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Book Review: A Treatise on International Criminal Law (1973)

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A TREATISE ON INTERNATIONAL CRIMINAL LAW. 2 Vols. Edited by M. Cherif Bassiouni* and Ved P. Nanda.** Springfield, Illinois: Charles C. Thomas, Publisher, 1973. Vol. I: pp. xxv, 751. $26.50. Vol. II, pp. xix, 426. $19.75.

This book can be viewed in one of two ways. It can be viewed as principally a criminal law treatise, or it can be viewed as a treatise on one aspect of international law, but an international law treatise nonetheless. Admittedly, it has been viewed in this review, perhaps myopically, by one whose usual perspective is that of the criminal law scholar and not that of the internationalist. With the reviewer's bias announced, the reader is free to accept that which may seem accurate or incisive, and to disregard that which seems unpalatable or unacceptable.

If the work is viewed as principally a criminal law treatise, it has an inherent handicap. The editors of these monumental two volumes state in the preface the justification for a work of this nature: "The world . . . continues to be plagued by man-made ills, some of which threaten its very existence. Among such threats are forms of conduct by states and individuals which so offend the common morality of mankind that they rise to the level of international crimes."[1] This succinct statement raises at a glance two threshold questions: first, whether there exists a body of law that can properly be called international criminal law; and secondly, and more fundamentally, whether there exists a "common morality of mankind" on which such a body of law might be based.

According to traditional analysis, the answer to the first question is "no," for one will not find contained in these two volumes the usual treatment of criminal law. The distinctions between traditional criminal law and what has been described as international criminal law are obvious. First, in the international setting there is no single, authoritative, legislative or like rule-defining body empowered to create and define with precision a code of conduct to which all member states or individuals must conform. Such an absence in a typical criminal law setting would be a fatal flaw and would be an anathema to one versed in the principle of legality. Secondly, contrary to traditional criminal law, jurisdiction over international wrongs is not fixed, since there is no single tribunal or judicial structure empowered to hear and dispose of cases occurring in the transnational setting. The absence of international jurisdiction over criminal conduct is accompanied by a related third

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[1] 1 TREATISE ON INTERNATIONAL CRIMINAL LAW xi (M. Bassiouni & V. Nanda eds. 1973).

distinction, the absence of general enforcement powers to command adherence to an international code of conduct.

In answer to the second question, whether there exists a "common morality of mankind," one finds in the international context, as opposed to the typical national setting, none of the cohesiveness that binds a social structure together. One does not find, for example, the principal unifying ingredients of a society—custom, language, common interests, shared ideals, and cultural similarities. Since there is no international social order in this sense, it is difficult to conceive the existence of a universal code of conduct based on the values of such a society.

Indeed, in one of the sections in volume one the latter point is clearly made. The section concerns the Nuremberg and Tokyo trials and was written by Bert Röling, who served as one of the judges of the International Military Tribunal for the Far East (Tokyo trials). He points out the substantial differences in fundamental philosophy between the views expressed by the majority in the Tokyo trials and those expressed by dissenting Judge R. B. Pal. Even aggression precipitating a disastrous and devastating world war, particularly the more harsh when viewed in retrospect, could not produce a consensus opinion that the crime against peace was a "crime" at all. Röling states that "[i]t is indeed a real contrast: the supreme international crime, in the opinion of Nuremburg and the majority Tokyo judgment—no crime at all according to the dissenting opinion of Judge Pal."[2]

The difficulty inherent in defining or even conceptualizing an international "crime" is further indicated by Röling when he observes that "[t]rials after the war are the unavoidable consequence of the scientifically cultivated moral indignation of the victor."[3] That is to say, what is or is not morally blameworthy is measured not so much by a predetermined consensus of society extant *prior* to conflict as it is by the extent of the moral outrage of the victor, who by necessity and fortune is placed in judgment over individual members of the defeated nation.

