disbursement to the West Bank (WB) and the Gaza Strip (GS) which followed the signature of the Declaration of Principles (DOP), and which turned Palestine into "one of the most substantial examples of 'peacebuilding through aid' of the post-cold war era" (9).

During the last fifteen years, financial aid to WB and GS has clearly taken various routes, both considering the numbers and the types of donors involved (institutional, private, Diaspora based, non-governmental), their agendas and those at the receiving end. Immediately after the signing of the DOP, the international community (twenty-nine national states, the EU and the US) pledged $ 2.1 billion for the period 1994-98 ($ 570 million for the first year). In July 1995, the total amount pledged had reached $ 2.5 billion. Between 1994 and 2004 $ 8 billion (averaging $ 250-400 per capita or 10-30 % of the GDP) were provided to the oPt as foreign aid, "making Palestinians the largest per capita recipients of international assistance in the world" (10).

Civil society was by no means intended to be the only or even the main recipient of this flow of support, which targeted infrastructure, administration and institution building. However, such a disbursement clearly exerted an influence on civil society too. The first part of this essay will thus consider some of the transformations of Palestinian civil society and politics as a result of the pouring of resources after Oslo; I will then move on to analyse the results achieved by cooperation programs geared at promoting peace-building through education, reconciliation and mutual recognition, focusing in particular on the 'People-to-People' (P2P) experience. Finally, I will conclude discussing where one can draw the line between civil society cooperation and normalization in the face of the continuation of the Israeli occupation and which kind of civil society cooperation could instead function as an alternative.

1. International aid and Palestinian civil society between emergency relief and development

Most of the literature on international financial aid to the PA after Oslo has variously addressed its quite complex structure, functioning and bureaucracy, the ways it changed in provenance, quantity and destination after 1993 and some of its purposes -whether it responded to emergency relief and/or to development; a part of this literature has analysed the differences in intervention between European, US and Arab states, shedding some light, among other things, on which part of foreign financial aid was pledged (and given) as loans. Other authors have focused on the ways donors' agendas have influenced Palestinian society and politics, and on the development and/or consolidation of a neo-patrimonial political system in the WB and GS as a result of the pouring of

funds, especially in conditions of protracted conflict or of political instability (11). Most of them agree that, although aid has played a crucial role in the past fifteen years in trying to keep the peace process going, the way funds have been channelled and/or used may actually explain how activities and structural improvements intended for peace-building contributed to the management- and at times even the fuelling -of the conflict instead.

At least three questions - which speak of a process of negative transformation -seem relevant to a discussion on the role of international donors in Palestinian society, economy and politics since 1993: in the first place what Karma Nabulsi has called the process of Palestinian de-democratization; secondly, what is usually referred to as the economic de-development of Palestine; thirdly, the widening of the economic, social and political gap between the WB and GS which resulted in the long run in the outbreak of civil strife. Clearly, the volume of funding and the ways in which it has been disbursed during the past fifteen years should not be seen as the only explanation for this process of negative transformation which I will briefly describe below. The continuation - and the tightening - of the occupation following the outbreak of the Second Intifada, the expansion of settlements, the construction of the separation barrier (started in 2003), the checkpoints system, the so-called matrix of control of roads and, finally, the withholding of Palestinian custom revenues by Israel following the electoral victory of Hamas in January 2006, are all factors which should also be framed into the picture. Moreover, the ways in which, traditionally, successive Israeli governments have contributed to further divide a Palestinian leadership already quite fragmented between insiders and returnees and along the lines of political affiliation, have in the long term certainly also played into the latest political developments (12).

a) De-democratization. At the heart of the institutional, political and economic changes which transformed Palestinian life after the signing of the DOP stands the unbalanced relationship between two weak and newly established institutions -the PA and the Palestine Legislative Council (PLC) - and an increasingly stronger civil society, buttressed by international financial aid. Both the PA and the PLC - which also tended to overlap in some of their institutional functions - were conceived as temporary structures, whose task was the negotiation of the Agreement's final status (13). In contrast to their implicit weakness, the already existing and altogether vibrant civil society (which historically had played both a representative role and that of service provider in the oPt) grew apparently stronger. As mentioned above, it received international aid for its presumed and expected role of facilitating inter-community negotiations, engaging in dialogue with the Israeli counterparts, increasing public participation (including women) to the peace process, bringing governance and favouring transparency.

