45 *It* is not necessary to dwell on the contribution of later Western commentators, as they do not advance beyond the work of the medievals in this discussion. One finds in Calvin an echo or Origen: just as God did not appear to the patriarchs as He was in Himself, but only insofar as they could endure, so Christ appears under external symbols, so that the disciples may taste according to the limited capacity of their flesh what cannot be fully comprehended (*Ioannis Calvini Opera* XLV, 485—6). With Hugo, Grotius and Maldonatus one finds reflected the critical concerns aroused by the study of biblical languages, namely the use of the meaning of words within a given text as interpreted by other biblical uses of that word. So, on the basis of Dan 10:6, Hab 3:4 and other texts they conclude that *morphè* refers to the *facies rei exterior*. Hence, it is not the body of Jesus that is changed by his Transfiguration but rather his external aspect and figure (Grotius and Maldonatus as cited in Poole, M. *Synopsis*, 432).

46 Rahner, K. 'Hermeneutics of Eschatological Assertions', in *Theological Investigations* 4, London: DLT & New York: Seabury, 1966, 342—43.

47 Compare Rahner. 'It is the nature of *eschata* to be hidden. Eschatological revelation concerns the making known of the existence of hidden realities so that they can no longer be ignored. But insofar as the future as such is concerned, it cannot be presented as a known inevitable, or man loses the essential free side of his nature. All eschatological assertions address man as a totality. However, we do not yet experience our total being, finding ourselves still in the process of shaping our destinies. Hence revelation of the last things addresses both something begun in us which we can know at this moment, as well as something which awaits us when our being achieves total fulfilment.' Rahner, K. *Hermeneutics*, 329, 333, 340—41.

48 Rahner, *Hermeneutics*, 336. '... (B)iblical eschatology must always be read as an assertion based on the revealed present and pointing towards the genuine future, but not as an assertion pointing back from an anticipated future to the present' (*ibid.*, 337).

A Threat to Due Process — The War Crimes Act 1991

Aidan O'Neill

In Act One of 'A Man for all Seasons', Robert Bolt's play about Thomas More's pilgrimage to martyrdom, More's impetuous son-in-law, William Roper, argues that the Devil does not deserve benefit of law. In the course of the discussion More pushes Roper into the stark claim that obstacle to the conviction of the Devil must be overcome, even if it meant failing to follow due process of law. Roper, in his hunger and thirst for justice, declares that he is prepared to tear down every law in England in so worthy a cause. More, with his finely-tuned jurisprudential mind, answers him:

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> And when the last law was down and the Devil turned on you—where would you hide, Roper, the laws all being flat? This country's planted thick with laws from coast to coast—Man's laws, not God's—and if you cut them down—and you're just the man to do it, d'you really think you could stand upright in the winds that would blow then? Yes, I'd give the Devil benefit of law, for my own safety's sake'. (Robert Bolt, *A Man for All Seasons,* 1960, Act I)

In this passage from Bolt's play More focusses some of the issues raised by the recent War Crimes Act, which obtained the Royal Assent on 9 May 1991.[1] The Act's long title states that its purpose is 'to confer jurisdiction on United Kingdom courts in respect of certain grave violations of the laws and customs of war in German-held territory during the Second World War.' For an Act of Parliament it is surprisingly brief, consisting of just three short sections, only the first of which is concerned with any substantive change in the law. The Act allows, in certain cases, proceedings for murder, manslaughter or, in Scotland, culpable homicide to be brought against any person who was a British citizen on 8 March 1990 (or on any date subsequent to that) irrespective of his or her nationality at the time of the alleged offence.

Before the Act was passed, courts in the United Kingdom were, as a general rule, permitted only to try cases where an alleged offence was said to have been committed within the territory of that court. Thus, offences committed in Scotland could be heard only by Scottish criminal courts. Offences committed in England, even by Scots, were the prerogative of the courts of that country. There were certain exceptions to this general rule. For example a British subject accused of committing a crime abroad which amounted to murder, manslaughter or culpable homicide could also be tried in the various courts in Britain.

