

# UNIVERSAL JUSTICE FOR CRIMES AGAINST HUMANITY\*

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## Introduction

The subject matter of my paper is the use of criminal law, both national and international, along with international human rights law, to respond to very serious human rights abuse. Crimes against humanity are a category of offences that have come to be established in international criminal law and describe crimes that are widespread or systematic and aimed at a civilian population. Such crimes include murder, rape, torture, or enforced disappearance. Gross violation of human rights is the language used in international human rights law for similar acts of terrible personal abuse.

Crimes against humanity entail individual criminal responsibility in international law for those who plan as well as those who carry out such acts. The occurrence of gross violation of human rights give rise to state responsibility under international human rights treaties, if a state's agents have instigated such violation or carried them out. Responsibility can also arise where the state has failed to act to prevent them. State accountability for violation of international human rights treaty commitments does not involve direct individual criminal responsibility in international law. Responsibility of the state gives rise to a duty to make restitution or to provide full

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\* This paper is based on a lecture given during the XVII Curso Interdisciplinario en Derechos Humanos "Emilio F. Mignone," July 1999 at the Inter-American Institute of Human Rights, San José, Costa Rica. It has been updated to December 2000.

compensation to victims of such gross violation. A finding of violation will also establish a duty on the state to take action to investigate and punish those individuals responsible. Such a duty may in appropriate cases, include prosecution of individuals for crimes against humanity or other international crimes in domestic courts. For the future it may also involve the duty to deliver individuals alleged to be responsible to an international tribunal for trial and sentence.

It is useful therefore to think of gross violation of human rights in breach of international human rights law and crimes against humanity in violation of international criminal law as two sides of the same coin. A system of universal justice for the victims of large-scale human rights abuse requires a framework that develops the linkages between international humanitarian law, international criminal law and international human right law. It is essential to use all such resources of law if we are to prevent large-scale violations of human rights and eliminate the scandal of impunity.

But such a universal system is not to be envisaged as resting on international law and international institutions alone. The enjoyment of human rights begins and ends at home. The effective legal protection of human rights requires a range of policies at the *national* as well as the international level. The prosecution and punishment of individuals for international crimes is essential. But it is domestic criminal law that must take primary responsibility to enforce such norms, not the developing international criminal process. That requires states to embrace universal jurisdiction for the prosecution of crimes against humanity. State responsibility for gross violation must be enforced through regional and global human rights treaty mechanisms. But it is also incumbent on the state responsible as an obligation in international law, to bring its own law enforcement agents and governmental officials to account for such violations through its own criminal courts. It is equally necessary for national civil courts to have the jurisdiction to provide restitution or compensation to victims.

Such an ideal scheme of legal responses, whether at domestic or international level, is designed to react to episodes and

events that have entailed massive human rights abuses. But legal responses cannot prove effective unless they are also related to an effective democracy, which requires commitment to participation, social justice and social inclusion. An effective democracy from this perspective requires that those institutions through which power is exercised must be accountable both politically and to the rule of law. The experience of gross abuse of human rights is directly linked with the absence of accountability, and with impunity of those who abuse power. Impunity usually begins with the apparently small or isolated violations -one case of torture or a killing by the police not investigated properly or the offenders not brought to justice. From such incidents can grow the scale of violations and abuse of power we have witnessed in so many countries in the last decades.

If the search for universal justice for crimes against humanity requires commitment to make democracy effective within states, it equally requires international co-operation between states. It requires a renewed commitment to all the goals of the United Nations, including human rights, disarmament, economic and social development and respect for international law. Those goals cannot be further advanced without the development of democratic principles and structures to support co-operation between states.

This paper will first review developments in international criminal law, focused mainly on crimes against humanity. It will also consider what has proved one of the most significant legal controversies since the Nuremberg Tribunal after the Second World War, directly relevant to the subject of universal jurisdiction for crimes against humanity and of great regional interest in the Americas; the foreign and now local criminal proceedings against Augusto Pinochet Ugarte, the former dictator of Chile. Finally it will note the contribution that international human rights treaties can contribute through fixing state responsibility for large-scale violation of human rights along with the new possibilities of individual criminal responsibility arising from the planning or taking part in such gross violation.

## The law of international crimes including crimes against humanity

International criminal law consists of a body of crimes, which the international community has chosen to reflect as being of such seriousness that they are crimes against the international legal order and the human rights principles that are the moral foundation of that order.<sup>1</sup> International law is normally concerned with the responsibility of states alone but the seriousness of these crimes is such that it seeks to punish individuals who have committed those crimes. It follows that international law permits and in some cases requires states to enforce international criminal law, including crimes against humanity, under its own legal system against persons suspected of such crimes.<sup>2</sup> In 1998 international law took an enormous leap forward when the statute of an International Criminal Court was agreed and opened for signature in Rome.<sup>3</sup> The role envisaged for the international criminal court as complementary to national jurisdiction in the enforcement of international criminal law will be discussed further below.