Despite the good intentions behind most of the projects supporting these aims, many obtained opposite results instead. Funded from abroad, the post-Oslo cooperation schemes gradually took the place of the projects which had been carried on by a civil society composed of local associational networks, committees, community associations and the like. While these had in the past responded to the contingent needs of a population under occupation, both from the point of view of emergency and in part also from a perspective of development, foreign funded civil society projects embraced both perspectives at once, however declining them according to the donors' agenda. In this respect, they contributed to detach civil society from the situation on the ground and from the population's needs (14). The main emphasis of the first Emergency Assistance Plan (EAP, $ 570 m for 1994) was on small projects with an immediate impact -for example getting electricity or water to villages, expanding schools, completing sewage projects and so on -relying on the existing networks of local NGOs and on developing institutions already working on the field (for example UN agencies, such as UNRWA) (15). However, the developmental approach which followed in later years and which informed many of the projects sustained by foreign funding contributed in the long run to the rise of a political leadership recognised as such by its ability to handle and distribute international funds, a process which also nurtured clientelistic practices and nepotism. The auditing required by donors moreover made these NGOs no longer accountable to Palestinian society, cutting them off from those structures and organizations which had sheltered and represented its plurality until then. The language and the actions of these NGOs, replete with terms and expressions like peace making,

dialogue construction, mutual recognition, human and environmental sustainability and so on, further alienated them from the social and political reality, marked by the continuation of the Israeli occupation (16). Finally, the procedures and rules which regulated the mechanism of granting aid transformed these NGOs into a managerial and market-oriented networks and coalitions competing one against the other for resources. A research -whose results are to be shortly published -conducted on thirty-seven donor organizations among the most active in the fields of advocacy and health support between 2003 and 2005 seems to confirm these trends: to a significant increase in the size and volume of funding given by these donors (average $ 3.7m a year) corresponded on the one hand a specialization and/or professionalization of the types of NGOs involved, together with the spreading of a market-oriented mentality of aid management and the survival of larger NGOs (17).

b) De-development - WB and GS. From the point of view of the economic development, the period 2000-2004 clearly constituted a moment of rupture in the oPt, with an impressively quick decline in standards of living, rates and conditions of employment, number and quality of service provision, industrial and agricultural production and so on. While such an economic and material deterioration can be in part ascribed to the tightening of the Israeli occupation, the re-occupation of entire areas of the oPt by the Israeli army in 2002 (operation 'Defensive Shield'), the construction of the separation barrier, the restrictions of the freedom of movement etc., the semi-complete stall of the Palestinian economy can also be seen in a longer perspective, in the framework of a more general impoverishment of the oPt since the beginning of the Oslo process. As outlined in the previous section, the Oslo years (1993-2000) had contributed to crystallize a model of economic development and of infrastructures building in which NGOs were pivotal and which largely relied on outside sources; in those years the capacity of industry and agriculture to contribute to the Palestinian GDP decreased from 40% in 1994 to 26% in 2000, while employment in the private sector also decreased from 70,6 % to 61,1. During the Second Intifada (2000-2004) foreign donors mainly invested on emergency projects rather than in long-term development ones, as the circumstances required, leaving Palestinian economy and society with limited perspectives for the post-Intifada period. Between 2000 and 2002 the GDP per capita declined by 36 % (18); in July 2005 the overall poverty rate had reached 68 % and the depth of the poverty was severe, with 35 % of the population in a situation of extreme poverty; in the same period, only 40 % of the labour force was employed full-time, one-third was unemployed and one quarter underemployed (19). Food remained the major need of Palestinian households, followed by health care, education and employment. Following the electoral victory of Hamas in January 2006, the international community froze financial aid, while Israel withheld return revenues, leading to a further worsening of the situation.

