

Revisiting Schwarzenberger today: The problem of an international criminal law

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ABSTRACT

This article canvasses some of the main points raised by Schwarzenberger in a famous article written in the 1950s. The central objection he had to the idea of an international criminal law arose from the structure of the system of international law itself, which has no central authority to enforce its proscriptions. This article explores the concept of individual and state criminal responsibility and considers the characteristics which all international crimes cumulatively embrace. It considers recent evidence of international criminal law offered by the establishment of the *ad hoc* Tribunals and the International Criminal Court. It attempts to chart the progress made by the international community in this field since the 1950s but concludes, as did Schwarzenberger, that international criminal law is not universally applicable.

Introduction

In a world of uncertainty, we can be certain that the article, 'The problem of an international criminal law' by Georg Schwarzenberger,¹ will be prescribed reading for the introductory lecture on what is international criminal law in any course on that subject. A further certainty is that the world in 2003 is a very different place to that of 1950 when his article was first published, particularly because it is no longer divided into two diametrically opposed camps as it was during the Cold War.

Schwarzenberger's article is a useful teaching tool because he challenged the meaning and value of 'international criminal law'. He began by dismissing the claim that 'international criminal law' had been established 'unequivocally as a technical term'.² In support of this dismissal, Schwarzenberger analysed several different meanings attributed to the term 'by those who consider international criminal law to form part of the existing law of nations'.³

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¹ G Schwarzenberger 'The problem of an international criminal law' (1950) 3 *Current Legal Problems* 263-96.

² *Op cit* (n1) 264.

³ *Ibid*.

First, there was 'international criminal law' as the ability of states to extend the territorial scope of their municipal criminal law beyond their boundaries. Secondly, 'international criminal law' had been equated with internationally prescribed municipal criminal law that in some instances, but not all,⁴ led when violated to internationally authorised domestic prosecutions. Finally, he noted that 'international criminal law' had been understood as international co-operation in the administration of municipal criminal justice. We are struck by the repetition of the proponents of an 'international criminal law' in locating the meaning of international criminal law within 'municipal criminal law'. Surely we would expect international criminal law to imply an international criminal justice system? Schwarzenberger, therefore, concluded that these meanings were 'merely a loose and misleading label for topics that comprise anything but international criminal law'.⁵

Schwarzenberger had two main objections to 'international criminal law'. First, for 'international criminal law' to exist in a true or material sense, it should consist of 'rules germane to international law with two essential characteristics ... a prohibitive character and ... endowed with penal sanctions'.⁶ As with criminal law in municipal jurisdictions, he expected that the conduct prohibited and sanctioned by international criminal law would 'strike at the very roots of international society'⁷ and be strengthened by the threat of having penal sanctions imposed by a superior authority when the law was infringed.

Secondly, Schwarzenberger's main objection was the absence of a strong central power in international society. In the 1950s, 'any attempt to enforce an international criminal code against either the Soviet Union or the United States ... would be war under another name'.⁸ For him, both the 'swords of war and of justice [were] ... annexed to the Sovereign Power'⁹ and it was only '[i]f, and when, the swords of war [were] taken from their present guardians ... [that] the international community [would] be strong enough to wield the sword of universal criminal justice'.¹⁰

⁴ Schwarzenberger only discusses piracy *jure gentium* and war crimes, which until the 1940s were the only crimes punishable under international law. See op cit (n1) 268-9 and A Cassese *International Criminal Law* (2003) 16.

⁵ Schwarzenberger op cit (n1) 268-9.

⁶ Op cit (n1) 274.

⁷ Op cit (n1) 273.

⁸ Ibid.

⁹ Op cit (n1) 294.

¹⁰ Op cit (n1) 296.

The question this article addresses is one that is often put to students after reading Schwarzenberger's famous article. In light of the tremendous developments made towards international criminal justice since the end of the Cold War, the question is: Has international criminal law become a more defensible concept? Does one conclude, as Schwarzenberger did, that 'in the present state of world society, international criminal law in any true sense d[oes] not exist'?¹¹ The article seeks to answer these questions against an analysis of the attempts by the international community 'to wield the sword of universal criminal justice'.¹²

Criminal Law in an International Society

A first reading of Schwarzenberger reminds one of the age-old debate as to whether or not international law even exists because the model of a vertically-structured state does not fit that of a horizontally-structured international society. Unlike a municipal legal system with a central legislature, executive and court system, international society still remains largely without these institutions.¹³

Positivist legal theory premises the source of the existence of law on the command of a sovereign with the authority to enforce its command by the threat of sanction.¹⁴ Echoing the language of positivism, Schwarzenberger argued against the material existence of international criminal law because of

¹¹ Op cit (n1) 295.

¹² Ibid.

¹³ See J Dugard *International Law: A South African Perspective* 2ed (2000) 2ff. The General Assembly of the United Nations, arguably equivalent to a central legislature, only has the power to pass recommendations that cannot, in and of themselves, establish legally binding obligations on member states. The Security Council can establish binding obligations in terms of the powers conferred to it under Chapter VII of the Charter but only in situations determined to be a threat to the maintenance of peace and security, which requires agreement by all five permanent members. Legal obligations, if one considers the sources of international law, are therefore only binding if states so agree to bind themselves or believe themselves to be bound through their consistent practice.

The Security Council, arguably equivalent to a central executive, lacks a permanent police force and the power to direct states to comply with the law. During the Cold War, the veto power wielded by the five permanent members paralysed the effective working of the Council until 1991 when collective action was authorized to force Iraq out of Kuwait. However, '[t]he threat of the veto has prevented further collective action of this kind'.

The International Court of Justice in The Hague does not have compulsory jurisdiction over all states as a domestic court would have over all individuals on the state territory. It can only exercise jurisdiction over states that have consented thereto and has, to date, not imposed any criminal sanctions. The court can only order a state to make restitution, pay reparations or compensation, and even then the decision is only binding between the parties.

