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INTRODUCTION

**THE FUTURE OF INTERNATIONAL
CRIMINAL JUSTICE**

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Some three decades ago, inhabitants of our planet first saw Earth photographed from outer space. That image, more than any multitude of words, made us aware of our interdependence and highlighted the artificiality of our political boundaries. As a result, if not solely because of that perception, rigid concepts of national sovereignty have been gradually giving way to an increase of commonly shared international interests, and multi-lateral decision-making has replaced unilateral national actions. Thus, collective action on international peace and security issues, particularly in the context of the United Nations Security Council, has become more frequent than ever before. The end of the cold war and the disintegration of the U.S.S.R. have accelerated this process along with the sweeping winds of democracy, human rights, and free market economics, which have changed the world we had known only a few decades ago.

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This process of socio-political transformation occurred during a time of extraordinary scientific and technological advances which broke down many barriers between states and peoples.

National boundaries have disappeared with respect to the flow of communication and information. Coupled with the spread of democracy and free-market reforms, these scientific and technological advances have radically and rapidly altered our traditional ways of life and have ushered in the global society. This process of transformation is the hallmark of the last half of the Twentieth Century. That is socio-political and economic transformations necessarily brought about a change in our conceptions of world order and in our outlook on traditional international legal concepts and norms.

For example, one need only contrast the 1961 downing of a United States U-2 spy plane after it penetrated Soviet air space with the current state of affairs to see how science and technology have affected traditional notions of sovereignty. Whereas both the United States and the Soviet Union went on full military alert after the overflight incident in 1961, today, satellites overfly almost every country in the world, including Russia, without any threat of being fired upon or any mention of the infringement of national sovereignty.

The process of globalization collapses time and space, breaks down political boundaries, and has had profound implications for so many aspects of daily life around the world, not only culturally, but in many other ways as well. Globalization is a simple concept with complex consequences and unforeseeable ramifications.

The great benefits it is likely to bring humankind, will be accompanied by many detriments, including those which every civilization has faced at times of profound change and extraordinary expansion. Great leaps forward have always been the product of scientific and technological developments. From the spinning wheel to the steam engine to the electric motor to the internal combustion engine to the Internet, each new innovation has had a profound social, economic, and human impact. Indeed, each has brought about significant changes in power relations and in human relations, and consequently in legal relationships, both at the international or national levels. But law

has seldom anticipated these historical changes. Instead, it has merely reacted to them, all too frequently failing to meet the needs of the times wherever and whenever these societal transformations have occurred.

Today, international law is having difficulty adapting to the new needs of international criminal justice. In addition to various considerations pertaining to the fields of communication, economics, banking, and finance, two different but related developments have shaped the need for globalization of certain aspects of criminal justice.

The first development is the large-scale victimization that results from the commission of international crimes whose principal perpetrators have gone unpunished. In international civil society this situation has engendered an irreversible groundswell of opposition to such crimes and to the impunity that benefited the perpetrators. National legal systems have proven that under their present limitations, they are substantially unable and frequently unwilling to deal with these offenders. Thus, the need for the globalization of criminal justice becomes imperative.

The second development is the significant increase in transnational criminality, particularly in drug trafficking, organized crime, and money laundering, all of which produce a high level of corruption in developing countries. These transnational crimes have in turn increased domestic levels of criminality. The combination of these international and national criminal manifestations have negatively impacted on social, economic, and political stability in many countries particularly in developing countries, which are more vulnerable to these problems. National legal systems have once again proven their inability to deal adequately with these problems, thus confirming the need for a globalized response to transnational criminality and its national implications.

The need for a new system of international criminal justice is heightened by a combination of factors that may well have created an irreversible trend. They include the rapid growth in communication technology that makes possible the instant global dissemination of information; the growth of an international civil society consisting of nongovernmental organizations with abundant popular support; the evolution toward greater

popular participation in national democracies; and the coalescence of commonly shared values that emerged from the experiences of World War II and gave rise to the human rights movement.

PREVENTING AND PUNISHING INTERNATIONAL CRIMES

The driving force behind the globalization of criminal justice is the realization that in the Twentieth Century some 250 conflicts in almost every region of the world resulted, through genocide, crimes against humanity and war crimes, in the death of an estimated 70 to 170 million victims and that almost all of the perpetrators benefited from impunity. Indeed, since the trial of the Nazi leadership at Nuremberg, governments have for the most part retreated to the comfortable and convenient practices of *realpolitik*. Thus, they bargain away accountability and justice in favor of political compromise, unencumbered by the obligations assumed in numerous international treaties to respect, ensure respect for, and enforce international human-rights norms. The result has been not only that *jus cogens* crimes, such as aggression, genocide, crimes against humanity, war crimes, slave-related practices, and torture have continued and even increased in intensity in so many parts of the world, but that their main perpetrators have benefited from impunity. It is paradoxical indeed that in spite of the commitment expressed in the motto "never again," which was adopted by the world community after the atrocities of World War II, enormous tragedies have occurred repeatedly since that war and are still occurring today.