The War Crimes Act is intended to create another exception to these existing rules on jurisdiction, but only for very specific offences. It does not extend the rules to allow that any person who is now a British subject, but was not so at the time the alleged offence was committed, may be tried in United Kingdom courts for murder, manslaughter or culpable homicide. Instead, the Act holds that persons who were not British citizens at the time they allegedly committed a crime outside the territory of the United Kingdom, may now be tried in the United Kingdom courts. However, they may be so tried only if their alleged offences were committed at a particular time, in a particular place and in a particular manner. The period in question dates from 1 September 1939 to 5 June 1945. The place must have been at that time a part of Germany or under German occupation. Furthermore, the alleged offence must have been committed in a manner which constituted 'a violation of the laws and customs of war.'

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1. The War Crimes Act and International Law

The phrase 'a violation of the laws and customs of war' is a conscious reference, by those who drafted the Act, to terminology and the substantive law prior to the Nuremberg trials and to the Geneva Convention of 1949. It is, therefore of particular interest. Prior to the Second World War, customary international law provided that the right of belligerents to adopt means of injuring the enemy was limited[2]. The consensus among international lawyers was that in war, a power which occupied another country had duties and obligations toward the subjects of the occupied territory. Even under occupation the lives of individuals, particularly of civilians, had to be respected. Collective punishments of occupied populations for the acts of others for whom they had no collective responsibility were held to be contrary to the usages of war. Matters which were not covered by the laws and customs of war were held to be any acts committed against civilian populations when not at war, or any acts taken by a state against its own citizens. Accordingly the persecution by the Nazi Government of German Jews on its own territory did not constitute a 'violation of the laws and customs of war'.

The experiences of the Second World War gave rise to the view that a new category of offence had to be created to take into account the persecution of minorities by a State within its own territory. The Nuremberg Tribunal, set up after the war by the Allies to prosecute and punish 'major war criminals of the European Axis'[3], defined such conduct as constituting 'crimes against humanity', and held that it also had jurisdiction over these matters. The notion of crimes against humanity was later given full recognition in the Geneva Convention of 1949.

The concept of international law generally held up until the Nuremberg Tribunal was a post-mediaeval development, consequent upon the rise of the independent sovereign nation state, the ruler of which claimed and exercised full power within his own borders—*rex est in regno suo imperator*. Outside his borders, the activities of the nation state were limited only by concerns of its own self-interest. This self-interest might lead individual states to treat with one another and agree to govern their international activity in accordance with the provisions set down in formal contracts or treaties. However, the necessary prerequisite to such consensual regulation of conduct is that the integrity of each participant be respected. Thus, *the* fundamental principle of international law is that the borders of other countries be physically respected; put simply, one state ought not to invade or annex another. It can be further argued that if international law relies on respect for the integrity of each contracting nation, then each country has a duty to concern itself solely with its own affairs and not to comment or otherwise interfere in the internal affairs of another country.

Implicit in the Nuremberg Tribunal's naming and prosecution of

'crimes against humanity' was the claim that the international community *had* the right to interfere in the internal affairs of individual states, even to the extent of overriding their national sovereignty, and municipal laws and convicting the nationals of that state of crimes not recognised in the state's own domestic law. This was a radically new concept of the relationship between nations. Although the vocabulary of international law was still used in the jurisprudence of the Nuremberg Tribunal and in the Geneva Convention, the substance of what was set out therein comprised an appeal to some supra-national law, a natural law against which the laws of individual states could be measured and found wanting. This was quite a different concept from the kind of international law set out for example in the Hague Conventions of 1907.

The Nuremberg Tribunal also clearly established that international law could be used to impose liabilities and duties directly upon individuals and was not a matter which affected only states and state institutions. It was observed by the Tribunal that 'crimes against international law are committed by men not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced.'[4] It was held to be no defence for an individual to plead that in acting as he did, he was only carrying out orders of the then established authority.