The modern foundation of international criminal responsibility for human rights abuses dates to the Second World War. The international military tribunal at Nuremberg established by the Allies in 1945 sought to fix individual criminal responsibility on Nazi leaders who were accused of violating the laws and customs of war as well for a range of terrible acts against civilians linked to that war which were termed “crimes against humanity.”<sup>4</sup> The same legal principles

- 1 See Article 19 of the International Law Commission’s Draft Articles on State Responsibility “...an international obligation so essential for the protection of fundamental interests of the international community that its breach is recognised as a crime by that community as a whole.” *Yearbook of the International Law Commission* (1976) Chapter III B, Draft Articles on State Responsibility article 19. A/CN.4/SER.A/1976/Add.1 (Part 2).
- 2 See generally N.S. Rodley *The Treatment of Prisoners under International Law* (1999) 2nd ed.
- 3 Statute of the International Criminal Court UN Doc. A/CONF.183/9, 17 July 1998; 37 I.L.M. 999 (1998).
- 4 Charter of the International Military Tribunal (IMT), Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis (London Agreement) August 8 1945, 82 U.N.T.S. 280. Crimes against Humanity were defined in the Charter Article 6 (c) as “murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial, or religious grounds in execution of or in connection with any crime within the jurisdiction

were pursued in the Tokyo Tribunal, which was established to try Japanese military personnel.<sup>5</sup> The principles underlying these post war tribunals, in particular the right of the international community to try and punish those responsible for atrocities conducted under colour of war was endorsed by the General Assembly in a resolution in 1946.<sup>6</sup> The General Assembly also mandated what has been a long effort to codify international criminal law by the International Law Commission. A final draft was completed in 1996 but remains to be acted upon.<sup>7</sup>

One immediate response to the atrocities of the Second World War was the Convention on the Prevention and Punishment of Genocide adopted by the United Nations General Assembly in 1948.<sup>8</sup> Genocide, the attempt or act of physically destroying a people in whole or in part, is treated as the most heinous of a number of crimes against humanity. It was one of the crimes for which the Spanish prosecutor sought to have Augusto Pinochet extradited from Britain in the 1998 legal proceedings in London.<sup>9</sup> A further response to the atrocities of the Second World War came in 1949 when the International Red Cross promoted the four Geneva Conventions designed to codify the law of armed conflict or international humanitarian law.<sup>10</sup> These Conventions made “grave breaches” of their

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of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated. See, G. Ginsbergs and V. N. Kudriavtsev (eds.) *The Nuremberg Trials and International Law* (1990); F. Biddle, “The Nurnberg Trial” 33 Va. L. Rev. 679 (1947); H.Ehard, “The Nuremberg Trial against the major war criminals and international law” 43 AJIL, 1949, 223.

- 5 P.R. Piccigallo, *the Japanese on Trial; Allied War Crimes Operations in the East, 1945-1951* (1979); V.A. Roling and A. Casesse, *The Tokyo Trial and Beyond: Reflections of a Peacemaker* (1993).
- 6 GA res. 95(1) 11 December 1946.
- 7 Draft Code of Offences against the Peace and Security of Mankind; Report of the International Law Commission, GAOR 51st Session, Suppl.No.10 (1996) ch. IID.
- 8 GA Resolution 2106A, 9 December 1948. W. Schabas, *Genocide in International Law: the Crime of Crimes* (2000).
- 9 The Home Secretary in the event determined that extradition was not under UK Law an offence for which extradition could be granted. See N.S. Rodley “Breaking the Cycle of Impunity for Gross Violation of Human Rights; The Pinochet Case in Perspective” 69 Nordic Journal of International Law 11-26 (2000).
- 10 Geneva Conventions of 12 August 1949; Geneva Convention 1 (armed forces in the field) article 49; Geneva Convention 11 (armed forces at sea) Article 50; Geneva Convention 111 (prisoners of war), Article 129; Geneva Convention IV civilian populations), Article 146.

provisions in the context of international armed conflict, criminal offences and imposed duties on all signatory states to prosecute persons responsible.

However after these early steps to build an effective international criminal law little happened for many years until the 1990s. There have been many atrocities committed in the intervening decades -the military dictatorships in Latin America, Pol Pot's regime in Cambodia, the use of poison gas by Iraq against its Kurdish citizens, the Amin regime in Uganda -none of which have led to an international commitment to punish the perpetrators. It has been the atrocities in the new wars of ethnicity of the 1990s, in Bosnia Herzegovina, Rwanda and now Kosovo, which have finally forced the international community to act.

The fundamental reason for the failure to respond to earlier atrocities was the reluctance of states to challenge the sovereignty doctrine. Despite the clear principle set out as early as 1945 in the Nuremberg Charter, that gross violations of human rights within a state whether in war time or in peace, were crimes against international law, states were reluctant to accept the necessary implications. One such implication was to establish means at the international level to prosecute such crimes. The Genocide Convention made provision for trial before an international penal tribunal should such ever be established. But no such tribunal was created. States have proved equally unwilling to act to enforce international humanitarian law within their own territory. Even where obliged under the Geneva Conventions 1949 to take jurisdiction to prosecute individuals suspected of grave breaches of the Conventions, who are present on their territory, states have been reluctant to act.

