Geoffrey
Robertson QC

CRIMES AGAINST HUMANITY

The Struggle for Global Justice

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FOURTH EDITION

For Julius and Georgina

PENGUIN BOOKS

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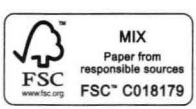

Preface to the Fourth Edition

> 'I have put my death-head formations in place with the command relentlessly and without compassion to send into death many women and children of Polish origin and language. Only thus we can gain the living space that we need. Who after all is today speaking about the destruction of the Armenians?'
>
> Adolf Hitler to chief commanders and commanding generals, 22 August 1939[1]

I happen to have been born on the day of the Nuremberg judgment – 30 September 1946 – so the length of my life provides a precise temporal measure of the extent to which the international community has delivered on the momentous promise of that day, namely that crimes against humanity would henceforth be deterred by punishment of their perpetrators. It was the judgment imposed upon the authors of the Holocaust which created international criminal law, a free-standing and universal jurisdiction to prosecute those who direct or assist a crime so heinous that it is 'against humanity' because the very fact that a fellow human being could conceive and commit it demeans every member of the human race, wherever they live and whatever their culture or creed. It is a crime confined to genocide and mass murder and systematic torture, or to atrocious acts of warfare and terror, and it imputes a special responsibility to commanders, organizers and abettors of these crimes – be they heads of state or political or military leaders, bureaucrats or theocrats, ideologues or industrialists. Since the perpetrators will generally be powerful enough to be

above or beyond the law in their own state, the Nuremberg legacy depends for its fulfilment on the establishment of international institutions of justice with power to end impunity.

Sixty-five years on from that day of judgment, the nations of the world have made a start in devising institutions and procedures which work to protect the most basic of human rights: freedom from state-sponsored murder, torture and terror. This progress has been made mostly since publication of the first edition of *Crimes Against Humanity* in 1999. The book was fuelled by anger at the seemingly endless barbarities committed with impunity by governments throughout the world, some of which I had observed – officially for Amnesty International and Human Rights Watch, professionally as a barrister defending dissidents or just casually, as a television viewer. I sought to build, from the straws blowing in the *fin de siècle* wind (the arrest of Pinochet, the UN courts set up to deal with war crimes in Yugoslavia and Rwanda, the Lockerbie agreement and the Rome Statute for an international criminal court), an argument for a kind of millennial shift, from appeasement to justice, as the dominant factor in world affairs. The evolving force of international human rights law was carrying some compulsion in municipal courts and in an increasing number of international tribunals. The pioneering discovery (law being a science in its content, an art only in its practice) was how the crime against humanity, first defined in the Nuremberg Statute, might become the key to unlocking the closed door of state sovereignty, and to holding political and military leaders responsible for the evils they chose to visit upon humankind.

The preface to the first edition was completed on 24 March 1999, another red-letter day; it began with the British law lords ruling that the Torture Convention had destroyed General Pinochet's sovereign immunity, and ended with NATO bombing the sovereign state of Serbia over its 'ethnic cleansing' in Kosovo. The promise of Nuremberg, for the first time since 1946, seemed capable of realization. When, a few months later, a UN force landed on the shores of East Timor, to protect its people from massacre by Indonesian militias and to secure their right to self-determination, the era of human rights enforcement seemed to have dawned. It would, in effect, be the 'third age' of human

rights: the first had been articulated in the declarations of the American and French Revolutions; the second was ushered in by the Nuremberg judgment and the triptych of treaties it directly inspired – the 1948 Universal Declaration and the Geneva and Genocide Conventions. Now, more than a half century on, human rights law was teething at last – and in this third age, its teeth would be for biting, not gnashing.