International civil society and many governments reject these outcomes and demand enhanced prospects of accountability for international crimes.

The new era of instant communication and information disseminates the knowledge of these crimes to millions of people throughout the world. Nightly broadcasts from war-ravaged regions or Internet sites maintained from remote areas can influence and mobilize public opinion, and in turn strengthen the voice of international civil society in its calls for government accountability. This ease of access to information has also made it less possible for governments to plead ignorance or surprise in the face of large-scale violations.

Another outcome of globalization is the worldwide network of international and regional nongovernmental organizations with large constituencies capable of wielding institutional influence. This network now numbers millions of individual members, and its influence has forced governments to pay greater attention to human rights issues and to the need for accountability for their violation. The demands of international civil society have influenced the creation of several new international institutions dedicated to these ends, such as the International Criminal Tribunal for the Former Yugoslavia (ICTY), and the International Criminal Tribunal for Rwanda (ICTR), as well as the International Criminal Court (ICC), which has yet to come into being. These new institutions have all benefited from the support of governments motivated by universal humanistic values and increasingly by those governments that recognize the importance of international criminal accountability mechanisms as a means to maintain world order and restore peace.

These developments reflect the emergence of accountability and justice as internationally recognized values, which must be reflected in national and international norms. To that end, international standards need to be clearly established and consistently applied in order to achieve accountability and ultimately to achieve deterrence. The different legal mechanisms used for these purposes also need to be evaluated in terms of their appropriateness to specific situations in which they may be applied. Furthermore, permanent international institutions need to be established as a complement to national ones.

International criminal justice will be faced with challenges concerning enforceability. The test will probably be with the ICC, which at present is an international institution subject to norms of complementarity and dependent on national legal systems for enforcement. Questions arise as to whether the ICC's legal and moral authority will be sufficient to compel individual states to enforce its orders or whether a state's decision to enforce such an order will be subject to its particular political climate or dependent upon its political relations with other states.

In answering the question of voluntary enforcement by states of the decisions made by international judicial organs, a telling example can be drawn from the United States Supreme

Court, whose early decisions were also subject to the uncertainty of their enforcement. In connection with an unpopular decision, *Worcester v. Georgia*, 31 U.S. 515 (1832), President Andrew Jackson stated, "[Chief Justice] John Marshall has made his decision. Now let him enforce it." Few today in the United States even wonder whether any president would dare question the enforcement of an unpopular Supreme Court decision. The decisions of the ICC in its nascent days will surely face challenges of enforceability similar to those expressed in President Jackson's desultory comment. In time, however, its decisions will be carried out as routinely as those, for example, of the European Court of Human Rights in the forty-one member states of the Council of Europe that have ratified the European Convention on Human Rights and Fundamental Freedoms.

We must remember that while principled persons may be motivated by lasting values, governmental relations are based on interests. Even so, international civil society urges the recognition of lasting values, at least as being equal to the economic, political, and strategic interests upon which governments most frequently act. Thus, there will be always a risk that some governments or the Security Council will seek to manipulate the ICC and use it to achieve the goals of *realpolitik* that so frequently conflict with international criminal justice. This is what happened with the Dayton Accords, which contain a provision on the criminal responsibility before the ICTY of persons accused of genocide, crimes against humanity, and war crimes. Yugoslavian President Slobodan Milosevic, who clearly can be identified as the principal decision-maker for some of these crimes committed in Croatia and Bosnia between 1991 and 1994, has not yet been indicted by the ICTY for any of them. It appears, therefore, that so far he has been granted *de facto* immunity from international prosecution in exchange for agreeing to the terms of the Dayton Accords. In contrast, he was promptly indicted in 1999 for only a few of the criminal acts that occurred in Kosovo only after he failed to cooperate with the major Western powers in bringing about an end to that conflict, which he had initiated. In these two instances, the prospect of an indictment by the ICTY was used first as a carrot to help bring about the Dayton Accords, and then the prospect of prosecution was used as a stick to bring about an end to the

Kosovo conflict. In both instances, however, the game is not yet over, and we may still see one or more twists develop, including the triumph of accountability over impunity.

A substantially politically independent, effective, and impartial system of international criminal justice, working in complementarity with national criminal justice systems can serve as an effective deterrent against international and transnational criminality. As a result, it would reduce the level of victimization occurring in connection with these international and transnational crimes. The combined effectiveness of an international criminal justice system and national criminal justice systems will depend on a number of measures that are easy to accomplish. With respect to international crimes, these include application of universal jurisdiction, elimination of statutes of limitations, increasing national prosecutions, and facilitating extradition and legal assistance. With respect to both international and transnational crimes, these measures also include interstate cooperation in the investigation, prosecution, and punishment of perpetrators and more effective use of all modalities of interstate cooperation in penal matters, such as extradition or surrender, judicial assistance, transfer of criminal proceedings, transfer of sentenced persons, recognition of foreign penal judgments, and freezing and seizing of assets that derive from criminal activity. In other words, the legal maxim *aut dedere aut judicare* must be put into effect with due regard to the requirements of fairness and due process of law.

