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TRANSNATIONAL CRIMES: THE THIRD LIMB OF THE CRIMINAL LAW

M. SORNARAJAH*

Transnational crime must be seen as a by-product of globalization. The same technological means which integrate the world's markets are used in the commission of crimes that have global effects. The need for the evolution of common rules and procedures to combat them is now coming to be recognized through the formulation of conventions and treaties containing common rules and strategies. These international standards have to be translated into domestic law, thus giving rise in the criminal law systems of states to a distinct body of crimes that are not dependent on the morality or the security of that state alone but on the concerns of other states and the global community as a whole. This would necessarily create a new limb in every criminal law system. The development of this new limb of the domestic criminal law will increasingly be dictated by events outside the state. This article is an effort at detailing the parameters of this new limb and at outlining the course of its possible future development.

I. INTRODUCTION

The criminal law of the common law world consisted initially of crimes developed by judges. The power of the courts to develop the common law is still occasionally asserted, though much of the common law is now developed through statutes. Most of the common law crimes have, except in some jurisdictions of the Commonwealth,[1] come to be codified in penal codes or crimes acts. The basis of these criminal codes has been the English common law.[2] The codes remain to a large extent without significant alterations, at least as to their substantive content. The technique generally has been to permit courts to interpret codes and ensure that the necessary changes in keeping with the prevailing philosophies and social conditions are made. These crimes, which had roots in the moral codes that were accepted generally by society, constitute the first track of the criminal law. Though they were developed largely in the context of English society, the criminal law introduced into the colonies by the English has taken root. Modifications were made which purported to take into account the cultural, social and other circumstances of the states into which the law

* LLM (Yale); LLD (London); Professor, Faculty of Law, National University of Singapore.

1 In England, itself, the law remains uncodified. The power of the courts to develop the common law on crimes is recognized: *DPP v Shaw* [1961] A.C. 290. The substantive law has often been changed by the courts without reference to Parliament: *DPP v Camplin* [1978] A.C. 705. The power of Parliament to change the law is undoubted but is seldom exercised, except where a necessary change has to be made.

2 The argument is sometimes made that the Indian Code originated in the philosophic genius of Jeremy Bentham. It is a difficult argument to sustain. Clearly, the foundations of the Indian Code are to be found in the English common law. Sir Fitzjames Stephen, a formidable scholar of the criminal law, identified the Indian Code as "nothing but the English law shorn of its technicalities".

was so introduced. But, to a large extent, the adaptations to the different circumstances in the receiving states were made by the courts in the course of practice. If the criminal law truly reflects the moral code of a people, then, it can be said that the moral values on which the first track of the common law as developed in England has come to be shared by other states in the Commonwealth simply because of the fact that the notion of wrong and blameworthiness are ideas that are common to cultures and the ideas that grow up in one culture find ready acceptance in another, except in a minority of instances.[3] In this minority of instances, the courts and legislatures make the necessary changes so that the law could be adapted to suit the circumstances. To a large extent, it would be true to say that legislative interference with the codes has been minimal.[4] These codes, both in terms of history as well as importance constitute the first and most important limb of the criminal law of the Commonwealth. The law under the codes has been adapted by successive courts to accommodate the different cultural contexts in which they have had to operate. The English moorings on which the criminal law of the former colonies was based still remain but there has rightly been separate development.

The same assertions can be made of the criminal law of Singapore which is based on the *Indian Penal Code*.[5] The criminal law in Singapore has gone through and goes through continuously a succession of changes. Not only do the old substantive principles of the criminal law contained in the *Penal Code* continue to be fine-tuned to meet new conditions brought about by social changes, but new crimes have to be added in the context of these changes to meet novel social problems. These result from domestic changes that arise from social movements within society. Changes in moral values,[6] the ethnic composition of society[7] and the pressures of living in a confined and highly populated island require continuous responses to the new problems that are thrown up. The courts respond by construing existing rules to accommodate these changes. The legislature responds by creating new crimes to deal with them.

In addition to these domestic changes, the external environment in which a state and society have to function in the modern world bring about certain pressures to which the criminal law has to respond. The law must necessarily respond to this external environment as states and societies cannot remain insulated from the rest of the international community in this age of globalisation. As a result a distinct category of crimes is created. These crimes, which may be described as transnational crimes, are the focus of this article. It is evident from what has been said that there is a threefold classification of crimes that can be made in the light of the development of the law of crimes in the common law jurisdictions. The first consists

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3 There are bound to be variations. For example, the attitude to adultery varies. It is a crime in some states, not in others.

4 It is often a proud boast that the *Indian Penal Code* has stood without significant amendment for over a century, both in India and in the other jurisdictions into which it was introduced.

5 Indian Act XLV of 1860.

6 The current debate on oral sex in Singapore involves discussion of changes in sexual mores within Singapore.

7 The movement of foreign workers and the employment of expatriate staff result in courts and legislatures considering whether existing rules require changes to the substantive principles. See Chief Justice Yong Pung How in *PP v Kwan Cin Cheng* [1998] 2 Sing. L.R. 345 on the use of the reasonable man test as a "control device".

of those crimes that are contained in the criminal codes. The second consist of crimes created by legislatures having regard to certain novel social phenomena that occur within society. These statutory crimes created strict responsibility as courts accepted the possibility that the statutes in creating the offences without referring to a mental element, sought to ensure that strict liability attached to the performance of the prohibited acts, irrespective of whether or not they were committed with a blameworthy state of mind. The third category depends on the nexus between a given state and the rest of the international society. This nexus requires that every state should create new offences that seek to preserve certain fundamental, values not of itself alone, but those which it shares with the international society. This threefold pattern of development is, it is contended, a characteristic of the Commonwealth criminal law systems. Much of what is stated in this article has general relevance to the criminal law of the Commonwealth which has common roots though the propositions are tested out largely in the context of the criminal law of Singapore, with occasional parallels being sought in the law of the United Kingdom and Australia. The view that the first track of the criminal systems of these states is to be found in the criminal codes (or in England, in the substantive law as developed by the judges) needs no elaboration. It would be readily accepted. The view that there is a second track that is distinct, however, needs elaboration.

II. Strict Liability: The Second Track of the Criminal Law

In the course of the twentieth century, the emergence of the welfare state required the adoption of interventionist policies by the state. Whereas the criminal law in the previous centuries had grown up in the context of the state's function being limited to the maintenance of internal and external peace, the impact of socialism was to ensure that the state took on the roles of being the provider of health, education and other social facilities and the role of being the regulator of the market-place in general. This new activist role of the state as a provider of services, as an active entrepreneur in areas which had become state monopolies and as a protector of the disadvantaged meant that it had to increasingly enact legislation regulating a variety of activities. Much of it involved the prohibition of activities deemed harmful to society. State interference through the criminal law was required by the new functions, such as the regulation of the marketplace, which the state had taken upon itself. The necessary prohibitions were made through legislation, which created penalties for the breaches of the prohibitions. Because of the fact that they identified the prohibited act without making any reference to a mental state, they were regarded as creating crimes that were distinct from those created by the judge-made common law.[8] They were said to operate under conditions of strict liability, the mere proof of the prohibited act resulting in the imposition of the punishment stipulated in the legislation. The newly found paternalistic role of the state led to the prohibition of drugs. The role of regulating the market place led to statutes on consumer protection and the prevention of sale of adulterated or defective products. Building safety, standards of safety in industrial employment, the prevention of pollution, road safety and other essential

[8] The rules for regarding certain statutory offences as involving strict liability have been worked out in the case law.

activities of modern life gave rise to new legislation regulating behaviour relating to these areas through the identification of prohibited acts. This second track came about in all Commonwealth states, where shared experiences brought about similar techniques over sectors of social activity which were operated under conditions of strict liability. The state deemed that certain standards of care had to be observed in the performance of such activity so as to promote the social good.

