Offenses of International Concern: Multilateral State Treaty Practice in the Forty Years Since Nuremberg

By Roger S. Clark*

I. Introduction

It is forty years since the Charter of the Nuremberg Tribunal1 and the Judgment of that Tribunal2 asserted with considerable force the proposition that there are certain "international crimes", "crimes under international law", or "crimes against international law".3 The Charter and Judgment spoke of crimes against peace, war crimes, and crimes against humanity. This trio of evils had to be added to piracy which, all were agreed, had similar characteristics.4 Section 404 of the Restatement of Foreign Relations Law of the United States (Revised)5 has recently referred to a category of offenses "of universal concern" and has explained their characteristics in jurisdictional terms:

A state may exercise jurisdiction to define and punish certain offenses recognized by the community of nations as of universal concern, such as piracy, slave trade, attacks on or hijacking of aircraft, genocide, war crimes, and perhaps terrorism, even when none of the bases of jurisdiction indicated in Section 402 is present.6

The thrust of the present Article is that the Restatement account, suggestive as it is, does not capture the full flavor of some very sophisticated trends in state practice that have been taking place in recent years in regional and global multilateral treaty-making in respect of what I shall call, in a slight modification of the Restatement language, "offenses of international concern". Pursuant to a collection of treaties, states are authorized, and in some cases required,7 to act through their administrative and judicial criminal law processes against individuals who have been accused of engaging in one or more instances of a range of perceived evils. The treaties on offenses of international concern raise, and in some cases provide answers to, a multitude of issues, many of which will be discussed in the pages that follow. There is first, and in the more recent treaties, most prominently, the question of jurisdiction over matters criminal. Second is the package of issues that I call "extradition, asylum, the political offender exception, extradite or prosecute, and all that", a very complex set of interwoven matters. Then, given less prominence, are issues concerning the rights of those accused under the treaties. Finally is a set of issues concerning the "general part" of criminal law - the elements of culpability required, the rules concerning complicity in offenses, the relevance of the fact that the accused was a government official or acting on superior orders, diplomatic immunity, and the like. These issues have largely escaped the kind of systematic analysis which can only come from an examination of all the data. Such a systematic effort is what I have tried to carry out in this article.

What follows is thus an attempt to analyze what has been done on such matters8 in the past forty years under the auspices of the United Nations (U.N.), the International Civil Aviation Organization (I.C.A.O.), the United Nations Educational, Scientific and Cultural Organization (U.N.E.S.C.O.), the
International Atomic Energy Agency (I.A.E.A.), the Council of Europe, the Organization of American States (O.A.S.) and the International Committee of the Red Cross (I.C.R.C.). For the most part, the discussion will be of treaties adopted under the auspices of these bodies since these are the developments that have most clearly affected international law and practice. This is not to deny the importance of other "sources" of international law such as custom, general principles of law (an explanation given by the prosecutors for Nuremberg's "crimes against humanity") and resolutions of the United Nations General Assembly and comparable regional bodies (to the extent that they create or reflect international custom). My point is that a large part of the terrain is mapped out by treaty and that this part needs careful analysis. It will be necessary, however, to make reference from time to time to developments in the International Law Commission and the General Assembly of the United Nations, particularly in respect of the codification of the rules of State Responsibility and the work on the Draft Code of Offenses Against the Peace and Security of Mankind. These efforts have not yet resulted, and may never result, in treaty formulations, but they are contributing to a corpus of customary law in the area.


I believe that these are the most significant examples of multilateral treaty practice since the Second World War that proceed on the basis that there is an international dimension to the criminality with which the particular treaty is concerned.