To the editors' credit, they are cognizant of all the difficulties of their task. In the preface they acknowledge the problem of defining international crimes. "Not the least overwhelming of all prospects are the problems of codification, draftsmanship, definitional content of the prohibited conduct, appropriate sanctions, jurisdiction, and enforcement."[4] They further add: "Defining crimes and necessary sanctions are [sic] troublesome indeed, but deciding on the type of structure to imple-

[2] *Id.* at 601.
[3] *Id.* at 600.
[4] *Id.* at xii.

ment it is equally arduous. A court system and its enforcement machinery are not likely to be easily agreed upon."[5]

These difficulties, the editors point out, are merely symptomatic of two persistent problems that obstruct recognition of international criminal law as a distinct discipline:

> Foremost is the adamant refusal of nation-states to surrender or share their power with an international organization in certain areas determined for various reasons by each nation-state to be of vital self-interest. . . . The other seminal problem is the apparent impossibility of nation-states to agree on common goals in the areas considered part of the subject matter. Even when some consensus is reached on commonly shared goals, there is disagreement on the appropriate means to achieve them.[6]

The editors will only concede, however, that these are problems; they do not conceive them as insurmountable problems. Indeed, the very fact that "international criminal law" is abstruse, difficult to define, and even more difficult to perceive is a strong indication to the editors that a work of this nature is needed. They state their case as follows:

> It is now felt . . . that a new direction must be given to this entire field [of international criminal law]. One way is to consider it as a distinct discipline which falls neither under classical international law nor conventional criminal law. This indeed is one of the purposes of this book.[7]

If the treatise is viewed in this manner, then the question of whether international criminal law is a separate, distinct discipline becomes one of academic interest only. What *is* of interest is that a number of significant problem areas do, in fact, exist and are of sufficient gravity to warrant extensive, careful consideration. In terms of satisfying this need, the editors have done a superb job of focusing on the different problem areas and furnishing a single forum in which they are discussed. This is perhaps the strongest point of the treatise.

The treatise is not without its faults. The editors point out that the treatise is made up of articles prepared by 33 contributing authors from 17 countries, giving the treatise the "widest theoretical and doctrinal basis" and "a truly international perspective." These observations may indeed be accurate, but even though the use of so many viewpoints is advantageous, it furnishes a serious disadvantage as well: a lack of cohesiveness and an overall sense of purpose.

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[5] *Id.*
[6] *Id.*
[7] *Id.* at xi.

Perhaps more damaging to the overall integrity of the treatise, however, is the fact that many segments of the book were written for other purposes, perhaps with different objectives or different audiences in mind. No fewer than ten segments of the treatise (two of them entire chapters—chapters VI and XI of volume one) are reprinted from or based largely on articles, addresses or proceedings of various meetings or conferences. Because these segments were not prepared with the organizational scheme of the book in mind but were prepared as autonomous pieces, the treatise suffers somewhat from a lack of cohesiveness and direction.

However, aside from this basic structural fault, the treatise offers valuable material. Of course, it offers coverage of more traditional subjects, such as aggression, the regulation of armed conflicts (unlawful weapons, conventions on handling of prisoners of war, and the like), and procedural matters (prosecution of international crimes, jurisdiction, enforcement machinery), and these subjects are presented well. Particular portions of the treatise are extraordinarily well done; for example, the section in volume one dealing with common crimes against mankind. This part of the treatise includes, *inter alia*, an excellent chapter on terrorism and piracy. Terrorism and one aspect of piracy—hijacking —have become particularly grievous problems during this decade and have assumed a pervertedly faddish posture in international affairs. Uniquely, terrorism and hijacking are problems of international proportions with international consequences. They are not problems to be ignored by any nation. By the same token, they are problems capable of international solution. The treatment of both subjects is enlightening and suggestive of various approaches to be taken toward resolution of the problems.

The second volume contains two separate but equally exhaustive and well written parts on jurisdiction over international offenses and extradition and asylum. The subject of jurisdiction over international offenses is not one characterized by certainty and precision, and its inclusion adds stature to the treatise. Of particular interest, though certainly not typical of the jurisdiction material as a whole, is the section on criminal jurisdiction in outer space, which includes a discussion of jurisdiction over crimes committed in a spacecraft in outer space or, to make the problem more tantalizing, in a spacecraft on the moon or other celestial body.

The treatise represents a meaningful addition to both the literature of traditional international law and traditional criminal law. It fills what has heretofore been a vacuum of significant proportions, since it constitutes a single forum in which most of the important issues of the day are discussed or at least raised. Ultimately, the latter point is perhaps the strongest feature of this work. In preparing the treatise, the editors have moved closer to their goal of establishing international criminal law as a distinct discipline which transcends the distinctions between it and traditional international and criminal law.

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