An analysis so identifying the emergence of strict liability in the code jurisdiction of Singapore[9] has been criticized on several grounds.[10] First, the historical accuracy of the analysis is challenged. This challenge is the easiest to dismiss. There is no evidence at all of the existence of strict liability at the time the Commonwealth codes were drafted. Certainly, when Lord Macaulay drafted the first version of the Indian *Penal Code*, the forerunner of the other Commonwealth criminal codes, in 1834, there was no idea of statutory offences of strict liability known to English law or any other system from which he could have drawn comparison. The next round of code making began in 1876, with the draft of a criminal code for England by Sir James Fitzjames Stephen. His extensive writings do not address the issue of strict liability in the modern meaning of the term. His text, the *Digest of the Criminal Law in England*, published in 1876 has no discussion of strict liability. The draft Criminal Code which Sir James Stephen made for England was the basis of the later codes for New Zealand, Canada, Papua-New Guinea, some Australian states[11] and parts of Africa. There is no trace of the notion of strict liability in any of these codes. The first great case on strict liability, *R v Prince*,[12] came after the draft of the English Criminal Code. The provision of justifications for a separate groups of crimes of strict liability, based on social considerations, begin to be articulated only in the early twentieth century. Historically, it is proper to assume that from the point of view of Commonwealth criminal law, strict liability was a distinct tract of the criminal law. It had its basis not in moral values as the first track did, but in the perceived social needs of society that had to be met through the prohibition of certain types of conduct. Strict liability offences are a response to the change in the role of the state — from a laissez faire state to a welfare state.

The second criticism of the idea that the statutory offences of strict liability are distinct from the first track is that such a recognition would mean that the necessary defences to liability that are available under the first track of the criminal law and now codified in many of the Commonwealth codes become unavailable to the criminal offender who stands defenceless and exposed to the will of the legislature. This situation is said to offend as the individual is sacrificed in order to secure the greater good of society. But, this criticism is largely unfounded. The types of penalties imposed by strict liability statutes (except for drug offences)[13] are not severe punishment.

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9 M Sornarajah, "Defences to Strict Liability Offences in Malaysia and Singapore" (1985) 27 Mal. L. Rev. 1.

10 See generally Michael Hor, "Strict Liability in Singapore: a Re-examination" [1996] Sing.J.L.S. 312; Chan Wing Cheong, "Requirement of Fault in Strict Liability" (1999) 11 Sing. Ac. L.J. 98.

11 Queensland, Western Australia and Tasmania; Papua-New Guinea, New Zealand and Canada also have codes based on the English Draft Code.

12 (1875) L.R. C.C.R. 154.

13 In Singapore and Malaysia, drug offences carry severe penalties. This is a peculiarity confined to these countries. Such extreme punishments are not imposed for drug offences in other common law jurisdictions.

They usually involve pecuniary penalties. Besides, courts have ensured that justice is done to the individual offender by creating specific defences that are based on the possibilities of exercising the requisite diligence and care that is necessary to avert the undesired result. It is too late in the day to re-examine the theoretical justification of a technique of crime control the legislatures of the Commonwealth have come to accept as having a place in their criminal law systems. It promotes better analysis if the reality that strict liability offences constitute a distinct second track of the criminal law, complete with its own defences and principles of liability is recognized. Strict liability offences must not be treated as appended to the first tract, which is based on moral notions. The first track has a set of distinct defences to liability which are explained on rational grounds that are not applicable to defences developed in the context of strict liability. Courts have developed their own defences to strict liability offences. These are largely act based, providing evasion from liability in circumstances where the offender could not possibly have avoided the prohibition through the exercise of reasonable care. The further development of such defences will be facilitated if it is recognized that strict liability offences constitute a distinct limb of the criminal law de-linked from the control of the provisions of the criminal codes.[14] Thinking in the area will not be confined by the old box of morality which has nothing to do with the creation of strict liability offences.

It will aid in the rational development of the criminal law if the distinction is clearly made. In the context of the Commonwealth criminal law, it will promote a sharing of experiences leading to more cohesive development of the second tract if the legal systems of the different states accepted the differences and looked at the trends that have emerged in each other's jurisdictions. So far, it is possible to discover common threads that have emerged in this area and the strengthening of these trends is greatly desirable. The argument that is developed is that transnational crimes similarly constitute a third category of such crimes and that they too be subjected to separate development, having regard to the circumstances of their creation and the objectives that the creation of such crimes seek to achieve.

III. Globalisation and the Third Track of the Criminal Law

Globalisation has been hailed in modern times as contributing to rapid progress. In our age, it is characterized by rapid communication and transport which modern technology has made possible. This, coupled with notions of liberalization of trade and movement of assets, integrates the world in a manner not possible previously. The benefits, according to those who welcome the process, are rapid economic development of underdeveloped parts of the world and access to commerce and investment by all states. It has also been assailed as having negative effects by discontents. The protests against globalisation take place around the world. The discontents argue

[14] In some instances, absurd conclusions could result if such a de-linking is not accomplished. Thus, the provision on attempt (*Penal Code* (Cap. 224, 1985 Rev. Ed. Sing), s. 511) requires an intention in attempted offences and is a general proposition of the *Penal Code*. If it is linked to a strict liability offence, the result is that the main offence would not require any *mens rea*, whereas the attempted offence would require one. It is obvious that attempts at strict liability would have to be subjected to distinct principles so as to avoid such a ludicrous result.

that globalisation entrenches the rich, disadvantages poorer states, imposes a uniform culture of the hegemonic states onto others and creates insecurity by destroying the scope for diversity of religious and cultural values. The fragmentation that occurs as a result brings about tensions that result in global violence.

The underbelly of globalisation is the increase in transnational crime for the same processes that make commerce international through modern means of technology increase the possibility of international criminal groups cooperating with each other in making criminal empires. The fragmentation that results from the purveyance of uniform cultures inherent in the globalisation process increases insecurity in many who retreat into extreme nationalism and fundamentalism. The insecurity that comes about as a result of attacks on cultural and religious diversity increases insecurity in minority groups, which may resort to violence and cooperate transnationally in such violence, making global terrorism the menace of the present age. If poverty results from globalisation, then, the pool is once more created for the increase in the number of the disenchanted who will cooperate in seeking changes to existing structures. Globalisation is very much a two-sided phenomenon. Singapore, being at the crossroads of Asia and being a globalised city will be affected by both the positive and negative aspects of globalisation.[15]

Globalisation produces two distinct results on the criminal law. The first is that there will be more extensive use of extraterritorial jurisdiction. This is evident in Singapore where the old fallacy that a state's jurisdiction is confined to its territory has been discarded by the Singapore courts. As Singapore creates an external economy by investing and operating in other states, it will be necessary for its courts to reach out and apply its criminal law to prevent frauds and other crimes which have an impact on its economy or on its other interests. The present writer has dealt with this development in other writings.[16] This paper deals with the other phenomenon associated with globalisation in that it leads to the creation of a distinct type of uniform crimes created around the world brought about by the commonly felt need to prohibit certain behaviour which the whole of the international community seeks to proscribe.

The major thrust of this paper is that the underbelly of globalisation produces a third tract of the criminal law which derives from the felt necessity of the modern age

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[15] Saskia Sassen has written extensively on the role of cities in globalisation. The network of global cities, such as Shanghai, Sydney, Singapore, Hong Kong and Bombay in Asia is a visible factor of the interconnection of cities as financial centres, location of fashions, shopping paradises and the centres of art. They also become consequently centres for fraud, art thefts and other associated crimes. For Sassen's writings, see Saskia Sassen, *Cities in the World Economy*, 2nd ed. (Thousand Oaks, California: Pine Forge Press, 2000). Global cities receive global law, necessitated by similarity in patterns of financial and trade transactions. They will also use similar techniques in dealing with fraud and other criminal activities associated with these transactions. The externalization of law-making in this area results.