The socio-economic crisis, the continued delivery of public services and the support by international donors took therefore a different path, which saw a much greater involvement of the EU with the establishment of the 'Temporary International Mechanism' (TIM). Started in June 2006, it operated on a first budget of € 300 m (€ 90 m from the European Commission) (20). Devised as an instrument to bypass the international commitment not to aid the PA while being represented by Hamas, TIM aimed at reaching the population directly, paying its salaries for those employed in the public service, providing for households bills, giving monthly allowances for the unemployed etc. In this respect, TIM has been variously judged: on the one hand, it has received wide international praise for realizing on the ground what the international community was no longer able to do; at the same time, it has been accused to be financing a *coup d'etat* - paying the wages of a population in strike against an administration unable to do so (21). On the other hand, it has also been accused of perpetuating and spreading that sense of dependency upon foreign contributions - and a charity mentality -which appears antithetic to any state-building endeavour (22).

As in other cases analysed above, once again striking the right balance between emergency and development in conditions of protracted political (and military) instability did not prove easy for the international community. After its start as an emergency program, TIM has recently moved towards a more developmental approach, of which civil society - conceived once again generally as a sum of national and international NGOs - is a crucial component. Since 2004 civil society was moreover further enhanced through a new European program - 'Partnership for Peace' (P4P, 2000) - which

provided over € 100 m to finance more then 200 projects aiming at building the capacity of NGOs in transforming the conflict, so as to create a suitable context for peace negotiations (23). This factor was considered crucial for re-creating "the conditions for re-launching the peace process", to include a perspective of long-term sustainability and, most of all, to found cooperation on basis of "equality and reciprocity between Arab and Israeli societies" (24).

In this respect, P4P came last in a long series of other programmes also founded on civil society cooperation which had started in the immediate aftermath of Oslo and which aimed at educating towards peace, at promoting reconciliation, at favouring the deconstruction of enemy historical narratives and at building peace, which also benefited from international aid and which, in various ways, survived until today. It is to them that I now turn.

2. The creation of a trans-national civil society. The P2P experience and beyond

It will be seen that they go mad in herds
While they only recover their senses
Slowly, and one by one (25)

P2P programs and activities -institutionalized in Annex 6 of the 1995 Interim Agreement (Oslo II) - represented one of the direct and most immediate results of Oslo (26). Over the years, P2P has become a term and a concept inclusive of most kind of activities seeing the participation of Israelis, Palestinians and (often) foreigners, with the aim of helping the peace process move forward. P2P were not intended to materially improve living conditions, foster the economy or contribute to the construction of infrastructures; they were rather conceived to address the cultural question behind the peace process, to contribute to the deconstruction of the 'Other' as the enemy through prolonged contact between groups, and (generally) through educational programs geared at young generations. P2P also targeted professionals - especially in the fields of education and health - with two purposes: first, to formalize a cooperation which had been going on in the field for decades, for example in health provision; second, to strengthen civil society ties among middle classes (27). Their purpose was also to tackle a number of socio-cultural issues - among them the role of women in society - which were seen as potential sites for bringing along mentality changes and for reshaping of mutual perceptions.

While P2P may thus be seen as standing outside that cooperative framework analysed above which oscillated between emergency and development, and which looked at civil society as a space for conflict transformation, they are part and parcel of the very same context. Despite their not being linked to any kind of developmental function from an economic point of view, nevertheless P2P were also well positioned to appeal to foreign donors. At the core of P2P stands in fact once again civil society, indeed because of its presumed transformative powers (28).

Given the number and the variety of projects run under the banner of the P2P over the last fifteen years, a consistent classification of this phenomenon appears an improbable exercise. According to a study of the 'Israel-Palestine Center for Research and Information' (IPCRI, 1988) - one of the leading NGOs in education and environment - P2P programmes can be divided as follows: track II activities, professional meetings, professional training, formal education activities, cultural activities, capacity building/institution building/service provision, environmental cooperation, women's issues/shared identity issues, grass-roots dialogue groups, political struggle-solidarity-advocacy groups (29).

