

RECENT DEVELOPMENTS IN INTERNATIONAL LAW: THE INTERNATIONAL CRIMINAL COURT AND THE PINOCHET DECISION

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1 Introduction

This paper is offered as a contribution by someone whose work and expertise lies in the disciplines of law and history rather than in those of politics and philosophy. The aspiration is simply to raise the issue of whether human rights theory needs to be modified or re-examined in the light of recent developments in the legal sphere.

To date the international law relating to human rights has been directive and focused on the creation of general legislative texts, such as the International Covenant on Civil and Political Rights (ICCPR). These texts lay down general norms which states parties are obliged to effect in their internal legal systems by appropriate legal instruments. One may say that the approach of international law to human rights has, in effect, mainly been legislative in the post-war era, despite the precedent of the trials of the Nazi and Japanese war criminals in the immediate aftermath of World War II. More recently, however, there has been a shift towards a judicialisation and individualisation of human rights norms by which institutions have been set up by the international community for the purpose of trying and punishing individuals for criminal breaches of international law. This development, a product of the 1990s, although it has antecedents going as far back as the defeat of Napoleon Bonaparte,¹ has created a new field of law, usually styled international criminal law.

¹ See generally Gary Jonathan Bass *Stay the Hand of Vengeance: the Politics of War Crimes Tribunals* (Princeton University Press, Princeton, 2000).

For there to be international criminal law there has to be, of course, such a thing as international crime; there do not necessarily have to be international courts and tribunals applying the law relating to the investigation and punishment of international crimes — one can imagine international criminal law without international criminal courts — but such institutions have nevertheless certainly been established. Here the main developments have been the establishment of the ad hoc tribunals for the former Yugoslavia and Rwanda, both set up simply by special resolutions of the Security Council, and the Rome Statute of 1998 establishing the International Criminal Court (ICC).

The ad hoc tribunals, which, while not intended to be permanent were intended to function as long-standing courts of law, and the permanent ICC on the one hand, need to be distinguished from special, one-off arrangements as are sometimes made. An example of the latter is the trial of two Libyan nationals for allegedly bombing Pan Am Flight 103 which exploded on 21 December 1988 above Lockerbie, Scotland. The trial was before a Scots Court applying Scots law sitting in the Netherlands following an international agreement between Great Britain, Libya and the US.²

At the same time there have been interesting developments on the plane of domestic law. The concept of *jus cogens*, or peremptory norms of international law punishable by all states on behalf of the whole international community, has become re-energised as a result of the House of Lords decisions in *In re Pinochet*. My main focus this afternoon will, however, be on the ICC.

The move towards judicial enquiry rather than broad legislative prescription is also reflected in the development of judicial bodies set up within states to inquire into human rights breaches and other illegal actions by former regimes. This is to be distinguished from international criminal law in that the institutions are established, not by international bodies or by international treaty, but by states themselves using their own ordinary methods of law-making.³ Many states in a 'transitional' stage have set up such bodies, including Greece, Germany, South Africa, Guatemala, Ethiopia, Liberia, and Sierra Leone. The norms applied by such tribunals are those of domestic,

2 See Fraser Davidson "Lockerbie and Scots Law" [2001] 14 LJIL 171.

3 See generally Ruti G Teitel *Transitional Justice* (Oxford University Press, New York, 2000).

rather than international law *simpliciter*, but there is often a degree of overlap of course. These differences aside, it can be said that such bodies as the South African Truth and Reconciliation Commission and the International Criminal Tribunal Yugoslavia (ICTY) and International Criminal Tribunal Rwanda (ICTR) have a number of aspirations and objectives in common, and pose similar problems. What are the purposes of such judicial investigations into past wrongdoings? As one commentator has wondered, “What is law’s potential for ushering in liberalisation”?⁴

2 The International Criminal Court (ICC)

The ICC is undoubtedly the most significant institutional development. The Court — which has not yet actually come into existence — has received a considerable amount of publicity at the present time due to the decision by the present US administration to actively oppose its establishment — with, indeed, a degree of vociferousness and belligerence which has left many people normally well disposed to the US taken aback. The level of strident opposition from Washington has given rise to the unfortunate impression that the only issue that really matters with respect to the ICC is what the US government happens to think of it. Like it or not, the ICC Treaty is certainly here to stay, and indeed New Zealand has strongly supported its establishment, by means of both a very visible presence at the negotiations in Rome in 1998 and by moving quickly to enact domestic legislation implementing the Rome Statute.