[16] M. Sornarajah, "Jurisdictional Issues in Electronic Commerce" in Singapore Academy of Law, ed., *The Singapore Conference: Leading the Law and Lawyers into the New Millennium @2020* (Singapore: Butterworths Asia, 2000) 89-118; "Extraterritorial Criminal Jurisdiction: British, American and Commonwealth Perspectives" [1998] S.J.I.C.L. 1; "Extraterritoriality of US Antitrust Laws—Conflict and Compromise" (1982) 31 I.C.L.Q. 127-149; "Extraterritorial Jurisdiction over Crimes in Singapore, Malaysia and the Commonwealth" (1987) 29 Mal. L. Rev. 200; "Globalisation and Crime across Borders" [1999] Sing.J.L.S. 409; " 'Terrorism' NOT Useful for Analyzing Random Violence" 93, *Proceedings of the Annual Meeting—American Society of International Law, 1999* at 79; "Internet and Developing Countries" (2001) 95 ASIL Proceedings 173-175.

to cooperate internationally to prevent the increase of the global crimes that results from the process of globalisation. The obvious characteristic of this phenomenon is that the criminal law of not only the Commonwealth but of other legal systems will draw from the same pool of international instruments that will seek to identify methods of cooperation in dealing with the same problems that all states confront as a result of the internationalization of crime. The common source of definitions of these new crimes that afflict the world at large will be found in international documents, many of which make it mandatory that legislation modeled on them be drafted and introduced into domestic law. Thus, there will come about a linkage of domestic laws having identical language around the world, identifying transnational crimes. The interaction between these international instruments which create international obligations and their transfer into domestic law will provide fascination for international law theory as well but, it is the criminal law factors that one is concerned with in this article. The first point to be made is that the modern transnational crimes share commonalities with the universal crimes of the past but yet are different in many respects. It is necessary to elaborate on this point.

IV. The Past of Transnational Crimes

Transnational crimes are not new phenomena. Earlier, international law had developed piracy, a crime that affected international commerce, as a crime subject to universal jurisdiction. Pirates were considered "enemies of mankind" (*hostes humani*) and were subject to universal jurisdiction. This meant that they could be tried by any domestic court irrespective of where the act of piracy had been committed. Piracy was the first crime of universal jurisdiction to be created. Since international commerce was affected by piracy, the more powerful maritime states of the world sought its suppression through the creation of the rule that a pirate could be tried anywhere, irrespective of where the piracy was committed.[17] Such universal jurisdiction was extended later to slavery. The contrast between the two offences is clear. In the first, the protection of the commercial interests of sea faring trade was the motive. The creation of piracy as a crime subject to universal jurisdiction served the interests of the dominant states, which had an interest in traversing the seas for commerce. The hegemonic element in the creation of transnational crimes has an early example. The second, slavery, was inspired by purely humanitarian considerations and had to struggle against vested interests of the time, which were developing plantations in the United States and the Caribbean. Many would still argue that piracy is the only truly international crime created through customary international law. The conversion of purely moral principles into international crimes may be more difficult to achieve though in modern times, the candidates for such promotion to the status of transnational crimes subject to universal jurisdiction are dependent largely

[17] Piracy had a hegemonistic flavour. The British used the concept for political purposes, particularly in South East Asia. Rubin details the role played by the doctrine in the acquisition of Penang by the British: Alfred P Rubin, *The Law of Piracy* (Newport, R.I.: Naval War College Press, 1988); Alfred P Rubin, *The International Personality of the Malay Peninsula: A Study of the International Law of Imperialism* (Kuala Lumpur: Penerbit Universiti Malaya, 1974). It is interesting that modern writers comment on the hegemonistic nature of the offence of terrorism and as a concept belonging to hegemonic international law.

on moral considerations. The force of morality drives much of human rights law, which has turned out to be the most prolific source for the creation of transnational crimes recognized in international law.[18]

There have been recent candidates for promotion to the table of offences subject to universal jurisdiction. The process for conferment of such status on crimes is a difficult one though writers seem to draw lists without too much consideration of the criteria involved. The mere fact that a certain activity is universally condemned does not promote it to the category of crimes subject to universal jurisdiction. Thus, hijacking of air-craft is universally condemned but does not for that reason alone become a crime subject to universal jurisdiction. The instruments condemning such hijacking require that domestic legislation be enacted and list the priority of states where the air-craft's flight was initiated or terminated as the states having the prior right to try the offenders. Universal condemnation or the existence of uniform laws on a particular activity alone is insufficient. There must be some revulsion as in the case of slavery or some high interest in common activity indispensable to the functioning of the international community involved in the commission of the offence. Looked at in that light, genocide clearly qualifies, not only because of the Convention on the subject but also because of the acceptance of it as a war-crime and the numerous instances the offence has been subjected to prosecution by internationally constituted courts in recent times. Other crimes associated with the conduct of wars also qualify for humanitarian reasons.[19]

More recently, domestic cases have recognized torture as an international crime subject to universal jurisdiction. The *Pinochet Case*[20] is the most important of these cases. That case held that the former president of a state who had instigated torture during his regime is subject to universal jurisdiction in respect of the crime of torture. But, the force of the ruling was somewhat dented when the International Court of Justice had ruled in *Congo v Belgium*,[21] that a serving minister was immune to a charge of genocide.[22] But, this apparent conflict does not diminish the fact that there is now accountability at least after the executive official had laid down his office and is no longer immune to process. The fact is that there is an emerging viewpoint that

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[18] Ruwantissa Abeyratne, *Aviation Security: Legal and Regulatory Aspects* (Brookfield, VT: Ashgate, 1998); further see Abraham Sofaer and Seymour Goodman, *The Transnational Dimension of Cyber Crime and Terrorism* (Stanford, C.A: Hoover Institution Press, 2001).

[19] Efforts are sometimes made to distinguish between war crimes, international crimes and transnational crimes. See on this, Neil Boister, "Transnational Criminal Law?" (2003) 14 E.J.I.L. 953.

[20] *R.v Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte* (No.3) [2000] 1 A.C. 147. The American courts had accepted this principle much earlier in *Pena Irala v Filartiga* (577 F. Supp. 860). But the case law in the United States on this issue has undergone conflicts.

[21] *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)* [2002] I.C.J. Rep. 1. The case arose from Congo arguing that the arrest warrant issued by Belgium under its law making genocide subject to universal jurisdiction of its courts was unlawful. ICJ issued judgment on 14 February 2002. Several Law Lords had held in Pinochet that ordering genocide cannot be covered by sovereign immunity simply because such an act could not be regarded as falling within the competence of a sovereign. The International Court approached the issue more from the point of view of the conduct of international relations which required the immunity particularly of serving ministers rather than that of accountability for atrocities.

[22] Philippe Sands, "After Pinochet: The Role of National Courts" in P Sands, ed., *From Nuremburg to the Hague: The Future of International Criminal Justice* (Cambridge: Cambridge University Press, 2003), at 68. Also see Salvatore Zappala, "The Ghaddafi Case before the French *Cour de Cassation*" (2001) 12 E.J.I.L. 595.

domestic courts have the capacity to determine conduct as amounting to an international crime if there is a strong body of international instruments identifying such conduct. There is then a separate body of crimes that domestic courts can identify as amounting to international crimes subject to universal jurisdiction on the basis that they had been created by customary international law. The process of this creation depends on consistent practice that results through an accretion of a large number of international instruments condemning certain conduct and the moral opprobrium that exists for such conduct within the international community. The growth of such international crimes is a slow process for international custom is formed gradually through the accumulation of the practice of states signifying acceptance of particular norms. Their later elevation to a principle of law requires evidence of convincing conviction within the international community as to its universal acceptance.

Such a slow evolution of the law will not meet the needs of the international community when the speedy creation of principles is necessitated by the facts of a particular situation. It is not the creation of universal jurisdiction that is necessary in these circumstances but the creation of adequate machinery to investigate and punish those whose transnational misconduct causes disruption to international life. The obvious situation in the past was hijacking and money-laundering. The most recent instance is terrorism. It is best to concentrate on terrorism as the example of the creation of crimes through the alternative strategy of creating an obligation to ensure deterrent punishment of conduct that is harmful to the international community as a whole. It is obvious that slow evolving international custom will not be adequate to meet the need for immediate criminalization and suppression of the activity concerned.