A critical response to the publication of *Crimes Against Humanity*, in the summer of 1999, nervously concentrated on practicalities rather than principles. Might Pinochet's arrest not destabilize democracy in Chile? Would Milosevic ever be surrendered to face his indictment in The Hague? These fears seem risible now. Chile's democracy has gone from strength to strength: in 2006 the nation elected a Pinochet torture victim as president and its courts lifted the old tyrant's immunity for crimes of torture and murder. The indictment of Milošević hastened his fall from power and international pressure forced Serbia to disgorge him to The Hague; the issue before his death was not whether he should be tried, but how he should be tried more effectively. The main ideological objection to the book's argument came in Europe from relics of the socialist left who cling still to nation-state sovereignty (Milošević was its embodiment) as a protection from American interference. From their perspective, 'enforcing human rights' was a euphemism for forcing American freedoms on peoples who should not be allowed to enjoy them.[2] Ironically, the vehemence of this critique was contradicted in America itself by blasts from the Republican right. Future UN ambassador John Bolton, then an obscure think-tanker, wrote that the book's advocacy of a global justice movement was a serious threat to US sovereignty and to its ability to do in the world whatever served its national interest.[3] From his perspective, international law was a set of rules that could be imposed upon other countries, but which must never be enforced against Americans.

The first edition found its way into the footnotes of many books and articles on human rights enforcement and was set on many law and international politics courses. It was tempting to leave it unamended, as a *fin de siècle* case for global justice. But international

criminal justice was a work in progress, its principles developing case by case, and war by war, so I decided that this book should accompany its journey. I wrote additional material for the second (2002), third (2006) and now for the fourth (2012) editions, increasing the bulk (and perhaps the price) but also the cogency of the case for a global justice that today is rarely out of the headlines.

It must never be forgotten that international criminal law is a very recent development, dating in reality from the revival of the Nuremberg legacy by the arrest of General Pinochet in 1998. Like other branches of law it develops by the leaps and bounds of precedent, key events, and cases that are the result of happenstance as war criminals or tyrants or heads of state are arrested and sent to The Hague. Pinochet here, Charles Taylor there, then Milošević, Karadžić, Gaddafi (posthumously) and Laurent Gbagbo. Like any legal textbook, this work must be kept up to date. But unlike most other legal textbooks, its subject impacts upon international affairs by asserting the centrality of 'justice' to dealing with states that deny it to their peoples. For that reason I shall be reconsidering and recasting the material in this book every few years, doomed like Sisyphus to an uphill struggle, in my case to the improbability of ever giving a complete account of a subject under exponential expansion. Nonetheless, I hope that this edition will give a fairly clear picture of what the struggle for global justice has achieved by mid-2012.

The second edition was published in 2002, and incorporated into its thesis the fallout from the dastardly terrorist attacks on New York and Washington on 11 September 2001. This atrocity, which followed the al-Qaida bombings of USS *Cole* and American embassies in Kenya and Tanzania, precisely fits the definition of a 'crime against humanity', which covers not only genocide and torture but 'multiple acts of murder committed as part of a systematic attack against a civilian population'. Osama bin Laden was not some peripatetic gang leader but an honoured guest of Afghanistan's Taliban government during his genocidal jihad against Americans (and anyone else who happened to get in the way). I argued that the consequent war against the Taliban government by the US and its allies could not be justified as an exercise in self-defence under Article 51 of the UN

Charter: that certainly permitted an incursion on Afghan territory and sovereignty to flush al-Qaida out of its caves and to capture its adherents, but did not extend so far as to allow the overthrow of the Taliban. That action – which in reality still continues today – could be legitimate only if characterized as an operation to prevent and punish the commission of further crimes against humanity – a 'just' war if conducted by reference to the principles of human rights intervention for which NATO's action in Kosovo had come to stand (and which have now been generalized, not entirely satisfactorily, as the UN's 'responsibility to protect'). The ultimate principle, I suppose, is that in the twenty-first century, nations which go to war in the name of human rights must not only make good their case on the battlefield, but subsequently in a court of law. Losers must have access to justice, as well as victors.

