Commentary

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The problem of repression of violations is quite rightly described by Mr Thomson as one of particular difficulty because of the somewhat nebulous character of international law. The particular difficulty which is usually encountered in the field of the Geneva Conventions comes from the need to try to apply international legal notions to acts committed by individuals as well as by States. The problem is exacerbated by the different ways national law can be seen to interpret international obligations, and sometimes by the absence from national law of any process which could be used to bring punishment to a person whose acts constituted a grave breach.

It is perhaps easier to speak of grave breaches than simply breaches, as Mr Thomson has done. He points out that it is only the grave breaches which attract universal jurisdiction provisions, but the comment can be made that the existence of universal jurisdiction makes it theoretically possible, if anything because of the better definition, to suppress grave breaches a good deal more easily than to repress simple breaches. Taking this point a little further it is approrpriate to note the existence of the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity and its provisions relating to grave breaches.

The Convention, which was adopted and opened for signature by the United Nations General Assembly in its Resolution 2391 (XXIII) on 26 November 1968, entered into force in 1970. Article I provides that "no statutory limitation shall apply to the following crimes, irrespective of the date of their commission: (a) . . . the grave breaches enumerated in the Geneva Conventions of 12 August 1949 for the protection of war victims".

The Convention expands on, and to some extent clarifies, the obligations on States deriving from the Geneva Conventions. Article III contains the undertakings of the States Parties to adopt all necessary domestic measures, legislative or otherwise, with a view to making possible the extradition of persons to whom the Convention applies. In these senses it can be said to amount to a significant addition to the Geneva Convention articles like Article 51 of the First Convention.

Although the Convention on the Non-Applicability of Statutory Limitations has not achieved wide international support, it seems that the principal reason for this is its description of crimes against humanity and possibly the somewhat loose description of acts connected with the policy of apartheid. It is, nevertheless, arguable that this Convention should be examined more carefully by States with a view to giving further substance to the universal jurisdiction principles which are attracted to grave breaches of the Geneva Conventions but which do not seem to be enough to assure mankind that grave breaches will indeed be repressed.

Mr Thomson quite correctly analyses the two important repression mechanisms — if they can be so described — which are now accepted as being of value. They involve fact-finding and universal jurisdiction, but before coming back to the question of enforcement per se it is useful to look at work done in similar contexts by other, similar treaty implementation procedures.

Publicity through such means as fact finding and the publication of results is a means which has been fairly successfully used by other organisations with comparable responsibilities. One example which deserves attention in a debate on this topic is the work of the International Covenant on Civil and Political Rights and its Optional Protocol, with another being a body such as the Committee on the Elimination of Racial Discrimination which implements the United Nations Convention on this subject. Experience in these Committees has shown that States will work hard to avoid adverse publicity and that they will, by and large, endeavour to keep their houses in order and their legislative and administrative measures in good shape to avoid a report finding that violations have been or are taking place.

On another level, but within the same subject area, it is valuable to look briefly at the work of the United Nations Commission on Human Rights under what have come to be known as the "1503 procedures". These procedures are used by the Commission to examine "particular situations which appear to reveal a consistent pattern of gross and reliably attested violations of human rights". The resolution which established the procedures is Resolution 1503 (XLVII) of the UN Economic and Social Council, which was adopted on 27 May 1970. The resolution itself developed much earlier resolutions on basic fact finding and the handling of communications reaching the UN Secretary-General which allege the violation of human rights by governments. For many years the Commission on Human Rights entirely conducted its work on this subject in confidential sessions, but in 1979 the Commission recognised the value that could be obtained from the publication of the very fact that it was examining an unnamed situation in a named country. In this way, and without feeling the need for any further description of the nature of the violation concerned, the Commission has begun to play its part in what Mr Thomson has described as the "mobilization of shame". The IFFC could perhaps develop its own public usefulness using some sort of a combination of these models.

As Mr Thomson points out, the term "mobilization of shame" had its origins in the United States and perhaps reached its post-1945 zenith at the indictment and trial of Lt Calley. This trial led Mr Thomson to note Röling's comments about the reliance of international law on national law, but the point itself was effectively set in concrete earlier in Article III of the Statutory Limitations Convention. It is one which will obviously be relevant to this subject for as long as there is not an effective means of exercising jurisdiction over the commission of war crimes, crimes against humanity and grave breaches of the Geneva Convention.

The point leads inexorably to consideration of the need for an international criminal court. This question has been around, of course, for a long time. It will be recalled that one of the earliest objectives of members of the United Nations was the drawing up of plans for the formulation of the principles of the Nuremberg Charter and Judgment. The points in favour of such formulation were

succinctly put by the representative of Panama to the Sixth Committee of the United Nations General Assembly on 29 September 1947 at Lake Success when he said that "no effort should be spared in proclaiming and permitting the reign of law in international life".