In the enthusiasm which followed the signature of the DOP - and for a few years after - thousands of organizations, associations, educational institutions, numerous national and regional governments, not to mention individuals, either leaders or recipients, took part to this scheme. Originally entrusted to the Government of Norway through the FAFO Institute of Applied Sciences, the P2P model proliferated to include any other institution which would apply a rather simple but rigid and artificial scheme: Israelis, Palestinians and internationals meeting for a limited period of time (often) on a

neutral territory for seminars, discussions, youth camps, workshops etc. with an altogether limited follow-up. In 1998 the EU formalized a budget line for the P2P as part of the Euro-Mediterranean Partnership (the 'People-to-People Program' in fact) while two years later US Department of State also established a 'Wye River People-to-People Exchange Program'. All aimed at increasing mutual understanding between Israelis and Palestinians, promoting "cooperation to achieve common goals and strengthen the prospects for peace" (30).

The P2P experience is generally considered today to have failed - especially in view of the collapse of the peace process which it was not able to halt. One reason for such failure has been identified in the low sum which was disbursed for these kind of projects - estimated between $ m 25 and $ m 30 for the decade 1993-2003 (31), a relatively limited amount if compared to other peace building programs which have seen the participation of the EU (as in the case of Northern Ireland, where the EU allocated £ m 250) (32). However, it may also be suggested that P2P failed in realizing most of their stated goals also because the civil society that was mobilized for their implementation carried a governmental birthmark, as Benoit Challand has convincingly argued. The original P2P scheme was entrusted to the Norwegian government, almost as an act of gratitude for having handled the Accords, at least according to Gershon Baskin, co-director of IPCRI, who also took part to some phases of those negotiations (33). Leaders of the P2P were chosen in agreement with the negotiating sides. The major NGOs which immensely benefitted from this scheme, either in funding, in popularity or in international visibility and/or credibility - for example the Peres Centre for Israel or the Palestinian Centre for Peace for Palestine - were also quite strictly connected to governmental institutions. Since its establishment, the Peres Centre had tried to cultivate in practice that idea of *The New Middle East* to be re-founded on a new economic order, a topic which had been largely elaborated by the Center's own founder (34); the Palestinian Centre for Peace was established and run for several years by Mahmud Abbas, alias Abu Mazen. A major NGO like IPCRI, which has been very active in P2P activities since their inception, certainly does not belong to the fringe; on the contrary it has aimed since its foundation at reaching the establishment (35).

While these (and other) affiliations clearly speak of a civil society which is either tied by governmental agendas, or non autonomous from donors' sources, P2P have also provoked open hostility, for example among those sectors of civil society who opposed the Oslo process and which therefore viewed them as an instrument to normalize and/or manage a situation of disparity between Israelis and Palestinians, between occupiers and occupied. The more outspoken among these opponents have been not by chance some of those joint Israeli-Palestinian (from WBGS) NGOs - of which there exist today fourteen in all -which have placed themselves outside this mainstream civil society, which have benefited from international aid in a much less substantial way and which, as a result, have also maintained a greater autonomy. This is the case of the 'Alternative Information Centre' (AIC, 1984), of 'Physicians for Human Rights' (PHR, 1987), or for some examples of joint NGOs established more recently, of the 'Faculty for Israeli-Palestinian Peace' (2001), of 'All for Peace Radio' (2004), 'of Combatants for Peace' (2005)' and of others (36). The price for this autonomy has clearly been a lower profile, often financial difficulties and, at times, extinction, as in the cases of 'Shahrara' and "Year 21" (37). While the impact of these joint NGOs may seem altogether negligible - in consideration of their size, limited budgets, operational difficulties, of their own placing themselves outside (if not openly against) the cultural and political framework which informs the cooperation activities of most of the others -these are the organizations which have approached the question of peace-building and conflict transformation with a political perspective, rather than through economic means. For this reason, they have also placed at the very foundations of their work of cooperation a process of deep recognition of the Other and of his/her historical and national claims, a combination of factors which may stand a chance of effectively working towards conflict transformation and of resisting. It is not a coincidence that, when virtually all P2P and other cooperation activities (especially those involving foreign NGOs or international associations) stopped during the years of the Second Intifada, joint cooperation continued, albeit in an increasingly difficult way, trying to pave the way for better times.