## **Growth of international human rights law**

However, the intervening years of inaction on establishing principles of international criminal responsibility and an international criminal tribunal, does not mean that there have been no important developments. Of these developments the most important has been the growth of the law of international

human rights.<sup>11</sup> We have seen a corpus of universal human rights standards adopted some of which as we shall see, involve duties on states to prosecute violations of rights. Above all we have seen an universal recognition by human kind everywhere of the idea of human rights and a growing international public opinion that impunity for criminal acts involving gross violation of human rights should no longer be tolerated.<sup>12</sup>

One major effect of the fifty years of development of human rights has been to shift the balance between the mandate of the UN to promote and implement human rights and the principle included in its Charter of non-interference in the domestic sovereignty of its members.<sup>13</sup> This new balance has been built on the enormous range of international human rights treaties with implementation machinery generated through the United Nations as well as the many initiatives taken to investigate, and to condemn human rights violations at the UN level.<sup>14</sup> It has also resulted from the creation of regional systems of protection, under the African Charter of Human and Peoples Rights, the Inter-American Convention and the European Convention on Human Rights.<sup>15</sup> What is distinctive about the European and the American systems is the existence of judicial machinery to which individuals and communities can have access to complain over violation of human rights. (The possibility of an African Court of Human Rights lies in the future).<sup>16</sup> The success of

11 For an account of the growth of international human rights law and its relationship with international humanitarian law see, H. Steiner and P. Alston, *International Human Rights In Context*, (2000) 2nd ed.

12 Nigel S. Rodley, *supra*, note 9.

13 UN Charter Article 1 (3) and Article 2 (7) R. Higgins *The Development of International Law through the Political Organs of the United Nations* (1963); L. Sohn, "The New International Law: Protection of the Rights of Individuals Rather than States" 32 *AM. Rev.* 1 (1982).

14 For a detailed account of the growth of international human rights capacity through the United Nations see, P. Alston (ed), *The United Nations and Human Rights, a Critical Appraisal* (1992).

15 American Convention on Human Rights (Pact of San Jose) signed 22 November 1969 entered into force 18 July 1978; Charter on Human and Peoples' Rights adopted 27 June 1981, entered into force 21 October 1986; European Convention for the Protection of Human Rights and Fundamental Freedoms, signed on 4 November 1950 entered into force 3 September 1953. For an excellent introduction to and further reading on regional protections systems, see Steiner and Alston *supra* note 11.

16 A Protocol to the African Charter providing for the establishment of an African Court on Human and Peoples' Rights was adopted by the Organisation of African Unity on 10 June 1998. It has not yet come in force; O.A.U. Doc. CAB/LEG/TSG/rev.1.15.

these systems in enforcing state responsibility for violation along with United Nation treaty mechanisms, helped create a climate and following the end of the Cold War, in which the Vienna World Conference on Human Rights 1993 could confirm that “human rights is a legitimate concern of the international community.” The Declaration further urge 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.”<sup>17</sup>

### Recent developments in international criminal jurisdiction

The sudden surge of initiatives to establish international criminal responsibility, which we have witnessed in the last few years, would not have succeeded without the several decades of experience with international judicial accountability of states to international law for human rights violations. Nor would the prospects of bringing to justice those guilty of such violation, have been possible without the creation of a world opinion in favour of human rights values and democratic life.

The Security Council acting under Chapter VII of the Charter adopted the Statute of the International Criminal Tribunal for the Former Yugoslavia in 1993 (ICTY) and the Statute for the International Tribunal for Rwanda in 1994 (ICTR).<sup>18</sup> These *ad hoc* tribunals established in response to the atrocities in Bosnia-Herzegovina and the shameful genocide in Rwanda, gave impetus for an international conference to take action on the International Law Commission’s draft statute for a permanent international criminal court, completed in 1994.<sup>19</sup> The conference convened in Rome and attended by 160 states adopted the Statute for the International Criminal Court (ICC).<sup>20</sup> The Statute, which has now been signed by one hundred and fifteen

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17 United Nations World Conference on Human Rights Vienna Declaration and Programme of Action, adopted 25 June 1993, reprinted in 32 ILM 1661(1993), 14 HRLJ 352 (1993) paras. 4 and 60.

18 Security Council Res. 827 (1993) 25 May 1993, reproduced in 32 I.L.M. 1192 (1993); Security Council res. 955 (1994) reproduced 33 I.L.M. 1602 (1994).

19 Draft Statute for an International Criminal Court, Report of the International Law Commission, GAOR 49th Session Supplement No.10 (1994).

20 UN Doc. A/CONF.183/9 17 July 1998 reproduced in 37 I.L.M. 999 (1998).



states (including the United States) requires sixty ratifications before it comes into force. It is now entirely possible that we may see within a few years a permanent court exercising international criminal jurisdiction based at the Hague.<sup>21</sup> The ICC will have jurisdiction over: “(a) The crime of genocide; (b), Crimes against humanity; (c) War crimes, and (d) The crime of aggression.”<sup>22</sup> The Statute creates an office of a prosecutor who is required to act with independence at all times.<sup>23</sup>

The ICC is without doubt the most significant development ever in the establishment of an international order that can respond to international crimes.<sup>24</sup> The ICTY and ICTR through their work, will lay an important foundation and legal experience of international criminal prosecution on which the ICC, when functioning, can draw upon.<sup>25</sup> The major contrast between the two *ad hoc* tribunals and the ICC is that the latter is designed to be complementary to national jurisdiction, whereas the former have primacy over national jurisdiction. This is intended to result in states that are parties to the Statute of the ICC having the duty to take the initiative in prosecuting those persons within their territory suspected of international crimes. The ICC is entitled to act only where the national judicial system is unwilling or unable to prosecute. This concept of complementary roles for international and national criminal law and tribunals echoes the structure of accountability of states for violation of international human rights guarantees. States are first obligated to prevent and then to remedy violation, including gross violation, within their jurisdiction and the individual may not seek to invoke international protection unless the state authorities have had an opportunity and failed to provide a remedy at home. The approach of the *ad hoc*

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21 As of December 2000, 22 states have ratified the ICC Statute. New ratifications and developments are published on the Coalition for the ICC Home Page; <http://www.icc.org/icc>.

