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CYBER TERRORISM AND ACTIVITIES IN OUTER SPACE

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Introduction

In March 1998, the web site of the National Aeronautics and Space Administration (NASA) of the United States received a "denial of service" attack, calculated to affect Microsoft Windows NT and Windows 95 operating systems[1]. These attacks prevented servers from answering network connections; crashed computers, causing a blue screen to appear on the computers. The attacked systems were revived, but this attack was a follow up of one in February of the same year, when, for two weeks the US Defense Department had unclassified networks penetrated, where hackers accessed personnel and payroll information.

Cyber terrorism has the advantage of anonymity, which enables the hacker to obviate checkpoints or any physical evidence being traceable to him or her. It is a low budget form of terrorism where the only costs entailed in interfering with the computer programmes of a space programme would be those pertaining the right computer equipment.

Any interference with a space programme of a nation, which would be inextricably linked to peaceful uses of outer space, would tantamount to an act of terrorism performed against international peace.
The maintenance of international peace and security is an important objective of the United Nations,[2] which recognizes one of its purposes as being *inter alia* :

> To maintain international peace and security, and to that end: take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace.[3]

It is clear that the United Nations has recognized the application of the principles of international law as an integral part of maintaining international peace and security and avoiding situations which may lead to a breach of the peace.[4]

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1. Http://mgrossmanlaw.com/articles/1999/cyberterrorism.htm

2. *Charter of the United Nations and Statute of the International Court of Justice*, Department of Public Information, United Nations, New York, ***DPI/511 - 40108 (3-90), 100M*** at 1.

3. *Id.* at 3.

4. On 17 November 1989 the United Nations General Assembly adopted Resolution 44/23 which declared that the period 1990-1999 be designated as the United Nations Decade of International Law (the full text of Resolution 44/23 is annexed as Appendix 1 at the end of the text of this thesis). The main purposes of the decade have been identified *inter alia* as:

   a) the promotion of the acceptance of the principles of international law and respect therefor;

   b) The promotion of the means and methods for the peaceful settlement of disputes between States including resort to the international Court of Justice with full respect therefor;

   c) The full encouragement of the progressive development of international law and its codification;

   d) The encouragement of the teaching, studying, dissemination and wider appreciation of international law.

   The four tasks of the Resolution have been predicated upon the fact that the purpose of the United Nations is to maintain peace and security. See Resolutions and Decisions Adopted by the General Assembly During its Forty Fourth Session, Vol. 1, 19 Sept - 29 Dec 1989, *General Assembly Official Records: Forty Fourth Session*,

Under general legal principles, unlawful interference of legitimate outer space activity can be regarded as a crime. A crime has been identified as :

> a wrong which affects the security or well being of the public generally so that the public has an interest in its suppression.[5]

The word "wrong" in this definition could be considered as presupposing an act that is perpetrated against the law. Since interference with civil aviation is in itself a wrong, and therefore definitively against the law, the question arises whether the word "unlawful" is tautologous. Tautology in the phrase "unlawful interference" was judicially discussed in England in 1981 in a case which involved indecent assault on a mental patient. Hodgson J. observed :

> ...it does not seem to me that the element of unlawfulness can properly be regarded as part of the definitional element of the offence. In defining a criminal offence the word "unlawful" is surely tautologous and can add nothing to its essential ingredients.[6]

Lord Justice Lawton, in a later case analysed Justice Hodgson's reasoning and observed :

> We have found difficulty in agreeing with this reasoning, even though the judge seems to be accepting that belief in consent does entitle a defendant to an acquittal on a charge of assault. We cannot accept that the word "unlawful" when used in a definition of an offence is to be regarded as tautologous. In our judgment the word unlawful does import an essential element into the offence. If it were not there, social life would be unreasonable.[7]

Lord Lane C.J., in the 1987 case of *R.* v. *Williams*[8], citing with approval Lord Justice Lawton's analysis went on to say ":

> ...the mental element necessary to constitute guilt is the intent to apply unlawful force to the victim. We do not believe that the mental element can be substantiated by simply showing an intent to apply force and no more.[9]

Lord Lane C.J. seems to impute to the defendant a knowledge of going against applicable law, making the word "unlawful" *sui generis* and mutually exclusive from the term "interference".

This line of reasoning seems to suggest by analogy that "unlawful interference" constitutes an act whereby the perpetrator knows that his interference of an activity is clearly contrary to the law. Unlawful interference with outer space activities forms no conceivable exception to this logicality.