We are presently heirs to two quite distinct and sometimes contradictory notions of international law; the two ideas do not always easily co-exist. The pre-Nuremberg approach appeals to considerations of the self-interest of each state, and accepts that a state is limited only in regard to its relations to other states. According to this tradition each state is a free agent when it comes to the regulation of internal matters. The post-Nuremberg approach appeals to notions of individuals' rights and consciences and is no respecter of borders. The decision to set up a military force to wrest Kuwait from Iraqi occupation was justified in terms of the first view of international law. Whilst the policy of setting up safe havens for Kurdish refugees within Iraqi's borders rested on an appeal to the latter kind of international law.

2. The Limitations placed on the War Crimes Act 1991

It is implicit within the terms of the War Crimes Act 1991 that the drafters accept the basic idea on which the Nuremberg Tribunal proceeded, namely that international law can be enforced against individuals and creates obligations on them. However, the drafters of the Act are anxious not to apply the full substance of the law developed at and since Nuremberg. An example of this coyness is the fact that the War Crimes Act, as drafted, does not allow for the prosecution of offences which might nowadays be termed 'crimes against humanity'. The Act concerns itself only with those offences which were regarded, even before the Second World War, as being contrary to the commonly

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accepted standards of international law. The Act cannot be used to allow proceedings of genocide to be brought, since that crime was only defined by international convention in 1948. The change in the rules as to the jurisdiction of the British courts is limited to those acts committed between 1 September 1939 and 5 June 1945 which can be said to have constituted 'violations of the laws and customs of war' as that term was understood before the Nuremberg tribunal broadened the notion of war crimes to include 'crimes against humanity'.

The reason for such a limitation is that the drafters of the Act are anxious to avoid the charge that Parliament is legislating retrospectively and making acts criminal which were not so at the time they were committed. The War Crimes Act 1991 puts into effect the recommendation of the Inquiry into War Crimes headed by Sir Thomas Hetherington Q.C. and William Chalmers which was set up on 8 February 1988 and which reported in 1989[5] The authors of the Report state at §9.27:

> In our view to enact legislation in this country to give British courts jurisdiction over murder and manslaughter committed as violations of the laws and customs of war would not be to create an offence retrospectively. It would be making an offence triable in British courts to an extent which international law had recognised and permitted at a time before the alleged offences were committed. The only element of retrospectivity would be that jurisdiction would be made available to the British courts by Parliament after the commission of the acts in question. All of the allegations that we have investigated in detail, and the vast majority of all the allegations made to us, concern events on territory occupied by Germany by force, and thus would, if proved, be violations of the laws and customs of war.'

The authors of the report recognise the fundamental injustice which would be done if acts which were not criminal at the time of their commission were subsequently declared to be so, and prosecutions were brought accordingly. They distinguish their own recommended legislative reform as a change not in the substantive law, but simply in the procedural or adjectival law. To amend such rules retrospectively does not appear to the authors to be a similar injustice, although it is only with such a change in the procedural law that their proposed prosecutions can be brought in Britain.

3. The Role of Criminal Procedure

In making this central distinction between the substantive criminal law and procedural criminal law, and allowing the latter to be amended retrospectively but not the former, the authors of the report seem to be displaying a kind of impatience with the rules which surround our

criminal courts. It is as if the rules of criminal procedure in some ways prevent us from reaching the correct verdict and let the guilty walk free. They state at §9.18:

> The crimes committed are so monstrous that they cannot be condoned: their prosecution could act as a deterrent to others in future wars. To take no action would taint the United Kingdom with the slur of being a haven for war criminals. ... The United States of America, Canada and Australia have all acted in recent years and there has been considerable interest in our work in the Soviet Union. Both the Soviet authorities and Soviet public opinion consider it important that the United Kingdom, one of their allies in the 'Great Patriotic War', should be seen at last to be bringing war criminals to justice.

The report appears to consider justice as the successful prosecution of the 'war criminals' identified by its authors. That end dominates their minds, as it has dominated the debates in both Houses of Parliament. It would appear from the report that insofar as the existing criminal procedural law prevents the achievement of successful prosecutions, then it needs to be changed. The niceties of existing criminal procedure are seen as a hindrance rather than the means to justice.

The authors appear not to recognize the possibility of there being any notion of procedural justice; that there is justice not only in the end sought but in the means used to achieve it; that criminal procedure is more than instrumental and has its own integrity; that there is value in respect for ideas and practices developed over the years. Moreover, they do not seem to adequately consider what constitutes due process before the courts of the United Kingdom.

