Ending the impunity of perpetrators of human rights atrocities: A major challenge for international law in the 21st century

by
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A lengthy catalogue of atrocities serves as a tragic reminder of the fragility of commitments made by the international community since the end of the Second World War to ensure greater respect and protection for human life. Millions of innocent lives have been lost in war and at the hands of oppressive governments, in flagrant violation of the laws developed to protect the victims of armed conflict and to regulate the conduct of States towards their citizens. Non-fulfilment of obligations accepted by the majority of States to prosecute and punish genocide, grave breaches of international humanitarian law and other crimes against the most fundamental human rights has created a safe environment for the architects of such inhumane policies.

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Attracting universal revulsion, it was the atrocities committed during the conflicts in the former Yugoslavia and in Rwanda that ultimately provoked the international community to respond to this situation. These events consolidated a determination to revive the legacy of Nuremberg and to end the culture of impunity that has prevailed since and beyond international and domestic trials of the perpetrators of crimes against humanity and war crimes during the Second World War.[1] The establishment of *ad hoc* international criminal tribunals for the prosecution of serious violations of international humanitarian law in the former Yugoslavia and Rwanda has been instrumental in bringing to a successful conclusion years of effort to establish a permanent International Criminal Court. The practice of these institutions will have a positive impact on the enforcement of human rights and international humanitarian law. The increased concern for the punishment of atrocities that their establishment represents is acknowledged as influencing a third development, of monumental significance for human rights and international criminal law: the decision by British courts that Senator Augusto Pinochet could be extradited to Spain to face trial for crimes against humanity allegedly committed while he was Head of State of Chile. The final decade of the turbulent twentieth century therefore stands to be remembered as a defining moment for international law.

This commentary examines developments that put in place the elements of an international legal order in which those responsible for the commission of mass human rights atrocities, whether during armed conflict or in peacetime, will not escape justice. The Statutes of the two International Criminal Tribunals and the International Criminal Court offer clarification of the current state of

1 For example, "The World Conference of Human Rights expresses its dismay at the massive violations of human rights especially in the form of genocide, ethnic cleansing and the systematic rape of women in war situations (...) While strongly condemning such abhorrent practices it reiterates the call that perpetrators of such crimes be punished and such practices immediately stopped." 1993 Vienna Declaration and Programme of Action, World Conference on Human Rights, UN Doc. A/CONF.157/24 (Pt.1), 13 October 1993, para. 128, cited by John Dugard, "Bridging the gap between human rights and humanitarian law: The punishment of offenders", *IRRC*, No. 324, September 1998, pp. 445-453.

international humanitarian law and their jurisprudence may contribute significantly to the further development of that law. The following review focuses on internal conflicts: armed conflicts governed by Article 3 common to the Geneva Conventions of 12 August 1949 and/or their Additional Protocol II of 8 June 1977, and internal disturbances and tensions that are outside the scope of international humanitarian law but are subject to rules of human rights law. Internal armed conflicts have been the predominant and the most brutal type of conflict over the past 50 years. They have been the forum for the most flagrant and widespread human rights abuses and where the tragic consequences of impunity have been most clearly in evidence.

Human rights and international humanitarian law

It is now generally accepted that human rights law and humanitarian law are distinct but interrelated bodies of law. Both contain proscriptions against torture, genocide, slavery and extra-judicial killings that are regarded as having achieved the status of *jus cogens* and obligations *erga omnes*. As "obligations toward the international community as a whole [they are, by] their nature... the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection..."[2] To the extent that the two bodies of law overlap and share the same basic objective — the protection of human life and dignity — humanitarian law, without express reference to human rights, promotes and protects the most fundamental rights during armed conflict.[3] This is perhaps most

2 *Barcelona Traction Light and Power Company Limited*, Judgment, I.C.J. Reports 1970, p. 32, cited in Hans-Peter Gasser, "Ensuring Respect for the Geneva Conventions and Protocols: The Role of Third States and the United Nations", in Hazel Fox and Michael Meyer (eds), *Armed Conflict and the New Law*, Vol. 2: *Effecting Compliance*, British Institute of International and Comparative Law, London, 1993, pp. 21-22

