THE FUTURE OF INTERNATIONAL HUMAN RIGHTS LAW WITH A FOCUS ON EAST TIMOR*

Introduction

The world's jubilation at the end of the Second World War brought with it the grim knowledge of a trilogy of tragedies caused by humanity, or rather inhumanity: the Holocaust, the brutal treatment of many Japanese prisoners of war and the horror and suffering of the civilian population in the nuclear bombing of Hiroshima and Nagasaki. The world did not want to see such horrors again and in a curious mixed wave of international optimism, fear and cooperation formed the United Nations.

Fiftyone years ago today the United Nations Universal Declaration of Human Rights affirmed in its 30 Articles the inherent dignity and the equal and inalienable rights of freedom, justice and peace for all members of the human family. It still makes great reading! Some of you may be pleased to note that Article 24 declares you have a "right to rest and leisure, including reasonable limitation of working hours)"!

In 1945, made possible because of the unconditional surrender of the wrongdoers, the International Military Tribunals at Nuremburg and Tokyo were established to bring to trial and punish offenders for crimes against peace (aggression), crimes against humanity and war crimes. Great care was taken to ensure the fairness of the trials and to reinforce their operation within international law. Chief US prosecutor at the International Military Tribunal, Robert Jackson, later a US Supreme Court Justice, reminded the world:

> ") the record on which we judge these defendants is the record on which history will judge us tomorrow. To pass these defendants a poisoned chalice is to put it to our lips as well."

Over many years since 1945, the United Nations has attempted to develop a universally binding Code of Crimes against the Peace and Security of Mankind and to create an International Criminal Court through various special committees. But until comparatively recently, very little progress was made, largely because the "Cold War" froze up any spirit of cooperation between the super powers.

In the meantime, 170 million people, 80 per cent of whom were civilians, have been killed in armed conflicts throughout the world without anyone being held criminally accountable. (1)

The jurisdiction of the International Court of Justice in The Hague is restricted to

disputes between consenting States; no criminal court has been established to deal with international crimes.

The International Criminal Tribunal for the Former Yuogslavia

The bravery of journalists and photographers and developments in modern telecommunications bring into our kitchens and living rooms the horrors in countries torn apart by war or civil strife or where the rule of law is shamelessly abused. Until recently, world political will has not been strong enough to activate the United Nations. On the one hand, such brilliant media coverage makes us empathise: that could be our family, us; but for an accident of birth we could be victim, or worse, aggressor. On the other hand, the constant exposure to media images of atrocities saturates our senses and desensitises with over-exposure: 2D 30 second TV grabs cannot convey the fear, the smell of blood and death and sickness, the hopelessness and desolation. The end of the Cold War, television coverage of Nazi type concentration camps in Bosnia and Serbia and confirmation by UN investigators of shocking outrages, including the systematic rape and murder of thousands of women, mostly Moslem, wrought change. That this was happening to white Europeans with whom we at home in our loungerooms could empathise was probably a significant factor. Whatever the causes, the reality was the Security Council of the UN created the International Criminal Tribunal for the Former Yugoslavia and despite great administrative difficulties the first truly international criminal court since Nuremburg and Tokyo was established. The President, Judge Gabrielle Kirk McDonald from the USA, identified one of the fundamental issues faced by the Tribunal as the difficulty of determining which of the many culpable individuals should be brought to justice in The Hague. She emphasised the Tribunal had only limited resources and could not bring to trial every individual allegedly connected with the atrocities. In her view, the Tribunal's principal responsibility was to bring to justice those individuals whose presence impeded the establishment of a civil society in the Former Yugoslavia, the leaders who instigated the wars and prevented the restoration of peace. The Tribunal was also hampered by lack of cooperation from the Federal Republic of Yugoslavia, Croatia and the Republika Srpska. (2)

The ICTR

In April 1994, half a world away from the Balkans in Rwanda, between half a million and one million people were killed in 100 days of attempted genocide by rival tribes. Was it because they were tribal blacks rather than European whites that no significant world action was taken quickly in this incomprehensibly massive human massacre? Information now available suggests that in January 1994 the

UN Headquarters in New York was aware of the likelihood of the massacre yet did not refer it to the Security Council. (3) At least in the aftermath the UN Security Council created another ad hoc tribunal to deal with the perpetrators.

