Justice for Crimes Against Humanity

Edited by Mark Lattimer and Philippe Sands

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For Katya and Clara

Preface to the paperback edition

The aim of this book is to provide an assessment of recent developments in international law (including its domestic application) in bringing an end to impunity for persons accused of the most serious international crimes, namely genocide, war crimes and crimes against humanity. The book was conceived while we were both engaged, in different capacities, in the arguments on the *Pinochet* case before the Judicial Committee of the House of Lords. The great public interest in that case—and other developments in international criminal law since the late 1990s—demonstrated the close connections between the law and wider political and moral questions. In the field of international criminal justice there appeared, therefore, a clear need to distinguish legal from essentially political issues—promoting the application of the law in as objective a manner as possible—while at the same time enabling each to legitimately inform the development of the other. This book thus seeks to provide a broad perspective on the legal issues raised, from scholars, practitioners and a judge.

Since the hardback edition of this book was first published two years ago, developments in the creation of a system of international criminal justice have continued apace, and the subject of international criminal justice continues to command considerable attention. One hundred states have now ratified the Rome Statute of the International Criminal Court, and the Office of the Prosecutor has commenced investigations in three situations. The first two cases, concerning the Democratic Republic of Congo and Uganda, were referred to the Court by the states themselves, and the third case, concerning crimes committed in the Darfur region of Sudan, was referred by the UN Security Council. The Prosecutor issued his first indictments in the Uganda case in October 2005. One further state referral has been made by the Central African Republic concerning crimes committed on its territory. However, despite the Security Council referral in the Sudan case (and the decision by the United States not to veto the resolution), the US has continued its diplomatic campaign of opposition to the functioning of the Court, and has now concluded bilateral immunity agreements with approximately 100 states in an attempt to exclude US nationals from the jurisdiction of the Court.

The case work of the International Criminal Tribunals for the Former Yugoslavia and Rwanda has progressed to the extent that the Security Council has called for them to finish their work by the end of the decade, although a number of high-profile indictees in the former Yugoslavia remain at large. The trial of Slobodan Milošević has been subject to very considerable delays, raising serious policy and legal issues. The Special Court for Sierra Leone has worked diligently to bring to justice those most responsible for the grave crimes

committed in the recent conflict there, and all but two of the 11 indictees are now in custody. The agreement between the UN and Cambodia to establish Extraordinary Chambers in the Courts of Cambodia to try former leaders of the Khmer Rouge finally took effect in April 2005.

Developments remain uneven as regards states' prosecution of their own nationals for crimes under international law, lending support to Timothy McCormack's thesis in this book. The widely-publicised abuses at US facilities at Abu Ghraib and elsewhere in Iraq have so far led only to the prosecution of some low-ranking offenders, and the use of the camp at Guantanamo in Cuba to hold foreign nationals indefinitely represents an explicit attempt by the US to remove prisoners from the protections afforded under international law. The trial of Saddam Hussein before an Iraqi Special Tribunal commenced in October 2005, but has been criticised for not meeting international standards for fair trial. In Chile, attempts to bring Pinochet to justice for both human rights abuses and tax evasion repeatedly start and stall, and he passed his 90th birthday under house arrest. In Argentina, the Supreme Court invalidated in June 2005 the amnesty laws that shielded military officers from prosecution for crimes committed during the so-called 'Dirty War' from 1976–1983.

Progress has similarly been mixed regarding prosecutions for international crimes. In the United Kingdom, an Afghan warlord was found guilty in July 2005 of torture and hostage-taking in his home country and sentenced to 20 years imprisonment, the first successful prosecution under UK legislation implementing the UN Convention against Torture. In 2003 the Mexican Supreme Court had agreed that an Argentinian accused of torture and other crimes in Argentina could be extradited to face trial in Spain. Such cases, however, have been rare. Belgium's universal jurisdiction law was amended in August 2003, limiting jurisdiction of the Belgian courts to cases involving Belgian citizens and residents. Efforts to bring Hissène Habré, the former military ruler of Chad, to justice in Belgium nonetheless continued, and in November 2005 he was briefly arrested in Senegal pursuant to an extradition request in a case brought by alleged victims in Belgium.