Conclusions

The involvement of the international community in the Israeli-Palestinian protracted conflict -often described as that of a 'payer' rather than that of a 'player' -raises a number of questions: how effective has this chequebook diplomacy been in defusing the Palestinian situation as the epicentre of the Middle East conflict? Where can one draw the line between contributing to stabilize political instability and fuelling it?

These (and other questions) have been addressed - and partially answered -in the framework the international 'Do no harm' project (DNH), a collaborative effort of UN agencies, donor governments and international and local NGOs which began in the early1990s, a work which has now mapped and included over forty conflict areas (38). The DNH findings do not seem to offer ready solutions for a rather complex situation as the Israeli-Palestinian one, in which international aid seems to have been dispensed in the absence of a political solution. Also for this reason, international aid and the way it has been disbursed since 1993 stands today at the centre of a threefold contradiction: first, on the one hand international aid has failed in the promotion of sustainable economic development and in the construction of infrastructures; on the other hand, it has helped to literally maintain alive a population whose standards of life were gradually falling under the poverty line. Second, the way international aid has been dispensed -and the a-critical reliance on civil society that has sustained its disbursement -has contributed to the spreading of clientelism and, ultimately, has led to internal civil strife within the Palestinian group. Third, if international aid has partially rebuilt what the Israeli occupation was destroying, both in terms of material goods and of service provision, it has also run the risk of normalizing or "routinizing" the occupation (39); on the other hand, these factors inevitably also favoured the spreading of a mentality of dependence among the Palestinian population.

While this intertwining may appear particularly complex for the Israeli-Palestinian case, the general findings of the DNH project stand out for the clarity of their apparently banal suggestions: a) that aid in conflict setting is never neutral; b) that resources provided by donors - and the way these are delivered - play into the relationship of contending groups in recipient societies; c) that donors' assistance should emphasize factors which connect over those which divide both within each group and between contending groups. This has clearly not been the approach of the international community in assisting the PA and the Palestinian population.

Two broad case studies - the role of the US (and of USAID in particular) and that of civil society cooperation of European national states in the PA - would have contributed to substantiate this claim in a more complete way. However, these cases would have also opened a new set of arguments on the ways in which civil society cooperation has been used in this specific context as a proxy for altogether uncertain or shifting long-term foreign policies. Italy - and its twenty-seven NGOs operating on the field (the highest number of all European countries present in the PA) (40) - may be a case in point.

The impotence of the international community in defusing the factors which maintain alive the Israeli-Palestinian confrontation found a counterbalancing mechanism in the moral support, the financial encouragement -and altogether the enthusiasm -which it extended to those few mixed Israeli-Palestinian NGOs which I mentioned above, a peculiar phenomenon in view of the scarce following these NGO have received in their respective societies, whether in their early days (the 1960s) or since their relative expansion in numbers and participation (since the mid-1990s). Such encouragement from a distance might seem to place the international community on the bench of the payers only; while for the sake of international political visibility this might prove disastrous, for he sake of the transformation - and eventually the resolution of the conflict -leaving the game to those players which operate from within in order to deconstruct some of the mechanisms which maintain the conflict going might prove a more valuable investment in the long-term.

Notes

1. M. E. Bouillon, *The Peace Business. Money and Power in the Palestine-Israel Conflict*, I. B. Tauris, London, 2004.

2. H. K. Anheier and L. M. Salamon, *The Civil Society Sector*, "Society", 34 (1997), n. 2, pp. 60-65.

3. B. Fine, C. Lapavitsas and J. Pincus (eds.), *Development Policy in the Twenty-first Century*, Routledge, London & New York, 2001.