It is very easy to suspend critical judgment of the ICC in a mood of celebratory liberal enthusiasm, and very tempting to dismiss US objections as merely self-serving. But there are real reasons for caution, in fact, and certainly the American super-realist approach to international diplomacy of the present day has, it must be admitted, a certain amount of intellectual weight and plenty of precedents. The *Realpolitick* stance on this issue has never been better put than by the greatest practitioner of *Realpolitick* of all time, Otto von Bismarck: “The politician has to leave the punishment of princes and peoples for their offences against the moral law to Divine providence”.⁵ Politicians have to work with flawed humanity, and in the zone of international diplomacy legalism and the technical quibblings of lawyers

4 Teitel, above, 3.

5 Gary Jonathan Bass *Stay the Hand of Vengeance: the Politics of War Crimes Tribunals* (Princeton University Press, Princeton, 2000) 57.

have no place. Putting heads of state on trial may run counter to diplomatic objectives of containing and resolving conflict. Certainly a Bismarckian view of the world seems to be emanating from Washington these days.

The feasibility of establishing an international criminal court became apparent with the establishment and (admittedly highly qualified) success of two ad hoc special tribunals. When Bosnia-Herzegovina (BiH) declared its independence in March 1992, the resulting violence led to Resolution 955 of the Security Council, 22 February 1993, establishing the ICTY. The establishment of the Court had little impact on the Yugoslav conflict of course, shown most starkly by the massacres which took place at Srebrenica (in BiH) in a supposed UN 'safe area' in July 1995. Those carrying out the Srebrenica massacres evidently were untroubled by the possibility that they might have to face being arraigned at The Hague. But the ICTY has gradually established itself as a working institution, has tried and convicted a number of individuals, and has produced a substantial amount of case law. The same is true of the ICTR, established in March 1994.

Both institutions have their critics, of course, the main criticisms being that both tribunals are far too expensive and have been in operation much longer than is really necessary. Most Serbs regard the ICTY as simply biased and anti-Serbian. The ICTY has bagged its most prestigious defendant, of course, with Slobodan Milosevic, extradited to The Hague by the Yugoslav government (led at the time by Zoran Djindjic) in June 2001. Milosevic, charged with sixty-six counts of war crimes, and with genocide in Bosnia, began his defence at The Hague in February 2002, rejecting all charges, claiming that others were to blame, including NATO, and arguing in addition that he was not responsible for such criminal acts in Bosnia and Kosovo as may have occurred.⁶

In December 1995 the General Assembly created a Preparatory Committee (PrepCom) on the establishment of an international criminal court. There were six PrepCom sessions between 1996 and the 1998 Rome conference. During the PrepCom stage the most significant step, in the eyes of a number of commentators, took place in December 1997 when Great Britain took the historic step of agreeing to the so-called "Singapore compromise", by which Security Council consent was no longer necessary in order to commence a

6 See Tim Judah "The Star of the Hague", (25 April 2002) 49 *The New York Review of Books* 10.

prosecution in the proposed ICC (although it would have power to delay proceedings). The Rome conference itself took place in June-July 1998. After fairly arduous negotiations, 120 states voted to approve the Treaty, with only seven voting against it, one of them being the US. There was strong NGO participation in the conference including, for example, by the International Committee of the Red Cross and the American Bar Association, which took a stance on the court diametrically opposed to that of the US government.