¹⁴ Dugard op cit (n13) 8.

the lack of an international authority that is superior to all states that can enforce its prohibitions universally.¹⁵

Yet, in principle, he stated that 'there is no preconceived reason why international law should, or should not recognize the existence of international crimes'.¹⁶ States, he argued, have the ability and freedom to bind themselves in whatever manner, either through acceding to treaties in the multilateral treaty-making process or through recognising legal obligations binding on themselves through their practice as international custom. To Schwarzenberger it did not matter whether potential violators of the rules of international criminal law were states or individuals as subjects or objects respectively of international law. What was important to him was one 'very simple criterion: the evidence produced by those who assert the existence of an international criminal law'.¹⁷

Today, when looking for such evidence one thinks of the International Criminal Tribunal for the former Yugoslavia (ICTY), the International Criminal Tribunal for Rwanda (ICTR) and the International Criminal Court (ICC). A number of issues that relate to the essence of international law and criminal law arise for consideration. First, are individuals properly the subjects of criminal responsibility for international rules? Secondly, what are these international crimes that consist of 'rules germane to international law with . . . a prohibitive character . . . with penal sanction'?¹⁸ Thirdly, can international criminal law impose criminal responsibility directly on individuals given that there is no strong central power in the international community.

Individual Criminal Responsibility

At a domestic level, the individual has legal personality and is the legal subject of the municipal state. At the international level, states are the subjects of international law for they alone¹⁹ are capable of possessing international rights and duties and have the capacity to maintain their rights by bringing international claims. However, for criminal responsibility all criminal justice systems of the world, as a general principle of law, recognise that only those who deserve punishment should suffer it. The criminal justice

¹⁵ Schwarzenberger op cit (n1) 295.

¹⁶ Op cit (n1) 275.

¹⁷ Op cit (n1) 276.

¹⁸ Op cit (n1) 264.

¹⁹ Certain international organisations like the United Nations are also recognised as having legal personality. See Dugard op cit (n13) 1.

system is therefore shaped by its role of showing beyond doubt that the accused is the individual responsible.²⁰

Although various authors argue that the individual is a subject of international law,²¹ the better view is that '[i]ndividuals benefit from the protection of international law, [through the tremendous growth of human right protections since World War II] but they cannot be described as proper subjects of international law'.²² It is compatible with the principle of sovereignty for states to agree that certain acts committed by their own nationals constitute international crimes for which individuals can be prosecuted. Even Schwarzenberger had to concede that:

'... it would be an unwarranted assumption to hold that only if the international personality of the individual were recognized could the individual be treated as the object of proceedings of an international criminal character'.²³

The principle of individual criminal responsibility was affirmed by the following passage in the Nuremberg Judgement in what has come to be referred to as the 'Nuremberg revolution':

'Crimes against international law are committed by men, not abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced.'²⁴

This principle was subsequently adopted by the General Assembly and enshrined in the Nuremberg Principles²⁵ and replicated in the International Law Commission's Draft Code of Crimes against the Peace and Security of Mankind.²⁶ It has been enshrined in the statutes and jurisprudence of both *ad hoc* tribunals²⁷ and the ICC.²⁸

²⁰ See J Burchell and J Milton *Principles of Criminal Law* 2ed (revised reprint February 2002) 3.

²¹ See for example, P Dupuy 'International criminal responsibility of the individual and international responsibility of the state' in A Cassese, P Gaeta and J Jones (eds) *The Rome Statute of the International Criminal Court: A Commentary* (2002) Vol I 1087.

²² Dugard op cit (n13) 2.

²³ Schwarzenberger op cit (n1) 275.

²⁴ Trial of the Major War Criminals before the International Military Tribunal (1947) Vol I 223, as quoted in Dupuy op cit (n21) 1085.

²⁵ See Principle 1 of the Principles of International Law recognised in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal, UNGAOR, 5th session, Supp No 12, UN Doc A/1316 (1950) in C van den Wyngaert (ed) *International Criminal Law – A Collection of International and European Instruments* (1996) 501.

²⁶ Article 3 of the draft Code. *Report of the International Law Commission*, 43rd session, UNGAOR, 46th session, Supp No 10, A/46/10 (1991) in Van den Wyngaert op cit (n25) 505.

²⁷ Articles 7(1) and 23(1) of the ICTY and aa 6(1) and 22(1) of the ICTR.

²⁸ Article 25 of the Rome Statute of the International Criminal Court A/CONF.183/9 (1998) *ILM* 999.

Rules Germane to International Law

Cassese, writing in 2003, describes 'international criminal law [as] a branch of public international law'²⁹ whereas Schwarzenberger in 1950 submitted that 'international law [had] not yet evolved a branch of criminal law of its own'.³⁰ However, as Cassese cautions, it is a relatively new and very rudimentary branch of law,³¹ the rules of which are to be found in the sources of public international law as set out in a38(1) of the Statute of the International Court of Justice, which are:

- '... (a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting States;
- (b) international custom, as evidence of a general practice accepted as law; [and]
- (c) the general principles³² of law recognized by civilised nations'.³³

Although public international law is defined as that body of rules and principles binding upon states in their relations with one another,³⁴ states have limited their sovereignty by developing accountability for breaches of international rules through gradual accretion. Initially, treaties – and even less so, international custom – merely prohibited certain conduct without necessarily providing for any criminal consequences if the prohibition was breached.³⁵ Since the 1940s, the international community considered certain values, such as the protection of human life and dignity, important enough to enshrine in various international instruments.³⁶ Treaties, particularly in the

²⁹ Cassese op cit (n4) 16.

³⁰ Schwarzenberger op cit (n1) 293.

³¹ Cassese op cit (n4) 16-7.

³² General principles of international criminal law include principles specific to criminal law, such as the principles of legality, specificity, the presumption of innocence and equality of arms. See Cassese op cit (n4) 31.

³³ Article 38 of the Statute of the International Court of Justice in I Brownlie (ed) *Basic Documents in International Law* 4ed (1995) 448. The only difference is that the 'writings of the most distinguished publicists' are not considered a source as 'it would violate the principles of legality recognised in the world's major legal systems'. See MC Bassiouni 'The sources and content of international criminal law: A theoretical framework' in MC Bassiouni (ed) *International Criminal Law* 2ed (1999) Vol I 4.

³⁴ Dugard op cit (n13) 1.

³⁵ Cassese op cit (n4) 17.

