

Accountability for international crimes: From conjecture to reality

by

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At a 1987 international colloquium devoted to the Nuremberg trials Professor Eric David posed a hypothetical question — could Augusto Pinochet be arrested and tried in Belgium for acts such as enforced disappearances, extrajudicial executions, torture and unlawful detention committed since his ascendance to power?¹ While Professor David answered in the affirmative,² at the time it was only academic conjecture that such a scenario could ever come to pass. And yet, just over a decade later, his hypothetical question proved to be prescient. Augusto Pinochet was arrested in the United Kingdom, whose highest court eventually ruled that he did not enjoy immunity from legal process for torture and conspiracy to commit torture perpetrated while he was in office.³ It was a defining moment in the fight against impunity and perhaps the most important milestone in the struggle for international justice since the Nuremberg trials.

The proceedings against Pinochet did not, however, come out of the blue. Ever since the end of the Cold War and the resulting new impetus in international relations, the international community had been setting important markers in the fight against impunity. The trend only accelerated after the Pinochet case, allowing the full-fledged emergence of what can now be called a global movement

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against impunity.⁴ The purpose of this brief text is to outline some of the major developments along the way⁵ and to mention some of the challenges that lie ahead. But, before that, tribute should be paid to the heroes of that endeavour: the victims of crime and abuse of power worldwide, as well as their families, whose perseverance and fortitude have spurred governments to action and galvanized NGOs. They were and will continue to be at the very centre of the global fight against impunity.

International ad hoc tribunals

It is no exaggeration to say that the flurry of normative developments prompted by the horrifying legacy of the Second World War died down fairly quickly when it came to establishing mechanisms that would ensure individual accountability for crimes under international law. Early efforts to establish a permanent international

¹ Eric David, “L’actualité juridique de Nuremberg”, in *Le Procès de Nuremberg: Conséquences et actualisation*, Actes du Colloque international, Université Libre de Bruxelles, 27 March 1987, Editions Bruylant, Brussels, 1988, p. 168.

² *Ibid.*, p. 171.

³ *Regina v. Bartle and the Commissioner of Police for the Metropolis and Others Ex Parte Pinochet*, (1999) 381 ILM 581 (UK House of Lords) [hereinafter *Pinochet Case*]; see Reed Brody and Michael Ratner (eds), *The Pinochet Papers: The Case of Augusto Pinochet in Spain and Britain*, Kluwer Law International, The Hague, 2000, p. 40 [hereinafter *Brody and Ratner*].

⁴ A very useful — and rare — definition of “impunity” reads as follows: “Impunity means the impossibility, *de jure* or *de facto*, of bringing the perpetrators of human rights violations to account — whether in criminal, civil, administrative or disciplinary proceedings — since they are not subject to any inquiry that might lead to their being accused, arrested, tried and, if found guilty,

convicted, and to reparations being made to their victims”: “The administration of justice and the human rights of detainees: Question of the Impunity of Perpetrators of Human Rights Violations (Civil and Political)”, Final Report prepared by Mr Joinet Pursuant to Sub-Commission decision 1996/119, UN Doc. E/CN.4/Sub.2/1997/20, 26 June 1997, Annex II, pp. 13-14 [hereinafter *Joinet Report*]. The definitional section of the document also refers to genocide, war crimes and crimes against humanity as being “serious crimes under international law”. *Ibid.*, p. 15.

⁵ Due to lack of space, this article will not cover truth commissions as a non-penal mechanism in the fight against impunity. For a comprehensive review of the issue, see Priscilla B. Hayner, *Unspeakable Truths: Confronting State Terror and Atrocity*, Routledge, London, 2001. See also *Joinet Report*, *op. cit.* (note 4), pp. 14-17.

criminal court⁶ did not get very far owing to Cold War tensions. While international human rights law did develop quickly, its monitoring mechanisms at the international level remained primarily political or quasi-judicial at best. After several decades of hardly any progress, the breakthrough came in 1993 and 1994 respectively, with the establishment of the two ad hoc criminal tribunals for the former Yugoslavia (ICTY) and Rwanda (ICTR).

Even though the geographical focus of the two tribunals is different, they were created essentially because of the unwillingness or inability of the national authorities concerned to bring to justice the perpetrators of serious crimes under international law — genocide, war crimes and crimes against humanity. Regardless of how the totality of their jurisprudence and rules of procedure will be viewed in historical perspective, the precedential value of the ad hoc tribunals cannot be contested. Both tribunals were created by the Security Council which, treading on previously untested ground, drew on its Chapter VII powers to establish judicial organs with which all UN member States are legally obliged to cooperate. The tribunals, simply put, showed that international adjudicatory mechanisms were not only necessary but also possible, thus paving the way for the adoption, several years later, of a treaty for the world's first permanent International Criminal Court (ICC).⁷

In the almost nine years since its creation, the ICTY has clarified and developed key concepts of international humanitarian law and made an invaluable contribution to softening the distinction between the legal regimes applicable to international and non-international armed conflict. The way was paved fairly early on, with the well-known 1995 *Tadic Jurisdiction Decision*,⁸ which essentially

⁶ See Report of the Committee on International Criminal Jurisdiction, 1-31 August 1951, UN Doc. A/2136 (1952); see generally Report of the 1953 Committee on International Criminal Jurisdiction, 27 July-20 August 1953, UN Doc. A/2645 (1954).

⁷ Rome Statute of the International Criminal Court, adopted by the United Nations Diplomatic Conference of Plenipo-

tentiaries on the Establishment of an International Criminal Court on 17 July 1998, UN Doc. A/CONF.183/9, 17 July 1998 [hereinafter ICC or ICC Statute].