Humanitarian intervention was not the principle invoked by the US or the UK for invading Iraq in 2003, an exercise which should not be allowed to affect the principles of humanitarian intervention other than to illustrate the risks of ignoring them. Saddam Hussein was a tyrant who mass murdered some 300,000 of his people: his regime should have been ousted when he began to use poison gas against the Kurds back in 1988. Instead, the world's advanced nations – most notably, the US and UK – vied to do business with him until he invaded Kuwait, when the coalition that counter-attacked stopped short of marching on Baghdad. Its victory in 1991 was pyrrhic, because it failed to protect Shias from Saddam's venomous reprisals and defended the Kurds only by makeshift 'no fly' zones. The US claim in 2003 of entitlement to 'pre-emptive self-defence' was no excuse for regime change in Iraq, since there was no credible evidence that Saddam was harbouring terrorists or was bent upon further unlawful foreign adventures. There was, certainly, reason to suspect him of harbouring weapons of mass destruction: he had attempted to develop them in the early 1990s and had behaved as if he *did* possess them, by obstructing UN inspectors, and there were seemingly credible reports from defectors. Most members of the Security Council wanted these to be verified, but the belligerents could not wait: the US launched 'Operation Shock and Awe' before Hans Blix and his team

could complete their work. It was a war commenced without UN or NATO approval, justified neither as an humanitarian intervention nor as a measure of self-defence. It was the latter justification, not the former, that the US invoked in support of its act of aggression.

The United Kingdom, its main coalition partner, assumed that Saddam was hiding WMD and relied upon an earlier Gulf War resolution that might, on a pettifogging reading, be 'revived' to justify enforcement action. All belligerents expressly rejected any human rights rationale: indeed, shortly before the invasion, they offered Saddam and his sons amnesty if they would leave the country. It must be said, however, that the initial support for overthrowing Saddam Hussein, certainly among Western journalists and politicians, was based on a belief that it was 'just' to use force to topple a tyrant. Belatedly, as Saddam's WMD proved a chimera and Iraq became engulfed in civil war, Western leaders have retrospectively justified the invasion by reference to Saddam's atrocious human rights record and the moral rightness of putting him on trial for it, an argument which puts the humanitarian cart before the warhorse, and has done much to discredit so-called 'liberal interventionism'. George W. Bush was no liberal, and his decision to invade Iraq was not influenced by humanitarian considerations. The subsequent trials of the Iraqi leaders were neither held in an international court nor make any contribution to international law: Saddam was convicted and executed for a local crime, after improper political interference with the independence of his judges. I participated in the training of these brave men, but cannot regard the proceedings, which ended in the squalor of the scaffold, as any precedent for international justice. Thanks to American insistence on exposing the Iraqi leaders to the death penalty, the trial of Saddam Hussein turned into an exercise in wild justice – that is, revenge.

The US, as leader of an increasingly free world, inevitably came in for further scrutiny in the third edition in respect of its denial of due process to Guantanamo Bay detainees, its responsibility for torture at Abu Ghraib and its tolerance of 'renditions' that are extraordinary because they are secret and involve the sending of suspects for brutal interrogation in foreign prisons. I noted the emergence of the 'Bush

lawyer' – originally a colloquial Australian phrase for a hick counsellor ignorant of the rules, but here applied to lawyers in US government service who have misrepresented the law with opportunistic advice that the Geneva Conventions are 'obsolete', that due process is unavailable on offshore islands and that the threshold for torture should be defined as pain comparable to that suffered by the loss of a bodily organ.

It took years before the US Supreme Court could strike down the dishonourable advice of the Bush lawyers, premised on the unconstitutional notion that the President could do no wrong – indeed, in time of war (his self-proclaimed 'war on terror'), could do anything. In this fraught time, the Republican administration challenged the very idea of universal enforceable human rights – to the extent that Bush signed the Jesse Helms-inspired 'bomb The Hague' bill (the American Service-Members' Protection Act) which permitted the President to take military action to free any American 'captured' by the International Criminal Court. Nonetheless, international justice continued to have momentum: in this period I served as President of the UN's War Crimes Court in Sierra Leone, which indicted Charles Taylor, fashioned an international law against recruitment of child soldiers, and struck down amnesties for crimes against humanity. Similar progress was being made at the *ad hoc* tribunals dealing with war crimes in the Balkans (ICTY) and in Rwanda (ICTR). The third edition of *Crimes Against Humanity* took in the aborted trial of Milošević – a striking example of the power of international justice to humble demagogues, but equally a measure of the inadequacy of its procedures to cope with a truculent defendant who died mid-trial after three years of prosecution evidence.