³⁶ The 1945 United Nations Charter in Brownlie op cit (n33) 1. The 1948 Universal Declaration of Human Rights in Brownlie op cit (n 33) 255. The 1996 International Convention of Civil and Political Rights and Economic, Social and Cultural Rights Convention in Brownlie op cit (n33) at 276 and 263 respectively. The 1969 American Convention on Human Rights in E Patel and C Watters (eds) *Human Rights: Fundamental Instruments and Documents* (1994) 94. The 1970 United Nations Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations in Brownlie op cit (n33) 36. The 1981 African Charter of Human Rights and Freedoms in Patel and Watters op cit 141.

area of international human rights and humanitarian law, criminalized the violation of conduct proscribed in order to protect these values.³⁷

Bassiouni, with his characteristic punctiliousness, analyses 274 conventions concluded between 1815 and 1996³⁸ dealing with 25 categories of crimes³⁹ which, he submits, contained one or more of ten possible penal characteristics.⁴⁰ Ironically, the term 'international crime' has never specifically been used in treaties. Instead, provision was made for 'a crime under international law' or crime against the law of nations. However, regardless of the exact phraseology, to address Schwarzenberger's objection that international criminal law is not a branch of law on its own, one has to do more than assess the provisions of international rules that prescribe municipal criminal law.

As a branch of international law, it is important to contextualise his objection in the conflicting philosophies that underlie international criminal and public international law.⁴¹ International criminal law aims at punishing transgressors whilst still safeguarding the rights of accused persons. Therefore, its prohibitions must be as clear, detailed and specific as possible, particularly in order not to violate the principle of legality.

³⁷ For example, the Torture Convention as a major human rights treaty and the Geneva Conventions as a humanitarian law treaty. See SR Ratner and JS Abrams *Accountability for Human Rights Atrocities in International Law: Beyond the Nuremberg legacy* 2ed (2001) 12.

³⁸ Bassiouni op cit (n33) 46-55.

³⁹ 1) Aggression; 2) genocide; 3) crimes against humanity; 4) war crimes; 5) crimes against United Nations and associated personnel; 6) unlawful possession, use and emplacement of weapons; 7) theft of nuclear materials; 8) mercenarism; 9) apartheid; 10) slavery and slave-related practices; 11) torture and other forms of cruel, inhuman or degrading treatment or punishment; 12) unlawful human experimentation; 13) piracy; 14) aircraft hijacking and unlawful acts of international air safety; 15) unlawful acts against the safety of maritime navigation and the safety of the platforms on the high seas; 16) threat and use of force against internationally protected persons; 17) taking of civilian hostages; 18) unlawful use of mail; 19) unlawful traffic in drugs and related drug offences; 20) destruction and/or theft of national treasures; 21) unlawful acts against certain internationally protected elements of the environment; 22) international traffic in obscene materials; 23) falsification and counterfeiting; 24) unlawful interference with international submarine cables; and 25) bribery of foreign public officials.

⁴⁰ 1) Explicit recognition of proscribed conduct as constituting an international crime or a crime under international law or as a crime; 2) Implicit recognition of the penal nature of the act by establishing a duty to prohibit, prevent, prosecute, punish or the like; 3) Criminalization of the proscribed conduct; 4) Duty or right to prosecute; 5) Duty or right to punish the proscribed conduct; 6) Duty or right to extradite; 7) Duty or right to co-operate in prosecution and punishment (including judicial assistance in penal proceedings); 8) Establishment of a criminal jurisdictional basis (or a theory of criminal jurisdiction or priority in criminal jurisdiction); 9) Reference to the establishment of an international criminal court or an international tribunal with penal characteristics; and 10) Elimination of the defence of superior orders.

⁴¹ See generally Cassese op cit (n4) 20-1 for a discussion on these conflicting philosophies.

Public international law, on the other hand, regulates the conflicting interests of sovereign states with the aim of facilitating minimum peaceful intercourse between states, rather than calling them to account for their breaches of the law – a ‘kind of “private law” between equal sovereign States’.⁴² The normative role of public international law is more important than its repressive function. To ensure consensus between states on the regulation of their conduct, law-making processes are based on the gradual evolution of general, non-specific provisions – often only loose rules,⁴³ which are ambiguous enough to reconcile any conflicting interests of states.

National legislatures are therefore, under an obligation to incorporate treaties or international customary law that criminalize certain acts committed by their subjects or within their territorial jurisdiction.⁴⁴ This has to be done with the requisite specificity of content required of a criminal proscription⁴⁵ in a way that complies with the principle of legality. The principle of legality requires that conduct be criminalized in a consistent and prospective manner, which accordingly affords an accused the ability to regulate his or her conduct to avoid the prescribed sanction being imposed. However, since each state has its own unique judicial system, international rules are criminalized in different ways. These differences have been accentuated because the general⁴⁶ and procedural⁴⁷ parts of international criminal law are undeveloped.

However, are all the 25 categories of crimes Bassiouni identifies ‘international crimes’? Bassiouni states that only certain of these crimes are truly international, while others are only transnational or partly international or partly transnational.⁴⁸

⁴² M du Plessis ‘Seeking an international International Criminal Court – Some reflections on the United States opposition to the ICC’ (2002) 15 *SACJ* 301 at 304.

⁴³ Known as ‘soft law’ which are ‘standards and guidelines devoid of legally binding effect’. See Cassese op cit (n4) 20.

⁴⁴ Schwarzenberger op cit (n1) 266; Cassese op cit (n4) 21.

⁴⁵ Bassiouni op cit (n33) 5.

⁴⁶ The general part of the substantive international criminal law refers to the ‘definition and character of the objective and subjective elements of crimes’ and defences. See Cassese op cit (n4) 17.

⁴⁷ The procedural part although receiving some mention in the Nuremberg and Tokyo Statutes has been greatly developed by the *ad hoc* tribunals and their respective Rules of Procedure and Evidence. However, as Cassese claims ‘remains at a rather underdeveloped stage’. Op cit (n4) 18.

⁴⁸ Bassiouni op cit (n33) 97.