This kind of impatience with the tules of criminal procedure, with the desire to get a result, is a pervasive attitude in Britain today. It is the attitude behind the police investigation and prosecution of the Guildford four, the Birmingham six and the Maguire seven. The rules of due process both before and during these trials were flouted by the police in a desire to secure convictions. The impatience with procedure is equally evident in the spate of press criticism of Lord Lane which followed upon the release of the Birmingham six. It was widely canvassed by responsible individuals that the Lord Chief Justice should tender his resignation for his earlier decisions in some of these cases. It seems to be suggested that the Lord Chief Justice should have bent the rules in order to secure the result which everyone knew to be right; that result being the quashing of a conviction which everyone, or at least the press, 'knew' to be right in 1974.

The Hetherington report recommended, in addition to the central retrospective change to the rules on jurisdiction, a number of other changes to criminal procedure so that convictions for war crimes might be more readily secured. Since there exists no means of compelling the

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attendance of witnesses who live abroad before courts in the United Kingdom, the report suggests that consideration be given to other means of making their evidence available to the courts. They recommend that witnesses be permitted to give evidence via live television links. This possibility already exists under English law, but specific provision would require to be made in respect of Scotland. Further, a procedure known as Letters of Request, whereby a statement from a witness may be taken before a foreign magistrate in a foreign jurisdiction and received as unsworn evidence in the trial in the in the United Kingdom, already exists. The report suggests that, following the passing of the Act, this procedure could be used in any war crimes trials (§§9. 35—36). In the Letters of Request procedure, however, the court retains a discretion to refuse to admit such a statement if it might lead to unfairness to the accused or, indeed, the prosecution. The courts also have existing powers to appoint a Commissioner, either a British judge or his representative, before whom evidence from a witness resident abroad can be taken and cross-examined. Again the authors of the report suggest that this procedure might also be used in the proposed war crimes trials.

The difficulty with reliance on such procedures as Commissions and Letters of Request is that the evidence is taken without the jury being present. Thus, the jury is deprived of the opportunity of making its own assessment of the performance and credibility of any witness when being cross examined before a judge. It is, after all, the jury who, in coming to their verdict as to the guilt or innocence of the accused, have the duty to make the judgements as to the credibility and reliability of witnesses and the weight ultimately to be attached to their evidence. To get round difficulties posed by the absence of a jury, the report recommends (at §9.37) that legislation be introduced to allow for a video tape recording to be made of the examination and cross-examination of the witness. This evidence would be secured either by Letters of Request or by Commission and video evidence would subsequently be shown to the jury. However, this procedure diminishes the role of the jury preventing them, for example, from seeking particular clarification from the witness, through the judge, of any lack of clarity in the testimony of the witness.

The question of the admissibility of statements given by witnesses who have since died also arises. The report recommends no change in existing English legislation on this matter, but suggests that Scottish legislation be introduced to allow for the admissibility of recorded statement of persons now dead, leaving it for the trial judge to comment on the weight to be attached to such evidence given that the accused is deprived of the opportunity to cross-examine the witness.

4. The Implications of the Act

Each of the changes outlined above are represented by the authors of the report as minor alterations to existing rules as to the admissibility of evidence before the court. No account appears to be taken by them of the cumulative effect of all these changes. The courts already have provision for admitting evidence from witnesses resident abroad, but these rules have always been seen as secondary or ancillary to the main trial and as a means of introducing formal non-controversial evidence at minimal expense. If, however, there is to be substantial reliance on these rules, as they are proposed to be amended, so as to allow a great deal of controversial and contested evidence from witnesses resident abroad to be brought before a jury in the United Kingdom, then the whole complex balance of a criminal trial in Britain is upset. The accused would no longer be directly faced by his accusers in the presence of his peers. Such trials, with their proposed reliance on statements of the dead, videos of the sick, and television links with those unwilling to travel cannot be seen as normal trials. They would become special sorts of trials for special sorts of crimes.