New Zealand was one of the first states to ratify the Treaty and to implement it in domestic law, which we have done very comprehensively with the International Crimes and International Criminal Court Act 2000. In April 2002 the 60th instrument of ratification of the Rome Statute was deposited, making the Treaty binding international law. The US has signed the Treaty — practically the last thing President Clinton did in office — but has not, of course, ratified it, and there is no possibility that it will.

3 The Law of the International Criminal Court

The normative law to be applied by the new body has in fact been around for some time, and in this sense the Rome Statute has not significantly affected the *content* of international law. The Rome Statute gives the ICC jurisdiction over (i) genocide; (ii) crimes against humanity; and (iii) war crimes. Genocide as an international crime derives, of course, from the Genocide Convention of 1948,⁷ largely the work of a lone Polish-Jewish professor named Raphael Lemkin. The war crimes derive from the four Geneva Conventions of 1949.⁸ To qualify as a war crime the criminal action has to be “committed as part of a plan or policy or as part of a large-scale commission of such crimes”.⁹ The Court has jurisdiction over “grave breaches”¹⁰ of the Geneva Conventions as well as “other serious violations of the laws and

7 Convention on the Prevention and Punishment of the Crime of Genocide (9 December 1948) 78 UNTS 277.

8 Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (12 August 1949) 75 UNTS 31; Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea (12 August 1949) 75 UNTS 85; Geneva Convention Relative to the Treatment of Prisoners of War (12 August 1949) 75 UNTS 135; Geneva Convention relative to the Protection of Civilian Persons in Time of War (12 August 1949) 75 UNTS 287.

9 Rome Statute of the International Criminal Court, art 8(1) (Rome Statute).

10 Rome Statute, art 8(2)(a).

customs applicable in international armed conflict”; importantly it has jurisdiction in “armed conflict[s] not of an international character” as well.¹¹ The Court, more controversially, has been given jurisdiction over “the crime of aggression”,¹² but this has yet to be defined.¹³

New Zealand’s implementing statute, the International Crimes and International Criminal Court Act 2000, follows suit and makes genocide, crimes against humanity, and war crimes as defined in the Rome Statute crimes in New Zealand law whether the crimes have been “committed in New Zealand or elsewhere”.¹⁴ This is a departure from the territoriality principle which is the usual rule in criminal law. It means, then, that should a person suspected of genocide happen to be in New Zealand, we can try that person ourselves. However, it seems that if the ICC has commenced prosecution and has requested arrest and surrender, we are obliged to hand him/her over, rather than put him/her on trial in a New Zealand court, at least under our statute.

Article 1 of the Rome Statute establishes the ICC which “shall be a permanent institution and shall have the power to exercise its jurisdiction over persons for the most serious crimes of international concern”. Article 4 confers on the Court “international legal personality”. The Court will have its permanent seat at The Hague, but it “may sit elsewhere, whenever it considers it desirable”,¹⁵ and it may carry out its functions “on the territory of any State party” and “by special agreement, on the territory of any other State”. States parties are deemed to accept the jurisdiction of the Court.¹⁶

11 Rome Statute, art 8(2)(c)-(e).

12 Rome Statute, art 5(1)(d).

13 Rome Statute, art 5(2): “The Court shall exercise jurisdiction over the crime of aggression once a provision is adopted in accordance with articles 121 and 123 defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime. Such a provision shall be consistent with the charter of the United Nations.”

14 International Crimes and International Criminal Courts Act 2000 (NZ), s 9(1) (genocide), s 10(1) (crimes against humanity), s 11(1) (war crimes). Grave breaches of the Geneva Conventions were already an offence under New Zealand law under the Geneva Conventions Act 1958.

15 Rome Statute, art 3(1).

16 Rome Statute, art (12)(1): “A State which becomes a Party to this Statute thereby accepts the jurisdiction of the Court with respect to the crimes referred to in article 5”.