The Characteristics of International Crimes

At this stage of the development of international criminal law, Cassese submits that

'...international crimes include war crimes, crimes against humanity, genocide, torture (as distinct from torture as one of the categories of war crimes or crimes against humanity), aggression; and some extreme forms of terrorism (serious acts of state-sponsored or -tolerated international terrorism).'⁴⁹

Bassiouni regards international crimes as constituted by:

'[t]hose international criminal law normative proscriptions whose violation is likely to affect the peace and security of humankind or is contrary to fundamental humanitarian values, or which is the product of a state action or a state-favoring policy'.⁵⁰

Bassiouni's list of international crimes includes all six referred to by Cassese plus a further six.⁵¹ What is common to both lists is that they cumulatively embrace the following five characteristics.⁵² First, the rules protect values having the status of *jus cogens*. Their protection is therefore considered important by the international community and consequently binding on all states and individuals. Secondly, there is a universal interest in repressing these crimes. Therefore, in principle, any state can prosecute and punish these crimes, regardless of whether any territorial or nationality link exists between the state and the perpetrator or the victim through the exercise of universal jurisdiction. Thirdly, so as avoid violating the principle of legality, all international crimes are violations of international customary law. Fourthly, if the perpetrator has acted in an official capacity and is no longer serving in that capacity,⁵³ the state on whose behalf he has performed the crime is barred from claiming immunity in foreign criminal proceedings. Each characteristic is discussed in turn.

Jus Cogens:

Initially a concept taken from the law of treaties, the existence of peremptory norms was first expounded in a53 of the Vienna Convention on the Law of

⁴⁹ Cassese op cit (n4) 24

⁵⁰ Bassiouni op cit (n33) 98-9.

⁵¹ Aggression; genocide; crimes against humanity; war crimes; crimes against the United Nations and associated personnel; unlawful possession or use or emplacement of weapons; theft of nuclear materials; mercenarism; apartheid; slavery and slave-related practices; torture and other forms of cruel, inhuman or degrading treatment or punishment; and unlawful human experimentation.

⁵² See Cassese op cit (n4) 23-5 and Bassiouni op cit (n33) 98.

⁵³ If the category that the state official belongs to is that of head of state, foreign minister or diplomatic agent. See Cassese op cit (n4) 24.

Treaties. Article 53 states that a treaty will be 'void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law'. The convention described 'a peremptory norm of general international law [as] a norm accepted and recognised by the international community of States as a whole as a norm from which no derogation is permitted'.⁵⁴ Argued for by socialist and developing countries in the late 1960s the concept of *jus cogens* was not that certain rules could not be derogated from but that it was because of the very nature of the rule that derogation was sought to be prevented.⁵⁵

It is arguable that these peremptory norms, or *jus cogens*, have transformed international law from a system in which all rules carried equal weight to 'a system of "graduated normativity" in which certain peremptory norms enjoy a higher status'⁵⁶ and are applicable to all states irrespective of their specific treaty obligations. Traditionally, international law consisted of norms, being equal in status, because of their formation by consensual and equal states⁵⁷ in a 'morally pluralistic' system.⁵⁸ There is still much scholarly debate on what constitutes a peremptory norm and how a given norm rises to that level. However, norms that protect human life and promote human rights are universally recognised as having a special status.⁵⁹ The prohibition on the use of force or aggression is clearly accepted and there is sufficient legal basis⁶⁰ to conclude that genocide, war crimes, crimes against humanity, apartheid, piracy, slavery and slave-related practices and torture are *jus cogens*.⁶¹

Obligations Erga Omnes

One of the consequences of a given international crime attaining *jus cogens* status is that certain obligations 'flowing to all' results.⁶² Although dealing with a civil matter, the International Court of Justice in the *Barcelona Traction, Light and Power Company Limited* case in an *obiter dictum* held that:

⁵⁴ 1969 Vienna Convention on the Law of Treaties in Brownlie op cit (n33) 388.

⁵⁵ A Cassese *International Law* (2001) 140. The kind of norms they argued for were the condemnation of 'imperialism, slavery and forced labour and all practices that violated the principle of equality of all human beings' see 139.

⁵⁶ Dugard op cit (n13) 41 quoting P Weil 'Towards relative normativity in international law?' (1983) 77 *AJIL* 413. See also Bassiouni op cit (n33) 40.

⁵⁷ Dugard op cit (n13) 40.

⁵⁸ Du Plessis op cit (n42) 304.

⁵⁹ Dugard op cit (n13) 40.

⁶⁰ This basis is, *inter alia*, the large number of states that have ratified treaties relating to these crimes and the international customary law status of the crimes.

⁶¹ Bassiouni op cit (n33) 41; Dugard op cit (n13) 41.

⁶² Bassiouni op cit (n33) 45.

'In view of the importance of the rights involved, all States can be held to have a legal interest in their protection, they are obligation *erga omnes*. Such obligations derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination.'⁶³

Dugard argues that the Court recognised *erga omnes* obligations to avoid a repeat of the *South West Africa* cases of 1966⁶⁴ in which Ethiopia and Liberia were denied standing before the Court to challenge South Africa's mismanagement of the territory of the then South West Africa. Their action had been dismissed because they had no national interest in the dispute. With the development of obligations *erga omnes*, it is no longer required that a state prove a national interest if the obligation is of concern to the international community. All states, therefore, have a legal interest in the protection of the *jus cogens* norms.

In the field of international criminal law, obligations *erga omnes* 'support the right of all states to exercise universal jurisdiction over individual offenders'⁶⁵ on the basis of the universality principle which will be discussed later.

Dual Nature

The international crimes over which the *ad hoc* tribunals and ICC exercise jurisdiction are crimes with a dual nature for which potentially both states and individuals can be criminally responsible. Although the individual is accountable in the current state of international criminal law, there is a fundamental distinction between 'individual' and 'system' criminality.⁶⁶

Individual criminality concerning war crimes refers to those acts 'committed by combatants on their own initiative and for "selfish" reasons'. System criminality refers to crimes committed on a large scale 'at the request or at least with the encouragement or toleration of the government authorities'.⁶⁷ The commission of international crimes 'presupposes the complicity, participation, toleration or acquiescence of State authorities'.⁶⁸

⁶³ *Barcelona Traction, Light and Power Company Limited* 1970 ICJ Reports 3 at 32.

⁶⁴ 1966 ICJ Reports 6 as referred to in Dugard op cit (n13) 41.

⁶⁵ K C Randall 'Universal jurisdiction under international law' (1988) 66 *Texas Law Review* 785 at 830.

⁶⁶ See Cassese op cit (n4) 295.