3 From the human rights perspective: UN General Assembly Resolution 2444 (XXIII) of December 1968, "Respect for human rights in armed conflicts", and Resolution 2675 (XXV) of December 1970, "Basic principles for the protection of civilian populations in armed conflicts", Article 1 of which states that "[f]undamental human rights, as accepted in international law and laid down in international instruments, continue to apply fully in situations of armed conflict". Both resolutions are regarded as declaratory of customary international law.

evident in Article 3 common to the Geneva Conventions, as supplemented by Additional Protocol II of 1977, which must both be recognized as expressing obligations *erga onmes*.[4] In setting standards for conflicts between State forces and organized armed groups within the territory of a State, Article 3 is concerned, as is human rights law, with the relationship between a State and its nationals.[5] As the reference to "each Party to the conflict" indicates, Article 3 imposes obligations on both State and non-State players, whereas human rights are enforceable only against the State. Therefore, insofar as human rights are enshrined within the standards prescribed by Article 3 common to the Geneva Conventions, abuses of these rights by non-State forces are prohibited.

Through both customary and conventional law a gradual criminalization of acts constituting serious human rights violations has occurred, together with an import from international humanitarian law of the principle of individual criminal responsibility and the duty of States to punish or extradite perpetrators.[6] In this respect it might be observed, at least until recently, that humanitarian law applicable to internal armed conflicts has lagged behind human rights law. Common Article 3 and Additional Protocol II contain a body of rules far less comprehensive than those for international armed conflicts. In contrast with the grave breaches provisions of the Geneva Conventions and Additional Protocol I, neither Article 3 nor Protocol II make express provision for criminal responsibility for their violation and are not subject to the obligation to exercise universal jurisdiction

4 Same view: Gasser, *op. cit.* (note 2), pp. 22-23.

5 Louise Doswald-Beck and Sylvain Vité, "International humanitarian law and human rights law", *IRRC*, No. 293, March/April 1993, pp. 94-119.

6 See e.g. Convention on the Prevention and Punishment of the Crime of Genocide (1948); (United Nations) Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984), Articles 2, 4 and 5; Convention on the Suppression and Punishment of the Crime of Apartheid (1973) — apartheid has been declared a crime against humanity by the UN General Assembly on several occasions since 1966 and by SC Res. 556 of 13 December 1994; Convention against the Taking of Hostages (1979); Convention for the Suppression of Terrorist Bombings (1988). In relation to gaps between the Conventions on hostage-taking and terrorist bombings and international humanitarian law, see Dugard, *op. cit.* (note 1).

that attends grave breaches.[7] Schools of thought on the law of internal armed conflict have encompassed views that violations of common Article 3 and Protocol II are not crimes under international law, or that even if they are, they do not entail individual criminal responsibility and are not therefore subject to universal jurisdiction. With respect to customary law, while some commentators have contended that no customary law exists for internal armed conflicts, others believe that the customary law applicable to internal armed conflicts does not include the concept of war crimes.[8]

The Statutes for the International Criminal Tribunals reflect this dichotomy between international and internal armed conflicts. The Yugoslav Statute, establishing a tribunal for conflicts that the Security Council regarded as essentially international in character,[9] includes within the Tribunal's subject-matter jurisdiction grave breaches and violations of the laws and customs of war but excludes

7 In the case *Nicaragua v. United States, Merits*, I.C.J. Reports 1986, p. 220, the Court took the view that Article 1 common to the 1949 Geneva Conventions, which obliges States parties to respect and ensure respect for the Conventions, also applies to conflicts regulated by common Article 3. The obligation imposed by Article 1 may include penal suppression of violations. On this point, see Theodor Meron, "International criminalization of internal atrocities", *American Journal of International Law*, Vol. 89, July 1995, p. 570.

8 UN War Crimes Commission for Yugoslavia, UN Doc. S/1994/674, annex (1994): "The content of customary law applicable to internal armed conflicts is debatable. As a result, in general (...) the only offences committed in internal armed conflicts for which universal jurisdiction applies are 'crimes against humanity' and genocide, which apply irrespective of the conflicts' classification" (para. 42). "There does not appear to be a customary international law applicable to internal armed conflicts which includes the concept of war crimes" (para. 52). Cited by Meron, *ibid.*, p. 559.