One must, at the outset, discard the possibility that one state's views as to crimes could be imposed upon other states through extraterritorial jurisdiction. The extraterritorial enforcement of crime is a fact of life in modern times. As previously stated, all states, including Singapore, exercise such jurisdiction where their nationals commit certain offences abroad or where offences inimical to their security or economic interests are committed abroad. Usually states do not protest the exercise of such jurisdiction by other states over conduct which takes place entirely within their own territory. The problem becomes acute only in those circumstances where priority of jurisdiction is claimed by the state in which the offence was committed or where the conduct is not punishable within the state where it was committed or the punishment in the state of offence is not as high as in the other state claiming jurisdiction. In the absence of such conflicts, states have generally condoned a measure of extraterritorial jurisdiction being exercised. But, extraterritorial jurisdiction is essentially about power. The more powerful states will be able to secure their interests by exercising extraterritorial jurisdiction more extensively in order to protect their interests.[23]

A clear example is provided of the assertion of this proposition in relation to internet crimes. New technology creates new problems for law in general and criminal law in particular. The internet knows no jurisdiction. The crimes technically occur in cyber-space, a space under the jurisdiction of no state. But, this is meaningless. Somebody must sit at a computer somewhere to transact some activity on the internet. There is activity and obviously the state in which that activity originates and the one in

[23] See further M Sornarajah, "Power and Justice in International Law" [1996] S.J.I.C.L. 28.

which it terminates clearly have jurisdiction. But, the difficulty is that the internet can affect a multiplicity of jurisdictions so that when pornography or racist propaganda is sent it can be received on machines around the world. There can be little doubt that the use of extraterritoriality by the state that has the resources to commit to the eradication of such crimes the suppression of which will be welcomed by all states will cause no problems. So too, the suppression of fraud in electronic commerce, the tracing of illegal hacking of computer facilities, trafficking in drugs, the trafficking of women for prostitution, sex tourism and the sending of computer viruses[24] benefits all states. Some of them may be supported by international conventions but even in the absence of these, there may be agreement that some transnational crimes require concerted effort and that extraterritorial jurisdiction over them should be permissible. In fact, in most instances of transnational crimes for the suppression of which there is universal support, domestic statutes referring to them contemplate extraterritorial enforcement. But, there may be areas such as gambling over the internet which may cause problems. Small states may want to harbour such activity for the revenue it generates whereas large states see it as the escape of revenue from their shores and an offence against their licensing laws that internet gambling run on an overseas website should take place within their territory. When such interests clash, extraterritoriality becomes a problem. But, as indicated, the focus of this article is not extraterritoriality in criminal law, though the subject has great relevance to the subject of transnational crimes.

The third track of the criminal law concerning transnational crimes has two principal means of formation. The first is where the domestic court, like the House of Lords in *Pinochet*, quarries an international crime out of an accumulation of instruments characterizing conduct as offensive to international morality or interests. This is largely done on the court's identification of the existence of sufficient practice among states evincing a desire on the part of the collectivity of states to regard conduct defined as sufficiently reprehensible or damaging that it should be regarded as an international crime. Usually, courts would find that there is a peremptory norm[25] that supports the characterization of the conduct as criminal. The formation of such norms undergoes a cumbersome process. The evolution of transnational crimes through such a process to meet urgencies involved in situations that require immediate attention is therefore well nigh impossible. Even when there is formation of a definite norm there could be doubts raised as to whether the norm has sufficient strength to be characterized as so basic as to be capable of giving rise to a universal crime or whether it should be received into domestic law as such. Though "norm cascades" do occur when an ideal notion is converted rapidly into a legal norm, yet, the process is too clumsy a method for the creation of rules in situations which require rapid action.[26]

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[24] The "love bug" virus sent from Manila which affected computers around the world is an example. The activity was traced by US officials but investigations etc. took place in Manila with the cooperation of the Philippines government.

[25] A peremptory norm or a *ius cogens* norm is defined as so fundamental to the existence of the international community that it stands at the top of the hierarchy of international norms and displaces all contrary norms.

[26] The notion of a "norm cascade" is where an articulated ideal receives such widespread acceptance rapidly among leaders and other decision makers that it is soon converted into a legal principle. The theory is widely accepted in international relations experts belonging to the constructivist school. Torture itself

The second method of formation copes with the situation, which requires urgent norm formation. This involves the enactment of an international instrument, usually a resolution of the Security Council or the General Assembly of the United Nations. Both bodies are representative of the community of nations. The resolutions involving the criminalization of activity that is considered harmful to the international community is identified and a resolution defining such activity is enacted. To a large extent, this technique fulfills the function of an international legislature in that an obligation-certainly, if the resolution is one of the Security Council, consequent on a finding of a breach of peace[27]—is created for the member states to act in accordance with the resolution. Where there is a General Assembly resolution, such an obligation does not strictly arise as resolutions of the General Assembly have no binding effect but a commitment could be said to have been made by each member of the United Nations to other members to act according to the resolution. To this extent, an international obligation could arise from a General Assembly resolution as well. Since the whole of the international community comes together in the General Assembly, the idea that its resolutions on transnational crimes have a quasi-legislative effect is more meaningful, particularly when they soon become the basis for later domestic legislation.

To the same extent, one may say that specialist international organizations create offences in areas they deal with. The conventions on hijacking of aircraft provide the clearest examples. The various conventions sponsored by the International Civil Aviation Organisation brought about a network of domestic law around the world which effectively provided for the punishment of offenders. Similar instruments exist in the areas of drug-trafficking, money laundering and other offences where the need for transnational enforcement is required for the effective suppression of the conduct that, of necessity, takes place across borders of states. There are also provisions for effective cooperation of investigation of the offences through agreements providing for assistance in the search for evidence and the extradition of offenders for trial.

From the above, it is evident that transnational crimes operate best when their formation and subsequent operation is attached to international regimes. Regime theory, studied widely in international relations, maintains that certain sectors of activity in international life are regulated by international organizations created jointly by the sovereign states so that there could be regulation of these sectors. The sectors are vital to the functioning of different aspects of international life. Civil aviation again provides a relevant example. Here, an institution, the International Civil Aviation Organisation is constituted by the international community to regulate activity in a vital sector of transnational life. Among other things, it deals with criminal activity associated with civil aviation through conventions on hijacking and other crimes like air rage. Member states willingly adopt the provisions of these conventions, recognizing that the proscription of such activity is in their mutual interest. This mutuality of interests supplies the compliance system necessary to bring about a network of domestic laws, all of which have uniformity and enforcement machinery necessary to suppress a global activity that poses a common threat to the international community.

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provides the best example of such norm formation where the norm was quickly accepted within the international community, despite the fact that it is not widely followed.

[27] Technically, the resolutions of the Security Council are binding under Article 25 of the *United Nations Charter* and member states are under an obligation to act in accordance with the resolutions.

Transnational crimes are usually driven by international regimes. Some of these regimes may have a hegemonic component. The role of the hegemonic state in ensuring compliance with regimes is also a widely studied phenomenon. Thus, in the case of terrorism, it is evident that it is the dictate of the United States, indirectly expressed through the Security Council's Committee on Terrorism that ultimately shapes the law. The power of a dominant state in ensuring the maintenance of the law is relevant. The displeasure it expresses against those states, which do not strictly conform to enforcement standards, acts as a deterrent against transgressions of mandates that require transnational crimes to be created by domestic legislature and enforced through adequate mechanisms.[28] Regime supervision also ensures uniformity in the law. It also shows that, unlike in the crimes involved in the first two tracks of the criminal law, the offences in the third tract attract external concern and even control and supervision.

Common threads will emerge connecting the law of the different states of the world regarding these crimes. They will be initiated by international instruments creating an obligation to transfer principles contained in the documents into domestic law. There will progressively come about interpretations of the provisions by domestic courts. The process will be no different from the several international conventions in the commercial field which seek to harmonize the law on international business.[29] The domestic courts will interact in the sense that they will be aware of the decisions of each other. As has been observed, a conversation between courts comes about in such areas, each domestic court responding to the domestic courts in other jurisdictions by taking into account the opinions that these other courts had delivered and tailoring them to suit their own needs. This leads to the globalisation of large areas of the law through judicial processes which are driven by domestic courts.[30] Thus, it is possible to contemplate basic similarities in the law because the source document is the same but also some diversity because of the need to adapt that document and its principles to local needs, but at the same time having regard to developments that had taken place in other jurisdictions. The task is a challenging one which the criminal lawyer of the future has to face. No longer can he be content with the awareness of the case law in his own jurisdiction (hopefully, this was never the case) but he has to show awareness of the international context in which a crime newly created in response to

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[28] The expressions of displeasure with the manner in which terrorist crimes are dealt with in Indonesia and the lack of severity in punishment provided by the courts show that there is external interest in domestic proceedings. One may argue that there is a certain external supervision of events which are essentially domestic in character. To that extent too, transnational crimes are different from domestic crimes belonging to the first two tracks of the criminal law.