22 ICC Statute, Article 5.

23 Article 42.

24 M.H. Arsanijani, “The Rome Statute of the International Criminal Court” 93 A.J.I.L. 22 (1999).

25 D. Murphy, “Progress and jurisprudence of the International Criminal Tribunal for the Former Yugoslavia” 93 A.J.I.L. 57 (1999); V. Morris, M.P. Scharf, *The International Criminal Tribunal for Rwanda* (2 vols) (1998).

tribunals and the ICC statute, specifically towards crimes against humanity, will be referred to further below.

## **What are crimes against humanity?**

Crimes against humanity are established as such in customary international law.<sup>26</sup> There is no single definition of the scope of all crimes against humanity as international crimes incorporated in a multilateral treaty. Instead there are a number of definitions ranging from the Nuremberg Charter which first invoked this category of crime, to the statutes of the Rwanda and Yugoslavia tribunals and the Statute of the International Criminal Court as well as the International Law Commission's draft Code of Crimes against the Peace and Security of Mankind 1996.<sup>27</sup>

The one crime against humanity which is treated separately and which has been given clear definition is that of genocide given in the Convention on the Prevention and Punishment of the Crime of Genocide 1948.

The Convention defines genocide as comprising the following elements:

1. An intent to destroy in whole or in part a national, ethnical, racial or religious group as such;
2. The commission of one of the following acts aimed at one such group, with the above intention:
  - Killing members of the group;
  - causing serious bodily or mental harm to members of the group;
  - Deliberately inflicting on the group conditions calculated to bring about its physical destruction;
  - imposing measures to prevent births in the group;
  - Forcibly transferring children of the group to another group.<sup>28</sup>

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26 See generally M.C. Bassiouni, *Crimes Against Humanity in International Law* (1999) 2nd.

27 *Supra* note 7.

28 See Genocide Convention, Article 2.

The Convention was in many respects a political compromise, but it did confirm that genocide, whether committed in peace or in time of war, was a crime under international law and it imposed on signatories the duty to prevent and punish it.<sup>29</sup> What it did not do as already noted, was to establish an international tribunal to prosecute and punish this most serious of international crimes. Instead the possibility of an international tribunal being established was left open with the other basis of jurisdiction being that of the state where the act was committed. The ICTY, ICTR and the ICC statutes all include genocide within their jurisdiction as defined in the 1948 Convention.

When the concept of crimes against humanity were first used in the Nuremberg Charter it was confined to crimes arising from *international* conflict.<sup>30</sup> But it is now clear that it extends to acts committed in *non-international* conflict and indeed that it can be applied and can occur without reference to any conflict. An example might be a *coup d'état*.

The break in any required nexus between crimes against humanity and armed conflict international or non-international, was confirmed by the Appeals Chamber of ICTY in *Prosecutor v Tadic*:

... it is by now a settled rule of customary international law that crimes against humanity do not require a connection to international armed conflict. Indeed, customary international law may not require a connection between crimes against humanity and any conflict at all.<sup>31</sup>

The ICTR statute's definition of crimes against humanity requires no connection between armed conflict and any such offences.<sup>32</sup> This important development has been confirmed by the definition of crimes against humanity in Article 7 of the ICC statute. Article 7 makes no reference to armed conflict. The

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29 W. Schabas *supra* note 8.

30 Article 6 (c) Charter of the International Military Tribunal 5 U.N.T.S. 251.

31 Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Case No IT-94-I- AAR72, of 2 October 1995; I.L.M. Vol. 35 1996 p. 35.

32 Article 3.

definition is worth citing in full and is set out in the Appendix to this chapter.

The definition embraces the entire range of human rights violations including arbitrary killings, torture, disappearances, arbitrary detention, rape, and persecution. The definition requires that any such act to be classified as a crime against humanity must be committed “as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack.” Thus there remains a distinction between a human rights violation for example an individual being subjected to torture, and a crime against humanity. For that single act of torture to constitute a crime against humanity then it must be committed knowingly as part of a systematic *or* a widespread attack against a civilian population of which the victim is part. Further Article 7 defines an “attack directed against any civilian population” as one which means:

*a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organisational policy to commit such attack.*

It would be possible to prosecute on the basis of one act of torture or rape for example, provided either crime had occurred within the context and with the elements set out in Article 7. Thus the definition mirrors in substance the concept used in international human rights practice of gross or systematic violation.

One further issue to be considered is whether crimes against humanity require to be crimes committed by a state or can non-state agencies be held responsible? It is submitted that the best view at this stage of development, that groups who seek to exercise authority as government, in other words guerrilla groups and national liberation forces, can be held responsible for these international crimes.

