Judgment

Dr. Robert I. AKROYD, Barrister, J

I. INTRODUCTION, THE LAW OF WAR CRIME

This is an action concerning war crimes allegedly committed in the course of military action in Afghanistan following the terrorist attacks of September 11th 2001 on the WTC and the Pentagon.

Major sources of law include the ancient customary law of arms as currently declared and extended by:

The Charter of the United Nations Arts.2 (4), 39, 51.The General Assembly Declaration on the Principles of International Law, 2625 (XXX)

The Geneva Convention III 1949 on POW The Geneva Convention IV and Protocols 1949 on civilians Protocol I and the Ottawa Convention 1997 on landmines.

Like the law of human rights, that of war crime is partly inchoate within the concept of natural law waiting to be teased out of collective notions of ideology, morality and ethics, on the one hand, and habits, customs and practices, on the other.

Standards are almost invariably those originally developed as applicable to the conditions and technologies of a perhaps long passed war. Moreover, in a situation of war, the adaptation of such conservative norms to new conditions and technologies is all too likely to be a bone of contention between adversaries, whilst their practice is likely to be dictated by the character of technologies available to them.

As the world's sole remaining superpower, any tendency on the part of the United States to regard itself as aloof from the principles recognized by other states relating to the conduct of war, such as its refusal to recognize the International Criminal Court, must be scrutinized both dispassionately and rigorously.

At the time of the attack on the WTC and the Pentagon there were also UN General Assembly conventions specifically on terrorism relating to diplomats, 1975, hostages, 1979, bombing, 1997 and financing 1999.

The major regulatory problem, in relation to terrorism is the difficulty of defining it, as distinct from such unprivileged belligerents as resistance movements following invasion, or civil wars involving third party guerrilla campaigns.

II. THE EVIDENCE

The basic facts regarding the United States military action in Afghanistan, however, are not in dispute. They are a matter of public record and may be subject to judicial notice, although the prosecution has presented a substantial body of both direct and indirect evidence.

The evidentiary problem with cases involving terrorism is that it is covert on the part of the

terrorists and secret on the part of a responding state. Consequently evidence and argument are badly informed with a consequent tendency to degenerate into mere assertion and supposition. In this context, the onerous role of a judge is to cut through the Gordian knot to provide a clearly reasoned decision.

III. LIABILITY FOR WAR CRIMES

Accordingly, the President of the United States, George W. Bush, is accused of waging aggressive war, war crimes against civilians, property and detainees and crimes against humanity, in his capacity as Head of the US administration at the time of the action in Afghanistan.

Accordingly, the key to mens rea in all types of war crime is that of the moral choice of principle. Thus, in the case of an administrative superior, not only actual permission, or deliberate refusal to control the known acts of subordinates, but also gross failure to control them through indifference, such as might lead to a belief in tacit permission is sufficient to constitute liability, as in the Yamashita Case, 4 War Crimes Trial Reports, 1-96, although the degree of indifference remains uncertain. In crimes against peace, such as aggression, the initiation of orders is the sole ground for the liability of a head of state, or government. Liability for war crimes and crimes against humanity also lies on the person initiating orders, as well as upon those executing them.

There is no doubt that, there was a United States military action in Afghanistan, nor that, under the US Constitution, his was the ultimate authority by which this took place. These are matters of public record open to judicial notice.

1. Crimes against peace, aggressive war

It is contested whether the United States has gone to war in, as opposed to on Afghanistan; the intended target is said to be the Taliban regime harboring the terrorist Al Qaeda organization and not the Afghan state.

The United States has repeatedly sought to characterize as lawful self-defense, retaliatory acts, which are more correctly characterized as unlawful reprisals. The Lockerbie bombing had shocked a developed world, which appeared impotent to act effectively in the face of terrorist blackmail. Terrorist acts continued. This evoked the retaliation on Iraq for its alleged attempt in 1993 to assassinate President George Bush Senior. President Bill Clinton’s retaliation on the Taliban suspected of harboring Al Qaeda terrorists, after the 1998 bombing of United States embassies in Kenya and Tanzania, and now President George W. Bush’s retaliation for their supposed responsibility for the 2001 bombing of the WTC and the Pentagon, representing a massive escalation of the same on-going struggle.

A plea of self-defense may be entered in rebuttal of the charge of aggression.