⁶⁷ *Ibid.*

⁶⁸ *Ibid.*

For this reason, Schwarzenberger criticised the Genocide Convention saying that '[h]ardly any of these...crimes have been committed spontaneously by irresponsible individuals.'⁶⁹ Instead, for him, the Genocide Convention was 'based on the assumption of virtuous governments and criminal individuals, a reversion of the truth in proportion to the degree of totalitarianism and nationalism practised in any country'.⁷⁰ Schwarzenberger concluded that 'the Convention is unnecessary where it can be applied and inapplicable where it may be necessary'.⁷¹

Finally, almost 50 years later, the Genocide Convention became applicable where it was necessary. Jean-Paul Akayesu was the first individual⁷² tried for genocide, not by a national court but by the ICTR.⁷³ Cassese argues that because system criminality 'involves an appraisal and condemnation of a whole system of government,' it is more likely that international tribunals will prosecute violations than states. States are unlikely to prosecute because of their own complicity or their reluctance to meddle in the domestic affairs of another state.⁷⁴

Immunities

As Lauterpacht argues:

'It is impossible to admit that individuals, by grouping themselves into States and thus increasing immeasurably their potentialities for evil, can confer upon themselves a degree of immunity from criminal liability and its consequences which they do not enjoy when acting in isolation.'⁷⁵

However, state officials in the exercise of their functions, whether acting in a *de jure* or *de facto* official capacity, could not be prosecuted because of the immunities that accrue to them under international customary law. However, as a further consequence of the recognition of *jus cogens*, 'a State is never entitled to immunity from any act that contravenes a *jus cogens* norm'.⁷⁶

⁶⁹ Schwarzenberger op cit (n1) 292.

⁷⁰ Ibid.

⁷¹ Schwarzenberger op cit (n1) 293.

⁷² Jean-Paul Akayesu was the Bourgemester (Mayor) of the Taba Commune. A number of higher-placed officials have been tried, for example the former Prime Minister, Jean Kambanda. The Chief of Staff of the Rwandan Army, Augustin Bizimungu is currently in detention. See ICTR Detainees – Status on 1 September 2003 available at <http://www.ictor.org>.

⁷³ *The Prosecutor v Jean-Paul Akayesu*, Judgment, Case No ICTR-96-4-T, 2 September 1998.

⁷⁴ See Cassese op cit (n4) 298.

⁷⁵ Schwarzenberger op cit (n1) 275.

⁷⁶ Cassese op cit (n55) 145.

The statutes of the military,⁷⁷ of the *ad hoc* tribunals,⁷⁸ and the ICC⁷⁹ removed these immunities so state officials could be held responsible for international crimes. However, the bar on immunities is applicable only at the level of international prosecutions. If the perpetrator is a serving head of state, foreign minister or diplomatic agent, he or she will enjoy complete personal immunity⁸⁰ from prosecutions by foreign states. These immunities are required for the effective performance of their functions⁸¹ when travelling abroad.

State Criminal Responsibility

After perusing various judgments and awards of the International Court of Justice and other international tribunals, Schwarzenberger argued that none have

‘...openly avowed that a State has committed a crime under international customary law as distinct from a breach of treaty or from the commission of an international tort, or visited such an act with at least the sanction of frankly admitted punitive damages’.⁸²

Recently, a number of cases have been brought by states before the International Court of Justice alleging violations of international customary law – for example, genocide. However, the plaintiff states continue to request relief in the language of ordinary state responsibility, ie the cessation of hostilities and reparations rather than the imposition of penal sanctions.⁸³

⁷⁷ Article 7 of the Nuremberg Charter: Charter of the International Military Tribunal adopted by the Big Four Powers (1945) in Van den Wyngaert op cit (n25) 420. Article 6 of the Charter of the International Military Tribunal for the Far East (1946) in G K McDonald and O Swaak-Goldman (eds) *Substantive and Procedural Aspects of International Criminal Law: The Experience of International and National Courts* (2002) Vol II 73.

⁷⁸ Article 7(2) of the ICTY, a6(2) of the ICTR.

⁷⁹ Article 27 of the Rome Statute op cit (n28).

⁸⁰ Cassese op cit (n4) 271.

⁸¹ Ibid, quoting from *Case concerning the Arrest Warrant of 11 April 2000 (The Democratic Republic of Congo v Belgium)* 2001 ICJ Reports 1.

⁸² Schwarzenberger op cit (n1) 279.

⁸³ See for example *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v Serbia and Montenegro)*; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Yugoslavia (Serbia and Montenegro))*; *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)* and the cases brought by Serbia and Montenegro against Belgium, Canada, France, Germany, Italy, The Netherlands, Portugal and the United Kingdom. All filings are available at <http://www.icj-cij.org/icjwww/idocket.htm>.

The International Law Commission, charged with the progressive development and codification of international law, attempted to expand state responsibility to the commission of international crimes. The Draft Articles on State Responsibility⁸⁴ do not deal with the primary substantive obligations of states, but with the responsibility of states for the violation of treaty obligations or rules of international customary law. They set out the secondary rules dealing with the consequences for a breach that 'encompasses a separate and relatively autonomous body of international law, the law of State responsibility'.⁸⁵ Internationally wrongful acts, referred to as international delicts,⁸⁶ were to be distinguished from international crimes, formulated in a19 as follows:

...

2. An internationally wrongful act which results from the breach by a State of an international obligation so essential for the protection of fundamental interests of the international community that its breach is recognized as a crime by that community as a whole, constitutes an international crime.
3. Subject to paragraph 2, and on the basis of the rules of international law in force, an international crime may result, *inter alia*, from:
 - (a) a serious breach of an international obligation of essential importance for maintenance of international peace and security, such as prohibiting aggression;
 - (b) a serious breach of an international obligation of essential importance for safeguarding the right of self-determination of peoples, such as prohibiting the establishment or maintenance by force of colonial domination;
 - (c) a serious breach on a widespread scale of an international obligation of essential importance for safeguarding the human being, such as those prohibiting slavery, genocide, *apartheid*;
 - (d) a serious breach of an international obligation of essential importance for the safeguarding and preservation of the human environment, such as those prohibiting massive pollution of the atmosphere or of the seas.⁸⁷

Here again one sees the nomenclature of the concept of *jus cogens*, especially in para 2. In the International Law Commission's 2001 report, a19 in the form quoted above and the distinction between delicts and crimes no

⁸⁴ The Draft Articles on State Responsibility were adopted at their first reading in 1996. See Dugard op cit (n13) 205.