[29] The most notable are the *United Nations Convention on Contracts for the International Sale of Goods* 1980, online:<http://www.uncitral.org/english/texts/sales/CISG.htm> and the several UNCITRAL Conventions. For a study of case law around the world on the UNCTIRAL Model Law on Arbitration, see Henri Alavarez, *Model Law Decisions* (The Hague: Kluwer Law International, 2003).

[30] There is much focus on this in modern literature. The notion of transnational judicial discourse has been studied in a number of articles written by Anne Marie Slaughter and her associates. This process has sometimes been referred to as "global judicialization", which directs emphasis more to the proliferation of specialist international tribunals such as the International Criminal Court, the World Trade Organization's Dispute Settlement Board and several other international courts and tribunals which have come into existence in the last decade. For a symposium describing these trends, see (2004) 39 Texas Journal of International Law 1.

an international phenomenon affecting the global community as well as his own has been shaped and the policies underlying such creation.

Deviations from normal development of the law will not be permitted by the international organisation dealing with the area in which the transnational crime is committed. Likewise, the hegemonic state that dictated the formation of the transnational crime will also not tolerate a deviation that undermines the purpose for which the crime was created. To this extent too, uniformity will be brought about as to how the crime is interpreted and dealt with in the different legal systems of the world. To demonstrate this relatively new phenomenon of the rapid growth of the third limb of the criminal law, the next section deals with international terrorism, a crime that has attracted much global attention in recent times.

V. Terrorism as a Transnational Crime

The current prominence of terrorism as a transnational crime is due to the terrible carnage effected by the crashing of passenger aircraft onto the Trade Centre at New York on 11 September, 2001. The events evoked reactions of fear and revulsion, both within the United States and the world at large. The immediate responses were triggered by feelings of revenge, disbelief and raw emotions rather than tempered thinking about the problem. The feelings may have been kept alive for political reasons, particularly within the United States. Some analysts allege that in the climate of fear, it was possible to rush through legislation that would have normally been considered harsh and justify the unleashing of war on states that were considered to be responsible for terrorism.[31] At the international level, the feelings resulted in the United Nations passing resolutions that may normally have been considered expansive. The enactment of legislation on terrorism in the aftermath of the incident provoked lively debates as to whether the legislation created crimes that were too broad, invested powers of investigation which were too wide in the authorities and contributed to the erosion of human rights of individuals.[32] Besides the United States, there were other states which followed suit in enacting such legislation.[33]

For us in Singapore and the rest of Asia and the previously colonized world, the phenomenon of the use of violence as a means of terrorizing a community into submission to a particular ideological vision is not a new one. Conquest, colonialism and the episodic violence attendant upon it were acts of violence practised on Asian people to ensure that the imperial supremacy was maintained and qualifies in every sense as acts of terrorism, though practised under the cloak of legitimacy provided by imperialism. The massacre of the aboriginals in Australia and of the native peoples in the United States and Canada were the founding acts of terror by some of the most powerful states in the world today. The rhetoric that clouds the modern discourse on terrorism that comes from the leaders of the same states, historically the purveyors of

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[31] There is much literature on the subject. See *e.g.*, Ross Barber, *Fear's Empire* (Norton, 2003); Richard Falk, *The Great Terror War* (Polity Press, Cambridge, 2003).

[32] For the particularly vigorous debate on the Canadian bill on terrorism, *The Security Of Freedom: Essays On Canada's Anti-Terrorism Bill* Ronald J. Daniels, Patrick Macklem & Kent Roach, eds. (Toronto: University of Toronto Press, 2001).

[33] For the UK, see Clive Walker, *Blackstone's Guide to the Antiterrorism Legislation* (Oxford: Oxford University Press, 2002).

unlimited terror upon hapless people, is unfortunate. The area requires dispassionate discussion. The "empire of fear" so created should not be the basis for dealing with the new phenomenon.[34] It requires a nuanced approach which balances the different competing interests involved and not knee jerk reactions based on the creation of a climate of global fear directed at the guilty and the innocent alike.

In Asia, state formation has been characterized by violence. Singapore is no stranger to that process, though it now enjoys stability and calm due to the adoption of prudent policies. Singapore, like the rest of Asia, has dealt with ethnic violence and communist insurgency, both of which involve the use of terrorist violence. The technique used to deal with them has been domestic law that has been used with vigour when initially required but kept in abeyance when not required by the circumstances. Views of course will vary as to the manner of the use of the laws. The law itself could serve as an instrument of fear and its intrusiveness in the life of a community must be carefully limited in a democratic state.

The experience in UK has not been dissimilar. The United Kingdom unleashed massive violence when dealing with independent struggles in its empire. Many of brutalities practiced by the British should have resulted war crimes trials and prosecutions in a state that now, sanctimoniously, has decided the *Pinochet Case*.[35] But, closer home, when having to deal with the violence of the Irish Republican Army, the approach adopted was more balanced, taking into account the fact that the civil rights of the community, the individual liberties of the suspect, security interests of the community as well as the democratic right to protest or revolt against establishment views have to be balanced against the suppression of terrorism. In any event, any excesses practised in this regard would be put right by the European Commission on Human Rights. The thrust of the approach within the Commonwealth has been to adopt a balanced approach to the problem and not be swayed by the rhetoric or the fear of the moment. Asian states, much maligned in the field of human rights, have had the sagacity to deal with problems of mass violence with a more discriminating approach.

It has been suggested that the phenomenon of terrorism after the destruction of the World Trade Centre in New York is different. The view has been expressed by Professor Clive Walker thus:

> "The loss of life was overwhelming, and, combined with the nature and scale of the attacks, conducted to an analysis that terrorism had indeed developed a new strand in the current millennium into a multi-faceted threat, unbounded by instrument or location. That change was personified by the Al-Qaeda group-a movement based on loose networks across national borders rather than tightly organized cells and a movement motivated by religious and cultural ideals rather than rooted in national self-determination or a particular political ideology."[36]

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[34] The term "empire of fear" is the title of a book. R Barber, *Fear's Empire* (Norton 2003).

[35] The perpetrator of the massacre at Jalianwalahbagh recorded in Attenborogh's film, Ghandi, was rewarded with a purse collected from the grateful British public upon his return home. The suppression of the Sepoy Mutiny in Singapore is another case in point. Imperial history is replete with such incidents which have gone without comment. British writers on war crimes write as if such crimes were foreign to them. Sadly, such crimes are embedded in the history of every nation, but more particularly in those of imperial states.

[36] *Supra* note 33.

The justification for new legislation is said to be the novelty of the problem presented by Al-Qaeda. The international scope of that particular organization and it being driven by religion are given as the reasons for the novelty. This reasoning does not bear examination. The communist insurgency was driven by a more integrated international organization directed by two powerful states, the Soviet Union and China. Both states had it as a matter of their foreign policy to assist what they referred to as national liberation movements in other states and espoused violence to pursue their ideological goals. Al-Qaeda does not command the same degree of state support. The only government which supported it, the Taleban in Afghanistan, has been properly and successfully dismantled. International organization and violence do not give novelty as the triad gangs which the British had to deal with in Hong Kong and other Asian countries had to deal with had more effective organization than Al-Qaeda and used the tactics of terror as a weapon against its victims. That religion drives the terrorism in the present age and therefore makes terrorism different from the past events is a statement that is problematic. Islam, as interpreted by the large majority of its followers, does not condone terrorism. Walker's rationalization of the novelty of present-day terrorism is therefore faulty.