This fourth edition comes as the ICTR is winding up efforts which have put behind bars a number of perpetrators of the 1993 genocide in Rwanda, and after the ICTY has captured its two most important fugitives, Karadžić and Mladić, now being tried on charges of genocide and crimes against humanity for Srebrenica and other massacres. The ICTY may not have worked well but at least it has worked, and its conviction of Croatian General Gotovina has reassured sensible Serbs that it has not worked one-sidedly. The demand for justice

against tyrants became a catch-cry of the crowds during the so-called 'Arab Spring': in Iran (2009) Syria and Bahrain, and (more successfully) in Tunisia, Egypt and Libya. It was a cause for which many were prepared to die. The most important precedent was set in 2011 by the Security Council, which by Resolution 1970 referred the case of Libya to the ICC prosecutor (who subsequently indicted Colonel Gaddafi, his son Saif and his intelligence chief Al-Senussi). This unanimous resolution gave universal justice a great-power imprimatur it had hitherto lacked, as the US, Russia and China had always insisted on *ad hoc* courts to deal with country-specific problems. Now, by Resolution 1970, they all endorsed the International Criminal Court as the proper instrument for investigation and prosecution of the leaders of a country who were preparing to kill their own people. Back in 2005 the Security Council had referred Darfur to the ICC, but that decision was subject to a number of abstentions (including, hypocritically, that of the US, which had brought the case forward). Now, partly due to the influence at the UN of the 'Responsibility to Protect' doctrine which justified international intervention in states that could not protect their own people, the principle of universal (rather than *ad hoc*) justice was invoked, bolstered a few weeks later by Resolution 1973, which empowered NATO to use 'all necessary means' to protect Libyan civilians – the means that became necessary were aggressive armed action calculated to overthrow the Gaddafi regime.

In consequence, in 2012, the odds that nemesis will catch up with perpetrators of crimes against humanity are significantly better than they were in 1999. That means that international human rights law can be confidently said to exist in the real world, not just in the reports of non-governmental organizations or the pipe dreams of law professors. True, there is a selectivity in its enforcement at this early stage: the Security Council will not move against governments or governors allied with its 'big five' permanent members, while some pariah states and rogue statesmen may escape through its lack of interest or lack of funds. There is a 'catch as catch can' quality about international criminal justice at this point (illustrated by the failure to catch Bashir or to indict Assad) but criticism that enforcement is selective should count not as a principled objection but rather as a spur to get international

justice systems up and running, creating precedents that can be universally applied. The Arab Spring, for example, produced ICC indictments on Gaddafi and his son, while Mubarak was tried domestically and Ben Ali escaped to refuge in Saudi Arabia. As for the US, even when the Bush administration adopted the 'exceptionalist' position that international law is a set of rules for the rest of the world, those rules were entrenching themselves in American legal practice. The opposition of many in the US military to undermining the Geneva Conventions was vindicated by the Supreme Court and President Obama began his term by renouncing torture and promising (albeit unsuccessfully) to close Guantanamo. The most urgent problem for international justice is no longer US exceptionalism but the failure of international courts to devise and to operate expeditious and effective (and cost-effective) procedures for delivering it.

Most cases in international courts are still excruciatingly slow and intolerably expensive. These courts have an unfortunate structural bias towards the prosecution, but have not managed to slow the flow of gravy-train motions by some defence lawyers. Judicial appointment through a UN system of state nomination does not mean selection on merit or selection of the fittest. NGOs, philosophically supportive of the international justice movement, sometimes pull punches that should be landed on international courts for costs blow-outs and procedural obfuscations. The adversarial system, which works in many Anglo-American countries because defendants are prepared to co-operate with a system that offers a possibility of acquittal, can collapse in chaos when that co-operation is withdrawn. The high-profile trial of Slobodan Milošević provides a case in point: the court bent over backwards to do him justice but he mocked it by outrageous cross-examination and constant demands for adjournments. The judges can also be as slow as the lawyers: in Charles Taylor's case, for example, after a trial lasting three and a half years, there was an unexplained delay of over thirteen months in delivering judgment.