⁸⁵ Cassese op cit (n55) 185.

⁸⁶ Article 19(4) of the Draft Articles op cit (n84).

⁸⁷ International Law Commission's 1996 Report, GAOR 51st session, Supp 10 at 125 quoted in D J Harris *Cases and Materials on International Law* 5ed (1998) 487.

longer appear. According to Cassese, the concept of international crimes entailing state responsibility was abandoned 'because of the reluctance of States to accept the notion that they may be accused of "crimes" ... [and] the difficulty for the international criminal law in pinpointing the consequences of these "crimes"'.⁸⁸ The authors of the 2003 Commentary on the Draft Articles recognise that there has been 'no development of penal consequences for States of breaches of these fundamental norms'.⁸⁹ They quote a statement by the Appeals Chamber of the ICTY:

[U]nder present international law it is clear that States, by definition, cannot be the subject of criminal sanctions akin to those provided for in national criminal systems'.⁹⁰

Therefore, Schwarzenberger's observation that states cannot be criminally liable⁹¹ is still pertinent today.

International Criminal Courts

Schwarzenberger, writing in another historical context, only considered the evidence of the International Military Tribunals of Nuremberg and Tokyo as enforcing international criminal law at an international level.⁹² Both imposed criminal liability on individuals for crimes against the peace, war crimes and crimes against humanity committed during the World War II. Schwarzenberger conceded that '[i]n form, the law applied by the tribunals was international law'.⁹³ However, for him the tribunals were 'in substance more akin to municipal war crime courts than to truly international tribunals'⁹⁴ because 'the signatories to the Charter ... only did jointly what each of them, if in sole control of Germany, could have done'.⁹⁵ As co-sovereigns of Germany, the Allies 'were free to agree on any additional legal principles which they cared to apply'.

The idea of a permanent international criminal court, however, was not a new one. After World War II, the newly constituted United Nations adopted a

⁸⁸ Cassese op cit (n55) 200.

⁸⁹ International Law Commission's 2001 Report at 279, available at http://www.un.org/law/ilc/texts/State_responsibility/responsibilityfra.htm.

⁹⁰ *Prosecutor v Blaskic*, Judgement on the Request of the Republic of Croatia for review of the Decision of Trial Chamber II of 18 July 1997, Case No IT-95-14-AR 108bis (1997) 110 *ILR* 688 at 698 para 25.

⁹¹ Schwarzenberger op cit (n1) 274.

⁹² There were, however, unsuccessful attempts made after World War I to bring the German Emperor to trial before an international tribunal. See Dugard op cit (n13) 151.

⁹³ Schwarzenberger op cit (n1) 290.

⁹⁴ Op cit (n1) 291.

⁹⁵ Op cit (n1) 290.

resolution mandating the International Law Commission to begin work on a draft statute for such a court.⁹⁶ It was recognised that 'in the course of the development of the international community, there will be an increasing need [for] an international judicial organ for the trial of certain crimes under international law'.⁹⁷ However, only after the end of the Cold War and the explosion that occurred in its aftermath⁹⁸ in the form of 'nationalism, religious fundamentalism, and ethnic and religious hatred [that] spawned violence, ethnic cleansing [and] bloodshed,'⁹⁹ was attention again given to the need of a permanent international criminal court.

At the time the International Law Commission was preparing a draft statute, events compelled the Security Council, acting in terms of Chapter VII of the United Nations Charter, to assess the situation in the former Yugoslavia as a threat to international peace and security. The Security Council created an *ad hoc* court to respond to the atrocities, mandating the ICTY to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991.¹⁰⁰

In November 1994, and acting on a request from Rwanda, the Security Council voted to create a second *ad hoc* tribunal, charged with the prosecution of genocide and other serious violations of international humanitarian law committed in Rwanda and in neighbouring countries during the year 1994.¹⁰¹

The creation of the *ad hoc* tribunals 'fuelled the widespread belief that a permanent international criminal court was desirable and practical'.¹⁰² Its creation was finally accomplished on 1 July 2002 when the Statute of the International Criminal Court¹⁰³ came into force after receiving the requisite 60 ratifications.¹⁰⁴

⁹⁶ See W Schabas *An Introduction to the International Criminal Court* (2001) vii.

⁹⁷ Schwarzenberger op cit (n1) 264 quoting from the debates of the General Assembly during its Third Session in 1948.

⁹⁸ Dugard op cit (n13) 152.

⁹⁹ Cassese op cit (n4) 3.

¹⁰⁰ United Nations Security Council Resolution 808 of 22 February 1993 and Resolution 827 of 25 May 1993. See V Morris and M Scharf *An Insider's Guide to the International Criminal Tribunal for the Former Yugoslavia: A Documentary History and Analysis* (1995).

¹⁰¹ United Nations Security Council Resolution 955 of 8 November 1994.

¹⁰² Du Plessis op cit (n42) 303.

¹⁰³ The International Criminal Court Statute was adopted on 19 July 1998 at Rome by a non-recorded vote of 120 in favour, seven against and twenty-one abstentions. Although the vote was non-recorded at the United States's suggestion, the United States, China, Israel and India acknowledged that they had voted against the adoption of the Statute. The other three States voting against the adoption of the Statute were presumably Libya, Iraq and either Algeria, Qatar or Yemen. See J Charney 'Progress in International Criminal Law' (1999) 93 *AJIL* 452 fn17. Mexico, Singapore, Sri Lanka, Trinidad, Tobago, and Turkey explained that they had abstained.

¹⁰⁴ For signature and ratification status, see <http://www.un.org/law/icc/index.html>.