The degree to which the Act allows for special trials for special crimes becomes clearer when we realize that the Act only allows for certain war criminals to be prosecuted in Britain. The Act still leaves the courts in Britain unable to prosecute persons who are now British citizens, but who were not such at the time of their alleged offences, who killed people in such a way as to constitute a 'crime against humanity' rather than a 'violation of the laws and customs of war.' In this way, a former German officer now a British citizen, accused of responsibility for killing German Jews within Germany cannot be prosecuted under this Act before United Kingdom courts. A naturalised British citizen who killed in a manner which constituted a violation of the laws and customs of war, but who did so outside the United Kingdom, Germany or German-occupied areas while he was the citizen of another country also cannot be prosecuted. Any person who, before he became a British citizen, was guilty of killing people abroad in a way which constituted a violation of the laws and customs of war, but who did so before, either before 1 September 1939 or since 5 June 1945, cannot be prosecuted in United Kingdom courts.

In all of the above cases, and in all of the cases which are covered by the 1991 Act, there remains the possibility of extraditing the accused to the country on whose territory these crimes were committed. Special extradition arrangements can be made under the Criminal Justice Act 1988 to allow for persons to be extradited in the absence of specific extradition treaties. It is even possible to extradite people who are now British citizens to stand trial in the Soviet Union. Hetherington and Chalmers would not favour such a move on the grounds set out in §§9.45—49 of their report. They say that public opinion might not find

such extradition acceptable. Extradition to the Soviet Union for crimes committed in Lithuania, Latvia and Estonia might involve the recognition by the British government of the Soviet's seizure of the Baltic states under the Ribbentrop-Molotov pact. Moreover, the Soviet regime it itself implicated in crimes against humanity in the 1930s and, it is widely-held that the Soviet Union is not yet subject to the rule of law. The authors state at §9.47:

> Judges (in the Soviet Union) rely for their appointments on the approval of the local party machine and, while interference in cases is no longer overt, judges naturally remain mindful of how they were appointed and that they could be dismissed in a similar manner. The individual in the Soviet Union still has a very limited scope to seek legal protection of his rights or to resort to the courts to restrain any action by the State which he may consider to be unlawful. Equally the notional presumption of innocence is often not respected in practice. The Second World War is still a very emotive issue in the Soviet Union and there would be a great pressure—public and political—for the courts to secure convictions. While some of the recent changes are in the right direction, they certainly have not established the sort of standards which exist in the United Kingdom.

The question of the degree to which respect is being shown for the rule of law in the United Kingdom and for the maintenance of British legal standards by the enactment of the War Crimes Act 1991, and the proposed legislation associated with it is not addressed. What has in fact happened is that, after a degree of public pressure and selective leaking of information to the Press, the Government set up a roving commission of inquiry to look into various allegations about certain named individuals. The inquiry has concluded that there is sufficient evidence against three of those individuals for them to be convicted in a British court of unlawful homicides, either murder or manslaughter. However, as the law stood, no such trial could take place in Britain on grounds of failure to found jurisdiction. The authors of the report, Sir Thomas Hetherington and William Chalmers recommend that the law be changed to allow for prosecution to be brought in the three cases in which they saw 'a realistic prospect of convictions on the evidence already available' (§9.14). An Act of Parliament has now been passed to change the law on jurisdiction as it affects just those three cases so that proceedings may be brought. The House of Commons, overruling the Second Chamber, has changed the law on criminal jurisdiction retrospectively and particularly. They have chopped down one law, to deprive the devil of its benefit. They may yet have to change others, just to be sure of a conviction.

5. Conclusion

The use of legislative power to change the law retrospectively as it affects particular cases would, in many legal systems, be regarded as an abuse of power by the legislature and a breach of fundamental constitutional rights. Previous examples of the law being changed retrospectively for particular cases include the *ex post facto* legislation and re-definition as 'lawful execution' of the massacre in 1934 of almost one hundred individuals belonging to the Nazi S.A. or Brown Shirts in Germany. The then German Chancellor, Adolf Hitler, signed a retrospective decree to this effect on the day after the massacre. In May and July 1961 a statute of the Supreme Soviet made sentence of death the penalty for persons convicted of certain 'economic crimes', such as illicit trade in foreign currencies. This penalty was held to apply to persons who had been convicted of these crimes before that statute had been passed and sentence duly carried out in some cases, *pour décourager les autres.*