This Panamanian aspiration, which actually voiced the hopes of many other delegates, ran into trouble in those early days and no useful progress has been made on the subject. Much of the debate in that and subsequent sessions of the General Assembly was diverted to the discovering of a definition for aggression. Röling himself, speaking to the Sixth Committee in Lake Success in 1950, found himself discussing what he called "controversial questions" on the formulation of the Nuremberg principles and aggression. He made the unfortunate but highly valid point that war virtually always finishes in circumstances which allow the victor to claim to be the country which defended itself against aggression and to be the one therefore able to punish the crimes of the vanquished. He summarized this aspect of the problem by concluding that "until a world legal order, maintained by a world police force, was established and until supporting States were no longer allowed to pursue their own interests unhampered by law, that difficulty would remain".

These problems have always surrounded the problem of repression of violations and it is because of this, and because of the lack of a panacea like an effective world police force, that they are not going to go away. The only faint hope that I can find it easy to hold is that the concept of "mobilization of shame" will be strengthened by a more vigorous press and will come to act as a significant restraint on government or even quasi-government activity in this field. The trouble is that shame is only mobilized after the commission of the violation and what we most urgently need is a readiness and a willingness on the part of governments to make sure that the violations are not in fact committed. To some extent the concept of shame is associated with the concept of deterrence. In this sense Lt Calley's trial is not an unproductive example for the rest of the world to observe. The same may come of the enquiry being conducted now into the hideous massacre of the inhabitants of the Palestinian camps in Beirut in 1982. Sometimes, but often for the wrong reasons, deterrents will come from trials such as that which led to the execution of Morant during the Boer War.

It is not, however, the establishment of effective deterrents that we need to, or indeed ought to, discuss in this Seminar. It is necessary to go further back and deal with the problems before they occur. The link with the whole concept of mobilization of shame is, as Mr Thomson points out, the mobilization of public opinion and hence the item on this Seminar's agenda on "Dissemination and Education" is of very great importance to the effective enforcement of international humanitarian law. In all this debate it is important not to be side-tracked away from the need to repress grave breaches by becoming too deeply involved in the intractable questions of enforcement machinery. Unhappily, all too many writers on this subject have dwelt to an impractical extent on this latter argument. It is, in this context, perhaps instructive to recall that nobody at the time could answer the question put by Morozov in 1952 to the General Assembly Sixth Committee when it was discussing the Nuremberg/ Aggression conundrums. He asked: "how is it possible both from the legal point

of view and from the point of view of ordinary common sense to subordinate the definition of a crime to the question of what judicial body would be called upon to take cognisance of that offence?''.

With this in mind, I share the broad conclusions reached by Mr Thomson. I particularly endorse what Mr Thomson describes as ''extra-systemic'' means of enforcement. They are not, however, wholly ''extra-systemic'', involving as they can the IFFC to be established under Article 90 of Protocol I. This body has an important role to play in the galvanising of public opinion. For this reason I place emphasis on the objective of securing widespread ratification or accession to the 1977 Protocols, although I should add the fear that I hold that a body like the IFFC could politicize the work of the ICRC to an unacceptable degree. On the other hand, however, I think there is more that can be done on enforcement machinery and the provision of substance to the ideal of universal jurisdiction. One step which it would be timely to suggest is a thorough examination of the things which would need to be done to enable the Statutory Limitations Convention to be added to the list of those which seek to protect the rights of victims of war. Another step, which is perhaps even more fanciful now than it was when it failed in the late 1940s, is the idea of establishing an international criminal court and criminal justice system which would do those things of which Röling spoke in 1950.

The international community is, oddly enough, a little closer now to quite a few of these ambitions and in our thinking on the subject we should not forget the interesting propositions which are now being studied by the United Nations concerning the creation of an international penal tribunal. Although the tribunal's mandate would initially be based on the implementation of the International Convention on the Suppression and Punishment of the Crime of Apartheid it is clear from the draft statutes prepared for examination by the Commission on Human Rights that it is planned with a view to a wider scope. We should also note the universal jurisdiction provisions now being examined by the UN Commission on Human Rights in its work on the draft Convention on Torture as well as the provisions of the Hijacking Convention. I suppose, realistically, that the ideal of a tribunal is still far from realization, but at least there seems to be a feeling that the work which went nowhere in the 1940s should not be characterized as having failed. The continuation of growth in international relationships can only bring closer the time when nations will have to negotiate seriously if they are to overcome problems as fundamental as that of the enforcement of international criminal law in general through the repression of violations. When we reach that stage, of course, the first question to answer will be that to which, as I recalled a few minutes ago, Morozov obtained no answer in 1952.

The trouble with this debate is that it would be possible to describe options and discuss them for hundreds of pages, and indeed some writers have done just that. What this discussion can, however, provoke is the realisation that grave breaches happen all the time and that victims suffer the results in all parts of the world. There is no less urgency now about this topic than there was in 1945 or in 1949. It is particularly important that the peace — if this word has any meaning in 1983 — which the world now tolerates should not lull us into a sense of false security about the need to deal with these violations before they actually take place.