Article 12 provides that the Court has jurisdiction if *either* the state “on which the conduct in question occurred” or the “state of which the person accused of the crime is a national” has accepted the jurisdiction of the Court. A state will accept the Court’s jurisdiction normally by becoming a state party, of course, but a non-party state may separately accept the jurisdiction of the Court in a particular case if it wishes.¹⁷

A case in the Court can be commenced in one of three ways.¹⁸ First, a state may refer a case to the Prosecutor; second, the case may be referred by the Security Council; or thirdly, the Prosecutor may initiate an investigation *proprio motu* (on his/her own motion). Should the Prosecutor conclude “that there is a reasonable basis to proceed with the investigation”¹⁹ he/she “shall submit to the Pre-Trial Chamber a request for an authorisation of an investigation.” The Security Council has, however, power to delay prosecutions.²⁰

Perhaps the most important limitation on the Court’s powers is the principle of *complementarity* set out in Article 17 and also to some extent in Article 20. Article 17(1) stipulates that the ICC “shall” determine that a case is inadmissible where:

1. The case is being investigated or prosecuted by a state which has jurisdiction over it, unless the state is unwilling or unable genuinely to carry out the investigation or prosecution;
2. The case has been investigated by a state which has jurisdiction over it and the state has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the state genuinely to prosecute.

An example may be the Indonesian army officers recently tried and acquitted for crimes carried out against the civilian population of East Timor. Could we

17 Rome Statute, art 12(3).

18 Rome Statute, art 13.

19 Rome Statute, art 15(3).

20 Rome Statute, art 16: “No investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the Security Council, in a resolution adopted under Chapter VII of the Charter of the United Nations, has requested the Court to that effect; that request may be renewed by the Council under the same conditions”.

say that this is a case of a state being “unwilling” to “genuinely” (whatever that means) conduct the prosecution?

Essentially the same principle is set out in Article 20, dealing with *ne bis in idem* (double jeopardy). Article 20(3) protects a defendant already tried in another Court from prosecution in the ICC, unless, however, “the proceedings in the other Court:

1. Were for the purpose of *shielding the person concerned from criminal responsibility* for crimes within the jurisdiction of the Court; or
2. Otherwise *were not conducted independently or impartially in accordance with the norms of due process recognised by international law and were conducted in a manner which, in the circumstances, was inconsistent with an intent to bring the person concerned to justice.*

Again, suppose that an Indonesian army officer acquitted by the Indonesian courts comes on a holiday to New Zealand, is arrested here following a request from the ICC for arrest and surrender, is sent to The Hague, and then seeks to invoke Article 20(3). In such a situation the ICC will have to sit in judgment on the Indonesian process and make its own assessment. No doubt issues of this kind will create a substantial volume of case law in their own right.

4 Implications of an International Criminal Court

The most obvious importance of the Rome Statute is the establishment of the Court itself. The very notion of a permanent, international criminal court is such a radically new step, and such a potentially perilous undertaking, that the flood of commentary in law reviews has become enormous and shows no sign of abating. Actual criminals will have to be actually convicted and put into actual prisons. The establishment of a court, especially a court of criminal jurisdiction, gives rise to a host of practical problems of a kind very familiar to lawyers but situated at some distance, one suspects, from the usual focus of human rights theory, to say nothing of the practice of international diplomacy. Lawyers are preoccupied by such issues as arrest and detention of suspects, rights to representation, the conduct of trials, the burden and standard of proof required, rules relating to evidence, and methods of review and appeal. Many of these issues have already proved problematic in the case of the existing ad hoc tribunals.

There are also problems deriving from contrasting approaches in the world's great legal cultures. The ICTY and the ICTR have on the whole adopted Anglo-American (rather than European Civil Law) modes of legal argumentation and procedure, which has caused practical problems for European lawyers appearing before the Tribunals. One particular issue has been the examination and cross-examination of witnesses, something Anglo-American lawyers do all the time but which is new territory for lawyers from such jurisdictions as the Netherlands, where examination and cross-examination are left to the examining magistrates.