No-one wishes to equate the substance of such legislative changes with the War Crimes Act 1991, but the point has to be made that retrospective and particular changes to the law damage the fabric of the society in which we live. By passing this Act, Parliament (and more particularly, the House of Commons) is seen to use all its power to change the law as it applies to particular individuals. The law becomes simply the means by which state power is exercised to achieve a particular end desired by those in power. But if the law can be changed so completely at will in this way, where is our protection? As in Nazi Germany and in Soviet Russia, the form of the law is respected while little respect is paid to the rights in due process of those subject to the law.

Due respect for legal procedure is our only protection against tyranny. The idea of due respect is summed up in the phrase 'the rule of law'. The rule of law means that it is the law which rules even the actions of the state. The rule of law must mean more than that the state is bound to respect the outward form of the law. The state has to respect the law in and for itself: the state has to be seen to regard itself as bound by the law and to accept that the law can in some sense limit state power. These ideas should not be seen as controversial and in many countries are not seen as such. They are not controversial in Germany and the United States, which have a basic written constitutional document setting out the rights of the individual and the limits of state power. Where there is a written conctitution and/or an entrenched bill of rights, legislation may be challenged by the individual before the courts on the grounds of its unconstutionality or infringement of basic rights. Amongst these rights we could cite the right to equal protection of the laws, or the right not to be convicted of an offence on the basis of retrospective legislation[7]. However, in the United Kingdom, and in countries such as Israel and South Africa which inherited constitutions based on the Westminster

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model, the doctrine of the absolute sovereignty of Parliament (over and against the King) has meant that the legislature has seen its powers to make and change the law to be unlimited, and the role of the judiciary has been seen to be that of simply applying rather than challenging the law declared by Parliament.

Unlike his counterparts in the other countries of the European Community or of the United States of America, the citizen of the United Kingdom cannot challenge a law once passed by Parliament as being an abuse of legal procedure or a breach in the 'inner morality of law', as the American jurist Lon Fuller would have it[8]. In this country, Parliament still claims to be able to legislate in whatever manner—retrospectively, particularly or inconsistently it wishes. The War Crimes Act 1991 is all of those things. We should be concerned about it. It makes explicit just how much we still live under a 'Tudor despotism' (or an 'elective dictatorship' as a Lord Chancellor other than Sir Thomas More termed it). It would seem that, in the United Kingdom the individual has no rights over and against the state, but simply privileges presently permitted him. Perhaps it is time that we too had recourse to a Bill of Rights.

1 Chapter 13 of 1991.

2 See articles 22 of both the International Convention with respect to the Laws and Conduct of War by Land (Hague Convention II). (The Hague, 29 July 1899; T.S. 11 (1901); Cmnd 800) and the International Convention with respect to the Laws and Conduct of War by Land (Hague Convention IV) (The Hague, 18 October 1907; T.S. 9 (1910); Cmnd 5030.

3 See the Charter of the International Military Tribunal, annexed to the Agreement for the Prosecution of the Major War Criminals of the European Axis (London 8 August 1945; T.S. 27 (1946); Cmnd 6903).

4 (1947) 41 A.J.I.L. 172 at 221.

5 War Crimes, Cmnd 744, 1989.

6 The idea that a change in the law is forced on the Government, essentially for the sake of the United Kingdom's international reputation, may be contrasted with the approach taken in Sweden which in 1987 refused to make any changes in its laws which provided for a twenty five years st???? of limitations for crime so as to permit the prosecution of alleged Nazi war criminals living in its territory.

7 See, for example, Article 1 Section 9 to the United States Constitution which provides, *inter alia* that:
'No bill of attainder or ex post facto law shall be passed (by Congress).'
While Article 19 of the German Basic law provides:
'(2) Insofar as a basic right may, under this Basic Law, be restricted by or pursuant to a law, such a law must apply generally and not solely to an individual case.'

8 Lon Fuller: *The Morality of Law*, revised edition (1969; New Haven; Yale University Press).