## **Universal jurisdiction**

The existence of a definition of the criminal responsibility that flows from the commission of gross and systematic human

rights abuse, in the statute of a future permanent international penal tribunal, is a heartening achievement. However, as pointed out above, we must not imagine that a new era of individual criminal accountability for gross violation of human rights will automatically be successful should the new international Criminal Court come into existence. The new court is a crucial part, but only a part of what will be necessary to establish an effective system of prosecution and punishment. States must be also prepared to enforce international criminal law through their own courts. No single international tribunal could deal with all of future cases in which persons are suspected of responsibility for crimes against humanity, genocide or war crimes. As noted, the Statute of the ICC states that its jurisdiction shall be **complementary** to national criminal jurisdiction. It shall have jurisdiction only when the national state, either the state on whose territory the crime occurred or the state of which the person accused is a national and which is a party to the Statute, is unable or unwilling to act.

Thus, apart from pressing states to ratify the ICC statute, the other task is to persuade states to take the necessary steps in their internal law that will enable them to exercise jurisdiction to punish individuals who are suspected of war crimes, crimes against humanity and other international crimes. The need in fact is to encourage states to take jurisdiction on a universal basis. A state must be prepared to act both with respect to international crimes that occur in its own territory or that occur outside its own territory. The rationale of such prosecutions is that the state is acting on behalf of the international community as a whole or in defence of international order. Universal jurisdiction rules require the state either to prosecute persons responsible for such crimes in their own courts or to extradite them to the courts of other states where requested. Universal jurisdiction as a principle is **wider** than the jurisdiction required by the ICC statute. While universal jurisdiction was sought for the Court, the compromise reached was jurisdiction based on nationality or where the conduct occurred on the territory of the state.<sup>33</sup> However apart from the requirements of the ICC statute, international law provides for states to exercise such

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33 See Article 12 of the Statute of the International Criminal Court.

jurisdiction either on an obligatory or permissive basis, including in respect of crimes against humanity. The establishment of an effective international criminal law against gross violations of human rights requires the adoption of universal jurisdiction. For universal jurisdiction to be effective, all states need to adapt the necessary legislation. That means that the state is in a position to exercise jurisdiction over any suspect, who happen to be in its territory, no matter where the alleged crime occurs in the world and even if the suspects or the victims are not nationals of the state, or pose no direct threat to its national security.<sup>34</sup> The goal is that there should be no safe havens for the perpetrators of serious human rights violations.<sup>35</sup>

### Universal Jurisdiction and specific crimes against humanity

We may look briefly at the international crimes which international law either *requires* or *permits* states to exercise in such universal jurisdiction. In the case of genocide, there is a duty to prosecute and to prevent such crimes under both customary international law and under the Genocide Convention 1948.<sup>36</sup>

In the case of war crimes and other grave breaches of the Geneva Conventions, there is equally a duty on all states to prosecute, at least in the case of breaches of the Geneva Convention where that state has ratified the Convention.<sup>37</sup>

In the case of crimes against humanity as a general category, it is now accepted that under customary international law these are subject to *permissive* universal jurisdiction.<sup>38</sup>

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34 Latin American states have been distinctive in legislating for universal jurisdiction, for example Costa Rica. Other examples are Canada, Germany, France, Spain and Denmark. But few states have exercised the jurisdiction. Some examples are the Eichmann trial in Israel (1961) and the Klaus Barbie trial in France (1983) both related to Nazi persecution.

35 *Hard cases: bringing human rights violators to justice abroad. A guide to universal jurisdiction*, International Council of Human Rights (1999).

36 *Restatement (Third) the Foreign Relations Law of the United States, Section 404 (1987)*; N.S.Rodley *supra* note 3 at 123. Attorney General of the Government of Israel v Eichman 1961 36 ILR 5.

37 N. S. Rodley *supra*, note 2 at 121.

38 "...while no treaty requires the exercise of universal jurisdiction over perpetrators it may be assumed that such jurisdiction is permitted." N. S. Rodley *supra* note 2 at 125.

## Human rights violations not reaching the threshold of crimes against humanity

It was noted above that to constitute a crime against humanity, conduct must reach a threshold of scale or be of a systematic nature to amount to this international crime. What does international law say of violations on a smaller scale? The direction is towards holding the individual criminally accountable on the basis of universal jurisdiction. It is the view of Professor Sir Nigel Rodley, that in the case of disappearances, (outside of international armed conflict or crimes against humanity) international law permits but does not require the assumption of criminal jurisdiction over an alleged perpetrator on the basis of universal jurisdiction.<sup>39</sup> However we can also note that the Inter-American Convention on Disappearances, appears to anticipate compulsory universal jurisdiction.<sup>40</sup> For the signatories of the Inter-American Convention there is a duty to extradite or to try whether the suspect is held for a single act or a large number of such acts. The Convention defines enforced disappearance as a crime against humanity.

### Extra -legal executions

It is also the case that the protection of the right to life in international law permits acts of extra legal execution under international law, which fall below the threshold of crimes against humanity, genocide or war crimes to be tried by the state on the basis of universal jurisdiction. The UN Principles on Extra Legal Executions set out a requirement of universal jurisdiction in any case of such killing.<sup>41</sup> However there is little or no state practice to draw upon.<sup>42</sup>

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39 N. S. Rodley, *supra* note 2 at 266.

40 Inter-American Convention on the Forced Disappearances of Persons, signed 9 June 1994, entered into force 28 March 1996, reprinted in 33 I.L.M. 1529 (1994).