It is inconceivable that an international criminal court could be used for Stalinist show trials, and it will have to conform to the highest standards of due process. Those appearing before it will be entitled, for example, to defence counsel, who will have to be paid for somehow; there will not only be convictions, but also acquittals, perhaps on technicalities; and there are also very practical problems relating to punishment — where are convicted persons to be detained, and who should meet the costs? Such are the advantages and the disadvantages of the rule of law, of course, ignoring for the moment the doubts of those who argue that the rule of law has little place in the Hobbesian world of international politics.

Underpinning all of these concerns one might say there certainly are human rights principles, although here we are talking about the rights of the likes of Radislav Krstic or Slobodan Milosevic to a due process and a fair trial — the human rights of international criminals. But this is only to recognise on an international plane an aspiration that all states should aspire to at the domestic level, of course. Of all the practical procedural problems which confronted the two ad hoc Tribunals, none has proved more problematic than the arrest and detention of suspects.

5 Putting History on Record

My own interest in this subject derives from a somewhat unusual route, that of a practitioner in the Waitangi Tribunal. At first sight the Waitangi Tribunal, which is of course merely a commission of enquiry, has nothing much in common with the ICC or the ad hoc tribunals. However, one of the main justifications that has been advanced for the current enthusiasm, both for international criminal courts and for judicial investigations in states in transition, is the creation of an authoritative record. The ICTY could not stop Srebrenica, but it can at least investigate it closely and authoritatively and create a body of evidence and testimony which can endure and which future

generations can use. The most obvious example is the Nuremberg trials, the records of which remain a key source for historians of the Holocaust. And a very similar aspiration underpins the work of the Waitangi Tribunal.

I happen to believe that this is indeed vital, perhaps because I am a historian, but it also perhaps indicates some areas of discussion for human rights theory. Is there, perhaps, a right to have atrocity exposed and recorded — a poor service to the victims, but surely vastly preferable to forgetting? And also, perhaps, a right of testimony — for the victims of human rights breaches to at least be able to *speak*, to say aloud, in an authoritative forum where one's words will be listened to and recorded in a permanent form what happened to them? These are deep moral and ethical imperatives, and areas where legal commentators could benefit from reasoned analysis by specialists in the theory of human rights.

6 International Crime in Domestic Courts

The idea of an international crime is that the prohibited conduct is a criminal act irrespective of whether it is criminalised in domestic law. The matter of the relationship between international and domestic criminal law gives rise to the converse question whether domestic courts may try and convict persons accused of international crimes committed elsewhere. Generally criminal law is territorial; New Zealand criminal law applies to the territory of New Zealand, including foreigners who happen to be in the jurisdiction, not to New Zealanders overseas (unless stated otherwise). Crimes committed elsewhere are dealt with by extradition. But there are some crimes which are regarded as criminal everywhere and which may be tried and convicted by all courts. As noted, there have been significant departures from the core territoriality rule with our 2000 Act, but the principle of peremptory norms of international law has a long history.

The most often cited example of such a crime is piracy (noted for example by Lord Millett in his judgment in *Pinochet*²¹). An early rule of international law emerged that all states may try and convict all pirates, regardless of where the crime was committed — often it would be committed on the high seas, of course, but not necessarily. Another departure from territoriality was Israel's

21 *R v Bow Street Metropolitan Stipendiary Magistrate and others, Ex parte Pinochet Ugarte (No 3)* [2000] 1 AC 147, 275 (HL) Lord Millett; see also Bartram S Brown "The Evolving Concept of Universal Jurisdiction" (2001) 35 New England Law Review 383, 383-4.