Measures designed to maintain security against further acts state protected terrorism, therefore, are true examples of self-defense, albeit strictly within the United States domestic jurisdiction. The actions taken in Afghanistan specifically, however, are not essentially defensive, but they are within the jurisdiction of the law amongst nations relating to the conduct of war. Such right of self-defense exists in both customary law and under Art.51 of the U. N. Charter.

In order to be lawful under either customary or treaty law, such act of self-defense must:

i. relate to a previous unlawful act either by another state, or by an informal organization for which it is responsible, causing immediate and overwhelming danger to the rights of the state seeking to exercise it.

ii. be preceded by a demand for reparation by the state seeking to exercise it,

iii. be necessary to protect such a right against any further attack, rather than in retaliation and

iv. be proportionate to such necessity in terms of both range and focus.

This has been interpreted narrowly in both the United Nations and in case law, leading to a potentially dangerous inability to act collectively, opening the window to action taken under unilateral interpretation.

In the Nicaragua Case, 1986, International Law Journal Reports, pp. 14, 94 Judge Jennings dissenting judgment identified the lacunae:

It seems dangerous to define unnecessarily strictly the conditions for lawful self-defense so as to leave a large area where both a forcible response to force is forbidden and yet the UN employment of force, which was intended to fill the gap, is absent.

After the attack on the World Trade Center and the Pentagon, the United Nations Security Council passed Resolutions 1368 and 1373, (S/2001/946), thought by some to implement Judge Jennings opinion.

On the 27th October President Bush announced to the UN Security Council that the United States was going to take military action against the Taliban and Al Qaeda in Afghanistan, if necessary unilaterally.

To what extent, therefore, can the resulting action be regarded as complying with the conditions necessary for lawful self-defense?

Undoubtedly, this action was taken in the light of the terrorist attack on the World Trade Organization and the Pentagon, for which the US government held the Taliban and Al Qaeda responsible. Proof, in the shadowy world of intelligence against terrorism, is almost impossible to obtain. But, it is open to question whether it can be considered in any meaningful way as contemporaneous with the attack on the WTC and the Pentagon.

It might be argued that the response was not preceded by a demand for reparation. Indeed, it might be difficult to imagine what reparation could be considered adequate, other than the trial and punishment of the perpetrators, even should that be forthcoming. Such a reparation was eventually obtained from Libya after the Lockerbie bombing, following the imposition of acts of none military reprisal and lengthy negotiations. No doubt President Bush was under great political pressure to act at least as decisively as his father and predecessor by mounting some form of military retaliation in response.

Nevertheless, it is probable that the demand of September 20th 2001 that the Taliban hand over the suspects of the attacks on the WTC and Pentagon, or share their fate constituted sufficient demand in the certain knowledge that it would be rejected, thereby justifying military action under Art. 51 of the UN Charter.

Some immediate and concerted action on the part of the international community was undoubtedly not only necessary but long overdue. Its absence can only have fuelled a mounting sense of frustration. President Bush's letter to the UN Security Council announcing the forthcoming action spoke of clear and compelling information that the Al Qaeda organization, which is supported by the Taliban regime, had a central role in the attacks. But the measures actually taken were not purely or effectively preventative in character. The threat of terrorism may have been lessened, but has not prevented as a result of operations in Afghanistan.

Proportionality of the force employed in self-defense to the continued threat posed relates to both the extent of the force, how widespread, and its focus, what weapons against what targets. Was the response proportionate to the threat both in the sense of extent and focus? The extent of the force is a technical issue beyond current contention. The defendant himself maintains that this is not war between the United States and Afghanistan, but between the United States and a Taliban regime protecting the Al Qaeda terrorist organization, supposedly responsible for the September 11th attack on the WTC and the Pentagon. But the sufficiency of focus of the force employed is negated by proof of attacks on civilians and/or against civilian property. Although, the Geneva Convention IV, nowhere deals with attacks on civilians as such, Protocol I Arts. 48 et seq. dealing with operations against civilians is considered to be largely declaratory of ancient customary law.

Accordingly, in Henry V, Shakespeare has Fluellen say:

> "This expressly against the law of arms."

And King Henry himself reacts:

> "I was not angry since I came to France until this instant."