⁸ *The Prosecutor v. Dusko Tadic*, Case No. IT-94-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995 [hereinafter *Tadic Jurisdiction Decision*].

established that there is a common core of international humanitarian law rules applicable to armed conflicts *per se*, regardless of their character. In reaching that conclusion, the Tribunal relied on Article 3 of its Statute (“Violations of the laws or customs of war”), construing it as a residual basis of jurisdiction that may be invoked when more specific provisions of the Statute do not apply.⁹ The *Tadic Jurisdiction Decision* was, moreover, “the first judgment rendered by an international tribunal confirming, in unequivocal terms, the criminal character of war crimes committed in [internal armed conflicts]”.¹⁰ The Decision also laid the groundwork for a number of later judgments in which the substantive content of the rules applicable to non-international armed conflict were developed.¹¹

The ICTY’s high point in practical terms has been the well-publicised transfer of former Yugoslav President Slobodan Milosevic to the Detention Unit at The Hague in June 2001. Milosevic, who is currently on trial, was initially indicted by the Tribunal — as the first ever serving head of State — for violations of the laws and customs of war and crimes against humanity committed against the Kosovo Albanian population in 1998–99. Since then he has also been separately indicted for grave breaches of the Geneva Conventions, violations of the laws or customs of war and crimes against humanity committed against the Croatian and other non-Serb populations in the Republic of Croatia and, in addition to those latter charges, for genocide and complicity in genocide during the war in

⁹ The more specific and related provisions would be Article 2 of the ICTY’s Statute — Grave breaches of the Geneva Conventions of 1949 — which, according to the *Tadic Jurisdiction Decision*, *ibid.*, may be applied only to acts perpetrated in a conflict that has been established to be international.

¹⁰ Sonja Boelaert-Suominen, “The Yugoslavia Tribunal and the Common Core of Humanitarian Law Applicable to All Armed Conflicts”, *Leiden Journal of International Law*, Vol. 13, Issue 3, 2000, pp. 630-631.

¹¹ As Boelaert-Suominen points out, “this jurisprudence shows that war crimes charges based on grave breaches of the Geneva Conventions have a corollary in war crimes charges based on Article 3 common to the Geneva Conventions”. Thus, for example, several ICTY Trial Chambers have ruled that there is no qualitative difference between the terms “wilful killing” as a grave breach and “murder” as used in common Article 3. Similarly, the grave breach of “inhuman treatment” corresponds to “cruel treatment” within the meaning of common Article 3. *ibid.*, pp. 637-638.

Bosnia and Herzegovina.¹² In view of the factual and legal findings that the proceedings are expected to generate, as well as Milosevic's refusal to appoint defence counsel,¹³ it may safely be said that his trial will be the most closely watched in the ICTY's history.

Milosevic's transfer to The Hague by the Serbian authorities was effected under huge international pressure and almost immediately caused the fall of the then federal Yugoslav government, one faction of which was opposed to his surrender. The difficulties in surrendering indictees and other forms of non-cooperation of national authorities remain one of the major obstacles to the fulfilment of the Tribunal's mandate.¹⁴ Even though the Tribunal's Statute, as mentioned above, demands the cooperation of UN member States, there is no established enforcement mechanism on which the Prosecutor can rely to bring indictees in. It is, in fact, fortuitous that there is an international military presence in the former Yugoslavia and that contributing States can sometimes be persuaded by Tribunal representatives to arrest indictees. The situation would, presumably, be quite different if there were no such forces, a reality that the future ICC is likely to face far more frequently. The international community therefore still has to take the step from having established international accountability mechanisms to endowing them with enforcement capacity. It is to be hoped that this will be one of the next advances in the fight against impunity.

Internationalized tribunals

The establishment of the ad hoc Tribunals paved the way not only for negotiations on the ICC treaty, but also, at least indirectly, made it possible to pursue work on the creation of three other judicial bodies: the first dealing with crimes committed two and a half decades

¹² See *Milosevic Case* (IT-01-51), Case Information Sheet (CIS), 26 November 2001, <<http://www.un.org/icty/glance/milosevic.htm>> as well as CIS of 9 and 29 October (IT 01-50 resp. 99 37 I).

¹³ For Milosevic's possible strategy in terms of legal assistance, see Mirko Klarin, "Analysis: Milosevic to put NATO on Trial",

IWPR's Tribunal Update, No. 248, 10-15 December 2001, <<http://www.iwpr.net>>.

¹⁴ See Address to the United Nations Security Council by the Prosecutor of the International Criminal Tribunals for the former Yugoslavia and Rwanda, Mrs Carla Del Ponte, 27 November 2001, <<http://www.icty.org/ENGLISH/speeches/delponte271101sc.htm>>.

ago in Cambodia; the second dealing with crimes committed in Sierra Leone not that long ago; and the third dealing with crimes committed before and after the UN-administered referendum on the independence of East Timor in 1999.

The “Khmer Rouge tribunal”, as it is colloquially called, has been the object of lengthy and rather complicated negotiations between the Cambodian authorities and the United Nations for over two years. At the time of writing this text, the outcome of those discussions is still uncertain, although the tribunal’s basic mandate and structure are known. It would be composed of both Cambodian and international judges (and prosecutors), organized in three extraordinary chambers within the domestic court system, with subject-matter jurisdiction over serious violations of Cambodian and international law committed by senior leaders and others during the period of Democratic Kampuchea (1975–1979).¹⁵ Stumbling blocks in the negotiations between the Cambodian government and the UN have included the procedure for issuing indictments and reaching verdicts, amnesty provisions, rules on foreign defence counsel, rules of procedure and, most recently,¹⁶ the official language to be used in court.¹⁷ Needless to say, both international and Cambodian human rights activists believe that the Khmer Rouge tribunal, if properly established, would be “the beginning of the end of a culture of impunity”¹⁸ in Cambodia.