The President of the International Criminal Tribunal for Rwanda (ICTR), Judge Navanethem Pillay from South Africa, in a statement to the UN General Assembly recently reviewed the progress made by the Tribunal in its first five years. She hoped the establishment of this ad hoc tribunal would effectively deter future atrocities and noted its laudable achievements which were, however, regrettably modest when viewed in the light of the backlog of cases awaiting trial and the deep concern over delays in the administration of justice which interfered with the right of accused persons to a speedy trial. Ninety investigations are currently being conducted by the Office of the Prosecutor and 20 new indictments were expected to be brought in 2000. Trials lasting one to two years were not uncommon but she emphasised that fairness rather than speed must be the paramount consideration. A better organised and more supportive court management system was urgently needed to resolve the many administrative problems leading to constant adjournments, lack of translation and court reporting services and the importance of judicial independence from the Registrar. Cases have been delayed by a plethora of pre-trial motions and interlocutory appeals, but Judge Pillay hopes, with the use of joint trials to accelerate proceedings, that the trials of those in custody will be concluded by 2003. The Rwandan prosecutor has indicted 49 people, including the former Prime Minister, Jean Kambada, and former mayor of the Taba commune, Jean Paul Akayesu, as well as former Rwandan government ministers and Ignace Bagilishema, the former mayor of Mabanza, who surrendered to Tribunal authorities in Pretoria after being tracked for three years and with warrants out for his arrest in Zambia, Australia, South Africa and Singapore.

It should be proudly noted that the Brisbane Bar has contributed to the work of the International Criminal Tribunal for Rwanda. Craig Maconaghy worked in Rwanda during 1995, assisting in the registration of the 130,000 middle and low ranking prisoners dealt with by Rwanda's own justice system and for whom conviction means either execution or 20 years imprisonment. These prisoners included 300-400 child soldiers as young as ten. He returned in 1996-1998 to head an investigation team for the ICTR focussing on the use of media as propaganda and incitement to genocide.

Ken Fleming QC is travelling to Arusha this week to commence his 12 month contract with the ICTR, advising and assisting the prosecutor and conducting prosecutions. His departure has been delayed by the ongoing tension between Rwanda and the ICTR, especially over the release by the CTR's Appeal Tribunal of the former Rwandan Minister for Information.

The ICC

Whilst there has been action in Yugoslavia and Rwanda, the shocking atrocities committed in Burundi, Algeria, the Congo, Mozambique, El Salvador, Burma, Chechnya and elsewhere in the world continually demonstrate humanity's inhumanity, yet remain unavenged.

Why were no ad hoc tribunals established to deal with Pol Pot's killing fields in Kampuchea or the human rights abuses in Uganda, Iraq, Tibet and Afghanistan. David Scheffer, the US Ambassador at Large for War Crimes Issues, visited Sierra Leone in 1998. He heard accounts from victims and refugees of rebels burning entire neighbourhoods, lining up the children, women and men and one by one chopping off their arms and/or feet; many of the rebels were child soldiers, smoking dope and unable to do their butchering effectively, leaving hands dangling from arms and feet from legs. Some boys were spared mutilation and made to serve as slave labour or as soldiers. Many women and young girls were raped and kept in sexual slavery until killed. It goes without saying that property was stolen. Scheffer saw one pre-teen girl whose eyes had been burned out by rebels pouring heated plastic into them after they raped and shot her. Another five year old girl had been thrown onto a fire and suffered extreme burns to the front of her body. Other children were shockingly injured from gunshot wounds, burnings and choppings. (4) But no ad hoc tribunal is dealing with these travesties. When a nation is incapable or unwilling to deal with the issue itself, such horrific crimes should be dealt with by an International Criminal Court.