A more recent authority explains:

> A principle of long standing, if not always honored in practice, is the requirement to protect civilians against the effects of hostilities. As far as the civilian population is concerned during hostilities, the basic rule formulated in article 48 of Protocol I is that the parties to the conflict must at all times distinguish between such population and combatants and between civilian and military objectives and must direct their operations only against military objectives.
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> (Shaw, M. N0., 2003, International Law, 5th edn, Cambridge U.P. p1063)

A plea of customary reprisal in self-defense may provide a possible supplementary alternative.

Reprisals, either customary or under the Protocols to the 1949 Geneva Convention IV on Civilians may constitute an exception to the Kellogg Briand Pact and the United Nations Charter.

But any such plea of reprisal provides justification, if at all, only conditionally in accordance with the case for self-defense. In other words, the use of force in self-defense may be a form of retaliation, provided that it also fulfills all the conditions of self-defense.

In particular, acts of retaliation carry a higher burden of responsibility to discriminate between military and civilian targets, in order to demonstrate necessity for the action and its

proportionality to the continuing threat.

Such originally customary conditions are declared in the Protocol I to the Geneva Convention of 1949. The United States, however, declined to ratify the Protocol under the argument that Art. 44 gave face to terrorism and it already operated customary conditions for reprisal through its actual terms for military engagement, whereas the Protocol could be used to provide a cloak for terrorism. Such an argument can be regarded as underlying the previous President Clinton's response to the bombing of US embassies.

But the United States cannot opt in or out of such conditions arbitrarily or at will. There cannot be one law of reprisal for the United States and another for the rest of the world, nor can there be a law of reprisal, which changes from time to time with different administrations. It, therefore, seems likely that the United States, but perhaps not the administration of President Bush, is committed to a customary law of reprisal identical to its expression in Protocol I with the exception of Art. 44.

Accordingly:

It is clear that the United States has taken the categorical position that reprisals using the use of force are illegal under international law.

(Memorandum on United States Practice with Respect to Reprisals American Journal of International Law, 1979, p489).

Thus, it is clear that, whilst President Clinton's reprisal against the supposed Taliban and Al Qaeda terrorist camp in Afghanistan using Tomahawk precision guided missiles arguably complied with such conditions, the reprisal of President Bush on the same supposed perpetrators of the attack on the WTC and the Pentagon using cluster bombs, daisy cutter bombs and depleted uranium munitions, did not. The effectiveness of these latter weapons is essentially indiscriminate. In a situation, where it may be difficult to distinguish between Taliban and Al Qaeda terrorists, on the one hand, and their civilian victims, on the other, there can be no possible justification for their use in reprisal.

A just war?

It is now doubtful whether any doctrine of just war survives as a justification independently of the doctrine of self-defense. I am, nevertheless, impressed by Okubo Sensei's argument in principle that it continues to exist as a residuary justification independently of its later specific encapsulation. One of the basic problems in any system of law is how to avoid getting locked into specific rules without an overriding principle to fall back on when, inevitably, circumstances change. The concept of just war is just such an overriding principle, which, properly employed, could provide much needed flexibility in the laws response to the challenges to come.

I, nevertheless, consider that it does not have relevance to the specific circumstances of the present action.

2a. War crimes against civilians and civilian property under the Geneva Convention IV and Protocols 1949.

It is not disputed that the US used cluster bombs, daisy cutter bombs and depleted uranium munitions, designed, tested and manufactured by themselves. It is inconceivable that the Bush

administration would go to war without knowing of and intending the results actually obtained. The effectiveness of each of these weapons lies in their indiscriminate and persistent destructiveness.

In its Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons, the International Court of Justice stated:

The cardinal principles contained in the texts constituting the fabric of humanitarian law are the following. The first is aimed at the protection of the civilian population and civilian objects and establishes the distinction between combatants and non-combatants; states must never make civilians the object of attack and must consequently never use weapons that are incapable of distinguishing between civilian and military targets. (ICJ Reports, 1996, pp 226, 257).

There is extensive and cogent evidence of fatalities and injuries to humans, including women and small children, fully consistent with their specific use.

There is, likewise, further damage to property over and above that sustained during a decade of civil war, also fully consistent with their specific use, especially the characteristic damage by cluster bombing.

The fact and intention of making war on civilians and civilian property is implicit in the choice of weaponry and does not, therefore admit of any defense. It is an classic, unanswerable case of res ipsa loquiture, i.e. the facts speak for themselves.