Yet, there is novelty in the situation brought about by the events relating to the World Trade Centre. It is that terrorism ceased to be of domestic concern and became international, not only because Al-Qaeda is an internationally organized body but because for the first time, the representative organs of the international community sought to address terrorism as a crime that harmed the international community as a whole. They sought to take action at a global level. It is the rapidness with which the crime was created through United Nations efforts and the machinery set in motion to prevent acts of terrorism associated with the Al-Qaeda that gives novelty to the situation. It gives impetus to the view that there is a body of crimes that are transnational in character in every domestic legal system. These transnational crimes have to be studied as a part of its criminal law system. It demonstrates that in a globalised world action has to be mobilized through the instrumentality of the domestic criminal law to deal with problems common to the global community and that the quickest and most effective way is through legislation mandated by international bodies such as the General Assembly or the Security Council of the United Nations.[37]

Michael Hor rightly points out in the context of previous experience of terrorism in Singapore only a mere tweaking of the existing law was necessary to deal with the problem in Singapore.[38] This may be a general experience of the situation in most Commonwealth countries which, unlike the United States, have had experience with prolonged terrorism.[39] But, Professor Hor's examination of the manner of

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[37] A distinction must be drawn between crimes over which the International Criminal Court (ICC) has jurisdiction and other transnational crimes. The crimes subject to ICC jurisdiction are usually the major crimes associated with war which evolved through customary practice. Domestic courts have concurrent jurisdiction over such crimes as well and may exclude ICC jurisdiction by trying the offenders. The debate as to whether a distinction should be drawn between crimes triable by the ICC and those other transnational crimes triable by domestic courts is without substance.

[38] Michael Hor, "Terrorism and the Criminal Law: Singapore's Solution" [2002] Sing.J.L.S. 30.

[39] Thus, in Canada, the presence of separatist violence by Quebec nationalists resulted in such legislation. In India, again, numerous separatist campaigns (*e.g.* Punjab, Kashmir, Nagaland and Assam) have required legislative response. In Sri Lanka, the separatist wars fought by the Liberation Tigers of Tami

introduction of the United Nations resolutions through executive acts overlooks the fact that an international obligation had been assumed by Singapore to enact the legislative framework necessary to make the resolution a part of Singapore law.[40] Singapore's membership of the United Nations carries with it an obligation to ensure that the will of the Security Council is carried out and that the wishes of the General Assembly are fulfilled. The *United Nations Act*[41] is the parent legislation. It states that where the Security Council of the United Nations in pursuance of Article 41 of the *United Nations Charter* calls upon member states to take measures giving effect to a decision of the Council,[42] the Minister in Singapore may make provisions to ensure that those measures are effectively applied in Singapore. The Act delegates the power to the Minister to give effect to the measures decided upon by the Security Council through regulations. It is not a general delegation but a delegation specific to the measures taken against terrorism. The regulations made have to be presented to Parliament as soon as possible.

Professor Hor's criticism of the delegation does not take into account the pre-existing commitment made by the government to translate the measures required by the Security Council into the law of Singapore. In many constitutional systems, international obligations, assumed by a state, seep into the internal law by automatic processes.[43] In most common law jurisdictions, customary law is incorporated by osmosis in domestic law but treaties have to be made part of the domestic law through legislation. One would expect that states would enact such legislation where it is necessary to do so to give effect to the obligation. In the case of the Security Council Resolution, there was a clear obligation to do so. If the government felt that the delegation of powers to the Minister to implement the Resolution by regulations made through gazette notifications is appropriate, then, that decision cannot be regarded as erroneous. Democratic processes are satisfied, as such legislation, in accordance with practice in most of the Commonwealth, is placed before Parliament. However, the manner of the creation of transnational crimes does present a problem of democratic legitimacy in that such creation is mandated from outside the state.

The investigation of the crime and the procedures for arrest and detention are usually provided in legislation that applies to terrorism. In the UK, legislation specifically addressed to terrorism provides for such procedures. In the United States, the specific recent legislation that has been devised to deal with terrorism has provoked criticism on the ground that it erodes human rights significantly. In Singapore, events indicate that the existing legislation on public security will be used. This would be that case in most Asian countries which have had relatively greater experience in dealing with public security problems as well as terrorism in the past. The need

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Eelam with great vigour, resulted in such legislation and demonstrated the extent to which it could lead to human rights abuses and state terrorism.

40 Such obligations to create offences are not uncommon. The *Geneva Conventions on War* create similar obligations. The *Fourth Convention on the Protection of Civilians* (Article 146) provides that parties shall "enact any legislation necessary to provide penal sanctions for persons committing or ordering to be committed" breaches of the Convention.

41 Cap. 339, 2002 Rev. Ed. Sing.

42 Article 41 reads "The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon Members of the United Nations to apply such measures."

43 See *e.g.* Germany, where the Basic Law 25 decrees that the international obligations assumed by Germany become part of domestic law.

to balance individual rights with the interest of preserving public security has been an issue that has not been successfully resolved. It would appear from the recent record of the United States that when faced with the real issues of national security, the answers that are provided are somewhat more draconian than those provided by Asian states. This experience is widely believed to have muted American criticism of human rights violations in Asia. The pot has been blackened far more extensively than the kettle as a result of recent experiences in this field.

Further issues arise as to the setting in which the crime so created is to operate. This is another instance in which the idea of a third track of the criminal law becomes relevant. The fact is that there will be a large number of international crimes created in the future as a result of globalisation, a phenomenon which did not exist at the time the *Penal Code* was introduced into Singapore. These new crimes, intended to provide for new phenomena taking place in the global context, cannot be fitted into a domestic system that was devised in Victorian times. It has worked well for the domestic system. But, changes require that other notions must be tacked onto the existing system. The responsiveness to certain crimes, especially those created by resolutions of international institutions, to internationally accepted ideas should be accepted so that a globally integrated approach could be formulated.[44] A domestic court which tries a person for terrorism under the provisions of a statute based on the United Nations Resolution prosecutes the offender not on behalf of its own state but on behalf of the international community as a whole. That idea is inherent in the *Rome Statute of the International Criminal Court*, which shares jurisdiction with domestic courts over international crimes.[45] The external interest would be accentuated where the victims of the crime happen to be citizens of other states.[46] The role of the domestic court, in these circumstances, is to contribute to the creation of a uniform body of international criminal law by examining the precedents both of international tribunals as well as domestic courts of other states. There is a duty to promote the emergence of a global law.

An international crime, created on the basis of the exigencies that arise in the international community cannot be easily fitted into the domestic criminal law system. As far as procedure and evidence are concerned, there is talk of a laxer standard for preventive custody and a lesser standard of proof for crimes such as terrorism. If the domestic scene is not insulated from such considerations, there will be an erosion of standards of human rights on both the international and domestic levels. The

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[44] A case which graphically illustrates this responsiveness concerns the events involving homosexuality in Tasmania. This was considered criminal under the Criminal Code of Tasmania. A homosexual successfully argued before the United Nations Human Rights Committee that the maintenance of such a crime violated the International Covenant on Civil and Political Rights. *Toonen v Australia* (1994) 1 International Human Rights Reports 97. The Tasmanian state refused to change the law. The federal government passed legislation permitting homosexuality. Toonen then argued that the Tasmanina Code was in violation of the federal legislation and hence was invalid. The argument was upheld by the High Court. *Croome v Tasmania* (1997) 191 C.L.R. 119. Also see Michael Kirby, "The Changing Boundaries of Criminal Law" in Mads Andenas, ed., *Judicial Review in International Perspective* (The Hague, Kluwer, 2000) at 437. Commenting on the case, Kirby pointed out that the case is "a vivid illustration of the practical way in which, today, international law can be brought to bear upon domestic law, including in the field of criminal law and in the sensitive area of sexual conduct".

[45] Entered into force on 1 July, 2002, online: <http://www.un.org/law/icc/>.

[46] For this reason, Australia has a legitimate interest in ensuring that those responsible for the bombing at Bali are brought to book.

arguments made at the international level should not be permitted to seep into the domestic scene and provide a justification for repression on the domestic scene as well. If this is done, once the international situation clears, the repressive laws that were enacted to cater to the international situation could be dismantled easily or go into desuetude. This consideration too strengthens the argument that transnational crimes should be treated as a distinct track of domestic criminal law.