Another significant fact emerges from the judgment of Lord Lane C.J. when His Lordship said:

> What then is the situation of the defendant in labouring under a mistake of fact as to the circumstances? What if he believes, but believes mistakenly, that the victim is consenting, or that it is necessary to defend himself, or that a crime is being committed which he intends to prevent? He must then be judged against the mistaken facts or

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Supplement No. 49 (A/44/49), United Nations, New York, 1990, 31. For a detailed discussion on Resolution 44/23 see R.I.R. Abeyratne, The United Nations Decade of International Law, *International Journal of Politics, Culture, and Society*, Vol. 5, No. 3, Human Sciences Press, Inc.: New York, 1992, 511-523.

5. *Halsbury's Laws of England*, Fourth Edition Reissue, Vol II (1), Butterworths, London 1990, para 1 at p.16.

6. *D.P.P.* v. *Morgan* (1981) All E.R. 628, at 639.

7. *R.* v. *Kimber* (1983) 3 All E. R. 316 at 320.

8. (1987) 3 All E.R. (CA) 411.

9. *Id.* at 414. See also *R.* v. *Abraham* (1973) 3 All E.R. 694 at 696.

circumstances and if the prosecution fails to establish his guilt, then he is entitled to an acquittal.[10]

By analogy therefore, if a person interferes with outer space activities performed legitimately by a recognized State, but does not believe he is contravening the law, he is not guilty of an offence and the mental element in an offence becomes as important as the physical element of the offence of unlawful interference with civil aviation. The criminal element[11] that is thus infused into the offence of unlawful interference makes the offence, like any other, hinge on the criminal policy that is created in the jurisdiction to which it applies. In other words, an act of interference would be considered unlawful and thereby an offence only in jurisdictions whose criminal policies determine such acts to be unlawful. Although a crime has so far not been coherently defined by any writer[12], the characteristics of a crime i.e. the *actus reus* (physical act forbidden by law) and the *mens rea* (the intention to commit the act and to understand the reasonable and natural consequences of the act) have been identified.[13]The identification of these elements has given rise to the maxim *Actus non facit reum (hominem) nisi mens sit rea*, meaning that whatever deed a man may have done, it cannot make him criminally punishable unless his doing of it was activated by a legally blameworthy attitude of mind. Usually, each prohibited deed is legally specified and defined and the legal definition identifies the essential facts which must be present to constitute the forbidden deed.

The manipulation of computer data by hackers is analogous to a robber in one's house. In the Canadian case of *R. McLaughlin*[14] when a student of a university hacked his way into a computer, the Supreme Court of Canada decided that a computer is not a telecommunications facility but a data processing device, the abuse of which should be an indictable offence. This decision made the Canadian legislature amend its laws accordingly.[15]

The United Nations Charter

Although the Charter contains no provision which deals directly with the security of outer space exploration, it is one of the most salutary international legal documents in the area of outer space security. The Preamble to the Charter stipulates that citizens of the member States of the United Nations will practice tolerance and live together in peace with one another as good neighbours. The principle of security is embodied in several articles of the Charter. Article 1 (2) provides that the purpose of the United Nations is to pursue the development of friendly relations

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[10]. *Ibid.*

[11]. See *Halsbury's Laws of England, supra.* Vol II (1) Paras 4-9.

[12]. C.K. Allen, *Legal Duties* 1931 The Clarendon Press, Oxford at 230. Also *Kenny's Outlines of Criminal Law*, 18 ed., J.W. Cecil Turner ed., Cambridge University Press, England, 1962, Section 1. See also, *Proprietary Articles Trade Association* v. *A.G. of Canada* (1931) A.C. 310 at 324, where it was held that the domain of criminal jurisprudence can only be ascertained by examining what acts at any particular period are declared by the State to be crimes. A general definition of a crime is that it is "a violation or neglect of legal duty of so much public importance that the law, either common or statute, takes notice of and punishes it". See John Wilder May, *The Law of Crimes*, Fred B. Rothman & Co., : Littleton Colorado 1985 at 1. The author goes on to say that "intent" to commit a crime should appear either expressly or by implication (supra, at 5). According to this definition and reasoning, the intent has to be unlawful.

[13]. See generally, *Russell on Crime*, J.W. Cecil Turner ed., Sweet and Maxwell Limited, London, Fred B. Rothman and Company , Littleton, Colorado 1986, 12 ed., Vol.1, at 24-36.

[14] 1980 2.S.C.R. 331

[15] See George S. Takach, *Computer Law*, Irwing Law: Toronto, 1998, at p. 158.

among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace.