¹⁵ Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea, as adopted by the National Assembly on 2 January 2001, <<http://www.phnompenh.dailyc.com/06.01.01.htm>>; see also Articles of Cooperation Between the United Nations and the Royal Government of Cambodia [in/Concerning] the Prosecution under Cambodian Law of Crimes Committed During the Period of Democratic Kampuchea, *Phnom Penh Post*, Issue 9/22, 27 October–9 November 2000, <<http://www.phnompenh.post.com>> (both texts on file with the author).

¹⁶ See Colum Lynch, “UN Warns Cambodia on War Crimes Tribunal”, *The Washington Post*, 3 February 2001, p. A22; see also Human Rights Watch Press Release, “Core Issues in the Khmer Rouge Tribunal Unresolved”, 21 January 2001, <<http://www.hrw.org/press/2000/01/cambo0121.htm>>.

¹⁷ See “Khmer Rouge Trial Stalled Over Language”, Reuters, Phnom Penh, 26 November 2001 (on file with the author).

¹⁸ Youk Chang, Director of Documentation Center of Cambodia, quoted in Amy Kazmin and Carola Hoyos, “Cambodia Moves Towards Tribunal of Khmer Rouge”, *Financial Times*, 23 August 2001, <<http://www.globalarchive.ft.com/globalarchive/>>.

Moves to establish a special court for Sierra Leone were initiated by the government of that country in August 2000.¹⁹ The UN Security Council responded in a matter of days, authorising the UN Secretary-General to negotiate an agreement with the Sierra Leonean government on the creation of an independent special court and requesting him to submit a report on ways of meeting the government's request.²⁰ According to the ensuing Secretary-General's report, this "treaty-based *sui generis* court of mixed jurisdiction and composition"²¹ would have the power to prosecute persons "most responsible" for serious violations of "international humanitarian law and Sierra Leonean law committed in the territory" of that country since November 1996. The judges would be both Sierra Leonean and foreign; the Prosecutor would be appointed by the UN Secretary-General upon consultation with the government, while the Deputy Prosecutor would be Sierra Leonean. The special court would have concurrent jurisdiction with domestic courts, similar to the ad hoc tribunal model. Issues which generated further exchanges between the Security Council and the UN Secretary-General included the special court's jurisdiction over children²² and how widely the net should be cast in terms of other aspects of the court's personal jurisdiction, as well as the future court's funding.²³ Despite the fact that not all the funding pledged had come in from UN member States, in January 2002 the United Nations and the government of Sierra Leone signed

¹⁹ See Letter dated 9 August 2000 from the Permanent Representative of Sierra Leone to the United Nations addressed to the President of the Security Council, UN Doc. S/2000/786, 10 August 2000.

²⁰ UN Doc. S/RES/1315 (2000), paras 1 and 6, 14 August 2000.

²¹ Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone, UN Doc. S/2000/915, para. 9. The Report, in its Annex, includes a draft Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra

Leone, and, in Enclosure, a draft Statute of the Special Court for Sierra Leone.

²² See Letter dated 22 December 2000 from the President of the Security Council addressed to the Secretary-General, UN Doc. S/2000/1234, 22 December 2000; see also Letter dated 12 January 2001 from the Secretary-General addressed to the President of the Security Council, UN Doc. S/2001/40, 12 January 2001.

²³ Letter dated 12 January 2001 from the Secretary-General addressed to the President of the Security Council, *op. cit.* (note 22).

an agreement setting up the Special Court to prosecute persons bearing “the greatest responsibility” for crimes committed in that country.²⁴

For most of last year, an internationalized domestic tribunal established by the United Nations Transitional Administration in East Timor (UNTAET) has been trying persons suspected of having committed crimes in that region in 1999. The tribunal is composed of Special Panels — made up of one East Timorese judge and two judges of other nationalities — which are part of the District Court of Dili. The Special Panels are authorised to hear cases of genocide, crimes against humanity, war crimes, torture and specific violations of the Indonesian Penal Code. The first judgment, against ten militiamen, was rendered in a crimes against humanity case in December 2001. While this internationalized domestic tribunal presents a model that could potentially be of benefit in other situations as well, researchers have pointed out that the tribunal’s main failings have been its link to a very weak domestic criminal justice system and lack of adequate resources and funding for the Special Panels.

International Criminal Court

The issue of resources and funding might also plague the permanent International Criminal Court given that it will essentially operate on the voluntary contributions of States Parties unless its proceedings are initiated by a Security Council referral.²⁵ This, it is submitted, is a regrettable development, because it hampers the ability of international mechanisms engaged in the fight against impunity to properly carry out their mandate.

The ICC will come into operation once the 1998 Rome Treaty has been ratified by 60 States.²⁶ At the time of writing this text, the treaty has garnered 50 ratifications²⁷ and the expectation is that the requisite number will be achieved “well before the summer of

²⁴ See “Sierra Leone: UN Government sign historic accord to set up special war crimes court”, UN NewsCenter, 16 January 2002, <<http://www.un.org./apps/news/story.asp?NewsID=2639&Cr=Sierra&CrI=court>>.