The fitting of the international crimes into the domestic substantive law also may be a problem. It may be possible to define the components of the crime, although even this has proved to be a difficult exercise in international crimes such as torture or terrorism. But, fitting it into the substantive defences to liability may be more difficult. It is for this reason too that transnational crimes must be kept distinct. It is necessary to promote uniform defences to liability for transnational crimes lest the law that develops in the various jurisdictions take different courses and the purpose of the creation of the transnational crimes thereby becomes frustrated. The next section takes the more usual principles and defences that could be used in the context of terrorism — the principles relating to complicity and the defences relating to duress and superior orders. It seeks to demonstrate that these policy imperatives behind the use of these principles differ depending on whether the offence is domestic or transnational.

VI. General Principles and Transnational Crimes

The contention here advanced is that most systems of criminal law, particularly those in the Commonwealth, derived from the common law, should have three distinct limbs. The first would be the common law crimes based largely on moral considerations with a distinct group of defences based on justifications or excuses that negative the ingredients of the crime. The second are strict liability offences which do not admit of any defences, except those which the courts have developed in the context of these offences. Liability for these offences usually follows upon the mere commission of the prohibited act. The situation is justified largely on policy grounds and is not dependent on morality. This justifies distinguishing strict liability offences as constituting a distinct track of the criminal law. The contention that has to be demonstrated is that there is yet another track, also brought about by the exigencies of the modern trends, in this case the phenomenon of globalisation which integrates nations to such an extent that they are no longer immune to the incidents that are triggered off in some distant state. The use of the criminal law to deal with the negative aspects of globalisation has been demonstrated in recent times. The need for a common approach requires the quick creation of crimes through legislative means based upon instruments that are made by central organizations which operate at the global level. This has been demonstrated in the case of terrorism in the previous section. The manner in which the offence originates alone sets it apart from other offences.

Quite apart from this factor which has already been examined, the further factor which isolates these transnational offences is that they may require an entirely new set of principles in the context of which they operate. As much as strict liability offences may involve the evolution of a new body of principles attached to them, transnational crimes, especially those created in response to the particular needs of the international

community, may require the creation of distinct or different principles in the context in which they operate. Already, this is visible in the case of investigation of the crimes, as treaties and other international instruments are beginning to provide for cooperation at international and regional levels. But, it is more relevant to contemplate whether the substantive principles that could be applied to the first limb of the criminal law on crimes based on morality are applicable to the third limb which consists of transnational crimes. If it can be shown that new substantive principles must be evolved to deal with transnational crimes separately because their nature is different from the generality of crimes based on moral considerations in the first track of the criminal law, then the argument that transnational crimes must be treated separately as constituting a third limb will become stronger. In order to demonstrate this, three distinct rules and the nature of their operation in the context of the transnational crime of terrorism will be explored. The three rules are: (i) the rule on complicity in crime (ii) the defence of duress and (iii) the defence of superior orders.

A. *The Rule on Complicity in Crime*

The rule on complicity in crime is carefully spelt out in domestic crimes and usually requires both geographical proximity with the offender at the time of the offence and a link of control that is present at the time the crime is committed. The degrees of participation are carefully spelt out on the basis of each individual offender's actual participation in the crime, reflecting to a large extent the moral blameworthiness that is to be attached to each participant. These underlying characteristics are the features of the law relating to complicity under the Singapore *Penal Code*, whether the participation is by abetment or common intention held by the participants. The more extensive notion of unlawful assembly also contemplates some sharing of an intention. Where crimes not associated with the original purpose of the conspirators are involved, liability for them would depend on the extent to which such a crime was in furtherance of the original crime or could have been contemplated as falling within some criterion such as foreseeability. There is a careful consideration of liability that does not extend beyond what was within the actual contemplation or at most, within the reasonable contemplation of the participants in the crime. In many decided cases in the common law jurisdictions, the courts have required a nice dissection of the extent of each participant's association with the actual perpetrator before liability is assigned. Such liability has often varied in accordance with the precise mental element of each participant.

These developments are sound as far as domestic law on complicity in crimes is concerned. The trend towards a subjective assessment of each participant's liability accords with the doing of justice to the individual. But, when it comes to transnational crimes, the objectives are different because of the enormity of the consequences of such crimes which involves, unlike domestic crimes, unintended and innocent victims spread around a wider geographical area. The nature of the terrorist bombings that take place around the world indicate that organisational links of the sought that are thought of in the case of domestic rules on complicity are weak in the case of such crimes. The so-called sleeper cells which are triggered into action may not be subjected to direct control by those at the higher end of the hierarchy. The trail that leads to them may be difficult to trace. But, deterrence rests in ensuring that it is

the top end of the hierarchy that is deal with as expeditiously as possible. The need for quick deterrence, the difficulty of investigation and the preventive nature of the measures that have to be taken to contain the effects will require that wider latitude must be given to the formulation of the framework of the law within the context of which liability for such crimes is to operate. While the creation of arguments based on fear psychoses can be no justification for the erosion of ordinary safeguards of the criminal law, yet, there is a need to balance these safeguards against other factors such as those mentioned.

The trends that have emerged in transnational criminal law indicate that such balancing has been effected by the tribunals and courts that have faced this issue. New bases for stating the law on complicity relating to such offences have arisen as a result. It is in the context of these trends that domestic courts called upon to deal with transnational crimes should assess issues relating to complicity. They should not use the narrower principles of their own domestic law. It is necessary, for this purpose, to outline the trends that have emerged.

Two developments impact on the issue. The first is command responsibility. This issue arises in the context of a commanding officer of the army in most instances, but more recently, it has arisen in the context of the liability of a head of state, a political official such as a minister wielding influence within sections of the community and, in the case of terrorist groupings, with those holding power and influence within the organization. The early military associations of the doctrine of command responsibility have been dispensed with and the notion now is extended to all persons who stood in a hierarchical situation of power and authority over others. This comes about in modern times due to the fact that much violence originates in ethnic passions stoked by chauvinist politicians who channel hatred onto other ethnic groups within the state. The events in Yugoslavia and the role therein of Milosovic who is presently standing trial before the International Criminal Tribunal for Yugoslavia provide an example. In these situations, the issue is not one of command responsibility but something akin to it in that a person in official or unofficial power within a state stokes up such frenzy as would result in mayhem within the state. In assessing responsibility in such a situation, the usual rules of complicity prove inadequate. There is no presence of the leader at the scene of the violence. He may not even have knowledge of the violence at the time it is perpetrated. Responsibility is based on the exercise of the obvious power he has over groups and the incendiary rousing of the groups to violence. No doubt this could occur within the domestic criminal law as where a political leader addressing a rally urges it to violence. But, the situation, which attracts transnational responsibility, is the enormity and the prolonged course in which the crime occurs attracting universal condemnation and the intervention of third forces in order to quell the situation.

Yugoslavia and Rwanda provide the examples. They also generated the cases in which new ideas of complicity and command responsibility came to be stated. In the judgment against Radislav Kristic,[47] it was held that it was no defence to a professional soldier in command to say that he did not want the men under his command to commit the atrocities they did. Liability was explained on the basis of

[47] For a description of the trial, see Patricia Wald, "General Radislav Kristic: A War Crimes Case Study" (2003) 16 Geo. J. Legal Ethics 445; on command responsibility, see Mirjan Damska, "The Shadow of Command Responsibility" (2001) 49 Am. J. Comp. L. 455.

a failure to exercise the command function to prevent the atrocities. This idea is not confined to the military context. It extends beyond it to leaders of states. One would think that it also extends to leaders of groups, such as terrorist groups which operate on the basis of a hierarchy requiring obedience to the dictates of superiors. These notions take the law away from the notions of complicity that are current in domestic legal systems, which tend towards subjective considerations of the precise role each individual had in the violence that was committed and tends towards providing some absolution to any one in the group who had no inclination towards the offence that was being committed. This is not so, in transnational crimes. Neither distance nor disinclination provides an excuse, once a course of events has been initiated. It is best that the two situations are kept distinct and not permitted to cross-fertilise each other, lest the liberal subjective trends in domestic criminal law be sidetracked by the necessary trend in transnational crimes for deterrence of mass violence resulting in humanitarian concerns. The policies that underlie the trends are distinct.

