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Reflections on the Creation of a Unified Criminal Law

Dr. Theo Vogler*

Many commentators have pointed to the goal of creating a unified criminal law, accepted in all countries and accompanied by an international penal authority to secure its enforcement.¹ It is easy to recognize the great advantages of a unified, global law. In the field of criminal law in particular, the compelling authority of a penal code would be much more persuasive to the individual citizen than today's criminal law, the proscriptions of which vary from state to state. The law appears arbitrary, generating exterior compliance but not true consent.

This insight becomes even more persuasive when one considers the growing acceptance of general prevention as the purpose of criminal law. By general prevention, I do not mean its negative aspects, deterrence of the public or at least of potential offenders, but its positive aspect, development of a basis of trust and confidence.² A criminal law which changes as one crosses the border and travels into another state is detrimental to the goal of general prevention. Yet even on the comparatively narrow level of the states represented in the Council of Europe, repeated efforts to work out a European Criminal Code as a model of a unified criminal law have led to nothing.³ Nor do they stand a chance of coming to fruition in the foreseeable future.

What makes the idea of a "World Law" appear utopian is not so much the idea, but the premise that there should be, for any conflict, a solution regarded as fair and efficient by all. If that premise held true, the development of a World Law would indeed be only a matter of time, as such solutions, being "final truths," would necessarily gain universal acceptance by their own momentum. Yet each attempt at defining, even for domestic law, the scope of criminal behavior makes it obvious that such a premise is totally unrealistic.

This insight does not preclude, however, efforts at reaching the goal of

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an International Penal Code, at least in some areas. Unified solutions are possible to the extent that they conform with the common interest of all states and do not interfere with national interests of particular states. This is the appropriate frame of reference for an evaluation of the Special Part of the Draft International Criminal Code presented by Professor Bassiouni,⁴ which is limited to particular acts which have been defined by international agreements and outlawed as contrary to international law by the community of nations. By restricting the Draft Code to that which is politically feasible and necessary to achieve the purposes of penal policy, its author has enhanced its prospects of being transferred into a binding convention in the future.

Even a convention binding under international law cannot achieve much, as long as its enforcement by courts of law is not guaranteed. The fact that most member states of the Council of Europe have submitted to the jurisdiction of the European Commission⁵ as well as the European Court of Human Rights,⁶ gives rise to some hope; yet the traditional reliance on the principle of national sovereignty is most likely to prevent the recognition of a supranational penal authority for the foreseeable future. It is therefore quite characteristic that, on the European level, many commentators do not regard the authority of the Court of the European Community to impose fines as a penal authority.⁷ The fate of the efforts to create an International Criminal Court⁸ confirms the futility of all such attempts.

In light of these facts, it is particularly noteworthy that the Committee on International Criminal Law of the International Law Association has presented the product of its work directed at the institution of a Commission of Criminal Inquiry.⁹ This would be a step forward, operating as a mechanism to support the proposal of an International Criminal Code. The proposed International Commission of Criminal Inquiry shall have jurisdiction over violations of a number of international conventions,¹⁰ more or less identical with those enumerated in the Draft International Criminal Code.¹¹ The task of the Commission is limited to the investigation of alleged violations of these conventions. It is a sort of international prosecutorial agency. In order to fulfill its purpose, the Commission shall have authority to collect all forms of evidence and, if there is probable cause, to request contracting states to conduct searches and seizures.¹²

The statute authorizes the Commission to act upon a petition by a contracting state or by any person or non-governmental organization claiming to be the victim of the alleged offense.¹³ Having regard to the facts established at the inquiry, the Commission shall: (a) terminate the inquiry against the alleged offender, should the complaint appear to be unfounded in law or in fact; or (b) declare the matter settled by consent of all interested parties; or (c) recommend an indictment.¹⁴ In pursuance

of the jurisdiction conferred upon it by contracting states, the Commission shall submit its recommendation of indictment and other findings to the state where the suspected offender is present and request this state to act accordingly.