As spacecraft are presumed to be used at the present time to transport crews for purposes of space exploration, they will, in the future, be used to transport civilians, and both the Outer Space Treaty and the Liability Convention should ensure the protection of civilians and their property from dangers affecting spacecraft in flight. The United Nations Charter can therefore be regarded as imputing to the international community a duty to protect the human being and his property in relation to flight:

> There is a mandatory obligation implied in article 55 of the Charter that the United Nations "shall promote respect for, and observance of, human rights and fundamental freedoms"; or, in terms of article 13, that the Assembly shall make recommendations for the purpose of assisting in the realization of human rights and freedoms. There is a distinct element of legal duty in the understanding expressed in article 56 in which all members pledge themselves to take joint and separate action in co-operation with the organization for the achievement of the purpose set forth in article 55.[16]

A spacecraft, cannot be attacked, whether by physical military means or by sabotaging communication means used. The United Nations Charter opposes the use of force against outer space exploration. Article 2(4) of the charter prohibits the use of force in any manner inconsistent with the purposes of the Charter. There is also provision for the settlement of disputes by peaceful means.[17]

Any attack against a spacecraft or space station, however founded, is a special kind of aggression and is protected by the right of self-defence which is recognized against an such an attack, by Article 51 of the Charter. This provision narrows the field of the exercise of self-defence to circumstances involving an armed attack. Although no authoritative definition of an armed attack has ever been adopted internationally, it is generally presumed that an armed attack against space exploration would constitute belligerence endangering the safety of those affected by such attack when it is carried out by an offender(s) wielding weapons. This analogy is true of cyber crime against the use of outer space.

Other International Conventions

a) The Geneva Convention on the High Seas (1958)

Transportation systems have often attracted terrorist attacks and the international community has come to terms with the vulnerability of modern aviation, taking sustained steps towards the protection of aviation.

The earliest forms of terrorism against international transportation was piracy. Pirates are considered by international law as common enemies of all mankind. The world has naturally an interest in the punishment of offenders and is justified in adopting international measures for the application of universal rules regarding the control of terrorism. The common understanding between States has been that pirates should be lawfully captured on the high seas by an armed vessel of any particular State, and brought within its territorial jurisdiction for trial and punishment. Lauterpacht recognized that:

> Before international law in the modern sense of the term was in existence, a pirate was already considered an outlaw, a hostis humani generis. According to the Law of Nations, the act of piracy makes the pirate lose the protection

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16 H. Lauterpact, *International Law and Human Rights*, (1950), p. 149.

17 Art. 33 of the U.N. Charter.

> of his home State, and thereby his national character. Piracy is a so-called international crime, the pirate is considered enemy of all States and can be brought to justice anywhere.[18]

It is worthy of note that under the rules of customary international law the international community had no difficulty in dealing with acts of terrorism which forms the offence of sea piracy. Due to the seriousness of the offence and the serious terroristic acts involved, the offence was met with the most severe punishment available - death. The universal condemnation of the offence is reflected in the statement:

> In the former times it was said to be a customary rule of international law that after the seizure, pirates could at once be hanged or drowned by the captor.

The laws dealing with the offence of piracy went through a sustained process of evolution. In 1956, while considering legal matters pertaining to the law of the sea, the International Law Association addressed the offence of piracy and recommended that the subject of piracy at sea be incorporated in the Draft Convention of the Law of the Sea. This was followed by the United Nations General Assembly Resolution (Resolution No. 1105 (XI) in 1957 which called for the convening of a diplomatic conference to further evaluate the Law of the Sea). Accordingly, the Convention of the High Seas was adopted in 1958 and came into force in September 1962.

The Geneva Convention of the High Seas of 1958[19] was the first attempt at international accord to harmonize the application of rules to both piracy at sea and in air. The Convention adopted authoritative legal statements on civil aviation security, as it touched on piracy over the high seas.[20]

Article 5 of the Convention inclusively defines piracy as follows:

Piracy consists of any of the following acts:

1)Any illegal acts of violence, detention or any act of depredation, committed for private ends by the crew or the passenger of a private ship or a private aircraft, and directed:

a)on the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft;

b)against a ship, aircraft, persons, or property in a place outside the jurisdiction of any state;

2)Any act of voluntary participation in the operation of a ship or of an aircraft with knowledge of facts making it a pirate ship or aircraft;

3)Any act of inciting or of internationally facilitating an act described in sub-paragraph 1 or sub-paragraph 2 of this article.

As provided for by Article 14 of the Convention, there is incumbent on all States a general duty to "co-operate" to the fullest extent in the repression of piracy as defined by the Convention. One commentator has observed,

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18 Cited in Oppenheim, *International Law*, Vol.1 8 ed. at 609.

19 The Geneva Convention was opened for signature at Geneva on November 16, 1937. See Hudson, *International Legislation*, Vol. VII at 862, U.N. Doc. A/C.6/418, Annex 1, at 1.