Enhanced national prosecutorial efforts, coupled with improved interstate cooperation in penal matters based on international norms and standards of fairness and due process, constitute the most effective approach to achieving accountability for international and transnational crimes. Indeed, having 185 domestic systems all pursuing the same type of violators, applying more or less the same legal norms, and cooperating effectively to the same ends will prove far more effective as a deterrent than the prospects of prosecution by any international criminal court.

Enhanced interstate cooperation, however, presumes the existence of effective national justice systems. Unfortunately this is not always the case, especially in Developing and Least Developed Countries and in states that have ongoing civil con-

flicts or have only recently emerged from such conflicts. Such states are often faced with many competing priorities, and thus their governments often fail or are unable to prioritize resources for criminal justice over other pressing social and economic needs. Donor states that may assist these countries also can fail to recognize the importance of providing economic and other assistance to restore or enhance the justice systems of such recipient states. This is why we see so few effective efforts in restoring national justice systems in post-conflict eras at a critical time when so much is at stake. Lastly, there are also tyrannical regimes that prevent their own systems of justice from functioning independently and properly. Because of all these considerations, a more globalized approach is needed.

The new approach to international criminal justice must also focus on the need to provide victims of international crimes with compensation, restitution, and rehabilitation. The enforcement of these victim's rights essentially will be made through national legal systems and will require a convergence of accountability processes for perpetrators and redress mechanisms for victims. Both must be connected.

PREVENTING AND PROSECUTING TRANSNATIONAL CRIMES

The rise in transnational crime is in fact an outgrowth of globalization. Some forms of this criminality, which pose the greatest threat to world stability, are drug trafficking, organized crime, terrorism, and money laundering. Other transnational crimes must also compel worldwide attention, even though they have not yet done so, particularly international traffic in women and children for sexual exploitation.

Globalization has given criminal organizations access to the benefits of the world's financial systems, as well as increased ease in means of communication and information. Thus, like legitimate commercial enterprises, criminal organizations have globalized their operations in search for greater profits and for new markets. The quantitative and qualitative increase in transnational crime is reflected in the estimated one billion dollars in criminal proceeds that are wire-transferred through world financial markets each day, and in the estimated \$200 to \$500 billion in illegally obtained proceeds that are laundered through international capital markets each year. The

threat posed by transnational crime is heightened by: the networking of domestic criminal organizations, the connections between so-called terrorist organizations that operate in different states, the strategic alliances between national revolutionary groups and drug trafficking organizations, and the use of the international financial system to launder money through which criminal activities and corruption are funded.

For example, recent reports have revealed connections between Russian *Mafiya* groups and Colombian drug trafficking organizations. In 1997, it was reported that advanced Russian weaponry had been exchanged for Colombian cocaine. Data has emerged linking revolutionary organizations such as the M-19 Group in Colombia and the *Sendero Luminoso* of Peru with the protection of drug trafficking groups as a means to finance the operations of these insurgent groups. Southwest Asian criminal organizations have mounted joint ventures with Nigerian organized crime to import cocaine into the United States. Situations such as these create new threats to the stability of states and regions, especially given the inability of national governments and international organizations to deal with these problems. The corrupting effects of transnational crime on government officials were most apparent with the 1989 arrest and 1990 conviction of Panama's head of state, Manuel Noriega, on drug-trafficking charges. Numerous other allegations were also made in 1997 against the governors of the Mexican states of Sonora and Morales and other high officials.

Governments are hampered in their efforts to combat transnational crime by their insistence on operating within narrow constraints of national sovereignty and bureaucratic boundaries that effectively limit their ability to deal with individuals and organizations that engage in wide-ranging international criminal activities.

The globalization of crime will require nothing less than the globalization of responses to it. Paradoxically, it may well be that this globalization of response to transnational criminality will drive the development of international criminal law in the years to come. The approach will necessarily be that of enhancing interstate cooperation in penal matters, which will also benefit international accountability for international crimes that rise to the level of *jus cogens*.

CONCLUSION

Globalization cannot be compartmentalized. International and transnational criminality are a global phenomena to which there can only be global responses. The brief description of this global phenomena and the possible responses to it offered in this article are but the basis for a new worldwide outlook. Crime, whether international, transnational, or national, is a threat to domestic, regional, and international stability, peace, public order, socio-economic progress, democracy, and human rights. Thus, a new international system of criminal justice must be developed.