41 Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions ECOSOC res. 1989/65, 24 May 1989.

42 N. S. Rodley, *supra* note 2, 198.

## Torture

The clearest case of universal jurisdiction and indeed compulsory jurisdiction arises for states that have ratified the UN Torture Convention, or the OAS Convention against Torture. All states parties are required where a person is suspected of having committed torture to take jurisdiction. No matter where the act of torture occurred in the world the state must either try the suspect or extradite to a state willing to exercise criminal jurisdiction. If one includes the effects of this Convention on customary international law, of relevance to states which have not ratified the Torture Convention, torture, as an international crime, has achieved universal jurisdiction for a crime against humanity. This position was reinforced by the judgement of the ICTY Tribunal in *Prosecutor v Anto Furundziya*.<sup>43</sup> Confirming the *jus cogens* status of the prohibition on torture the Tribunal concluded:

*...at the individual level, that is, that of criminal liability, it would seem that one of the consequences of the jus cogens character bestowed by the international community upon the prohibition of torture is that every State is entitled to investigate, prosecute and punish or extradite individuals accused of torture, who are present in a territory under its jurisdiction. Indeed, it would be inconsistent on the one hand to prohibit torture to such an extent as to restrict the normally unfettered treaty-making power of sovereign States, and on the other hand bar States from prosecuting and punishing those torturers who have engaged in this odious practice abroad. This legal basis for States' universal jurisdiction over torture bears out and strengthens the legal foundation for such jurisdiction found by other courts in the inherently universal character of the crime. It has been held that international crimes being universally condemned wherever they occur, every State has the right to prosecute and punish the authors of such crimes.*<sup>44</sup>

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43 Prosecutor v Anto Furundziya Trial Court Decision, 10 December 1998; www.un.org/icty.

44 Para. 158.



## The Pinochet litigation and immunities from jurisdiction

The extent to which the practice of torture has become an international crime was dramatically shown by the Pinochet legal proceedings in Spain and England and now in Chile. Central to the English proceedings has been the claim by the former dictator of Chile to immunity from prosecution based on his status as a former head of state. One vital issue for the exercise of universal jurisdiction by an international tribunal or by national courts concerns a claim of state immunity invoked by state officials. If the central aspect of the definition of crimes against humanity is that they are widespread or systematic, then where they are directed by the Head of State or senior military or police command, a successful claim of immunity from prosecution would render the exercise of jurisdiction futile.

The long established rules of international law have held that a foreign state cannot be sued or prosecuted before the courts of another state.<sup>45</sup> This extended to high state officials, diplomats, heads of state and former heads of state. This principle of state immunity is essentially a reflection of the doctrine of sovereignty. Developments in international law and national practice had led to the principle becoming a qualified principle. Thus whereas originally the principle applied to even commercial activities of state owned or controlled agencies, that is no longer automatically the case. Government agencies engaged in international commercial activities can be sued in foreign courts.<sup>46</sup>

The developments of the 1990s in respect of international crime have qualified the principle further. It is first to be noted that the tribunals established by the Security Council, the Tribunals on Yugoslavia and Rwanda, make no exception for the official status of persons alleged to be responsibly for crimes under their jurisdiction. The ICTY by its statute and the Rwanda Tribunal makes clear that individual criminal

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45 The *Schooner Exchange v Mc Fadden*, 7 Cranch 116 (1812); M. Shaw, *International Law* 491-9 (1997) 4th ed.

46 I. Brownlie, *Principles of Public International Law*, 354 (1990) 4th ed.

responsibility extends to a serving head of state as well as head of government. Indeed, in December 1998 in *Prosecutor v Furundzija* the ICTY stated that the provisions of the statute - Article 7 (2) is “indisputably declaratory of customary international law.”<sup>47</sup>

An extraordinary example has arisen with the indictment by the ICTY of Slobadan Milosevic for crimes against international law committed by Yugoslav forces in Kosovo between January and May 1999. When indicted, on 24 May 1999, he was serving Head of State of the Former Republic of Yugoslavia. He was then defeated in the federal presidential elections in October 2000. The prosecutor, in her application for an arrest warrant, noted that the indictment represented the first in the history of the Tribunal, “to charge a Head of State during an ongoing conflict with the commission of serious violations of international humanitarian law.”<sup>48</sup> The ICTY prosecutor, has since visited Belgrade to press the new democratic authorities to execute re-issued warrants for his appearance at the Tribunal.<sup>49</sup>

The International Criminal Court statute is explicit in providing that official capacity will not be barrier to its jurisdiction.

Article 27 reads as follows,

*This statute shall apply equally to all persons without any distinction based on official capacity. In particular official capacity as Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility or constitute a ground for reduction of sentence.*

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47 Prosecutor v Anto Furundziya Trial Court Decision 10 December 1998; www.un.org/icty.

48 ICTY Press Release, 27 May 1999.

49 See Press Release, “Milosevic and Other Cases Warrants of Arrest Re-Issued to the Federal Republic of Yugoslavia,” ICTY, The Hague, 23 January 2001.