Against this background we must also record here with great sadness the passing last year of one of our contributors, Sir Richard May. An outstanding criminal lawyer, Judge May was the presiding judge in the trial of Slobodan Milošević before the International Criminal Tribunal for the Former Yugoslavia, before his ill health forced him to resign in May 2004. The trial continues.

We are very grateful to a number of people whose efforts and encouragement helped make this book possible, including Maggie Paterson, Derek Cross, Tala Dowlatshahi, Noémi Byrd, Helen Ghosh and Ruth Mackenzie. The editors and Benjamin Ferencz would like to thank the Development and Peace Foundation and the Columbia Journal of Transnational Law for permission to use substantial revised extracts from, respectively, SEF Policy Paper 8, 'From Nuremberg to Rome: Towards an International Criminal Court' (Bonn, Development and Peace Foundation, 1998) and 'A Prosecutor's Personal Account' in *Columbia*

Journal of Transnational Law 37, Spring 1999. We also owe a debt of gratitude to our respective colleagues more generally, including those at the Faculty of Law at University College London and the Law Department at the School of Oriental and African Studies, the PICT Centre for International Courts and Tribunals, Matrix Chambers, Amnesty International, Human Rights Watch, Minority Rights Group International, the Redress Trust, and the Medical Foundation for the Care of Victims of Torture. A particular research debt is owed to Reed Brody and Michael Ratner, who in compiling *The Pinochet Papers* (Kluwer Law International, The Hague, 2000) have greatly facilitated the task of *Pinochet* scholarship.

At Hart Publishing we would like to thank Richard Hart, April Boffin, Jane Parker, and our copy editor Rosemary Mullins. We would also like to record our gratitude to John Louth at Oxford University Press for the numerous suggestions, including from other sources, which have improved the book considerably.

The strength of an edited collection such as this is that it reflects a wide range of different voices gathered together in a single volume. This is also a potential weakness, since diversity of style and substance necessarily imposes a challenge for coherence. In bringing together these different voices and perspectives we have tried to strike an appropriate balance between uniformity of style and the individual tone of the contributors.

A word of explanation is necessary about the style used in referring to the crimes which form the subject matter of this book. They broadly include genocide, torture, crimes against humanity, war crimes and other serious violations of international law attracting criminal liability. There is no precise catch-all phrase which covers all these categories of offence (which in some cases overlap) and a number are favoured by different contributors, including 'international crimes' or 'crimes under international law', 'human rights crimes', 'human rights atrocities' or (as in the book's title) simply 'crimes against humanity'. The individual contributor's preferred term has been retained where a summary expression is clearly being used; where the context requires reference to a particular category of offence or source of law, the correct specialist term is used, applied consistently through the book. An outline of the different sources of law—and their interrelationship—may be found in the introduction.

Mark Lattimer
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London, December 2005

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Contents

Introduction

MARK LATTIMER AND PHILIPPE SANDS

On Monday 27 September 1999, the clerk at London's Bow Street Magistrates Court began to read out the charges against the accused. It took over 15 minutes to reach the end of the list. The 35 charges of torture and conspiracy to torture included inflicting torture:

— on Marcos Quezada Yañez, aged 17, by inflicting electric shocks causing his eventual death;
— on Avelino Villarroel Muñoz by beating him, inflicting electric shocks on him, restricting his breathing and allowing him to hear the infliction of severe pain and suffering upon others;
— on Jessica Antonia Liberona Niñoles by depriving her of sleep, making threats about her nine-year old daughter and conducting repeated interrogations while she was naked;
— on Marcos Antonio Mardoñes Villarroel by beating him, inflicting electric shocks and burning him; and
— on Andrea Paulsen Figuera by depriving her of sleep, food and water for several days and threatening that her five-year old daughter would be tortured.