In the case of terrorist crimes, the offences may be committed by sleeper cells the existence of which may not even be known to leaders who may be in other states. But, the law would recognize their liability for all the offences committed by members whose existence may not be known to them and over whom no authority was directly exercised. The rules of complicity here are based once more on policy grounds that accountability and deterrence are promoted by laxer rules regarding complicity than is justified in the domestic context.

The domestic court acts on behalf of the international community in expressing abhorrence at the course of horrendous events initiated or condoned by persons in power by holding them complicit in what happened, even though every incident that occurred and was identified in evidence before the court was not known to such persons. All that the underlings committed in their excessive zeal would be attributable to the initiators of the chain of events. Thus, Pinochet was technically responsible for the Spanish citizens killed during his regime even though he may not have had knowledge of their existence in Chile. There is a definite departure from ordinary rules of complicity here. The underlings themselves may never be found. The object is to express condemnation of the type of behaviour through the trial of the leader. That policy purpose is only possible by discarding the domestic rules on complicity and fashioning a new rule that imposes accountability on the basis of the initiation of a policy of repression, ethnic cleansing or terror by official leaders or unofficial political leaders who wield power over groups. Sometimes, such leaders may be of states other than the ones in which the repression occurs.[48]

The same reasoning would apply in the context of terrorist groups. Radio broadcasts from far away places directing or inciting sleeping groups to violence without knowing their identity may not involve complicity in the domestic sense but may involve complicity in the context of the policy reasons behind the proscription of

[48] Thus, the Condor Plan, in respect of which the responsibility of Kissinger, the American Secretary of State is alleged, involved oppression of the left in a number of Latin American states. The plan was organized by the right wing regimes in Argentian, Bolivia, Brazil, Chile, Paraguay and Uruguay to eliminate left wing dissidents with one another's help. The United States was alleged to be involved in the plan: *International Herald Tribune* (30 May, 2001), LexisNexis. Many former dictators are currently being investigated in respect of the plan. Jorge Videla, the former Argentinian dictator and Pinochet, the former Chilean dictator are among these.

transnational terrorism. The phenomenon is unlike that of neatly structured organizations such as the triads that the law of this region has been familiar with. Policy and other factors dictate more laxity in the application of complicity principles and if other courts or tribunals elsewhere had devised criteria, these must be considered with a view to being followed. Regard must, of course, be had to balance human rights considerations, which must be given adequate weight despite the enormity of the nature of crimes committed or contemplated. The international law position is clear that even in times of national security emergencies, the right to life, even of an alleged terrorist, remains sacrosanct. The imposition of capital sentences on the basis of a more liberally construed doctrine of complicity is not to be permitted. The balancing of these conflicting notions requires careful thought.

Rules on issues such as complicity will be worked out for transnational crimes by international tribunals and domestic courts dealing with transnational crimes. The process of concretizing these rules depends on the recognition by all tribunals, international tribunals and domestic courts alike that such crimes are different and are not subject to the substantive rules of the criminal law in the domestic criminal code. It is necessary to promote an awareness to keep the two types of crimes distinct so that the emergence of a transnational criminal law of substantive principles applicable to transnational crimes could evolve. Since domestic courts speak for the international community as a whole, it is necessary that they be aware of the different policy goals that underlie transnational crimes.

B. *Duress, Necessity and Superior Orders*

These three defences are recognized in the domestic context. They constitute a cluster of defences as they involve the alleged offender in a choice between two moral imperatives. In Singapore, following the common law, duress is not a defence to murder.[49] Neither is it a defence where the threat is held out against a third party, however close that person may be to the accused. The law requires the offender to show an angelic courage in the face of a threat to his own life. The law dictates a choice and requires the offender to sacrifice his own life than cause the end of others. The law in the international conventions reflects changes to the defences which are more modern and appropriate in the international context. Given the fact that the offender tried by a domestic court will not implicate the interests of the domestic social order, it is appropriate that the domestic court applies these principles to the offender who is tried in respect of the newly created transnational crimes. The tribunals which have stated the law that has emerged in the international context also indicate the considerably greater evolution that these defences have gone through in the international context. These defences combine the general notions of both the civilian and common law traditions. The defence of superior orders, in particular, is, for obvious reasons, far more developed in international criminal law than in domestic law where there is a paucity of case law.[50] This is despite the fact that in

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[49] See *Penal Code*, s. 87.

[50] Y Dinstein, *The Defence of "Obedience to Superior Orders" in International Law* (Leyden, A. W. Sijthoff 1965); I Bantekas, *Principles of Direct and Superior Responsibility in International Humanitarian Law* (Manchester, UK; New York: Manchester University Press 2002). The Statute of the International

the early evolution of the law, particularly on war crimes constituting victors' justice, the dominance of the common law was visible.

Unless the applicable law was uniform, the liability would vary in accordance with whether the offender was tried by an international tribunal or a domestic court. Domestic courts dealing with transnational crimes should not use their domestic law on criminal defences but treat both the offence as well as the defences to it as distinct. They could regard both as forming part of law received into domestic law from international law and as distinct limbs of their criminal law systems.[51] This again calls for the idea that transnational crimes must be treated as a third limb of the criminal law of the domestic system.

It is necessary to explore this idea further in the case of duress and superior orders which are kindred defences. Duress is stated not to be a defence to murder under the *Penal Code*. It is precisely as a defence to murder that the defence has its most significant operation in transnational crimes. Whether or not the defence should operate should have regard to an international morality rather than national morality. Duress in national law has met with much criticism. It is formulated with high moral considerations in mind, requiring the offender faced with the situation of duress to disregard his own life than endanger those of others. This standard of courage has often been regarded as unrealistic. In transnational crimes, there is an opportunity for a fresh appraisal to be made, having regard to the circumstances without being impeded by formulation of rules at a distant time. This would be so as regards superior orders as well. The shades of guilt that have to be reflected in the situation of superior orders would be greater for violation of transnational crimes than for domestic crimes. The need to tap into the law as developed by other tribunals around the world is clearly present. The principles in the national criminal codes were drafted with different situations in mind and are not suitable for application to the situation of transnational crimes.

VII. Conclusion

Globalisation has led to the creation of transnational crimes which have seeped into the domestic legal systems of states. Singapore is a willing participant in the process. Its nature as a globalised state at the crossroads of commerce leaves it with no other choice but to ensure that it actively participates in the process of investigation and enforcement of the rules relating to such crimes. The democratic legitimacy of the making of the laws entirely outside Singapore and the fact that much of the law may be driven by hegemonic states is a reality that one has to live with. While the global must be received, the local must be respected. It is necessary to ensure that the crimes so received mesh in with the sensitivities, cultural norms, social policies and other factors that are unique to the state and to the region to which it belongs. There should neither be a slavish acceptance nor a rejection on the mere ground of external

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Criminal Court deals with the defence of superior orders in Article 33. It recognizes it subject to three conditions: (i) that the accused had a legal obligation to obey the superior; (ii) that he did not know that the order was illegal and that (iii) the order was not manifestly unlawful. For English law, see *R v Howe* [1987] 1 A.C. 417.

[51] n *R v Finta* (1994) 104 I.L.R. 284. The Canadian Supreme Court recognized the defence of superior orders as having been incorporated in the Canadian criminal justice system.

origins. A balanced approach is necessary. A consciousness of the situation and the trends that are emerging do not permit the Singapore criminal lawyer to remain aware only of developments within his own domestic legal system. The extent to which the Singapore experience is repeated in the other common law jurisdictions is also worthy of study. The need to ensure that developments in this area are made in awareness of what happens in other common law jurisdictions is also essential. There are bound to be deviations. Sensitivity to local conditions such as ethnic and religious compositions of different states and different attitudes to human rights issues involved will dictate approaches that will vary. When these approaches vary, it would be necessary to keep in mind the reasons for the difference and explain the basis of the different. Transnational crimes promise to be a rich source of study for the comparative criminal lawyer.