actions in kidnapping Eichmann and trying him in Israel — not only were the crimes not committed in Israel, but Israel did not exist as a state when the crimes were committed. To counter this, the Israeli courts (the Jerusalem District Court and the Supreme Court of Israel) took the stance that Eichmann's crimes were of such a nature that all states, Israel included, were legally justified in arresting, trying, convicting and punishing him.²²

The *Pinochet* case was, of course, an extradition case — a Spanish Court issued two arrest warrants against Pinochet for crimes of murder and torture committed against Spanish nationals in Chile, and the documents were served on the British authorities when Pinochet was in England obtaining medical treatment. Pinochet was arrested and his lawyers then applied immediately for *habeas corpus* and leave to seek judicial review. A complicating issue was whether Pinochet, as a former head of state, was entitled to immunity from criminal jurisdiction in English law (he was not).

The core principle in extradition law in most states, including our own, is the 'double criminality' rule — the extraditable offence has to be an offence in both the host state and the state seeking extradition at the time when the offence was committed. The end result of the case was that this requirement was met — just — because torture became a crime in English law in 1988. Pinochet could only be extradited for offences committed after that time, which happened to be only the last fifteen months or so of his being in power. This is not a particularly significant outcome in itself, although there is the unusual gloss that the crimes committed were not committed in the state seeking extradition (usually they are, of course).

What makes the case more interesting, however, is that some of the Law Lords were prepared to consider the possibility that torture became a crime in English law *even before* 1988 under the doctrine of *jus cogens* or peremptory norms. This was complicated too, by the existence of an international treaty, the 1984 Torture Convention. The most interesting of the judgments was the dissenting judgment of Lord Millett, who held that English courts had jurisdiction even before 1988 over torture committed in foreign states on the basis of customary international law. Lord Millett paid particular attention to

22 *Attorney-General of Israel v Eichmann* (1962) 36 ILR 5 (District Court of Jerusalem); 277 (Supreme Court of Israel).

the Supreme Court of Israel's decision in *Eichmann*. Lord Millett derived the three following principles from the decision in *Eichmann*:²³

1. There is no rule of international law which prohibits a state from exercising extraterritorial criminal jurisdiction in respect of crimes committed by foreign nationals abroad;
2. War crimes and atrocities of the scale and international character of the Holocaust are crimes of universal jurisdiction under customary international law;
3. The fact that the accused committed the crimes in question in the course of his official duties as a responsible officer of the state and in the exercise of his authority as an organ of the state is no bar to the exercise of the jurisdiction of a national court.

Lord Millett concluded:

The trend was clear. War crimes had been replaced by crimes against humanity. The way in which a state treated its own citizens within its own borders had become a matter of legitimate concern to the international community. The most serious crimes against humanity were genocide and torture. Large scale and systematic use of torture and murder by state authorities for political ends had come to be regarded as an attack upon the international order. Genocide was made an international crime by the Genocide Convention in 1948. By the time Senator Pinochet had seized power, the international community had renounced the use of torture as an instrument of state policy. The Republic of Chile accepts that by 1973 the use of torture by state authorities was prohibited by international law, and that the prohibition had the character of jus cogens or obligation erga omnes. But it insists this did not confer universal jurisdiction or affect the immunity of a former head of state ratione materiae from the jurisdiction of foreign national courts.

In my opinion, crimes prohibited by international law attract universal jurisdiction under customary international law if two criteria are satisfied. First, they must be contrary to a peremptory norm of international law so as to infringe a jus cogens. Secondly, they must be so serious and on such a scale that they can justly be regarded as an attack upon the international legal order.

23 *Ex Parte Pinochet (No 3)*, above, 274 Lord Millett.

Thus to summarise: first, the rapid development of international criminal courts poses many new challenges for both lawyers and specialists in human rights theory. Second, the once somewhat moribund doctrine of *jus cogens* has taken on new life as a result of the decision in *Pinochet*, strengthening the idea that there are universal standards and norms which transcend the national, religious, cultural and ethnic divisions of humanity.