9 In *Prosecutor v. Duško Tadic (Jurisdiction)*, Case No. IT-94-1-AR72, 2 October 1995, the Appeals Chamber concluded "that the conflicts in the former Yugoslavia have both internal and international aspects, that the members of the Security Council clearly had both aspects of the conflicts in mind when they adopted [the Statute], and that they intended to empower the International Tribunal to adjudicate violations of humanitarian law that occurred in either context" (paras. 74-78). For analyses of this approach see George Aldrich, "Jurisdiction of the International Criminal Tribunal for the Former Yugoslavia", *The American Journal of International Law*, Vol. 90, January 1996, p. 64, and William Fenrick, "The development of the law of armed conflict through the jurisprudence of the International Criminal Tribunal for the Former Yugoslavia", *Journal of Armed Conflict Law*, Vol. 3, December 1998, pp. 200-210.

reference to violations of Article 3 and Protocol II. Another reason offered for their exclusion was that Article 3 and Protocol II "were not rules of international humanitarian law which are beyond doubt part of the customary law".[10] Similarly, the Statute for the Rwanda Tribunal excludes from the Tribunal's jurisdiction grave breaches and violations of the laws and customs of war on the grounds that these have no application to internal armed conflicts. However, the Security Council granted the Rwanda Tribunal jurisdiction over violations of Article 3 and Protocol II. In doing so, it included within the Tribunal's jurisdiction "international instruments regardless of whether they were considered part of customary international law or whether they have customarily entailed individual criminal responsibility for the perpetrator of the crime".[11] The findings of the Appeals Chamber of the Yugoslav Tribunal in *Prosecutor v. Tadic*[12] on the existence and the scope of customary international law for internal armed conflicts, although controversial, defend this important development from challenges that it violates the rule of *nullum crimen sine lege*.[13]

International humanitarian law applicable to internal armed conflicts has assumed new dimensions through the Rwanda Statute and the jurisprudence of the Yugoslav Tribunal. The Rome Statute, for the most part, affirms these developments and may be taken to codify international humanitarian law applicable to internal armed conflicts as it has evolved, particularly since the adoption of Additional Protocol II.

10 Report of the UN Secretary-General pursuant to Paragraph 2 of Security Council Resolution 808, UN Doc. S/25704, para. 34 (1993), cited in Payam Akhavan, "The International Criminal Tribunal for Rwanda: The politics and pragmatics of punishment", *The American Journal of International Law*, Vol. 90, 1996, p. 503.

11 Report of the Secretary-General pursuant to Paragraph 5 of Security Council Resolution 955 (1994), UN Doc. S/1995134, para. 12.

12 *Tadic* (Jurisdiction), *loc. cit.* (note 9), para. 134.

13 See Meron, *op. cit.* (note 7), pp. 565-568, and Lindsay Moir, "The implementation and enforcement of the laws of non-international armed conflict", *Journal of Armed Conflict Law*, Vol. 3, December 1998, p. 164.

International humanitarian law and internal armed conflicts

To the extent that the Statutes and jurisprudence of the International Criminal Tribunals and the Rome Statute are accepted as affirming developments in international humanitarian law, the substance of the law applicable to internal armed conflicts may be stated to be as follows:

Serious violations of the law applicable to internal armed conflicts are international crimes that entail individual criminal responsibility.

The Rome Statute provides the first treaty-based statement of the criminality of violations in internal armed conflicts. There are two strands to this position. Firstly, serious violations of Article 3 and of Protocol II are international crimes, over and above the criminality of the acts that they proscribe under national law. Secondly, the body of law applicable to internal armed conflict includes not just these provisions but also laws and customs of war that were traditionally regarded as confined to international armed conflicts. The Appeals Chamber in *Tadic* determined the existence of a customary law basis for both strands. It concluded that customary law "imposes criminal liability for serious violations of common Article 3, as supplemented by other general principles and rules on the protection of victims of internal armed conflict, and for breaching certain fundamental principles and rules regarding the means and methods of combat in civil strife".[14] In effect, customary rules encompassing most of the Hague law and provisions of the Geneva Conventions other than the grave breaches provisions have developed to govern internal conflicts.[15]

The war crimes over which the International Criminal Court will have jurisdiction are grave breaches of the Geneva Conventions, serious violations of their Article 3,[16] and other serious

14 *Tadic* (Jurisdiction), *loc. cit.* (note 9), para. 134.