20 League of Nations, *Official Journal*, 1934, at 1839.

> The International Law Commission in its 1956 report, however, deemed it desirable to enjoin co-operation in the repression of piracy, to define the act to include piracy by aircraft, as set forth in the repressive measures that may justifiably be taken. The United Nations conference on the Law of the Sea in Geneva in 1958 accordingly incorporated these adjustments of the law to modern times in its convention on the High Seas.[21]

Article 14 seemingly makes it a duty incumbent upon every State to take necessary measures to combat piracy by either prosecuting the pirate or extraditing him to the State which might be in a better position to undertake such prosecution. The Convention, in Article 19, gives all States universal jurisdiction under which the person charged with the offence of aerial or sea piracy may be tried and punished by any State into whose jurisdiction he may come. This measure is a proactive one in that it eliminates any boundaries that a State may have which would preclude the extradition or trial in that State of an offender. Universal jurisdiction was conferred upon the States by the Convention also to solve the somewhat complex problem of jurisdiction which often arose under municipal law where the crime was committed outside the territorial jurisdiction of the particular State seeking to prosecute an offender. The underlying salutary effects of universal jurisdiction in cases of piracy and hijacking which was emphasized by the Convention, is discussed in the following manner :

> the absence of universal jurisdiction in relation to a given offence, means that, if a particular State has no jurisdiction either on the basis of territoriality or protection, or on the personality principle, whether passive or active, it will not be authorized to put the offender on trial, even if he is to be found within the territorial boundaries of the State.[22]

The inclusion of the offence of "piracy" in the Convention brings to bear the glaring fact that the crime is international in nature, giving the international community the right to take appropriate measures to combat or at least control the occurrence of the offence. The General Convention by its very nature and adoption has demonstrably conveyed the message that piracy is a heinous crime which requires severe punishment. The Convention also calls for solidarity and collectivity on the part of nations in combating the offence in the interests of all nations concerned.[23]

A speculative but possible scenario for the future would be the diversion of course of a spacecraft through the means of computer "hacking". This would, of course be analogous to hijacking in the aviation sense and therefore would attract a discussion of unlawful interference with civil aviation. Notwithstanding the above, it is worthy of note that the phenomenon of hijacking as it exists today, whether it be accomplished through the means of a computer or not need not necessarily fall within the definition of piracy as referred in Article 15 of the High Seas Convention (1958). Although there exists a marked similarity between the offenses of unlawful seizure of aircraft (or spacecraft) and acts of piracy directed against ships on the high seas, in that in both cases, the mode of transportation is threatened and abused and the safety of the passengers, crew members and the craft itself is endangered by the unlawful use of force or threat, there may still be a subtle difference that may exist between the offence as applying to sea transport and to air transport.

Whilst admittedly, there are similarities between the acts of piracy against ships and those against aircraft, the legal differences that

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21 Henry Reiff, *The United States and the Treaty Law of the Sea*, University of Minnesota Press:1959, at 86.

22 S.Z. Feller, Comment on Criminal Jurisdiction over Aircraft Hijacking, *Israel Law Review*, Vol. 7 (1972), at 212.

23 *Ibid.*

may exist should have to be determined in order to inquire whether aircraft hijacking amounts to piracy as defined by the Convention.

The essential features of definition of piracy as are incorporated in the Geneva Convention are as follows: (1) the pirate must be motivated by "private" as opposed to "public" ends; (2) the act of piracy involves action affecting a ship, an aircraft; (3) the acts of violence, detention, and depredation take place outside the jurisdiction of any State, meaning both territorial jurisdiction and airspace above the State; (4) acts committed on board a ship or aircraft, by the crew or passengers of such ship or aircraft and directed against the ship or aircraft itself, or against persons or property, do not constitute the offence of piracy.

Upon close examination, it appears that the definition of piracy does not apply to the phenomenon of aerial piracy or hijacking. Firstly it is a fact that most hijackings are not carried out in pursuance of private ends. INTERPOL[24] reported in 1977 that the percentage of cases in which political motives had impelled the offender was 64.4%. Hijacking of aircraft for political motives would thus not relate to Article 15(1) of the Convention on the High Seas (1958) since acts solely inspired by political motives are excluded from the notion *piracy jure gentium*. Sami Shubber has observed of the 1958 Convention that its inapplicability to the notion of aerial piracy may lie in the fact that private ends do not necessarily mean that they can affect private groups, acting either in pursuance of their political aims, or gain. The fact that it is not always possible to distinguish between private ends and public ends in defiance of the political regime of the flag State may be said to be covered by Article 15(1) of the Convention.[25] The reasons given by Shubber were that "private ends" do not necessarily mean private gain.