Although the initial steps taken in Rwanda and Yugoslavia should be celebrated, such ad hoc tribunals created months or years after the commission of wicked injustices to punish at best a limited or token number of offenders are not enough to ensure universal justice for all in accordance with the UN Declaration of Human Rights. The principles of crime and punishment contain universal themes: as with national and local crime, those who would commit these unforgivable inhuman acts against humanity are likely to be deterred if they know there is a real likelihood that they will be apprehended, tried and punished for their conduct.

The UN Declaration of Human Rights, the War Crimes trials following the Second World War, and the ad hoc tribunals created by the UN Security Council to deal with the international crimes committed in the former Yugoslavia and Rwanda have risen phoenix-like from the left-over bones of 50 years of unavenged crimes against humanity to form the living skeleton of a new and growing creature of hope, a permanent International Criminal Court (ICC).

This infant creature of hope evolved with the International Law Commission's 60 article draft *Statute for an International Criminal Court"* in 1994 and its 1996 draft *Code of Crime Against the Peace and Security of Mankind* into a proposal for an International Criminal Court incorporating the views of 185 nations. On 17 July 1998, at a diplomatic conference in Rome, after 5 weeks of intense debate, an overwhelming majority of the nations of the world voted to create the first

permanent International Criminal Court in human history. a concept which was hailed by Secretary-General, Kofi Annan, as "a gift of hope to future generations". (5)

One hundred and twenty States supported the statute, with seven opposing and twenty-one abstaining. Importantly, Australia signed the statute, the first step towards ratification, on 9 December 1998.

As at 8 December 1999, ninety-one States had signed the statute and five Trinidad & Tobago, Senegal, San Marino and Italy and Fiji had ratified it; in Fiji's case on 29 November.

Of those nations who voted against the International Criminal Court, China wanted to protect its national sovereignty; India claimed the statute failed to respect the equality of all states; Israel was unable to accept a last minute amendment that threatened its re-settlement policies; a few Islamic states objected to the statute and despite the many concessions made to accommodate its concerns, in the end the USA refused to support the statute whilst it included aggressive war as a punishable crime. In a skilful move to reach compromise, aggression, genocide, crimes against humanity and war crimes (including rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilisation, or any other sexual violence) were listed as the four "core crimes" within the ICC's jurisdiction, but the parties who do ratify the statute will have to agree upon a provision defining a crime, setting out the conditions under which the Court could exercise its jurisdiction; further conditions include that the statute be ratified by at least sixty nations; and that a further seven years will then have to pass for nations to get their own houses in order before the statute will become binding upon its parties. After all that, the provisions must then be approved by seven-eighths of the parties and a dissenting party may immediately withdraw from the statute.

The statute was a moral victory but with no immediate prospect of practical effect.

The US failure to endorse the statute is puzzling. Perhaps it is out of concern that US officials or troops may be vulnerable to politically motivated prosecutions when deployed abroad on peace keeping or humanitarian missions. The same concerns, however, have not been shared by Britain, France and other NATO countries whose forces represent 80 per cent of NATO forces, compared to the 20 per cent provided by the USA; the US forces comprise only 10 per cent of the international police task force. Cynics may feel that the US wants to retain the option to take international action (aggression) to protect its own national interest without being subject to the International Criminal Court.

The main argument against the establishment of an ICC is that of a nation's unassailable veil of sovereignty. The modern world, investigative journalism, instant telecommunications and the principles of equality and democracy espoused

in the UN Declaration of Human Rights, in combination, demand accountability from individuals and organisations, whether it be the Queen of Australia, elected politicians, school teachers, the President of the Court of Appeal and ministers of religion, even billionaire multi-media magnates with monopolies should not be excluded. As with the accountability of individuals, there comes a point when a nation's evil behaviour or the unrestrained, morally culpable behaviour of people within that nation, justifies international accountability and the lifting of the sovereignty veil for the protection of human rights; a time when the omnipresent tension between the concept of sovereignty and the concept of international justice must come down on the side of justice and international accountability.