Such an International Commission of Inquiry might represent a first step toward an international court. Reservations based upon the idea of national sovereignty carry less weight as against an international investigatory commission than against an international penal authority. Nevertheless, there is not much reason to be overly optimistic, if one examines the overall political situation, characterized by several sharp splits in the community of nations.

The fact that a unified international penal law appears as a chimera makes it even more important to promote efforts to carry into effect a unified international penal policy. In the interest of the common transnational struggle against crime, the cooperation of the greatest possible number of states is necessary to adopt common principles for the effective use of national penal authority. As crime has become international, penal policy must cross national borders.¹⁵

The twentieth century developments of penal policy should now bear fruit on an international scale. It is no longer enough to bring the offender to justice. The shift of emphasis toward prevention and rehabilitation has, during the last few decades, led to a number of significant reforms in national criminal legislation. These reforms should now be reflected at the international level.

The tendency to replace short term imprisonment by other measures—having the potential of making unnecessary the imposition or at least the execution of imprisonment even for offenses of average seriousness—has been the most important concern of reformers. In light of the increase of transnational crime, that tendency, to be effective in important areas, must be brought to bear in international relations by conferring supranational recognition to the achievements of modern penal policy.

Prevention-oriented modern sanctioning systems liberally grant offenders the opportunity to avoid prison by abiding by the law while at large. If these progressive sanctions of domestic law are not to lose their effect at the border, the imposition of certain measures should not depend on the nationality of the offender nor should such measures be rendered ineffective by lack of any control over their execution abroad. In Europe, the European Convention on the Supervision of Conditionally Sentenced or Conditionally Released Offenders¹⁶ has taken account of these considerations.

The convention allows a state which has sentenced an offender to request the assistance of the state in which the defendant ordinarily resides. This assistance involves the supervision of the offender and, if the offender

violates the conditions of his suspended sentence, the enforcement of the sentence. Without this mechanism, courts often deny foreign defendants the opportunity for probation and parole because of the difficulty of supervision.

The need to execute penal judgments pronounced abroad occurs not only in cases of probation and parole but also in cases of fines and prison sentences. The Convention on the Validity of Criminal Judgments¹⁷ may fill this need. Under the convention the sentencing state may, for example, request the state where the offender normally resides to receive and imprison the offender.¹⁸ The executing state then incorporates the foreign judgment entirely into its own legal order. The principle *ne bis in idem* is therefore internationally applicable to judgments executed under the convention.¹⁹ The convention thus closes a gap with respect not only to those national laws which merely give credit for punishment suffered abroad, but with respect also to the European Convention of Human Rights²⁰ which fails to guarantee the protection against being punished twice.

An international penal policy based on modern principles cannot satisfy itself, however, with establishing the international validity of a penal judgment as the final point of the proceeding; rather, the requirements of penal policy must influence the assertion of criminal jurisdiction. The coexistence of various grounds for establishing jurisdiction necessarily leads to a tangled network of competing jurisdictions of different states which all claim competence to try the defendant.

International recognition of the *ne bis in idem* principle is a first step toward a set of rules which would prevent the battle of jurisdiction to be fought at the cost of the defendant. Yet merely reducing the number of recognized grounds for establishing jurisdiction in order to avoid cases of multiple jurisdiction is not sufficient to solve the problem. Additionally, in cases of multiple jurisdiction the defendant should preferably be tried by the state which offers the best chances for his rehabilitation.

In many cases rehabilitation is most likely in the state of which the offender is a citizen or a resident, as he speaks the language of that state, is familiar with its customs and mores, and has social ties to its residents. On the other hand, the interests of efficient law enforcement may speak in favor of leaving jurisdiction to the state in which the offense was committed, as the evidence is easily obtained there, increasing the chances of solving the case.