Under the definition, the act of illegal violence or detention must be directed on the high seas, against another ship or aircraft. It is obvious therefore that this interpretation does not as a matter of course apply to hijacking since the offence of hijacking is usually committed by the offender who travels in the aircraft. However, the Convention is highly topical in the modern sense and in a futuristic senmse in the context of computer driven diversions of transportation vehicles. The Convention also excludes acts committed on board a ship by the crew or passenger and directed against the ship itself, or against persons or property on the ship, from the scope of piracy,[26] which will make the definition inconsistent with the exigencies related to the offence of diversion of vehicles.

Piracy, according to the Convention, must be committed on the "high seas", which is a direct analogy to cyber piracy in outer space or no man's land. Furthermore, piracy under Article 15 of the Convention must involve acts of violence, detention or depredation. Instances of sabotage through cyber terrorism may be direct, or through threats and may even be carried out through a variety of means other than those involving violence or force.

It is therefore reasonable to conclude that cyber terrorism would necessarily draw a direct analogy with and bring to bear the relevance of the Geneva Convention on the High Seas. In this context, the Convention is not without value to the present, and indeed, the future context of space travel.

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24 INTERPOL had submitted to the Legal Committee of ICAO in 1977 that out of recorded hijackings up to that year, the percentage of instances of hijackings which were motivated politically was 6.2 at a ratio of 64:4. See *ICAO Doc 8877-LC/161* at 132.

25 S. Shubber; *Jurisdiction Over Crimes on Board Aircraft*, at 226.

26 Aircraft Hijacking, *Harvard International Law Journal*, Vol. 12 (1971) at 65.

Jurisdictional Issues

Perhaps the single most important issue in cyber conduct is that which pertains to jurisdiction. Given the worldwide web and its global application, the most compelling question in this regard would pertain to the transboundary applicability of an Internet contract. In this regard, the most convenient analogy comes from the two jurisdictions of Canada and the United States. Would a hacker in Canada, who interferes with computer programming over the Internet in Toronto and Miami, be liable to be charged for his crime an in the United States by the aggrieved company which has its home base in Florida? In a case decided in 1952[27] in Canada where the plaintiff brought a case to the Ontario High Court against an American radio broadcasting station which was broadcasting from across the border, allegedly libellous statements which could be heard over the air waves in Canada, the defendant radio station brought up a motion of dismissal, alleging that the Ontario Court in Canada had no jurisdiction to hear a case against a party to the action which was an enterprise based in the United States. The Court disagreed, and held:

> A person may utter all the defamatory words he wishes without incurring any civil liability unless they are heard and understood by a third person. I think it a "startling proposition" to say that one may, while standing south of the border or cruising in an aeroplane south of the border, through the medium of modern sound amplification, utter defamatory matter which is heard in a Province in Canada north of the border, and not be said to have published a slander in the Province in which it is heard and understood. I cannot see what difference it makes whether the person is made to understand by means of the written word, sound-waves or ether-waves in so far as the matter of proof of publication is concerned. The tort consists in making a third person understand actionable defamatory matter.[28]

In the more recent case of *Pindling v. National Broadcasting Corporation*[29] in respect of an American television broadcast received in Canada, the Ontario High Court held that the Prime Minister of the Bahamas was held entitled to bring the case to Canada, instead of the United States. The *Pindling* decision illustrates well the principle of "forum shopping" which can be culled from the television context and be held applicable to the analogous situation of a contract transacted over the Internet.

The above principle may be derogated only in an instance where the Court seized of the case could invoke the principle of "forum non convenience" which allows the transfer of a suit from an originally filed jurisdiction to some other jurisdiction which is better placed to hear the case concerned. In the 1996 case of *National Bank of Canada v. Clifford Chance*[30] the Canadian courts which were charged with hearing a case where a Toronto based firm had contracted with a law firm in the United Kingdom, transferred the case to the United Kingdom although the contract was concluded in Toronto, on the grounds that the contract concerned a U.K. based project and the legal advice obtained had been U.K. law given by lawyers in the United Kingdom. Based on the *Clifford Chance* principle, it would not be unusual for a common law Court to determine that an illegal act performed through cyber space and originates in State A which is calculated to interrupt legitimate activities in outer space would lend itself to being adjudicated in State A itself.

There is a dichotomy in the judicial thinking with regard to cases involving transboundary conduct on the Internet. On the one

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27 *Jenner* v. *Sun Oil Co. Ltd.* (1952) 16 C.P.R. 87 (Ont. H.C.J.).

28 *Ibid* at 98-99.

29 (1984) 49 O.R. (Ed) 58 (H.C.J.).