The people of the world are no longer to be fobbed off with claims that the implementation of an International Criminal Court requires more time; they ask, how much time? The last 55 years has not been enough time. The blood of 170 million people has not been enough blood. Those who would commit crimes against humanity must know that they will be brought to account.

One of the difficulties of the statute as it stands is that cases may be referred by a prosecutor or a state party but only with consent of the state where the crime occurred, or the state of nationality of the accused; crimes committed by despots against their own citizens are unlikely to be referred to the ICC unless by the Security Council.

An ICC will have the jurisdiction to cover particular crimes rather than designated conflicts. Crimes of terrorism and drug trafficking are not yet within the Court's jurisdiction but a future amendment may permit this.

The statute allows for the issue of an international warrant for the arrest of those who evade its jurisdiction. It will not be retrospective, just as well for Australia with its shocking record in respect of indigenous Australians!

The Court will have a Presidency, an Appeals Division, a Trial Division and a Pre-trial Division with an office of a Prosecutor and a registry and allows for 18 judges serving generally for a non-renewable term of nine years. Although the Court has the six official languages of the United Nations, English and French are to be the working languages. Innocence is presumed until guilt is proven beyond reasonable doubt, the onus resting on the prosecution. The rules of evidence and procedure and the elements of crimes are currently being drafted by a Preparatory Committee with June 2000 as its completion goal. One of the more controversial aspects for those of us reared in the adversarial system is the proposition that witnesses may be allowed in some circumstances to give evidence without having to confront or become known to the accused.

The statute does not allow for the imposition of the death penalty although that remains an option where the accused is tried by a country whose domestic legal

system includes the death penalty.

Amnesty International has been instrumental in Australia and throughout the world in encouraging ratification of the statute. An International Criminal Court is needed to achieve justice, to end impunity and to act as a deterrent, to help end conflicts, to remedy the deficiencies of ad hoc tribunals and to provide a speedier resolution, acting when national criminal justice institutions are unwilling or unable to act.

East Timor

Had an International Criminal Court existed it could have, at least with Security Council support, swung into action in East Timor. Instead, East Timor's hopes lie with another ad hoc tribunal, although many argue that economies of scale do not justify a tribunal. The Law Institute of Victoria voted in September to urge the Australian government to ensure the immediate establishment by the United Nations Security Council of a War Crimes Tribunal to investigate allegations of breaches of humanitarian law, genocide and other crimes against humanity in both East and West Timor. The Institute also offered, in coordination with the International Commission of Jurists, Amnesty International and other groups, the help of its members to gather evidence as quickly as possible from refugees and witnesses.

The United Nations Human Rights Commission, with the support of the European Union, USA and Australia by 27 votes to 12, with 11 abstentions, has established an international inquiry into human rights abuses and atrocities committed in East Timor. It will work together with Indonesian investigators to probe allegations of widespread abuses committed by Indonesian backed militia after East Timor voted for independence. Indonesia, supported by a number of other Asian countries, including China, Japan, India, Pakistan, Sri Lanka and Vietnam, and by Russia, Oman, Saudi Arabia and Syria strongly argued that such an inquiry was meddling in internal affairs. Indonesia has pledged to establish and is apparently conducting its own investigation into atrocities committed in East Timor, and argues an international inquiry will only make reconciliation harder. Indonesia's Defence Minister announced on Wednesday that high ranking military officers will not be prosecuted despite atrocities committed by their men in East Timor or Aceh. ABC news of 9 December 1999reported that soldiers involved in abuses in Aceh were knowingly promoted by their superiors and were not merely undisciplined soldiers committing random acts of abuse.