Attempting to achieve a compromise between the conflicting interests of efficient law enforcement on the one hand and better rehabilitation of the offender on the other, the European Convention on the Transfer of Proceedings in Criminal Matters²¹ creates a novel European jurisdiction. The convention enables a requested state to prosecute those who have violated the laws of a requesting state when: the offender is a national or

resident of the requested state; the requested state otherwise plans to imprison the offender; the requested state is prosecuting him for the same offense as the requesting state; most of the relevant evidence is located in the requested state; the requested state is most likely to improve the prospects of rehabilitation; the requesting state cannot enforce a sentence or cannot ensure the presence of the accused at his trial. At the same time, the convention modifies the principle of mandatory prosecution adhered to by some states, as it permits each contracting state to satisfy its duty to prosecute by leaving prosecution and trial to the requested partner state according to the provisions of the convention.²²

The idea of transferring criminal proceedings has led international criminal law out of its isolation in the realm of domestic law to coordinate penal policies on an international level. The transfer of criminal proceedings is not meant to extend the punitive authority of the state of residence but to further the interests of the offender, who thereby gains the position of a national whose case is tried before a domestic court, in his own language and according to law familiar to him. Moreover, the prospect that the foreign offender can also be prosecuted in the state of his residence may reduce the need for the law enforcement agencies of the state in which the offense was committed to use such procedural restraining measures as pre-trial detention, bail, and impoundment.

The new developments in dealing with crime must not be limited to the offender and his treatment, but must consider the victim of the criminal offense. Some would argue that the state should bear responsibility if it fails to prevent the commission of crimes with harmful effects, as it has taken over the task of protecting its citizens by creating a state monopoly in law enforcement.²³ Yet no international instruments deal with this area of penal policy. It can hardly be denied that the victim's status constitutes a subject of the philosophy of criminal justice in international criminal law which is as important as the offender-oriented substantive criminal law. International criminal law is faced with the task of developing a mechanism for restitution for injuries caused by offenses committed abroad.

Thus, there is a plethora of problems which international and municipal law must solve in order to develop a unified international response to crime. The European states have made important advances in developing mechanisms to coordinate their domestic criminal procedures. Unfortunately, only a few countries have accepted these mechanisms.²⁴ Because progress toward a unified substantive law is likely to be slow, and because Europe and other regions face pressing problems in enforcing domestic crimes in a manner consistent with modern penal policy, nations must expand their efforts to coordinate their criminal procedures.

NOTES

¹ See, e.g., Zitelmann, *DIE MOGLICHKEIT EINES WELTRECHTS* (1916); Vogler, *Die Europäischen Übereinkommen über die Auslieferung und die sonstige Rechtschilfe in Strafsachen*, 80 *ZEITSCHRIFT FÜR DIE GESAMTE STRAFRECHTSWISSENSCHAFT* [Z.St.W.] 480, 505 (1968).

² For a more detailed discussion and additional references, see Vogler, *Möglichkeiten und Wege einer Entkriminalisierung*, 90 Z.St.W. 132, 133-42 (1978).

³ See Golsong, *Wege und Möglichkeiten einer europäischen Strafrechtspflege—Aufgaben für die Zukunft*, 1971 *REVUE INTERNATIONALE DE DROIT PENAL* 65.

⁴ M. BASSIOUNI, *INTERNATIONAL CRIMINAL LAW: A DRAFT INTERNATIONAL CRIMINAL CODE* 49-106 (1980).

⁵ Of the member states of the Council of Europe, only Liechtenstein has not recognized the jurisdiction of the European Commission of Human Rights. COUNCIL OF EUROPE, *CHART SHOWING SIGNATURES AND RATIFICATIONS OF COUNCIL OF EUROPE CONVENTIONS AND AGREEMENTS* (1981) [hereinafter cited as CHART]. See also L. MIKALSEN, *EUROPEAN PROTECTION OF HUMAN RIGHTS* xii (1980).

⁶ Thus far, sixteen states have submitted to the compulsory jurisdiction of the European Court of Human Rights. L. MIKALSEN, *supra* note 5, at xii.