For reasons that will become apparent, I prefer to deal with the issue of 2b. War crimes against detainees separately.

3. Crimes against humanity

Crimes against humanity are essentially an ancillary category, which must be committed in the execution of a crime against peace and/or war crime, Accordingly, it can be committed against the civilian population of the accused's own as well as that of other states and, as well as in wartime, in the peace beyond the formal cessation of hostilities. See the Pinochet Case, [1999] 2 all E R 97; Nulyarimma v. Thompson [2000]39 ILM20. The crime of genocide as defined in the Genocide Convention of 1948 can be regarded as a special form of crime against humanity.

The essential substance of liability for crimes against humanity lies in the persistence of civilian danger through unexploded ordinance and radioactivity.

Accordingly, a recent British coroners inquiry into the death of a bomb disposal expert found that up to 40% of cluster bomblets are estimated not to explode on impact and urged the Ministry of Defense to prohibit their use. The sheer number and uncertain location of unexploded bomblets means that it must take many years before they can be cleared and, whether rural or urban the land they lie on cannot be put beyond use. These remain a constant danger to the population at large particularly to refugees and children, who recognize their characteristic yellow as being that of a refugee food parcel. And who is to clear them? The new Geneva Convention places responsibility for clearing unexploded cluster bomblets onto the shoulders of those who dropped them, but the present defendant is unable to point to any part of their forces' operational budget for their clearance.

There is also evidence that depleted uranium ordinance has left appreciably high levels of radioactive contamination in locations where it has been used, causing grotesque injury to civilians, including children.

Reprisal, self-defense and aggression

In any given theatre of war, acts of aggression, war crimes against civilians and civilian property, (but not necessarily against POW) and crimes against humanity are likely to be causally linked in that sequence, i.e. “because”, the cause, “therefore”, the effect, in which each succeeding effect provides the most cogent evidence of its preceding cause. And so it was in the case of the US action in Afghanistan. The military action against Afghanistan, therefore, was a reprisal, disproportionate to the threat posed and, to that extent, not taken in self-defense, but in aggression.

I, therefore, have no hesitation in finding George W. Bush guilty of crimes against humanity, war crimes against civilians and against civilian property, and also, by virtue thereof, guilty of the crime of aggression.

2b. War crimes against detainees

The problem of the detainees is a difficult one. There are three elements which may invited different outcomes, under the Geneva Convention III of 1949 on POW.

Detainees in the field. There is substantial evidence of maltreatment of prisoners in the field. That of herding into container vans is inconclusive, but their ventilation・by random shooting is clearly a crime of some kind. Those responsible should be identified and punished. The problem is that its very randomness suggests that it was a series of impromptu acts on the part of troops insufficiently prepared and disciplined in combat conditions. I can find no evidence that this was part of a systematic policy, for which the head of the US administration is responsible by exercise of the requisite moral choice.

On November 13th 2001, President Bush provided for the trial of detainees by military commission, irrespective of what they were charged with. The US administration is on record as saying that detainees in Guantanamo Bay are not POW, within the Geneva

Convention, but unlawful belligerents or that, if they are POW, they have forfeited protection as failing to comply with its requirement for legitimate government troops to be in uniform, with some distinguishing mark and carrying arms openly..

The status of unlawful belligerent insisted upon by the Bush administration is nowhere recognized by international law. It seem to be the unfortunate result of a concatenation between two quite distinct concepts, the international belligerent entitled to protection as a POW and the private criminal liable to domestic criminal process, each of which may exist separately in parallel.

This creates a distinction between those detainees suspected of membership of the Taliban, and those suspected of being Al Qaeda.

The former may argue that they are the legitimate forces for the only government of Afghanistan to be recognized, by however few other states It seems consistent with both the general situation in Afghanistan over more than a decade of civil war, however, and the

specific philosophy of the Taliban regime that regular conventional troops wearing uniform are unknown, despite the obligation of combatants to distinguish themselves from civilians, under Geneva Convention IV Art. 4, Protocol I Art. 43 and 44(3). To make matters worse, it would be a very trusting civilian anywhere in Afghanistan to go about unarmed! There is, therefore, a case for the US administration to answer in this instance. If the US administration accuses detainees of membership of the Taliban, they should be accorded the rights of POW. A Lord of Appeal in Ordinary, Lord Stein summarized the position thus:

I am content to assume that the Taliban soldiers detained at Guantanamo are not covered by a literal interpretation of the third Geneva Convention, relating to the treatment of prisoners of war, because they did not wear uniforms on the battlefield. But under the Geneva accords prisoners captured during armed conflicts are entitled to humane treatment.