On Friday, 5 November 1999, the first of three United Nations special representatives arrived in East Timor to begin investigations and although more UN personnel were expected to arrive within days, there was then only one forensic scientist and no staff for the special 5 member commission of inquiry.

On 3 November 1999, INTERFET forces believed 80,000 Timorese were still unaccounted for although conditions made it impossible to conduct an accurate census and the exact numbers are still not clear. As at 3 November, Interfet had confirmed 108 violent deaths.

The UN Commission of Inquiry could be the first step towards establishing a UN War Crimes Tribunal for East Timor; such a tribunal is supported by UN High Commissioner for Human Rights, Mary Robinson.

Had there been an International Criminal Court, there is an excellent chance that the bullies in the militia would not have acted as they did in East Timor, and had they dared there would have been must faster international action.

The Brisbane legal scene has also played its role in the East Timor crisis. Brisbane barrister, Mark Plunkett, was a former UN prosecutor in Cambodia. He and Gary Wood on behalf of the Key Centre for Ethics, Law, Justice and Governance at Griffith University, visited East Timor both before and just after the ballot, witnessing the violence first hand and surviving an attack by militia.

Jose (Joe) Teixeira, who was to speak today but has been called to East Timor, has impressive genetic credentials. He was born in East Timor 35 years ago this month to a Portuguese father exiled to East Timor for political activity against the fascist regime and a Sino-Timorese mother, whose family had for generations been politically active against the Portuguese colonial government seeking rights and freedoms for indigenous Timorese. In 1975, when he was just 10 years old, he fled the Indonesian invasion with his family, spending some weeks in hiding in the mountains outside Dili before escaping to Darwin, and later settling in Sydney where he completed his schooling. Despite this violent upheaval in his life, he obtained an LL.B. from the University of Queensland. He has practised as a solicitor in Brisbane since his admission in February 1992. Joe is committed to promoting universal human rights and to establishing and maintaining the rule of law in an independent East Timor society.

Conclusion

The challenge for Australia and the world is firstly to ensure the growing creature of hope does reach fulfilment in the establishment of an International Criminal Court. This can be achieved by lobbying the Australian government and, far more importantly, the US government, to ratify the statute establishing the ICC. The second and ongoing challenge will be to ensure that the established ICC is not an ineffective idealistic bureaucracy collapsing under the burden of its enormous jurisdiction, rather like the governing body in the last Star Wars movie. It must be able to act selectively, effectively and fairly, where necessary lifting the sovereignty

veil of nations to ensure international justice. It must, subject to its mandate, fiercely maintain its independence and be lean and lithe enough to act quickly when and where needed, supported morally and financially by all nations, cooperating to surrender international criminals and to imprison those convicted and sentenced by the Court.

May the advances made in the next months in East Timor provide sustenance for this creature of hope, the draft International Criminal Court statute, and help it come of age with ratification to mature into a working model International Criminal Court.

* I acknowledge with thanks the research and editing assistance of my associate, Lisa Richardson.

j Speech delivered on Human Rights Day, 10 December 1999, for Amnesty International Legal Network, Brisbane.

1. Ferencz B B , "Getting Aggressive About Preventing Aggression", *Brown Journal of World Affairs*, Spring 1999. (Benjamin B Ferencz is a former Nuremburg War Crimes prosecutor.)

2. Judge Gabrielle Kirk McDonald, President of the International Criminal Tribunal for the Former Yugoslavia; in a statement to the General Assembly Work Program on 8 November 1999. (General Assembly Plenary 1a Press Release GA/9652 48th Meeting (AM) 8 November 1999).

3. "The UN and Rwanda: Abandoned to Genocide," produced by Bronwyn Adcock 21/2/99, Radio National's Background Briefing, http//abc.net.au/rn/talks/bbing/stories/s19237.htm

4. Scheffer D, "Deterrence of War Crimes in the 21st Century", 12th Annual US Pacific Command International Military Operations and Law Conference, February 1999,

5. UN Press Release, L/RON23, 18 July 1998.