4. The rediscovery of civil society in the late 1980s has led to what has been termed "an exercise in the archaeology of civil society", i.e., reconstructing the genesis and genealogy of the term and of the concept from Aristotle to Habermas, lingering along the writings of Hobbes, Locke, Rousseau, Kant, Hegel, Marx, de Tocqueville and Gramsci. This growing body of literature often includes also a discussion on the place of civil society in its relation to the State on the one hand, and to the Family on the other. See C. K. Rowley, 'On the nature of civil society', in Id. (ed.), *Classical Liberalism and Civil Society*, Edward Elgar, Cheltenham UK & Northampton MA, 1997, pp. 1-24. See also E. Gellner, *Conditions of Liberty. Civil Society and Its Rivals*, Hamish Hamilton, London, 1994; J. Habermas, *Between Facts and Norms: Contributions to a discourse theory of law and democracy*, MIT Press, Cambridge MA, 1996; H. Anheier, M. Glasius, M. Kaldor, "Introducing global civil society", in Id. (eds.), *Global Civil Society 2001*, Oxford University Press, Oxford 2001, p. 15. For a good discussion of the implications of the use of civil society in non-Western contexts, see B. Challand, *The evolution of Western aid for Palestinian civil society. The bypassing of local knowledge and resources*, "Middle Eastern Studies", in press.

5. Message of Erkki Tuomioja, Minister for Foreign Affairs of Finland of the EU Presidency, delivered by Ambassador Risto Veltheim at the Euromed Civil Forum held in Marrakech, Morocco, on 4-7 November, 2006.

6. There could be various examples to substantiate this claim, taken both from the Palestinian and from the Israeli camp: for just one example taken from Israel, see the violent debate on Palestinian textbooks raised in 2000 by the Centre for Monitoring the Impact of Peace (CMIP). See also, M. Simoni, *Intrecci traumatici. Storia, memoria e identità nazionale nelle scuole israeliane e palestinesi*, "Passato e Presente", 25 (2007), n. 71, pp. 45-68, esp. 64-65.

7. T. G. Weiss (ed.), *Beyond UN Subcontracting: Task Sharing with Regional Security Arrangements and Service Providing NGOs*, MacMillan, Basingstoke, 1998; J. Benthall, *Internaltional NGOs and complex political emergencies*, "Anthropology Today", 11 (1995) n. 2, pp. 18-19; W. F. Fischer, *Doing Good? The Politics and antipolitics of NGO Practices*, "Annual Review of Anthropology", 26 (1997), pp. 439-464; M. Naìm, *Missing links: Al Qaeda, the NGO*, "Foreign Policy", n. 129 (2002), pp. 99-100. For Asia see N. Heyzer, J. V. Riker and A. B. Quizon (eds.), *Government-NGO Relations in Asia: Prospects and Challenges for People-Centered Development*, St. Martin's Press, New York,1995; for Africa, see J. Prendergast, *Frontline Diplomacy: Humanitarian Aid and Conflict in Africa*, Lynne Rienner Publishers, Boulder Colorado, 1996; for South America in a gender perspective, see C. Ewig, *The strength and limits of the NGO Women's Movement: Shaping Nicaragua's democratic institutions*, "Latin America Research Review", 34 (1999), n. 3, pp. 75-102.

8. G. R. Watson, *The Oslo Accords: International Law and the Israeli-Palestinian Peace Agreements*, Oxford University Press, Oxford, 2000; D. D. Kaye, *Beyond the Handshake: Multilateral Cooperation in the Arab-Israeli Peace Process 1991-1996*, Columbia University Press, New York, 2001.

9. R. Brynen, *Buying Peace? A critical assessment of international aid to the West Bank and Gaza*, "Journal of Palestine Studies", 26 (1996), n. 3, pp. 79-92, p. 79.