It was the principle of state immunity from prosecution for gross violations of human rights including his alleged responsibility for largescale torture, killings and disappearances when he was Head of State, that Senator Augusto Pinochet advanced in London courts to contest his extradition to Spain. Some 15 British judges considered the request for extradition from the Spanish prosecutor Judge Baltasar Garzón, and Senator Pinochet's, claim to immunity as an ex-head of State in three different hearings in 1999. The final court to consider his objection, the House of Lords, by six votes to one to reject it.<sup>50</sup> The legal principle in the case is based on an interpretation of the definition of torture in the UN Torture Convention.<sup>51</sup> That Convention defines torture as having been inflicted "by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity."<sup>52</sup> Pinochet's lawyers conceded he was a public official at the relevant times. The Court held that this clause referred to all public officials. Therefore it was not open to Senator Pinochet to claim immunity. The Convention had removed the immunity of all public officials or at least those who were former Heads of State for acts of torture. However, the majority determined that as regards the extradition, under United Kingdom law it was only possible to extradite for such acts of torture that were alleged to have occurred after the ratification of the Convention by the United Kingdom, that is after 29 September 1988.

In the event Senator Pinochet was not extradited to Spain. In March 2000, the Home Secretary in circumstances of controversy accepted medical opinion that he was unfit to stand trial. He was permitted to leave Britain and return to Chile. His medical condition has also been central to the possibility of a criminal prosecution in Chile, which remains in doubt. However he has been formally interrogated by the prosecutor over his role in the so-called "caravan of death" a grisly episode after the coup in 1973, when a military unit

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50 R. Bow Street Magistrate, ex parte Pinochet [1999] 2 W.L.R. 827; 38 I.L.M. 581 (1999).

51 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment, 1984.

52 Convention against Torture Article 1.

toured the country's jails removing and killing some 75 prisoners.<sup>53</sup>

While the focus has been on the extradition proceedings in London it should be re-called that the prosecution brought against Pinochet was a Spanish initiative. Further, that initiative did not begin with the Spanish political or judicial authorities (who in fact opposed it) but with civil society institutions. It had been the pressure of citizens of Chile that began this affair. Under a Spanish-Chilean convention of 1958, on dual citizenship, any Chilean, whether resident in Spain or not, can file a suit in a Spanish court. One such action is the "popular action" in Article 101 of *Ley de Enjuicimiento Criminal* (14 September 1992). Thousands of Chilean citizens in the *Asociación de Familiares de Detenidos Desparecidos*, as well as Spanish citizens, were instrumental in initiating the Pinochet proceedings in Spain. Indeed these proceedings began as an investigation of both crimes against Spanish citizens in Argentina by the military *Junta* in Argentina between 1976 and 1983 to which the investigation of the Chilean *Junta* for crimes between 1973 and 1990 were added. It is note worthy for the legitimacy of this case and the developing pressure to end impunity that we are able to say that it was the victims and the relatives of victims who were the source of the pressure that brought Senator Pinochet to account.<sup>54</sup> In respect of the Spanish courts it is to be noted that they had accepted that they had jurisdiction to try Senator Pinochet on the basis of universal jurisdiction recognised in Spanish Law, for certain international crimes including torture and genocide.

## Implications of the Pinochet case

The final judgement of the English court is narrow in its scope, as well as confusing and uncertain in its reasoning.<sup>55</sup> It

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53 *Guardian Newspaper*, London 27 January 2001.

54 For the background to the Spanish case, see *Derechos* Human Rights Report 11 November 1998; <http://www.derechos.net/marga/papers/spain/html>.

55 C. M. Chinkin, "Casenote on Pinochet No.3" 93 A.J.I.L. 703 (1999); N. S Rodley "Breaking the Cycle of Impunity for Gross Violations of Human Rights: The Pinochet Case in Perspective" 69 *Nordic Journal of International Law* 11-26 (2000); T. Barker, "The Future of Former Head of State Immunity after *ex parte Pinochet*," 48 I.C.L.Q. 937 (1999).

is unlikely to become an influential international precedent despite its result.<sup>56</sup> It is nevertheless one further step along the road of establishing criminal accountability of high officials for human rights abuses before national and international law. Those in positions of power who are responsible for crimes against humanity, can understand its implications for them even if they do not understand the legal arguments. The decision also underlines the necessity, already discussed, that states should ensure that their internal law is changed to accommodate the exercise of criminal jurisdiction for international crimes and that such legislation consistent with international law denies any ground for immunity in respect of such crimes. Such legislation is required by existing international law customary law and by treaty where states are required or permitted to exercise extra-territorial jurisdiction. It is equally an obligation on ratification of the Rome Statute of the International Criminal Court in respect of the complementary jurisdiction required by the Statute in the prosecution and punishment of international crimes.

### **State responsibility and criminal responsibility**

As argued at the outset the established jurisdiction of international human rights judicial mechanisms, especially the regional mechanisms, need to be thought of as complementary to the developing international criminal jurisdiction in ensuring accountability for breach of the rules of international human rights law. Such jurisdiction can be regarded perhaps as the equivalent to civil jurisdiction at the national level, which typically is closely linked to criminal jurisdiction in the vindication of rights. This is particularly the case in respect of situations of gross violation of rights, situations that in terms of the widespread and systematic nature of the violation would justify the prosecution of individuals suspected of ordering or executing such acts for crimes against humanity. The relationship, then, between global and regional international human rights mechanisms and prevention of crimes against humanity

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56 Thus, the House of Lords appeared to rule out the possibility of universal criminal jurisdiction in customary international law applying to murder and disappearances; see N. S. Rodley *supra* note 2.

is clear. The fulfilment of human rights commitments by states is the best guarantee that there will not be the extreme abuse of power, which leads to crimes against humanity.