²⁵ ICC Statute, Article 115.

²⁶ *Ibid.*, Article 126(1).

²⁷ For up-to-date ratification status, see Rome Statute Signature and Ratification Chart, <<http://www.iccnw.org/rome/html/ratify.html>>.

2002".²⁸ The Court will be situated in the capital of the Netherlands, the government of which is already well advanced in its preparations for hosting this new international judicial body.²⁹ While the ICC has yet to start functioning, the adoption of the Rome Treaty can only be characterized as a momentous event in the struggle for international justice, one that would have been simply unthinkable just a decade ago. Apart from the already mentioned political climate that facilitated negotiations on the ICC Statute, the Court's creation is based on the recognition that national authorities have far too often proven unable or unwilling to deal with the perpetrators of serious crimes under international law. The ICC will not supplant national criminal jurisdictions but will, in accordance with the principle of complementarity,³⁰ be available to step in when domestic prosecutions and trials prove unfeasible.

Of the many achievements of the Rome Statute, two deserve special mention in a review of developments related to the fight against impunity: the first is the ICC's subject-matter jurisdiction over war crimes committed in internal armed conflict and over crimes against humanity,³¹ and the second is the Statute's approach to victims. The expansion of war crimes to include acts committed in non-international armed conflict was by no means a foregone conclusion when the treaty negotiations began. Even though Article 3 common to the 1949 Geneva Conventions and Additional Protocol II of 1977 prohibit certain acts in internal armed conflict, not all governments were happy to see some of them defined as war crimes entailing individual criminal responsibility. Partly as a result of the jurisprudence of the ad hoc tribunals and partly due to the obvious prevalence of internal conflicts globally, those objections were overcome. The ICC Statute is thus the first international treaty to explicitly provide for individual criminal responsibility for "serious" violations of common Article 3 and for

²⁸ See Statement by the Minister of Foreign Affairs of the Kingdom of the Netherlands, Jozias J. Van Aartsen, during the Eighth Session of the Preparatory Commission for the International Criminal Court, New York, 25 September 2001, <<http://www.iccnw.org/html/NetherlandsPrepCom8.html>>.

²⁹ *Ibid.*

³⁰ ICC Statute, Article 1. See also ICC Statute, Articles 17-19.

³¹ The ICC will have jurisdiction over genocide, war crimes, crimes against humanity and the crime of aggression (once the latter is defined). See ICC Statute, Article 5.

twelve other “serious violations of the laws and customs” applicable in non-international armed conflict, including intentional attacks against civilians, crimes of sexual and gender violence, and forced displacement.³² There is no doubt that the list should have been more expansive, but at least the Rome Statute will, as a matter of law, put a stop to claims that crimes perpetrated in internal armed conflict are a matter of solely domestic jurisdiction.

The ICC Statute’s definition of crimes against humanity (Article 7) is just as important. Arriving at a definition was no easy task given that there was no accepted definition or list of such crimes as a matter of treaty law. Previous definitions, such as those included in the Nuremberg and Tokyo Charters, Allied Control Council Law No. 10 and the Statutes of the ad hoc Tribunals differ in both their elements and in the enumeration of acts considered to constitute crimes against humanity. The ICC Statute definition is groundbreaking in that, for a start, it omits a nexus to armed conflict, thus clarifying that crimes against humanity may be committed in peacetime as well as in war. The Article 7 *chapeau* also provides that crimes against humanity may be committed either as part of a “widespread” or “systematic” attack against a civilian population, thus eliminating the need to prove a cumulation of these two elements. Lastly, the definition does not provide that persecution must be a motive for any of the acts listed as crimes against humanity; instead, persecution is included in that list as a separate crime.³³ It should also be noted that the Statute defines the crimes of torture and enforced disappearance³⁴ more expansively than the relevant human rights instruments³⁵ by dissociating them from the requirement of the perpetrator’s official capacity.

Largely due to NGO lobbying and the responsiveness of several key governments, the ICC Statute did not circumvent the interests of victims. It mandates *inter alia* the creation, within the future

³² ICC Statute, Article 8(2)(c)(e)(i), (vi) and (viii).

³³ ICC Statute, Article 7(1)(h).

³⁴ ICC Statute, Article 7(2)(f) and (i).

³⁵ See Convention against Torture and Other Cruel, Inhuman or Degrading Treatment

or Punishment, 10 December 1984, Article 1 [hereinafter Convention Against Torture], and Declaration on the Protection of All Persons from Enforced Disappearance, GA Res. 47/133, 18 December 1992, preambular para. 3.

Court's Registry, of a Victims and Witnesses Unit charged with providing protective measures, security arrangements, counselling and other appropriate assistance for witnesses, victims who appear before the Court and others who may be at risk on account of testimony.³⁶ In a groundbreaking development, the treaty also includes provisions on reparations to victims and their families.³⁷ The Court may, either upon request or on its own motion (in exceptional circumstances), determine the scope and extent of any damage, loss and injury to, or in respect of, victims. It is authorised to order that a convicted person make reparations to the victims or their families, which may include restitution, compensation and rehabilitation. The Statute further provides for the establishment of a Trust Fund from which victims may be compensated³⁸ and permits the Court to order the seizure of property or assets of the convicted person or of the property used to commit the crime.³⁹ States Parties are obliged to implement a Court decision to that effect. The Statute's provisions on reparations have been further outlined in the ICC's Rules of Procedure and Evidence.⁴⁰

Universal jurisdiction

As already mentioned, the ICC was created to offset the lack of willingness or ability of national authorities to mount domestic prosecutions and trials of perpetrators of serious crimes under international law. As a few high-profile cases have recently demonstrated, another avenue may in such circumstances be used to ensure justice — the exercise of universal jurisdiction by third States.⁴¹ The most

³⁶ ICC Statute, Article 43(6).