30 (1996) 30 O.R. (3d) 746 (Gen. Div.)

hand courts are refusing to bring a person into a jurisdiction purely because he contracted with a business entity which is based in that jurisdiction. This approach is illustrated by the 1994 U.S. decision in the case of *Pres-Kap, Inc.* v. *System One, Direct Access Inc.*,[31] where the court refused to grant jurisdiction to Florida where a resident in New York had used a Florida based online network information service merely to gain access to a database. Similarly, the Court in the famous 1997 *SunAmerica* case[32] refused to find jurisdiction in a trade-mark case solely on the basis of the defendant's operation of a general access web site:

> Plaintiffs ask this Court to hold that any defendant who advertises nationally or on the Internet is subject to its jurisdiction. It cannot plausibly be argued that any defendant who advertises nationally could expect to be haled into Court in *any* state, for a cause of action that does not relate to the advertisements. Such general advertising is not the type of "purposeful activity related to the forum that would make the exercise of jurisdiction fair, just or reasonable."[33]

Similarly, in the 1997 case of *Hearst Corporation* v. *Goldberger*[34] where the defendant operated a passive general access web site, the courts were of the view that to open worldwide jurisdiction merely because the Internet offered worldwide access, would be iniquitous:

> Where, as here, defendant has not contracted to sell or actually sold any goods or services to New Yorkers, a finding of personal jurisdiction in New York based on an Internet website would mean that there would be nationwide (indeed, worldwide) personal jurisdiction over anyone and everyone who establishes an Internet web site. Such nationwide jurisdiction is not consistent with traditional personal jurisdiction case law nor acceptable to the Court as a matter of policy.[35]

The *Hearst Corporation* decision seems to have followed the observation of a case[36] decided one year earlier where the Court held:

> Because the Web enables easy worldwide access, allowing computer interaction via the Web to supply sufficient contacts to establish jurisdiction would eviscerate the personal jurisdiction requirement as it currently exists; the Court is not willing to take this step. Thus, the fact that Fallon has a Web site used by Californians cannot establish jurisdiction by itself.[37]

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31 636 So. 2d. 1351 (Fla. App. 1994).

32 *IDS Life Insurance Co. v. SunAmerica, Inc.*, 958 F. Supp. 1258 (N.D. III. 1997), aff'd in part, vacated in part, 1998 WL 51350 (7th Cir.) (Westlaw).

33 *Ibid.* at 268.

34 1997 WL 97097 (S.D.N.Y.) (Westlaw).

35 Ibid. para 1 - For a similar result see: *Cybersell, Inc.* v. *Cybersell, Inc.*, 44 U.S.P.Q. 2d 1928 (9th Cir. 1997); and *Blackburn* v. *Walker Oriental Rug Galleries*, No. 97-5704 (E.D. Pa., 7 April 1998), reported in *Computer & Online Industry Litigation Reporter*, 21 April 1998 at 4.

36 *McDonough* v. *Fallon McElligott Inc.*, 40 U.S.P.Q. 2d 1826 (S.D. Cal. 1996).

37 *Ibid.* at 1828.

The second line of judicial thinking is the converse to the above approach, where courts have imputed to the non-resident defendant the responsibility for complexities brought about the Internet in its universal applicability. Therefore, in *Compuserv Incorporated* v. *Patterson*,[38] the courts held a Texas based computer programmer legally responsible for his Ohio based computer network online service, and found him to be under Ohio Law. Although the defendant had never visited Ohio, he was nevertheless found to be subject to Ohio law on the basis that an electronic contract had been concluded in Ohio where the defendant was distributing his product.

The principle of universal application of jurisdiction has been invoked in other instances, where courts have accepted jurisdiction on the basis of sales made to customers through the defendant's web site,[39] or based on soliciting donations,[40] or based on subscribers signed up by the defendant for services delivered over the Internet,[41] or for having follow-on contacts, negotiations, and other dealings in addition to, and often as a result of the initial Internet-based communication.[42] The common thread which runs through the fabric of judicial thinking in this regard is that parties who avail themselves of technology in order to do business in a distant place should not then be able to escape that place's legal jurisdiction. These cases are all embracing, from contract breach claims to tort, including trade libel; in several cases, courts have even found jurisdiction in trade-mark infringement matters merely on the basis of a defendant's general access web site,[43] or linking to a national

38 89 F. 3d. 1257 (6th cir. 1996).

39 *Digital Equipment Corporation* v. *AltaVista Technology, Inc.* 960 F. Supp. 456 (D. Mass. 1997). See also *Cody* v. *Ward*, 954 F. Supp. 43 (D. Conn. 1997), where a court took jurisdiction based on telephone and e-mail communications that consummated a business relationship begun over *Prodigy's* "Money talk" discussion forum for financial matters. In partially justifying this decision, the court noted that the use of fax technology, and even live telephone conferences, can greatly reduce the burden of litigating out-of-state.

40 *Heroes, Inc.* v. *Heroes Foundation*, 958 F. Supp. 1 (D.D.C. 1996).