10. S. Lasensky and R. Grace, *Dollars and Diplomacy: Foreign Aid and the Palestinian Question*, United States Institute for Peace, 2006. The database of the Palestinian Ministry of Planning (MoP)

estimates a disburment of about $ 6 billion. See also L. R. Iskandar, *Politicization of Aid, Development and Aid Effectiveness Best Practices: the Case of the Occupied Palestinian Territories (OPT) (2003-2006)*, MA Thesis, Bethlehem University, 2007.

11. See respectively R. Brynen, *International aid to the West Bank and Gaza: A primer*, "Journal of Palestine Studies", 25 (1996) n. 2, pp. 46-53, esp. p. 50; Id., *Buying Peace? ...* and B. Challand, *The evolution ...*; K. Nakhleh, *Developing Palestine. Political Aid in a Non-Sovereign Context*, Mimeo, [Jerusalem/Ramallah], 2002; R. Brynen, *The neopatrimonial dimension of Palestinian politics*", "Journal of Palestine Studies", 25 (1995), n. 1, pp. 23-36; M. Keating, A. Le More and R. Lowe (eds.), *Aid, Diplomacy and Facts on the Ground. The Case of Palestine*, Chatham House, Royal Institute of International Affairs, London, 2005. The present list is just a small selection of the available literature on the subject.

12. B. Challand, "Il 1967 e la trasformazione del baricentro palestinese: confini sociali e potere politico nei territori occupati" in A. Marzano e M. Simoni (eds.), *40 anni dopo. Confini, barriere e limiti in Israele e Palestina 1967-2007*, Il Ponte, Bologna, in stampa.

13. On the PLC, see Z. Abu Amr, "The Palestine Legislative Council" and H. A. Qader, "The Palestinian Legislative Council and Civil Society" in M. Abdul Hadi (ed.), *Dialogue on Palestinian State-Building and Identity*, Passia, Jerusalem, 1999, pp. 25-29 and pp. 86-94.

14. See K. Nabulsi, "The State-building project: What went wrong?" in M. Keating, A. Le More and R. Lowe (eds.), *Aid, Diplomacy and Facts on the Ground ...*, pp. 117-128, esp. pp. 122-125.

15. A. Bouhabib, *The World Bank and international aid to Palestine. An interview with Abdallah Bouhabib*, "Journal of Palestine Studies", 23 (1994) n. 2, pp. 64-74.

16. S. Hanafi e L. Tabar, "Donor assistance, rent-seeking and elite formation", in M. H. Khan, G. Giacaman and I. Amundsen (eds.), *State Formation in Palestine*, Routledge, London, 2004, pp. 215-38.

17. B. Challand, *The evolution ...*

18. These data are taken from L. R. Iskandar, *Politicization of Aid ...*, pp. 11-12.

19. R. Bocco, M. Brunner et al., *Palestinian Public Perceptions. Report IX*, April 2006, pp. 9-10. A detailed analysis of poverty divided by region of residence, gender, level of instruction, status (refugee/non refugee), household composition and consumption patterns can be found in ibid., pp. 63-72.

20. A. M. Fontana (European Commission - Near East Unit in DG External Relations) in M. Simoni (ed.), *Europe's Role ...*; see also Temporary International Mechanism - TIM, Key Facts. Since June 2006, €365.5 million has been provided by the European Commission to the Palestinians through the TIM, together with €144.17 million provided by EU Member States and other donors.

21. Interview of the Author with Dr. Najd Nasser, Beit Sahur, 7 January 2007.

22. K. Nakhleh, *The Myth of Palestinian Development: Political Aid and Sustainable Deceit*, PASSIA, Jerusalem, 2004.

23. A. M. Fontana in M. Simoni (ed.), *Europe's Role in the Resolution of the Palestinian-Israeli Conflict*, Tuscan Region, International Activity Department in collaboration with the Tuscan NGOs, Firenze, 2007.