³⁷ ICC Statute, Article 75.

³⁸ ICC Statute, Article 79.

³⁹ ICC Statute, Article 93(1)(k).

⁴⁰ See Finalised Draft Text of the Rules of Procedure and Evidence, PCNICC/2000/1/Add.1, 2 November 2000, Sub-Section 4, Rules 94 to 99, <<http://www.un.org/law/icc/statute/rules/rulefra.htm>>.

⁴¹ "Under the principle of universal jurisdiction, a state is entitled, or even required to bring proceedings in respect of certain serious crimes, irrespective of the location of

the crime, and irrespective of the nationality of the perpetrator or the victim. The only connection between the crime and the prosecuting state that may be required is the physical presence of the alleged offender within the jurisdiction of that state": International Law Association, *Final Report on the Exercise of Universal Jurisdiction in Respect of Gross Human Rights Offences*, Committee on International Human Rights Law and Practice, London Conference, 2000, p. 2 (on file with the author) [hereinafter ILA Report].

celebrated example is the 1998–1999 *Pinochet Case*, based both on passive personality and universal jurisdiction. It should be noted, however, that courts in Europe had initiated and successfully concluded proceedings based on universal jurisdiction against alleged offenders from the former Yugoslavia and Rwanda prior to Pinochet's arrest in England.⁴² Since then other cases have been brought as well.⁴³ It is submitted that the gradual, but steady expansion of the exercise of universal jurisdiction is likely to be a permanent trend in the struggle for international justice.

It was the Spanish *Audiencia Nacional's* ruling that "Spain could investigate crimes committed in Chile and that the court could exercise universal jurisdiction over crimes committed by and against non-nationals outside of Spanish territory"⁴⁴ that provided the basis for the formal request for Pinochet's extradition issued in Spain in November 1998. The Spanish request was followed by extradition requests from Switzerland, France and Belgium, respectively.⁴⁵ Leaving aside other seminal aspects of the Pinochet case,⁴⁶ the proceedings in the UK affirmed that States Parties have an obligation under the 1984 Convention against Torture⁴⁷ to take measures that would enable them to assert jurisdiction over an offender present in their territory and to

⁴² *Ibid.*, Annex. The Annex contains a review of various cases brought under the principle of universal jurisdiction — before Pinochet's arrest — in Austria, Denmark, France, Germany and the Netherlands.

⁴³ France most recently declared admissible a complaint filed by six victims against Tunisian officials, alleging acts of torture, regardless of lack of presence of the alleged perpetrators in French territory. See Comité pour le respect des libertés et des droits de l'homme en Tunisie, *Une brèche importante dans la lutte contre l'impunité: la plainte déposée en France contre des tortionnaires tunisiens est jugée recevable*, Paris, 28 November 1998 (text on file with the author).

⁴⁴ See Mary Griffin, "Ending the Impunity of Perpetrators of Human Rights Atrocities: A Major Challenge for International Law in the

21st Century", *International Review of the Red Cross*, No. 838, June 2000, p. 382.

⁴⁵ *Ibid.* It should be noted in this context that a Belgian *juge d'instruction* ruled in Pinochet-related proceedings that a person suspected of having committed crimes against humanity could be brought to justice in Belgium on the basis of customary international law. See Juge d'instruction à Bruxelles, ordonnance, 6 November 1998 (on file with the author), reprinted in *Revue de Droit Pénal et de Criminologie*, 1999, pp. 278-300.

⁴⁶ For a review of the Pinochet case, see Brody and Ratner, *op. cit.* (note 3). See also *Crimes Against Humanity: Pinochet Faces Justice*, International Commission of Jurists, July 1999.

⁴⁷ Convention Against Torture, Articles 4, 5 and 7.

either prosecute or extradite such a person. They also confirmed that a former head of State cannot invoke immunity from extradition and prosecution for torture and conspiracy to torture. Britain's highest court did, however, conclude that a serving head of State would *ratione personae* have enjoyed immunity for the acts alleged,⁴⁸ a finding which, it is submitted, contradicts both the letter of the Nuremberg Charter and Judgment and their normative legacy.⁴⁹ It should be noted that the UK proceedings also had an effect in Chile itself — upon his return from Britain, Pinochet's parliamentary immunity and his senator-for-life position were lifted, enabling the initiation of domestic proceedings.⁵⁰

Less than a year after the Law Lords' ruling in the *Pinochet Case*, in February 2000 a Senegalese court indicted former Chadian President Hissene Habre on torture charges and placed him under house arrest.⁵¹ This action by the Dakar Regional Court, initiated by Chadian victims as well as by Chadian and international human rights groups, is believed to have been the first exercise of universal jurisdiction for human rights offences in an African country.⁵² In July 2000, the Court of Appeals dismissed the charges against Habre, ruling that Senegal had not enacted legislation to implement the Convention Against Torture and therefore had no jurisdiction to pursue the charges because the crimes were not committed in Senegal, and in March 2001 Senegal's highest court essentially confirmed that ruling.⁵³ If there is one lesson to be learned from the Habre case, it is the

⁴⁸ See Brody and Ratner, *op. cit.* (note 3), p. 44.

⁴⁹ For a good review of the principles on immunity as enunciated in the Nuremberg Judgment and the normative follow-up, see Amnesty International, *The Case of General Pinochet: Universal Jurisdiction and the Absence of Immunity for Crimes against Humanity*, EUR 45/21/98, October 1998.