Article 75 of a subsequent Geneva Convention, (i.e. Protocol I), contains more far reaching provisions to protect prisoners, irrespective of their status, captured in armed conflicts. It is true that the US has not ratified this protocol, but it is generally accepted that the article reflects customary international law. Indeed, the US was advised that it was bound by the article. It prohibits the use of torture and inhuman or degrading treatment. There is no obligation on the prisoner to answer questions. (Stein, J, In the dock of Guantanamo Bay, The Sunday Times News Review, 30th November 2003 p 2; see also Morley, K. E. [The Permanent Representative of the United States to the United Nations] The Guantanamo detainees: A reply to Lord Stein, The International Herald Tribune,16th December 2003 and note Law and Lore, The Times editorial, 21st February 2004, p. 29).

After some initial prevarication, on February 7th 2002, this was acceded to by the Bush administration, but there is little sign of its implementation in practice. The techniques of interrogation have been described as not quite torture, but as near to what you can get, i.e. stress and duress by sleep deprivation and being forced to stand for long periods.

The latter, by contrast, are not in any way regular troops within the meaning of the Geneva Convention. They may be persons entitled to derivative POW status as protected by the de facto government regime of the Taliban. Although by definition terrorism involves criminal acts, it is itself only a war crime to the extent to which it is protected by state authority. Thus, the attack on the WTC and the Pentagon may itself be a war crime insofar as it was carried out by Al Qaeda under the aegis of the Taliban. Irrespective of that, however, they may be liable to the normal domestic criminal process of an appropriate jurisdiction, variously the US, Afghanistan, or perhaps that of their nationality under a Canadian line of authority culminating in R v. Kaeler and Stolski [1945] WWR 566. Alternatively, it may be that any state may exercise universal criminal jurisdiction jure gentium over acts analogous to piracy, including piracy by air under the Tokyo Convention. Subject thereto, the detainees should be accorded the status of POW, and/or of ordinary criminal suspects. The fact that they are accorded neither is a breach of the customary law of war crime protecting POW. As Lord Stein concludes,

> "... the US will, in due course, be judged at the bar of informed international opinion."

I, therefore, find George W. Bush not guilty of crimes against detainees in the field of action, but guilty of crimes against detainees suspected of being part of Taliban forces and against detainees suspected of membership of Al Qaeda currently held together with others in Guantanamo Bay.

VI. RECOMMENDATIONS

The war on terrorism in general.

Globalization in its accurate widest sense of a capitalist counterpart to Marx's withering of the state instigated by the convergence of information communication technologies, poses many challenges to the established apparatus of the nation state, including the role and rule of law. One of such challenges is that posed by terrorism, which has the ability to challenge the state by its ability to inflict unacceptable damage using very small numbers of covert activists fighting a guerrilla war. The key issue here is how to deal effectively with state sponsored, or state tolerated terrorism, in a situation where the victim of terrorism's response may itself militate against the very rule of law, which it is sought to protect.

Terrorism thrives on the destabilization of statehood derived from political polarization, which is invariably its aim. In this context, the heavy-handed United States approach is unlikely to provide an effective response. It plays into the hands of the terrorists by creating new enemies where none originally existed. As one British army officer put it:

For the Americans, safety lies in large numbers, for us, it lies in small numbers operating independently. ·

Meanwhile, it can be assumed that the use of military force characterized as being in self-defense is almost certain to be resorted to in a legal or illegal form, where there is sufficient provocation.

War is concerned with the use of controlled force. In the present context, this should follow the rule "minimum effective force with maximum effective focus" (MEF/MEF) the very opposite of shock and awe. To be effective against terrorism, a policy of MEF/MEF needs to be based on sound intelligence combined with the judicious use of special forces against specific terrorist targets. The use of conventional forces in overwhelming strength may also be needed, albeit strictly in a peacekeeping role to maintain stability. Such a role should include returning fire only when attacked. Essentially it is a matter of the controlled use of force to convince the terrorists that, in the fullness of time, there is nothing to be gained by their tactics. Britain has successfully applied these principles in combating American financed, East European armed terrorism in Ulster for the past 30 years. This requires courage, skill and, above all, patience. It needs to be the subject of special training in the dangerous world, which we inhabit together.