In jurisdictional terms, some of the difficulty comes from the attempted fusion of two very different doctrines: international law (which must be extrapolated from treaties, juristic writings and state

practices) with criminal law, which should be a clear set of legal rules simple enough for criminals to comprehend. Although I owe my own passion for law to teachers like Julius Stone and Ronald Dworkin, I learned it in practice with John Mortimer QC down at the Old Bailey, where a rule was one of law not because it could be found in a text book or deduced from 'right reason', but because there was a prospect that someone would be sent to prison for its breach. The task of producing a workable set of rules for international criminal tribunals has been to pare away the academic excrescences of international law, with its extinct Latin phrases and its obscure theories culled from indigestible treaties and tomes and *travaux préparatoires*, and to produce a straightforward set of prohibitions and procedures, operated by confident judges skilled at applying them in adversarial proceedings. It has also been a mistake to attempt to fuse the civil law inquisitorial system with the adversarial tradition of Anglo-American trial. Many European jurists thought that this would produce the best of both legal worlds: increasingly, it can be seen to have produced the worst.

But this is not a textbook on legal procedures. It aims to tell the human rights story, with some of the spilt blood and guts, passion and philosophy that have enlivened its history and will influence its future. It is difficult entirely to avoid Latin phrases or the 'alphabet soup' acronyms which stand for the profusion and confusion of UN conventions and committees. In this book, however, I have tried to use as few acronyms as possible and have kept the Latin *de minimis*. It is, in one sense, an exciting and timely story, because it has very recently become possible – with the help of the ICC, UN war crimes courts, the European Court of Human Rights, the Privy Council and leading national courts entrusted with the interpretation of bills of rights – to synthesize a body of basic guarantees potentially enforceable throughout the world, properly described as 'international human rights law' because states publicly recognize that its rules should never be breached, however frequently or secretly they are.

The first step, it seems to me, towards having human rights respected is to enable these rules to be understood by 'ordinary people' (the condescending phrase lawyers use to describe people who are

not lawyers). After all, the modern progress of human rights – from an aspiration born of the concentration camp and the gulag to a set of powerful international law propositions to which enforcement mechanisms may be attached – has been accomplished not by lawyers or diplomats but by a movement which now has millions of 'ordinary' members throughout the world: twelve million, for a start, who signed an Amnesty International petition pledging support for the Universal Declaration on its fiftieth anniversary. Some have been inspired by the courageous examples of dissidents who have suffered in freedom's cause, but many more by revulsion against the atrocities brought into their homes through a billion television sets and twice as many radios, now being superseded by electronic social connectivity through blogs, Twitter, Facebook and an Internet to which two billion people have access. This has created a vast audience which is beginning to think like global citizens and, as the Arab Spring showed, is certainly beginning to believe that democracy is a necessary, if not sufficient, condition for progress. In Václav Havel's phrase, 'the power of the powerless' is beginning to be felt. It is their reaction to human rights violations which constitutes, in Theodore Roosevelt's phrase, 'the indignant pity of the civilized world' and, when transmitted to different democratic governments, impels international and UN response. Horizons have widened: the old newspaper joke 'Small Earthquake in Chile: Not Many Dead' rings hollow when television pictures of corpses in Racak (Kosovo) can put that obscure village on the map of everyone's mind and galvanize the West to war. That crimes against humanity occur in 'a far away country between people of whom we know nothing' – Neville Chamberlain's reason for appeasing Hitler's invasion of Czechoslovakia – is no longer an excuse, as social media coverage of human rights black spots rekindles the potent mix of anger and compassion which produced the Universal Declaration and now produces a democratic demand not merely for something to be done, but for the laws, courts and prosecutors to do it.

Notwithstanding this groundswell for 'global justice', and the progress made in the years since the first edition, I have had no hesitation in keeping this book's subtitle, prefaced with the word 'struggle'. The mechanisms for delivery are imperfect and the opposition formidable.