Both the Inter-American and the European Conventions have had to respond in individual applications to situations of gross violation in particular countries. Such applications have resulted in state responsibility for the violation of these Conventions being established. Individual victims can receive compensation or restitution. But the machinery can do more than offer justice to the individual. It can identify the changes needed to stem impunity, in particular the duty on the violating state to investigate and prosecute the state agents responsible. It can also specify the changes needed in national laws and practices that are incumbent on that state to safeguard against further abuses.

Perhaps the most important contribution of the Inter-American jurisprudence over many years, and recently also the European cases, has been to focus on the importance of adequate and effective remedies, in particular effective use of the criminal law, to counter impunity for gross violation of human rights.

In *Velásquez Rodríguez*, the Inter-American Court in the context of enforced disappearances stated:

*The State has a legal duty to take reasonable steps to prevent human rights violations and to use the means at its disposal to carry out a serious investigation of violations committed within its jurisdiction, to identify those responsible, to impose the appropriate punishment and to ensure the victim adequate compensation.*<sup>57</sup>

The European Court has spoken in similar terms. Thus in *Yasa v Turkey* the Government sought to argue that civil remedies available to the victims of violation of the right to life were adequate and effective:

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57 Judgement of 29 July 1998 Series C No.4 para. 174 & 184.

*...the investigation, which the Contracting states are obliged by Articles 2 and 13 of the Convention to conduct in cases of fatal assault, must be able to lead to the identification and punishment of those responsible. As the Court has previously held, these obligations cannot be satisfied merely by awarding damages. Otherwise, if an action based on the states strict liability were to be considered a legal action that has to be exhausted in respect of complaints under Article 2 or 13 the States obligations to seek those guilty of fatal assault might thereby disappear.*<sup>58</sup>

But the capacity and willingness of the regional human rights courts to address the lines of high level responsibility that may be responsible for gross violation needs to be further developed.<sup>59</sup>

It is not the responsibility of such courts to fix individual criminal responsibility but it can and should be possible, in the investigation of individual complaints, to name names, to identify at what level of the chain of command, authorisation or toleration of practices of gross violations occurred. The new possibilities of prosecution of the individual public official, whether high or low in the state, will hopefully encourage the regional human rights courts to examine state responsibility for gross violation in terms of individual responsibilities of such officials. It then falls to the state to investigate and to prosecute those responsible.

## Conclusion

The international criminalisation of gross human rights violation and the use of enforcement mechanisms through regional human rights machinery, are different approaches to the same goal of accountability. Is it appropriate to term these the civil and criminal international approaches? <sup>60</sup> Whether such classification is appropriate or not, both can play an

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58 *Yasa v Turkey*, European Court of Human Rights judgement of 2 September 1998, para. 74.

59 K. Boyle, F. Hampson, A. Reidy, "Litigating Gross Violation of Human Rights Under the European Convention on Human Rights –the Case of Turkey–" 15 NQHR 161-73 (1997).

60 See the International Law Commission's Draft Articles on State Responsibility which develop the concept of international delicts and international crimes: *Yearbook of the International Law Commission* (1976) Chapter III B, Draft Articles on State Responsibility article 19. A/ CN.4/SER.A/1976/Add.1 (Part 2).

important part in the overall effort to achieve global implementation of common human rights standards through the rule of law and to ensure an end the era of impunity for crimes against humanity.

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## Appendix

### *Rome Statute of the International Criminal Court*

#### Article 7

#### Crimes against humanity

1. For the purpose of this Statute, “crime against humanity” means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:

- (a) Murder;
- (b) Extermination;
- (c) Enslavement;
- (d) Deportation or forcible transfer of population;
- (e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;
- (f) Torture;
- (g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;
- (h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court;
- (i) Enforced disappearance of persons;
- (j) The crime of apartheid;
- (k) Other inhumane acts of a similar character intentionally causing great suffering or serious injury to body or to mental or physical health.

2. For the purpose of paragraph 1:



- (a) “Attack directed against any civilian population” means a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack;
- (b) “Extermination” includes the intentional infliction of conditions of life, *inter alia* the deprivation of access to food and medicine, calculated to bring about the destruction of part of a population;
- (c) “Enslavement” means the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children;
- (d) “Deportation or forcible transfer of population” means forced displacement of the persons concerned by expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted under international law;
- (e) “Torture” means the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused; except that torture shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions;
- (f) “Forced pregnancy” means the unlawful confinement of a woman forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law. This definition shall not in any way be interpreted as affecting national laws relating to pregnancy;
- (g) “Persecution” means the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity;
- (h) “The crime of apartheid” means inhumane acts of a character similar to those referred to in paragraph 1, committed in the context of an institutionalized regime of systematic oppression and domination by one racial group over any other racial group or groups and committed with the intention of maintaining that regime;
- (i) “Enforced disappearance of persons” means the arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of, a State or a

political organization, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time.

3. For the purpose of this Statute, it is understood that the term “gender” refers to the two sexes, male and female, within the context of society. The term “gender” does not indicate any meaning different from the above.