Compulsory subjection of disputes to negotiation

Effective law has to be pragmatic in providing opportunities for altruism out of situations of expediency. Negotiation, mediated or otherwise, arbitration and/or adjudication can eventually succeed, as the Lockerbie case shows. But it would be naive to suggest that they will suffice without the threat of coercion in some form. This will normally be none military reprisals, but stronger measures may still be needed. The overall problem is that the appropriate body to do so, i.e. the United Nations, is chronically unable, or unwilling to act.

The problem with the argument advocating mediated negotiation in respect of terrorist action is that it invariably takes time, as in the case of Lockerbie, during which period the victim state loses the right to act in self-defense against an immediate and continuing threat. Judge Jennings' comment in the Nicaragua Case pinpoints the problem, which is the ongoing

unwillingness of the United Nations to act decisively, in order to stabilize a situation where tension is rising, thereby forcing one or both parties

to act unilaterally. Any move towards compulsory negotiation is welcome if accompanied by effective measures for stabilization, preferably by the United Nations and, if necessary, by forceful means.

It does not escape our notice that we live in interesting times when change may be unexpected. The rise of terrorism, ostensibly independent of the state control characterizing traditional war, is exactly a case in point. There can be little doubt that sooner rather than later this will bring calls for a new approach to dealing with apparently unprovoked terrorist attacks within, or between states. In particular, the law relating to self-defense was developed in an earlier age, when traditional warfare was still the norm. It may be too cumbersome for the rapid fluidity of modern terrorism.

Some, notably the present Japanese Minister for defense, have already repeatedly advocated Japan's need for pre-emptive action against imminent threats from such other states as North Korea.

Use of horrific weapons

We have just started to get rid of land mines, only for them to be rendered obsolete by even more horrific weapons. Cluster bombs, daisy cutters and depleted uranium ordinance are obscenities, which should be outlawed as soon as possible. Conceivably, DU munitions, at least, are already unlawful as causing unnecessary suffering・under Art. 35 of Protocol I and, indeed, under the 1977 Advisory Opinion of the International Court on nuclear weapons. Each type of weapon, however, has its own characteristics, which, in the case of DU are sufficiently technologically complex to invite abuse of a merely blanket prohibition. It is, therefore, likely that their effective prohibition will require three separate supplementary treaties.

Compensation for war crime

Reparations to the victims of war crime, as with the victims of terrorism, are fraught with difficulty.

It goes without saying that anything which helps to alleviate the sufferings of war crime victims is to be welcomed wholeheartedly. But this does not necessarily mean uncritically. It seems to be taken for granted that, in principle, such a development would necessarily be an unalloyed benefit. I do not wish to allow this assumption to pass unchallenged. The urge to seek compensation sometimes takes on the character of a knee jerk reaction to a frustrating situation. Even if compensation is geared to a war crime victim's practical need to purchase an annuity, how can any merely financial remedy ever be regarded as in any way adequate to the victim's suffering? Such an attitude is a manifestation of the compensation culture one side effect of which, we already know from experience, is likely to trivialize the offence. For those who are ready to commit war crimes, therefore, such liability to pay compensation is likely to be regarded merely as payment in advance not exactly a deterrent! Worse, it is unlikely that, in a rapidly changing world, any such code providing for compensation would be able to anticipate new developments in mankind's march towards Armageddon. In the course of time, therefore, in the absence of any clear body of overriding principle, anything not specifically liable to compensation under treaty could thereby effectively come to be regarded as a war criminal's charter.

The overall effect would be to introduce the notion of civil compensation into what is currently solely a criminal field, reflecting the emergence of tort/delict from its criminal roots under domestic law.

There are intractable substantive issues. What is to be compensated for? Is death, as well as incapacitating injury open to compensation? Who is liable to pay; the perpetrators, or their state? To whom are reparations payable; the victims themselves, or their state? It is not just a matter of reaching a consensus on some or all of such issues. Their theoretical justification needs to be clear, the role they are intended to play in the context of existing laws and, most importantly, their prospects of enforcement. Once again, the problem is reducible to the unwillingness of the United Nations to act decisively.