24. The European Commission, *The European Union's Programme EU Partnership for Peace. Guidelines*, November 2005, p. 2.

25. Charles Mackay, 1852, quoted in S. Herzog and A. Hai, *The Power of Possibility: The Role of People-to-People Programs in the Current Israeli-Palestinian Reality*, Friedrich-Ebert-Stiftung, Israel Office, 2005, p. 7.

26. The P2P was first referred to in Annex III of the DOP (Protocol on Israeli-Palestinian Co-operation in Economic and Development Programmes) and later formalized in the Israeli-Palestinian Interim Agreement of 28 September 1995, known as Oslo II, Annex VI, esp. point n. 3: "The two sides shall take steps to foster public debate ad involvement, to remove barriers to interaction and to increase the people-to-people exchange and interaction with all areas of cooperation described in this Annex and in accordance with the overall objectives and principles set out in this Annex".

27. T. Barnea and Z. Abdeen, "Cooperate and Cooperate: The Role of Health Professional in Promoting Israeli-Palestinian Coexistance" in T. Barnea e R. Husseini (eds.), *Separate and Cooperate, Cooperate and Separate. The Disengagement of the Palestine Health Care System from Israel and its Emergence as an Independent System*, Praeger, Westport, 2002, pp. 299-314.

28. B. Challand, *Donors and Civil Society in Palestine. Autonomy and Recognition at Risk*, Paper circulated for the workshop "Historical Trauma in Israel/Palestine between Family, Civil Society and State", RSCAS, EUI, Florence 28-29 September 2007.

29. IPCRI, *YES PM. Years of Experience in Strategies for Peace Making. Looking at Israeli-Palestinian People-to-People Activities 1993-2002*, December 2002, pp. 15-17.

30. S. Adwan and D. Bar On (eds.), *Building Peace under Fire. Palestinian/Israeli Wye River Projects*, Peace Research Institute in Middle East (PRIME), The American Embassy, Tel Aviv, Teh Consulate General of United States, Jerusalem, April 2004.

31. S. Herzog and A. Hai, *The Power of Possibility* ..., p. 31.

32. Mari Fitzduff, "Changing History - Peace Building in Northern Ireland", in *People Building Peace - 35 Inspiring Stories from Around the World*, 1999.

33. Interview of the A. with Gershon Baskin (IPCRI), Tantur, 8 January, 2007.

34. S. Peres and A. Naor, *The New Middle East*, H. Holt, New York 1993.

35. M. Simoni, "Sul confine. L'attivismo congiunto israelo-palestinese" in A. Marzano e M. Simoni (eds.), *40 anni dopo* ...; Interview of the A. with Gershon Baskin, Tantur, 8 January 2007; see also IPCRI, *YES PM* ...

36. Alternative Information Center; Physicians for Human Rights; Faculty For Israeli-Palestinian Peace; Radio All For Peace; Combatants for Peace; on joint NGOs in the Israeli-Palestinian conflict from a historical perspective see M. Simoni, "Sul confine ..."

37. For an example of the independent fund-raising campaigns of PHR-Israel see Archives of the 'Association of Israel Palestine Physicians for Human Rights, Tel Aviv (AIPPHR), b. 1, letters of the Associazione Medica Italo-Palestinese (2 June 1989), letter from Gail Pressburg (Peace Now Washingon DC) (28 June 1989), the letters to Noam Chomsky (8 July 1990) and the attempts to obtain funding from the New Israel Fund (26 October 1990). On exinct joint NGOs, interview of the A. with Sergio Yahni, Jerusalem, 26 Dcember 2006.

38. M. B. Anderson, "'Do no harm': the impact of international assistance to the occupied Palestinian territories" in M. Keating, A. Le More and R. Lowe (eds.), *Aid, Diplomacy and Facts on the Ground* ..., pp. 143-153.

39. Ibid., p. 145.

40. Interview of the A. with Maurizio Barbieri (Italian Consulate), Jerusalem, 8 January 2007. See also the material and data circulated at the workshop European Development Cooperation, *European NGOs in Palestine. Sharing Strategies, Improving Practices*, Jericho, 22-23 November 2006.