41 *Zippo Manufacturing Company* v. *Zippo Dot Com, Inc.*, 952 F. Supp. 1119 (W.D. Pa. 1997).

42 *Resuscitation Technologies, Inc.* v. *Continental Health Care Corp.*, 1997 WL 148567 (S.D. Ind.) Weslaw). The Court in this case was not concerned that the defendants had never visited the forum state in person and concluded at para. 5: "Neither is the matter disposed of by the fact that no defendant ever set foot in Indiana. The 'footfalls' were not physical, they were electronic. They were, nonetheless, footfalls. The level of Internet activity in this case was significant." See also *EDIAS Software International, L.L.C.* v. *BASIS International Ltd.*, 947 F. Supp. 413 (D. Ariz. 1996). In this case the court summed up the essence of many of the Internet jurisdiction cases by stating at 420: "BASIS [the defendant] should not be permitted to take advantage of modern technology through an Internet Web page and forum and simultaneously escape traditional notions of jurisdiction." See also *Gary Scott International, Inc.* v. *Baroudi*, 981 F. Supp. 714 (D. Mass. 1997).

43 *Panavision International, L.P.* v. *Toeppen*, 938 F. Supp. 616 (CD- Cal. 1996); above note 215; *Maritz, Inc. v. CyberGold, Inc.*, 947 F. Supp. 1328 (E.D. Mo. 1996); *Inset Systems, Inc.* v. *Instruction Set, Inc.*, 937 F. Supp. 161 (D. Conn. 1996). In the latter case the court observed at 165:

> In the present case, Instruction has directed its advertising activities via the Internet and its toll-free number toward not only the state of Connecticut, but to all States. The Internet as well as toll-free numbers are designed to communicate with people and their businesses in

ATM network through a telephone line indirectly through an independent data processor in a third state.[44]

An overall evaluation of the U.S. civil cases discussed above concludes that while the general trend is for courts to asset jurisdiction over non-residents based on their Internet activities, there are still a few situations where some courts may not apply jurisdiction.

Although the choice of forum may extend universally, it does not necessarily mean that enforcement from a judgment would automatically follow. In the case of *Bachchan* v. *India Abroad Publications Incorporated*[45] the plaintiff, who was a national of India who had won the right to have his case heard in the United Kingdom, was unable to enforce judgment in New York. The New York courts held that the United Kingdom law applicable to the case did not accord with United States law and therefore the decision could not be recognized as enforceable in the United States.

An insurmountable problem in international criminal justice is the question "before what court and according to what law should an individual who has committed an international crime be tried?" There are two possibilities:

a) an individual criminal may remain at large and unpunished; and

b) an international criminal may be tried by the court of any State which can bring him physically within its jurisdiction.

The former reflects the present ludicrous state of international criminal law. The latter brings to bear the reversal of established international law, as was seen in the dangerous precedent created in the extradition from Argentina to Israel of war criminal Eichmann and his trial in Israel for international crimes.[46] This would doubtless create international "vigilantes".

The inherent defect in the application of municipal law to international crimes lies in the fact that a host of municipal courts, adjudicating on different or separate instances of criminality may find difficulties in maintaining uniformity in application and interpretation. Uniformity of formulation could only be achieved if States followed an authoritative text when incorporating international criminal law into their municipal systems. Although this may be possible, it would certainly be a tedious and devious process. A more expedient method would be for States to except such a text in the form of an international code or convention, to be administered by one international body on the principle of international citizenship of people, irrespective of

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every state. Advertisement on the Internet can reach as many as 10,000 Internet users within Connecticut alone. Further, once posted on the Internet, unlike television and radio advertising, the advertisement is available continuously to any Internet user. ISI has therefore, purposefully availed itself of the privilege of doing business within Connecticut.

44 *Plus System, Inc.* v. *New England Network, Inc.*, 804 F. Supp. 111 (D. Colo. 1992).

45 585 N.Y.S. 2d. 661 (Supp. 1992).

46 See L.C. Green, The Eichman Case (1968) 23. *M.L.R.* at pp. 507-509.

their nationality. To achieve this goal, the concept of State sovereignty as it exists today has to be revisited along the lines of the foregoing discussion.

Another factor that has to be taken into account in the creation of an international court of criminal justice is that, as a condition precedent, States should form a consensus on definitions relating to critical terminology. For instance, an international crime would have to be clearly defined and universally agreed upon. The word "aggression" would also have to be clearly spelled out.