The domestic law of civil liability is notoriously reluctant to award compensation in damages for a victim's death as opposed to their injury on the grounds that 1, since the injury suffered is bereavement 2, there is nothing, except perhaps the loss of a breadwinner, by which the measure of damages can be estimated.. To take an analogous example, for what was compensation given in the Lockerbie Case?

Could it be that it was less pure compensation, but something in the nature of a fine? But, if so, who should receive it? Perhaps a United Nations Law Crime Compensation should be set up as part of the British sponsored reform package, to receive monies paid in this way. Such a move would also have the welcome side effect of placing responsibility where it should be responsibly exercised, but isn't.

It is not simply that it is difficult to obtain a consensus on the substantive nature of compensation, however, but, leaving aside the vexed question of evidence in chaotic and covert situations, it is even more difficult to ensure its enforceability. There are now welcome attempts to codify the law in this context, but the making of black letter international law, which remains un-enforced for lack of the political will is a blight on the history of international relations, which time has done all too little to remedy. Conceivably, such a code on compensation, like the former League of Nations Charter, or the early Geneva Conventions themselves, might come into theoretical existence as having been signed by the requisite number of state governments, which are subsequently unable, or unwilling to ratify it sufficiently to make it effective. Too much law that is un-enforced, especially against so much of a challenge to the institution of law as terrorism, simply serves the counter productive end of bringing the rule of law itself into contempt.

The most that can realistically and safely be said with confidence, therefore, is that a body of effectively enforced customary law and precedent needs to be developed. Such an effective way, as ever, is festina lente, to make haste slowly by pursuing the payment of compensation, case by actual case, before trying to discern a thread of common overriding principle. Naturally, this will depend upon events and responses to events. Any state that has committed war crimes, in the first place, is hardly likely to agree readily to the payment of compensation, in the second place, especially where perhaps millions of victims are involved. At a time of rapid technological and social change affecting the very nature of warfare, therefore, this could become a protracted and even turbulent business.

The expiry of generations after war and the absence of any limitation period for actions on war crimes may be significant factors in this context. It was widely supposed, for example, that the Japanese government resisted renewed claims for compensation by British exPOW not because the sums claimed were very significant in themselves, but because to have failed

to do so could have opened the floodgates to massive claims from elsewhere. [N.B. I am of the opinion that the Japanese government's argument, in this context, was legally, but not morally, justified]. At the present time, therefore, such a code on compensation for war crime is unlikely to be ratified by a Japan, which could still be threatened by the possibility of legal actions from China and South East Asian states for crimes committed against their populations during the Second World War. Nor would China and South East Asian states, necessarily want to hazard their own negotiation position by acceding to restrictions imposed by such a code. There is little doubt that the imponderable complexities of such honne, (realities), exercise the political ingenuity of their respective governments, which are all too likely to consign theoretical codes to the category of "tatemae" (symbolism).

V. JURISDICTION

The universal jurisdiction principle confers jurisdiction on any state which cares to exercise it for matters such as war crimes, or piracy, which are considered to be so horrendous as their punishment is in the common interest of the international community and/or which are difficult to confine within the jurisdiction of any one or more specific states.

In the case of war crimes, proceedings are normally brought between former adversaries. Very occasionally, however, states have been known to try their own nationals, probably with a view of placating international outrage. The earliest example of this was the German case of the Llandovery Castle, the most notorious, perhaps being the US Mai Lai Massacre Case and in its civil war, Nigeria prosecuted one of its own soldiers on TV for shooting a Biafran prisoner.

Accordingly, proceedings for war crimes may also be instituted by third party states. The most extreme example of this was probably the Eichmann Case by a state of Israel, which did not even exist at the time of the events concerned in Germany.

On a supplementary basis with universal jurisdiction, international jurisdiction was initiated by the Rome Statute of 1998 by the establishment of an International Criminal Court at the Hague. This was to become active with the acquisition of 60 signatories, but the United States declared its unwillingness to participate on the grounds that it was open to political abuse.

Accordingly it is also recommended that, in order to be effective, the ICTA, perhaps via the Nichibenren, should approach the Japanese government and the opposition formally and publicly, with a view of persuading them to adopt the action in order to exercise their universal jurisdiction.