⁵⁰ See Federico Andreu-Guzman, "L'affaire Pinochet: historique des événements et exposé des incriminations, L'arrêt de la Cour suprême de justice du Chili et perspective du combat judiciaire contre l'impunité", Paper

presented at the Journée d'études: L'immunité pénale des gouvernants, FIDH — CEDIN, Assemblée nationale de France, 30 September 2000 (on file with the author).

⁵¹ See Frederic Kirgis, "The Indictment in Senegal of the Former Chad head of State", *ASIL Insights*, February 2000, <<http://www.asil.org/insights/insigh41.htm>>.

⁵² ILA Report, *op. cit.* (note 41), p. 27.

⁵³ République Du Senegal, Cour d'Appel de Dakar, Chambre d'Accusation, Arrêt No. 135, 4 July 2000; see Human Rights Watch, "The Case against Hissene Habre", <http://www.hrw.org/justice/habre/intro_web2.htm>.

importance of States adopting implementing legislation (if required under domestic law) to give effect to the Convention's universal jurisdiction provisions. While non-implementation of the Convention Against Torture in Senegalese law ultimately defeated the proceedings, the Habre case did generate further developments well worth noting. It prompted the initiation of criminal proceedings against members of the political police that operated during Hissene Habre's regime by Chadian victims before Chadian courts. It also led the victims to request the UN Committee against Torture to apply interim measures of protection to prevent the former President from leaving Senegal except pursuant to an extradition demand, which the Committee granted.⁵⁴ Victims also filed a complaint against Habre in Belgium, under its law on universal jurisdiction mentioned below, seeking his extradition from Senegal.⁵⁵

The purpose of universal jurisdiction is to deny safe haven to persons suspected of having committed egregious crimes which are an affront to the international community as a whole. Among them are genocide, war crimes, crimes against humanity, torture, slavery and piracy, and, some would argue, enforced disappearances as well. It should be remembered that the 1949 Geneva Conventions and their Additional Protocol I of 1977,⁵⁶ as well as the Convention Against Torture,⁵⁷ provide for mandatory universal jurisdiction by States Parties to those treaties. In practice, however, several conditions have to be met before proceedings in a third State can actually take place. To begin with, domestic implementing legislation will most often be required given that national judges will be hesitant to assert jurisdiction unless authorised to do so by domestic statute (Habre case). Unfortunately, fairly few States have so far taken that step.⁵⁸ A notable

⁵⁴ Human Rights Watch, "The Case against Hissene Habre", *op. cit.* (note 53).

⁵⁵ See Linda Keller, "Belgian Jury to Decide Case Concerning Rwandan Genocide", *ASIL Insights*, May 2001, <<http://www.asil.org/insights/insigh72.htm>> [hereinafter *ASIL Insights*].

⁵⁶ See First Geneva Convention, Article 49(2); Second Geneva Convention,

Article 50(2); Third Geneva Convention, Article 129(2); Fourth Geneva Convention, Article 146(2); Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, Article 86(1).

⁵⁷ Convention Against Torture, Article 5.

⁵⁸ See ILA Report, *op. cit.* (note 41), p. 12.

exception is Belgium, whose 1993 universal jurisdiction law,⁵⁹ as amended in 1999,⁶⁰ permits the exercise of universal jurisdiction by Belgian courts for genocide, war crimes (committed in both international and non-international armed conflict) and crimes against humanity even when the suspect is not present in Belgian territory. The law does not allow the invocation of official immunity to prevent application of its provisions.

The first full trial completed under the Belgian law was the recent, well-publicized, case of four Rwandan defendants — including two nuns — who were convicted in 2001 by a Belgian jury for complicity in the 1994 Rwandan genocide.⁶¹ Complaints by victims have also been filed against a number of former and current high-ranking politicians from all quarters of the globe, including Israeli Prime Minister Ariel Sharon and Palestinian leader Yasser Arafat.⁶² The law's "success" has produced a backlash in Belgium, whose political authorities are worried that it has turned their country into a "magnet for the world's human rights cases",⁶³ and who point to the diplomatic difficulties caused. Belgium's Foreign Minister and other officials have called for amendments to the law that would effectively restrict its application by mandating political oversight over the judicial process.⁶⁴ Human rights groups have responded by emphasizing that the solution lies in getting more States to also adopt universal jurisdiction laws, rather than in Belgium limiting its own.⁶⁵ It should be noted that the ICC ratification process and the implementing legislation required of States for compliance with that treaty provide a good opportunity for

⁵⁹ Loi relative à la répression des infractions graves aux Conventions internationales de Genève du 12 août 1949 et aux Protocoles I et II du 8 juin 1977, additionnels à ces Conventions, 16 June 1993, *Moniteur Belge*, 5 August 1993.

⁶⁰ Loi relative à la répression des violations graves de droit international humanitaire, 10 February 1999, *Moniteur Belge*, 23 March 1999.

⁶¹ See *ASIL Insights*, *op. cit.* (note 55).

⁶² See "Rights Groups Support Belgian Law on Genocide", Agence France-Presse,

Brussels, 26 November 2001. See also "Suit Against Sharon Defended", *International Herald Tribune*, 29 November 2001, p. 5.

⁶³ See Press Release by Human Rights Watch, the International Commission of Jurists and the International Federation of Human Rights Leagues (FIDH), Brussels, 26 November 2001 (on file with the author) [hereinafter Joint Press Release].