Crimes Within the Jurisdiction of the International Courts

With regard to the Nuremberg and Tokyo Tribunals, Schwarzenberger submitted that

[i]n form, the law applied by the tribunal was international law: international customary law, in so far as jurisdiction regarding war crimes ... and newly established treaty law regarding crimes against peace and humanity.¹⁰⁵

However, he quoted a British Aide-Mémoire of 1945 that revealed their doubts as to whether crimes against the peace could 'properly be described as crimes under international law'.¹⁰⁶ Schwarzenberger quoted the Allies as saying that they 'declare what the international law is so that there won't be any discussion on whether it is international law or not'.¹⁰⁷

In the early 1990s, when Trinidad and Tobago revived the initiative to establish an international criminal court, it did so with the aim that the court would deal with drug-trafficking.¹⁰⁸ The Preparatory Commission (PrepCom) debated the prospect of the court's jurisdiction over drug-trafficking as an international crime. Although regulated by international treaty in what might be termed as a 'suppression convention',¹⁰⁹ drug-trafficking was eventually excluded from the jurisdiction of the court. The reasons were twofold.

First, they did not explicitly 'create or define crimes under international law, but envisage[d] that national legislation [would] be enacted to make specific conduct criminal under the relevant national law'.¹¹⁰ Therefore, drug-trafficking is not an international customary law crime and the PrepCom agreed that the prosecution of such crimes was better left to states using the modalities of international co-operation to enforce it. Secondly, 'normally it is [committed by] private individuals or criminal organisations ... against States'.¹¹¹

The ICTY and ICTR, sharing virtually identical statutes, exercise jurisdiction over genocide,¹¹² grave breaches of the Geneva Conventions of 1949,¹¹³ and

¹⁰⁵ Schwarzenberger op cit (n1) 290.

¹⁰⁶ Ibid.

¹⁰⁷ Extract from Sir David Maxwell Fyfe's speech at a meeting of the Four-Power Conference of 29 June 1945, quoted in Schwarzenberger op cit (n1) 290.

¹⁰⁸ Du Plessis op cit (n42) 302.

¹⁰⁹ In the 1988 Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances UN Doc E/CONF.82/15 & Corrs 1-2 (1988) in (1989) 28 *ILM* 497.

¹¹⁰ J Crawford 'The ILC's Draft Statute for an International Criminal Tribunal' (1994) 88 *AJIL* 140 at 146.

¹¹¹ Cassese op cit (n4) 24.

¹¹² Article 4 of the ICTY; a2 of the ICTR.

¹¹³ Article 2 of the ICTY.

violations of the laws and customs of war¹¹⁴ and crimes against humanity.¹¹⁵ Similarly, the ICC only has jurisdiction over four crimes, viz genocide, crimes against humanity, war crimes and aggression.¹¹⁶

International Enforcement

To assert with confidence that international criminal law exists because the international community has finally established an international criminal court is, unfortunately, only half the story. The enforcement of international criminal law remains rooted in the co-operation of states with international courts. No direct enforcement mechanism yet exists that allows 'a given body to enforce its orders without going through the authority of states to carry out enforcement functions'.¹¹⁷ Bassiouni refers to the direct and indirect enforcement models.¹¹⁸ In the direct or vertical model, an internationally created organ directly punishes individuals for crimes against the international order as opposed to the national order.

The ICTY, ICTR and ICC 'are only in part a "direct enforcement system."¹¹⁹ They cannot directly prosecute, adjudicate and enunciate penalties without going through the instrumentality of state authorities.¹²⁰ The international courts require states for almost all aspects of enforcement of their legal orders and sanctions. The *ad hoc* tribunals do not represent a voluntary concession by states of their sovereignty, as is the case with the ICC, as they were both established by the compulsory powers of the Security Council acting under Chapter VII. Court orders are therefore binding on all states although little can be done if a state refuses to comply.¹²¹

Bassiouni describes the ICC as a hybrid system.¹²² Not only does it depend on states for the same six modalities¹²³ as required for international co-operation to combat crime but its entire operation is premised on the

¹¹⁴ Article 3 of the ICTY. Article 4 of the ICTR refers to 'violations of Article 3 common to the Geneva Conventions and of Additional Protocol II'.

¹¹⁵ Article 5 of the ICTY; a3 of the ICTR.

¹¹⁶ See a5(1) and aa 6-8. Aggression, in accordance with a5(2) remains to be defined before the Court will be able to exercise jurisdiction over it.

¹¹⁷ Bassiouni op cit (n33) 6.

¹¹⁸ See Bassiouni op cit (n33) 5-6; 13-4 and 110-24.

¹¹⁹ See op cit (n33) 6.

¹²⁰ See a29 of the ICTY, which provides that 'States shall co-operate with the International Tribunal in the investigation and prosecution of persons'.

¹²¹ The most that can be done is that a report can be filed by the President of the Court with the Security Council. See Rule 7bis of the ICTY Rules of Procedure and Evidence II/32/Rev.28.

¹²² Bassiouni op cit (n33) 14

¹²³ Extradition, mutual legal assistance, transfer of criminal proceedings, transfer of prisoners, recognition of foreign penal judgments, seizure and forfeiture of illicit proceeds of crime. See Bassiouni op cit (n33) 5.

doctrine of complementarity. Paragraph 10 of the Preamble to the Rome Statute says that the court's jurisdiction will be complementary to that of the national criminal jurisdiction. Article 17 of the Statute embodies the complementarity principle and provides that a case is inadmissible before the court if:

- '(a) The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution;
- (b) The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute.'

Therefore, the ICC will only be able to exercise jurisdiction where a national judicial system is unwilling or unable genuinely to investigate. Article 17 creates a complex relationship between national legal systems and the court, with the latter declining to exercise jurisdiction when a case is being appropriately handled by a national judicial system. Moreover, the fact that a major power like the United States is not a state party to the Rome Statute raises questions as to the ultimate effectiveness of the court.¹²⁴

Enforcement by States

With the international community unable to proscribe conduct with the 'characteristics of enacted positive criminal law',¹²⁵ international law has only prescribed¹²⁶ or authorized¹²⁷ municipal criminal law. Therefore, Schwarzenberger concluded that offences by individuals 'against the "law of nations"' are not crimes under international law, but offences against rules of internationally postulated municipal criminal law'.¹²⁸

There are two issues. First, did the state actually prescribe such conduct by ratifying the relevant treaty; and secondly, how have states exercised their jurisdiction over the commission of such crimes?