During the Second World War the idea of an international criminal court gained increasing significance and it is often not realised how much effort was devoted to the practicalities of the creation and organisation of such a court. The work of a number of official and unofficial bodies[47] paved the way for the deliberations of the International Conference on Military Trials which resulted in the establishment of the International Military Tribunal at Nuremberg.[48]

Although the International Military Tribunal, *functus officio*, ceased to exist, the question of the creation of an international criminal court was actively taken up by the United Nations. It was raised in connection with the formulation of the Nuremberg principles in 1948[49] and with the genocide Convention.[50] The General Assembly eventually invited the International Law Commission to investigate the desirability and possibility of the creation of a international criminal court.[51] Although this task was successfully completed the matter went no further. In 1954 the General Assembly resolved that considering the relationship between the question of the definition of aggression, the draft code of offences against the peace and security of mankind and the creation of an international criminal court, further discussion of the latter should be deferred until the other two matters had been settled. The General Assembly reaffirmed this view in 1957. This ambivalence on the part of the United Nations reflects that as long as the solution of the problem of defining aggression remains a condition precedent to the creation of an international criminal court no further progress will be made.

The formation of an international court is based on the simplistic truism that as there are international crimes, so there should be an international court of justice to adjudicate on those crimes. States should, in this context, adopt a more universal attitude that recognizes the following premise:

> international law pierces national sovereignty and presupposes that statesmen of the several States have a responsibility for international peace and order as well as their responsibilities to their own States.[52]

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47 Such as the London International Assembly created in 1941 by Viscount Cecil of Chelwood under the auspices of the League of Nations Union; the International Commission for Penal Reconstruction and Development organised at cambridge in 1941; and the United Nations War Crimes Commission set up in 1943.

48 See R.H. Jackson, *International Conference on Military Trials*, London 1945 (U.S. Dept. of State Publication 3080).

49 See *Historical Survey of the Question of International Criminal Jurisdiction* (U.N. Document A/CN.4/7/Rev.1), p. 25 et seq.

50 Two draft statutes for courts were produced, see *ibid*, pp. 30-46 and 120-147.

51 *Ibid.* pp. 5, 6 and 44-46.

52 R.H. Jackson, *International Conference on Military Trials*, London 1945, U.S. Department of State: Washington, Preface, at p. ix.

The fact that the successful formation of such a court is now a reality may be attenuated from the existence of the International Court of Justice and the successful conclusion of the Nurembourg trials at the Nurembourg Tribunal. It cannot be denied that at Nurembourg, agreement was reached by lawyers from nations whose legal systems, philosophies and traditions differed widely. They circumvented technical difficulties at the trials with "a minimum of goodwill and common sense".[53]

The philosophy of the court should be totally flavoured with international interests, as opposed to national interests. Therefore, prosecution should not be relegated to a national entity or authority. It should be left to an international authority such as the United Nations.

Judges of the court should be selected from jurists worldwide, as in the procedure followed in the election of Judges to the International Court of Justice. A rigid screening system would have to be built in to the rules of court to obviate adjudication of issues which aree of a tendentiously political nature. An international convention or code should govern such principles as custody of offences pending trial, whereby Contracting States would guarantee to arrest criminals and deliver them up for trial.

An International Convention/Code

One of the responsibilities that would devolve upon the international community towards developing an international convention or code would be to set precise laws with regard to addressing pertinent issues involved. States should endeavour :

a) to refuse to support States which do not take stringent action with regard to their communication laws;

b) to enforce stringent limits on activities and size of diplomatic and consular missions and other official bodies overseas of States which engage in or condone cyber criminal activities; and,

c) introduce stringent and improved extradition procedures within the process of law for bringing to trial those who have perpetrated acts of cyber terrorism;

The Convention or code should, in addition, enforce the following:

a) introduction and implementation of strict visa and immigration requirements and procedure in respect of materials of States which support, sponsor or condone terrorism;

b) monitoring all persons, including those of the diplomatic corps, who have been expelled or excluded from States on suspicion of involvement in international terrorism and refusing to let them enter those States;

c) establishing multilateral, plurilateral and bilateral liaison and co-operation of police authorities, security and military authorities of States;

d) in the light of the COPUOS role in peaceful uses of outer space activities, strengthening the role of the Committee's regulatory role in the promulgation and

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53 G. Schwarzenberger, *International Law and Totalitarian Lawlessness*, London: 1943, at p. 76

disseminating Standards and Recommended Practices (SARPS) and requiring States' compliance thereof; and

h) providing adequate sanctions against States who fail to comply with the above SARPs ;

The offences related to cyber terrorism should be addressed on the basis that individuals have international duties which transcend the national obligations of obedience imposed by an individual State. By the same token, it must also mean that individual States owe their citizens and the world at large a responsibility for maintaining world security. The philosophy of these two premises has to be vigorously employed in bringing to fruition the above measures. It is only then that a substantial legal contribution could be made to the controlling of this offence.