⁷ See Van den Wyngaert, *Criminal Law and the European Communities: Defining the Issues*, this volume.

⁸ For a brief chronicle of these efforts, see Bouzat, *Introduction* to M. BASSIOUNI, *supra* note 4, at vii.

⁹ See INTERNATIONAL LAW ASSOCIATION, *REPORT OF THE FIFTY-EIGHTH CONFERENCE* 482-85 (1978) [hereinafter cited as I.L.A. REPORT].

¹⁰ See Draft Statute for an International Commission of Criminal Inquiry para. 2 [hereinafter cited as Draft Statute], in I.L.A. REPORT, *supra* note 9, at 482-83.

¹¹ For a list of conventions that relate to the Draft International Criminal Code, see M. BASSIOUNI, *supra* note 5 at xix-xxx.

¹² See Draft Statute, *supra* note 10, para. 10.

¹³ *Id.*, para. 7(b).

¹⁴ *Id.*, para. 16(1).

¹⁵ Kielwein, *Zumgegenwärtigen Stand einer internationalen Kriminalpolitik*, in *FESTSCHRIFT FÜR TH. RITTLER* 95 (1957).

¹⁶ Opened for signature Nov. 30, 1964, 2 European Conventions and Agreements [E.C.A.] 201, Europ. T.S. No. 51 [hereinafter cited as Convention on Supervision].

¹⁷ European Convention on the International Validity of Criminal Judgments, opened for signature May 28, 1970, 2 E.C.A. 426, Europ. T.S. No. 70 [hereinafter cited as Convention on Judgments]. See also COUNCIL OF EUROPE, *EXPLANATORY REPORT ON THE EUROPEAN CONVENTION ON THE INTERNATIONAL VALIDITY OF CRIMINAL JUDGMENTS* (1970). Cf. Draft Convention on Expatriation of Accused Persons for Trial and Sentence and Repatriation for Enforcement of Sentence, I.L.A. REPORT, *supra* note 9, at 477-82; Treaty Between the United States of America and the United Mexican States on the Execution of Penal Sentences, Nov. 25, 1976, 28 U.S.T. 7399, T.I.A.S. No. 8718.

¹⁸ Convention on Judgments, *supra* note 17, art. 5. Article 5 also provides that the sentencing state may request another contracting state to enforce the sanction: if enforcement of the sanction in the other contracting state is likely to improve the prospects for the offender's rehabilitation; if, in the case of a sanction involving incarceration, the sanction could be enforced following the enforcement of another similar sanction in the other state; if the other state is the offender's state of origin and is willing to enforce the sanction; or if the sentencing state considers itself incapable of enforcing the sanction.

¹⁹ See Convention on Judgments, *supra* note 17, art. 10.

²⁰ European Convention for the Protection of Human Rights and Fundamental Freedoms, opened for signature Nov. 4, 1950, 1 E.C.A. 21, Europ. T.S. No. 5.

²¹ Opened for signature May 15, 1972, 3 E.C.A. 7, Europ. T.S. No. 73 [hereinafter cited as Transfer Convention]. See also COUNCIL OF EUROPE, EXPLANATORY REPORT ON THE EUROPEAN CONVENTION ON THE TRANSFER OF PROCEEDINGS IN CRIMINAL MATTERS (1972).

²² See Transfer Convention, *supra* note 21, art. 6.

²³ See 1973 REVUE INTERNATIONALE DE DROIT PÉNAL 44.

²⁴ The Convention on Supervision, *supra* note 16, has been ratified by Austria, Belgium, France, Italy, Luxembourg, and Sweden; the Convention on Judgments, *supra* note 17, has been ratified by Austria, Cyprus, Denmark, Norway, Sweden, and Turkey; the Transfer Convention, *supra* note 21, has been ratified by Austria, Denmark, Norway, Sweden, and Turkey. CHART, *supra* note 5.