First, with regard to ratification as Schwarzenberger pointed out, the failure of a state to incorporate a treaty obligation to prohibit certain conduct into its national criminal law is merely a breach of its international obligation and not an international crime.¹²⁹ Furthermore, as observed by Cassese, '[s]tates have found many means of evading international obligations'.¹³⁰ For this reason, a

¹²⁴ Du Plessis op cit (n42) 301.

¹²⁵ Bassiouni op cit (n33) 4.

¹²⁶ Schwarzenberger op cit (n1) 266-8.

¹²⁷ Op cit (n1) 268-70.

¹²⁸ Op cit (n1) 268.

¹²⁹ Ibid.

¹³⁰ Cassese op cit (n4) 305.

characteristic of international crimes is that they are part of international customary law so that a state cannot claim that it does not have national law that proscribes certain conduct.

Secondly, with regard to enforcement, although Schwarzenberger did not mention any particular crime, he asserted that states in general are able to extend the reach of their criminal laws beyond their territorial boundaries because of their sovereignty and independence.¹³¹ Generally with regard to the exercise of jurisdiction,¹³² because of the principle of sovereignty, states have traditionally exercised their criminal jurisdiction on the principle of territoriality or, if it the perpetrator was a national, the active nationality principle. Gradually, states also began to exercise their jurisdiction if the victims were nationals in terms of the passive personality principle or if its own interests were at stake on the protective principle.

The *aut dedere aut judicare*, the prosecute or extradite, principle contained in many conventions¹³³ has extended the universal jurisdictional principle, which first allowed for the international authorisation of prosecutions against piracy.¹³⁴ Conditional universal jurisdiction, as the *aut dedere aut judicare* principle implies, requires the presence of the accused in the territory of the state for it to exercise jurisdiction or it must hand the accused over to a concerned state. Absolute universal jurisdiction, on the other hand, does not require any connection between the prosecuting state and the perpetrator. The exercise of absolute jurisdiction is a contentious issue¹³⁵ and only applies to international crimes that embrace all the characteristics previously discussed. Certain states, most notably Spain, Belgium and to some extent Germany have 'been prepared to substitute themselves for national and territorial courts, whenever the latter courts fail to take proceedings against persons suspected or accused of serious international crimes'.¹³⁶ More states have been prepared to do so since the ICTY and ICTR were established¹³⁷ yet many individuals continue to escape

¹³¹Schwarzenberger op cit (n1) 264-5.

¹³²With regard to the following discussion on jurisdiction see Cassese op cit (n4) 276-92. ICL; Randall op cit (n65) 785.

¹³³The most famous amongst them are the Geneva Conventions of 1949 which all provide that 'each [party] shall be under the obligation to search for persons alleged to have committed, or have ordered to be committed, . . . and shall bring such persons, regardless of their nationality, before its own courts'. Alternatively, a party may extradite such offenders to another party. See for example, a49 of the Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field [Geneva Convention I] in Van den Wyngaert op cit (n25) 7.

¹³⁴See Randall op cit (n65) 791-8.

¹³⁵See in particular the Joint Separate Opinion of judges Higgins, Kooijmans and Buergenthal in the *Arrest Warrants* case op cit (n31) para 45.

¹³⁶Cassese op cit (n4) 7.

¹³⁷Cassese op cit (n4) 8.

liability because their national state is unlikely to charge them with crimes committed with its collusion.¹³⁸

'Horizontal international criminal law' refers to the international co-operation between states in the enforcement of municipal criminal law and is not concerned with the substance of criminal law. It addresses 'the common interest of States in the punishment of offences which threaten the wellbeing of society and . . . the interest of the State into whose territory the criminal [has] come [so] that he should not remain at large therein'.¹³⁹ Due to the 'territorial limitation of national sovereignty',¹⁴⁰ the need for treaties on extradition, mutual assistance and other modalities of co-operation between states arises to facilitate the administration of municipal criminal justice. Despite the liberal and permissive regime of extraterritorial municipal criminal jurisdiction as set out in the *Lotus* case, which allows states to extend their jurisdiction as they wish unless there is a principle of international law which prohibits such extension, with regard to enforcement, there is one definitive prohibitive rule:

' . . . the actual exercise of criminal jurisdiction in concrete instances must take place within a State's own territory or in places assimilated to it.'¹⁴¹

Conclusion

As Dugard states:

'Punishment of individuals for international crimes is a sanction of international law in the best tradition of the municipal criminal offence and provides evidence to even the most ill-informed observer that international law is sometimes enforced by punishment. International law is not, therefore, without sanctions. On the other hand it must be conceded that sanctions of this kind lack the comprehensiveness, regularity, and consistency associated with sanctions in domestic law.'¹⁴²

Since the establishment of international fora to prosecute international crimes, 'international criminal law' as a technical term is coming into its own for the first time. States have established a new branch of international law by treaty with its own principles and standards, and as the jurisprudence of the *ad hoc* tribunals shows, it is beginning to develop areas previously neglected such as general principles and sentencing by applying the 'overlapping and

¹³⁸ Cassese op cit (n4) 307-8.

¹³⁹ Schwarzenberger op cit (n1) 272.

¹⁴⁰ Op cit (n1) 271.

¹⁴¹ Op cit (n1) 265 quoting the *Lotus Case* (1927) PCIJ Series A, No 10 at 20.

¹⁴² Dugard op cit (n13) 8.

concurrent sources of law . . . emanating from the international legal system and from national legal systems'.¹⁴³

However, Schwarzenberger's central objection that international criminal law cannot be applied universally because of the lack of central institutions, has not been solved by the establishment of the ICC, dependent and secondary as it is to states, with some like the United States remaining immune from its jurisdiction. However, 'the fact that delegates at Rome were able to come together and finalise the Rome Statute suggests the existence of a social system built on universal respect for the idea of human rights'.¹⁴⁴ Although more evidence exists of states pursuing accountability through their municipal criminal justice systems on the basis of universal jurisdiction, 'national courts are still loath to bring to justice persons accused of international crimes [because they are] still dominated by nationalistic, short-term interests'.¹⁴⁵

At present, the sword wielded by the international community is still made of paper, ineffective to hold all states accountable for the violation of international rules. Schwarzenberger's article will remain prescribed reading for awhile yet.

¹⁴³Bassiouni op cit (n33) 4.

¹⁴⁴Du Plessis op cit (n42) 304.

¹⁴⁵Cassese op cit (n4) 298.