⁶⁴ See "Un sénateur veut restreindre la loi belge sur la compétence universelle", Agence France-Presse, Brussels, 20 June 2001.

⁶⁵ See Joint Press Release, *op. cit.* (note 63).

appropriate amendments to domestic law that would allow the exercise of universal jurisdiction.

Amnesties

Apart from lack of implementing legislation, other obstacles to the exercise of universal jurisdiction include the possible official capacity — and therefore immunity from process — of the alleged perpetrator, lack of skills and resources in the third country, evidentiary problems and the effect of domestic amnesties.⁶⁶ Due to lack of space and to the fact that the issue of amnesties arises not only in proceedings based on universal jurisdiction in third countries, but also before national and international courts, it will be examined separately, albeit briefly, below.

The granting of amnesties to suspected perpetrators of serious crimes under international law violates the duty of States, under treaty-based and customary law, to bring to justice and punish suspected offenders.⁶⁷ If, over a decade ago, there might have been some doubt about the validity of this claim, a multitude of developments at both the national and international levels should have served to dispel it.⁶⁸ It is submitted that this trend is likely to not only continue, but accelerate.

At the international level, the incompatibility of amnesty laws with State obligations to investigate and punish serious crimes was indirectly recognized in the Vienna Declaration and Programme

⁶⁶ See ILA Report, *op. cit.* (note 41), pp. 10-19.

⁶⁷ International Covenant on Civil and Political Rights (Article 2), Convention Against Torture (Articles 4, 5 and 7), American Convention on Human Rights (Article 1), Inter-American Convention on Forced Disappearance of Persons (Article 1), Inter-American Convention to Prevent and Punish Torture (Article 1). See also non-treaty human rights standards such as the Declaration on the Protection of All Persons from Enforced Disappearance, GA Res. 47/133, 18 December 1992, and the Principles for the Effective Prevention and Investigation of Extra-Legal,

Arbitrary and Summary Executions, ECOSOC Res. 1989/65, 24 May 1989.

⁶⁸ For an excellent review of the current state of the law on impunity and the effect of amnesties, see “Argentina: Amicus Curiae Brief on the Incompatibility with International Law of the Full Stop and Due Obedience Laws”, presented by the International Commission of Jurists, Amnesty International and Human Rights Watch before the National Chamber for Federal Criminal and Correctional Matters of the Republic of Argentina (June 2001), *International Commission of Jurists Occasional Papers*, 2001, p. 23 [hereinafter ICJ Amicus Brief].

of Action adopted at the 1993 World Conference on Human Rights which called on States “to abrogate legislation leading to impunity for those responsible for grave violations of human rights such as torture and prosecute such violations, thereby providing a firm basis for the rule of law”.⁶⁹ The UN Human Rights Committee dealt with the issue as early as 1978 in relation to Chile’s amnesty law and has since made similar observations in regard to amnesty laws passed by Lebanon, El Salvador, Haiti, Peru, Uruguay, France, Yemen, Croatia and Argentina.⁷⁰ In its General Comment on Article 7 of the International Covenant on Civil and Political Rights prohibiting torture, the Committee stated that “amnesties are generally incompatible with the duty of States to investigate such acts; to guarantee freedom from such acts within their jurisdiction; and to ensure that they do not occur in the future. States may not deprive individuals of the right to an effective remedy, including compensation and such full rehabilitation as may be possible”.⁷¹ Non-treaty standards such as the already cited Joinet Principles have also dealt with the issue of amnesties, determining that the perpetrators of serious crimes may not be included in amnesties unless the victims have been able to obtain justice by means of an effective remedy.⁷²

In July 1999 the UN Secretary-General affirmed the notion that domestic amnesties for crimes under international law are not legally binding at the international level by instructing his Special Representative to sign the Sierra Leone peace agreement “with the explicit proviso that the United Nations holds the understanding that the amnesty and pardon in Article IX of the agreement shall not apply to international crimes of genocide, crimes against humanity, war crimes and other serious violations of international humanitarian

⁶⁹ See the Vienna Declaration and Programme of Action, adopted by the World Conference on Human Rights, Vienna, 14-25 June 1993, A/CONF.157/24 (Part I), Chapter III, Section II, para. 60.

⁷⁰ See ICJ Amicus Brief, *op. cit.* (note 68), pp. 30-32 and pp. 36-38.

⁷¹ See Human Rights Committee General Comment No. 20 on Article 7, Forty-fourth Session, 1992, para. 15.

⁷² Joinet Report, *op. cit.* (note 4), Principle 28(a).

law”.⁷³ This understanding was reaffirmed in the Security Council’s resolution calling on the Secretary-General to draw up a Statute for the Special Court⁷⁴ and a no-amnesty provision was included in the Court’s Statute.⁷⁵ As already mentioned, differences over how to deal with a domestic amnesty have been a sticking point in the creation of the Khmer Rouge tribunal, the outcome of which is still uncertain.

Given that the obligations of States to repress grave breaches of the 1949 Geneva Conventions and of their Additional Protocol I of 1977 are well known, and that war crimes clearly fall within the designation of serious crimes under international law, there is no doubt that what has been said about amnesties thus far applies to these offences as well. What has sometimes generated controversy is the amnesty provision of Additional Protocol II of 1977 which allows, upon the cessation of hostilities in non-international armed conflict, for a broad amnesty to be granted to “persons who have participated in the armed conflict, or those deprived of their liberty for reasons related to the armed conflict, whether they are interned or detained”.⁷⁶ It should be emphasized that this provision essentially seeks to encourage the release of individuals who might be, or are subject to, criminal or other proceedings under domestic law for the fact of having taken part in hostilities. It should in no way be read as supporting amnesties for war crimes or other international offences committed in internal armed conflict.⁷⁷

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⁷³ Seventh Report of the Secretary-General on the United Nations Mission in Sierra Leone, UN Doc. S/1999/836, 30 July 1999, para. 7.