They were, said counsel, 'some of the most serious allegations of crime ever to come before English criminal courts'.

Over the next five days, the details of this extraordinary hearing were followed avidly around the world. This was less on account of the gravity of the charges than the identity of the accused: Augusto Pinochet Ugarte, member of the Chilean Senate, former President of the Republic of Chile and former Commander in Chief of Chile's armed forces. But more than anything it was because Chile's former head of state was in detention and subject to proceedings in the United Kingdom on an extradition request from Spain and three other European states. Justice had gone global and the world was watching.

What made possible these events which would have been unthinkable just one year before? Most immediately, UK Home Secretary Jack Straw had allowed extradition proceedings to go ahead following an unprecedented set of legal proceedings in the Judicial Committee of the House of Lords which eventually

led to a judgment[1] which found that, even as a former head of state, Senator Pinochet had no immunity from the jurisdiction of the English courts in respect of a prosecution for the crime of torture over which states party to the 1984 UN Convention against Torture[2] had given universal jurisdiction to all courts, no matter where the crime was committed.

More broadly, the proceedings against Senator Pinochet must be seen against the background of normative and institutional developments in international law: the emergence of human rights instruments providing for universal jurisdiction, the establishment of international criminal tribunals for the former Yugoslavia and Rwanda and, in the summer of 1998 in Rome, the adoption of the Statute of the International Criminal Court, providing for a permanent institution to address crimes against humanity, war crimes, and genocide.

Against this background, Senator Pinochet's detention in the United Kingdom was triggered by the actions of Balthazar Garzón, the Spanish investigating magistrate. Judge Garzón had been investigating the deaths of Spanish citizens in Chile during the period of Senator Pinochet's governance, and seized his chance to issue an international arrest warrant when Senator Pinochet visited London in October 1998. Behind that warrant lay several years of research and coordinated legal preparations by Spanish and Chilean jurists—as well as jurists in other jurisdictions, including Belgium, France and Switzerland—working on the cases of those tortured, murdered and forcibly disappeared under Latin American dictatorships. These jurists were emboldened by the developing notion of a 'universal' jurisdiction for crimes against humanity as advocated by human rights groups and torture victims worldwide, and increasingly supported by states. In a significant decision that paved the way for the case to proceed, Spain's jurisdiction over the case was upheld by the *Audiencia National* in November 1998.[3]

But much of the debate in the proceedings against Senator Pinochet turned on points of UK statutory interpretation. Working within a strong dualist tradition, the English courts required the identification of sufficient jurisdictional authority in national legislation to prosecute substantive and established norms of international law. It is clear that the Judicial Committee of the House of Lords would not have affirmed English jurisdiction over Senator Pinochet were it not for the United Kingdom's ratification, by Margaret Thatcher's Government in 1988, of the UN Convention against Torture. This followed the adoption of the Criminal Justice Act 1988, which made torture committed abroad a criminal offence in the UK.

[1] *R v Bow Street Metropolitan Stipendiary Magistrate Ex p. Pinochet Ugarte (No 3)* (HL(E)) [2000] 1 AC 147, hereafter *Pinochet No 3*; the earlier judgments were *R v Bow Street Metropolitan Stipendiary Magistrate Ex p. Pinochet Ugarte* (HL(E)) [2000] 1 AC 61, hereafter *Pinochet No 1* and *R v Bow Street Metropolitan Stipendiary Magistrate Ex p. Pinochet Ugarte* (HL (E)) [2000] 1 AC 119, hereafter *Pinochet No 2*.

[2] UN Doc A/39/51 (1984). See Appendix I.