In some of the feudal societies of the Middle East, and the war-torn areas of sub-Saharan Africa, human rights and especially women's rights are little better today than they were half a century ago. Optimism is an eye disease which inflicts many who hold court on the subject in university lecture halls or the expensive Geneva hotel suites where diplomats prefer to hold their conferences. The matter is perceived differently from the cells of political prisons and the unmarked cars of death squads. I cannot forget standing on a Belfast street shortly after 'Bloody Sunday', as an armoured car passed and it dawned upon me that there was an exact point in its passing at which, in the event of any crossfire, I would be hit by a bullet in the head. It is that point which I have tried to keep in mind while writing this book. It is a point which permits hope (since Belfast has been made safer by a peace process guaranteeing human rights) but which serves to remind how many other 'mean streets' there are in this world where you can still be caught in crossfire, and in how many of them you can now be deliberately murdered by fire from drones in the sky or snipers in the pay of war criminals.

Today 'human rights' is much in fashion, which makes it the subject of a certain amount of humbug. In a world where virtue is no longer its own reward, there are plenty of human rights prizes, many funded by corporations exposed for exploiting the poor, awarded to well-paid lawyers, well-meaning journalists, well-photographed actresses and politicians who have never had to risk their careers in a cause perceived by national authorities as subversive. Ironies abound: the Simon Wiesenthal Center, celebrated for tracking down Nazi war criminals, today gives its peace prizes to supporters of the government of Israel. Self-promoting pop stars are prepared to promote politicians if they support the right to debt relief, but not the anti-war and anti-corruption measures without which there can be no relief for the poor in countries bankrupted by armed conflict and the extravagance of their rulers. In 2005, the 'Live 8' campaign to 'make poverty history' made no mention of ending the impunity which in Africa makes poverty inevitable. In 2009 President Obama was awarded the Nobel Peace Prize, just as he was authorizing the CIA's 'drone war' to execute summarily several thousand unconvicted terrorist targets,

and anyone who happened, however innocently, to be in their near vicinity. It would be churlish to decry the fashionability of human rights, but premature to think that this means the struggle to have them enforced – the crucial 'third phase' of the human rights revolution – has yet been won. Still, it is in a better position than when the first edition appeared in 1999, and a far better position than when I joined Amnesty International as a student in 1970. Then, my initial task was to write a letter to 'His Excellency Sir Idi Amin Dada, QC, MP, VC and bar' politely requesting that he hold an inquest into the deaths of three Supreme Court judges whose headless bodies had been found floating downstream after they had delivered a decision 'about which Your Excellency may well have had reservations'.

I am especially grateful to Amnesty for inviting me, years later, to conduct missions which gave me experience of the sharp end of this subject, and to Ken Roth of Human Rights Watch for preparing introductions to the American editions. I would like to record my lasting gratitude to the late Sir Robin Vincent, my Registrar in the early years of the Sierra Leone Special Court. My thanks for helping this edition to press go particularly to Lionel Nichols, whose research ability, judgement and facility with footnotes have given great comfort. The text has also benefited from discussions with Jen Robinson, Stephen Powles, Kate O'Regan, Caitlin Reiger, Nina Jorgensen, Simona Tutuianu, Toby Collis and Luis Moreno Ocampo. My thanks to Judy Rollinson, who did sterling work on the manuscript, to Stefan McGrath, Tom Penn, Bela Cunha and Richard Duguid at Penguin and Andre Shiffrin, Marc Favreau and Azzura at The New Press. My wife, Kathy Lette, and my children, Julius and Georgina, have frequently had to remind me that the most fundamental human right begins at home.

Geoffrey Robertson QC
Doughty Street Chambers
July 2012

'And here, over an acre of ground, lay dead and dying people. You could not see which was which except perhaps by a convulsive movement, or the last quiver of a sigh from a living skeleton, too weak to move. The living lay with their heads against the corpses, and around them moved the ghastly procession of emaciated, aimless people, with nothing to do, and no hope of life, unable to move out of your way, unable to look at the terrible sights around them . . . Babies had been born here, tiny wizened things that could not live. A mother, driven mad, screamed at a British sentry to give her milk for her child, and thrust the tiny mite into his arms and ran off, crying terribly. He opened the bundle, and found the baby had been dead for days. This day at Belsen was the most horrible day of my life.'

Richard Dimbleby
BBC broadcast from Belsen, 13 May 1945