⁷⁴ UN Doc. S/RES/1315 (2000), preambular para. 5.

⁷⁵ Statute of the Special Court for Sierra Leone, Article 10, reads: “An amnesty granted to any person falling within the jurisdiction of the Special Court in respect of the crimes referred to in articles 2 to 4 of the present Statute shall not be a bar to prosecution”.

⁷⁶ Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977, Article 6(5).

⁷⁷ Letter of the ICRC Legal Division to the ICTY Prosecutor of 24 November 1975 and to the Department of Law at the University of California of 15 April 1997 (referring to CDDH, Official Records, 1977, Vol. IX, p. 319) (on file with the author).

has also been handed down by the Inter-American Court and Commission.⁷⁸

Finally, it should be noted that the carefully crafted edifice of amnesties has started to crumble at the domestic level as well. In a historic ruling rendered in March 2001, Argentine federal judge Gabriel Cavallo declared unconstitutional and null the main provisions of the “Full Stop” and “Due Obedience” laws that had enabled impunity for human rights violations during military rule in that country between 1976 and 1983.⁷⁹ His decision was confirmed in November 2001 by the National Chamber for Federal and Criminal Matters of Argentina.⁸⁰

Conclusion

It seems fitting to close this review with the briefest possible mention of two challenges that henceforth should not escape attention. The first is the role of national criminal justice systems and the other is fair trial rights.

If the preceding review failed to focus on the role of domestic courts in the fight against impunity for serious crimes, it did so because there is, unfortunately, not so much to report. The international and third-State mechanisms outlined above came into being precisely because States fail to fulfil what is their primary duty — to bring to justice the perpetrators of serious crimes. While some countries can indeed plead lack of skills and resources, far too often the problem clearly lies elsewhere, in the lack of political will by national authorities to tackle current or past offences. Unless and until that will is created, international mechanisms of one sort or another, both penal and non-penal, will be necessary. The challenge for the global

⁷⁸ See generally, ICJ Amicus Brief, *op. cit.* (note 68). See also Douglas Cassel, “Lessons from the Americas: Guidelines for International Response to Amnesties for Atrocities”, *Law and Contemporary Problems*, Vol. 59, School of Law Duke University, No. 4, Autumn 1996, pp. 197-230.

⁷⁹ See “Argentine Judge Annuls Immunity Laws”, The Associated Press, Buenos Aires,

6 March 2001 (on file with the author). For a background to the case see ICJ Amicus Brief, *op. cit.* (note 68), pp. 5-9.

⁸⁰ See “La Camara Federal Confirma: Las leyes de Punto Final y Obediencia Debida son invalidas e inconstitucionales”, *Centro de estudios legales y sociales*, Archivos de HOY, <http://www.cels.org.ar/background/archivos/info2001/info_45_20011115.htm>.

movement against impunity is therefore to concentrate more on the local level and to ensure that domestic courts and other bodies are able and willing to perform their tasks in the fight for justice.⁸¹

Justice, it should not be forgotten, means not only doing good by individual victims or segments of society affected by crime, but also ensuring that the fair trial rights of suspects and accused in criminal proceedings are fully respected. Once again, national criminal justice systems often fail to implement even a modicum of internationally prescribed standards aimed at safeguarding the life, health and dignity of alleged offenders. Justice cannot be done, nor can it be seen to be done, unless persons presumed to have committed international or other crimes are treated with full due process. The challenges ahead for the global movement against impunity in this context, too, are enormous. The recent resurgence of the debate on the “balance” between State security and human rights after the events of 11 September 2001 is a troubling case in point.



Résumé

Rendre compte des crimes internationaux de la conjecture à la réalité

par JELENA PEJIC

Les poursuites engagées en 1998-1999 contre Augusto Pinochet au Royaume-Uni étaient bien sûr sans précédent, mais elles n'auraient pas dû surprendre. L'arrestation de Pinochet n'a été qu'une étape très visible dans le processus qui aboutira à l'obligation de rendre compte des crimes internationaux – lequel a débuté avant le cas Pinochet et se poursuit depuis. L'article examine les divers

⁸¹ The ICRC's Advisory Service was set up in 1996 to encourage States to ratify international humanitarian law treaties and to fulfil their obligations under those treaties at the national level, including the repression of war crimes. The Advisory Service is attached to

the ICRC's Legal Division in Geneva and has a team of legal experts based in each continent. Further information may be obtained on the ICRC's website at <http://www.icrc.org> or by E-mail at: advisoryservice.gva@icrc.org

mécanismes internationaux qui constituent aujourd'hui un cadre juridique général contre l'impunité. Il fait une revue des tribunaux pénaux internationaux ad hoc, des tribunaux internationalisés, de la future Cour pénale internationale et des efforts qui sont déployés pour mettre en œuvre le principe de la juridiction internationale. L'article évoque brièvement « l'effritement de l'édifice » des amnisties internes, un moyen de soustraire à la justice les auteurs de crimes internationaux. Il recense les problèmes et les défis à surmonter pour aller de l'avant et recommande qu'une attention accrue soit consacrée à la manière dont la juridiction pénale nationale peut jouer un rôle utile dans la lutte contre l'impunité.