[3] Order of the Criminal Chamber of the *Audiencia Nacional*, 5 Nov 1998. See www.derechos.org/nizkor/chile/juicio/audi.html for a copy of the order; an unofficial English translation is included in Reed Brody and Michael Ratner (eds), *The Pinochet Papers* (Kluwer Law International, The Hague, 2000).

Behind the immediate causes of Senator Pinochet's arrest and detention therefore stands the wider subject addressed by this book: the recent rapid development of an emerging system of international criminal justice, which may be traced back to the Nuremberg trials of Nazi leaders in 1945–1946. The *Pinochet* case, and the indictment and trial of Slobodan Milošević which closely followed it, may be seen as landmarks within a broader set of developments, whose central principle is that leaders and other individuals should be held personally responsible for their role in committing gross abuses of human rights and violations of the laws of war. In many ways these developments signal a shift in the basic foundations of the established international legal order, away from an order which promotes the primacy of the interests of the state towards one which promotes the interests of individuals.

HUMAN RIGHTS, THE LAWS OF WAR AND INTERNATIONAL CRIMES

The years following the end of the Second World War and the adoption of the United Nations Charter in 1945 saw a number of historic developments in international cooperation and standard-setting, many of which were aimed at preventing a re-occurrence of the massive human suffering that the world had just endured. Legally, those developments followed two main strands: the emergence of international human rights law following the 1948 Universal Declaration of Human Rights; and the further development of international humanitarian law with the Geneva Conventions of 1949 and subsequent standards.

Although the 1948 Universal Declaration of Human Rights was not in itself legally binding, it spawned a series of human rights treaties, including the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) of 1966.[4] Under these treaties, states accepted obligations to respect and protect the human rights of their citizens and other inhabitants. Some states further accepted the scrutiny of UN monitoring committees regarding individual complaints of violation (for example, the UN Human Rights Committee considers complaints from individuals or groups in those states which have ratified the Optional Protocol to the ICCPR).[5] The obligations under this new body of human rights law therefore fall squarely on states, as do any legal enforcement mechanisms established by treaty. In times of war or national emergency, states can derogate from these obligations, but not in respect of certain absolute rights (termed non-derogable) including the right to life and the rights not to be tortured or enslaved.

The specific need to protect civilians and other non-combatants in times of war was the aim of the 1949 Geneva Conventions, the cornerstone of what has come to be known as international humanitarian law. Building on customary law as well as earlier treaties signed at Geneva and The Hague, the four Geneva

[4] ICCPR, 999 UNTS 171; ICESCR, 993 UNTS 3.
[5] 999 UNTS 302.

Conventions established specific protections for the injured, ship-wrecked, prisoners-of-war and all civilians in wartime.[6] This protection was based on the fundamental obligation to distinguish at all times between military objects, which were legitimate targets of war, and civilians and civilian installations, which states were strictly forbidden to target and obliged to take positive measures to protect. Certain serious violations of the Geneva Conventions were expressly designated as 'grave breaches' thereby attracting a further duty on states to suppress them as war crimes and prosecute the individuals responsible. The protections established by the Geneva Conventions were in the main applicable in situations of international armed conflict and occupation, but Article 3 common to the four Conventions outlawed the killing or inhumane treatment of civilians and other non-combatants in situations of internal as well as international armed conflict (a prohibition without, however, any specific means of enforcement). This rudimentary protection in cases of civil conflict was enlarged on in the second of two additional protocols to the Geneva Conventions agreed in 1977,[7] although it remains to be ratified by some 40 states, including many with ongoing civil wars.

In certain respects international criminal law can be seen as a melding of principles of human rights law and international humanitarian law, with some specific sources of its own, including from national law. By applying a serious criminal sanction on the individual, it fixes in its sights the civilian or military leaders who are prepared to ignore their states' international legal obligations and the officials or forces who are given domestic licence to abuse human rights with impunity. Its *locus classicus* is the Charter of the International Military Tribunal at Nuremberg,[8] adopted as binding international law by resolution of the UN General Assembly in 1946.[9] The Nuremberg Charter established definitively the personal criminal responsibility of both military and political leaders for violations of the laws of war and for gross abuses designated crimes against humanity. The grave breaches provisions of the Geneva Conventions further defined those acts which attracted personal criminal liability. The development of international human rights law also played a key role in that human rights treaties place an obligation on states to suppress violations and provide a remedy to victims. In many cases this will mean the obligation to prosecute those responsible for such acts.

[6] Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 75 UNTS 31; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 75 UNTS 85; Geneva Convention relative to the Treatment of Prisoners of War, 75 UNTS 135; Geneva Convention relative to the Protection of Civilian Persons in Time of War, 75 UNTS 287.

[7] Protocol Additional to the Geneva Conventions of 12 Aug 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 1125 UNTS 609. Protocol I relates to the protection of victims of international armed conflicts, 1125 UNTS 3.

[8] The Charter is contained in the 'Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis (London Agreement)', 8 August 1945, 82 UNTS 280.

[9] 'Affirmation of the Principles of International Law recognised by the Charter of the Nuremberg Tribunal', UN GA Res 95 (I), 11 Dec 1946.

The existence of a universal jurisdiction in customary law over crimes against humanity was confirmed in the 1962 trial in Israel of Adolf Eichmann, the Nazi Gestapo chief responsible for administering the 'final solution'. The Jerusalem District Court ruled that such 'abhorrent crimes'

> ... are not crimes under Israeli law alone. These crimes, which struck at the whole of mankind and shocked the conscience of nations, are grave offences against the law of nations itself.[10]

In 1973 the UN General Assembly adopted a set of principles which declared that all states were to co-operate with each other in the detection, arrest, extradition and punishment of persons guilty of war crimes and crimes against humanity.[11] Both the Geneva Conventions and some human rights conventions, such as the UN Convention against Torture 1984, confirmed by treaty a universal jurisdiction to enable states to suppress the specified crimes, giving rise to an obligation *aut dedere aut judicare*—either to prosecute the alleged offenders or extradite them to a country willing to do so. Finally, a series of treaties have been agreed aiming at particular crimes of a trans-national character whose suppression requires international cooperation—such as hijacking, hostage-taking and other acts of international terrorism—developing some of the principles reflected in the long-established universal jurisdiction over piracy on the high seas.

All of these sources of law were drawn on in the early 1990s when the UN Security Council established international criminal tribunals for the former Yugoslavia[12] and for Rwanda[13]—the first since the tribunals at Nuremberg and Tokyo after the Second World War. The International Law Commission, a UN body of international lawyers, was also asked by the UN General Assembly to revive its work codifying international crimes and produce a draft statute for a permanent tribunal.[14] The Statute of the International Criminal Court was finally agreed at a UN conference of plenipotentiaries in Rome in 1998, and now provides the most comprehensive, definitive and authoritative list of war crimes and crimes against humanity attracting individual criminal liability.[15]

THE CASE OF SENATOR PINOCHET

Just three months after the Rome conference, Senator Pinochet was arrested in London by the Metropolitan Police, acting on a request from Interpol. The

[10] *Attorney-General of the Government of Israel v Eichmann*, (1961) 36 ILR 5.

[11] 'Principles of International Co-Operation in the Detection, Arrest, Extradition and Punishment of Persons Guilty of War Crimes and Crimes Against Humanity', GA Res 3074 (XXVIII), UN Doc A/9030/Add1 (1973).

[12] UN Security Council Res 827, 25 May 1993.

[13] UN Security Council Res 955, 8 Nov 1994.

[14] 'Draft Statute for an International Criminal Court', Report of the ILC on the work of its forty-sixth session, 2 May–22 July 1994, GA, 49th session, supplement No 10 (A/49/10), 29–161.

[15] UN Doc. A/CONF.183/9 (1998). See appendix II. Hereafter 'ICC Statute'.