15 *Ibid.*, para. 127

16 Rome Statute of the International Criminal Court, 17 July 1998, Art. 8 para. 2(a) and (c).

violations of the laws and customs of war applicable to international and internal armed conflicts "within the established framework of international law".[17] This expression may signify that violations of the laws and customs of war in international and internal armed conflicts, like grave breaches and violations of Article 3, are already war crimes under customary international law.[18]

With respect to the specific war crimes listed, the Statute does not include all violations of the laws and customs of war committed in international armed conflicts and does not reproduce those listed *verbatim* for internal armed conflicts. In excluding, for example, the prohibited use of weapons, it does not go as far as the Appeals Chamber's determination of the law on means and methods of warfare applicable to internal armed conflicts.[19] Whereas the decision in *Tadic* signalled a move towards a common body of laws and customs for all conflicts, the Rome Statute maintains the distinction between international and internal armed conflicts. This more restrictive approach to the law of internal armed conflicts may, however, be read in conjunction with Article 10 of the Statute which provides that, "[n]othing in this Part shall be interpreted as limiting or prejudicing in any way existing or developing rules of international law for purposes other than this Statute".

While express reference to Protocol II is omitted, some of its provisions are included with regard to violations of the laws and customs of war. The Statute applies the exclusionary definition of "armed conflict" found in Protocol II to the provisions relating to internal conflicts, and this may well finally settle the debate as to whether common Article 3, in not including such an exclusionary definition, also applies to internal violence of lower intensity. The provision relating to violations of the laws and customs of war applies only to armed conflicts taking place in the territory of a State, "when there

17 *Ibid.*, Art. 8, para. 2 (b) and (e).

18 On this point see Antonio Cassese, "The International Criminal Court: Some preliminary reflections", *European Journal of International Law*, Vol. 10, 1999, p. 152.

19 *Tadic* (Jurisdiction), *loc. cit.* (note 9), paras. 119-124.

is protracted armed conflict between governmental authorities and organised armed groups or between such groups".[20] Therefore, unlike Protocol II, this provision also applies to conflicts in which State forces are not involved.

Crimes against humanity may be committed in international or internal armed conflicts and entail individual criminal responsibility.

The Rome Statute contains a commendably clear and comprehensive definition of crimes against humanity and settles the discrepancies between the general definition of the offence in the Statutes of the two existing International Criminal Tribunals. Whereas the Yugoslav Tribunal has jurisdiction to prosecute persons responsible for the specified crimes when committed in an international or internal armed conflict, the Statute for the Rwanda Tribunal makes no reference to armed conflict, with the implication that such crimes may also be committed outside of armed conflict. Reference to armed conflict is excluded in the Rome Statute, with the effect that the International Criminal Court will have jurisdiction over such crimes committed in internal or international armed conflict and also in peacetime. It therefore lends weight to the findings of the Appeals Chamber in the *Tadic* case that "[i]t is now a settled rule of customary international law that crimes against humanity do not require a connection to international armed conflict [and that] customary international law may not require a connection between crimes against humanity and any conflict at all".[21]

The general definition in the Rome Statute does not include a discriminatory element and instead lists persecution on political, racial, national, ethnic, cultural, religious, gender or other grounds as a specific crime. Unlike the Yugoslav Statute, the Rwanda Statute requires that the crimes listed be committed "as part of a widespread or systematic attack against any civilian population on national,

20 Rome Statute, Article 8, para. 2(f).

21 *Tadic* (Jurisdiction), *loc. cit.* (note 9), para. 141.

political, ethnic, racial or religious grounds". The Trial Chamber in *Tadic* found that a discriminatory element was necessary.[22] In addition, the Rome Statute follows the Trial Chamber's approach by specifying that the offences listed must be committed as part of a widespread or systematic attack against any civilian population, involving the multiple commission of those offences, pursuant to or in furtherance of a State or organizational policy to commit such an attack and covers isolated attacks committed as part of that policy.[23] Therefore, as with Article 3 of the 1949 Geneva Conventions, it covers the actions of non-State forces.

In relation to the specific crimes, the Statute develops and adds to the list of crimes in the Statutes for the International Criminal Tribunals by incorporating further crimes under humanitarian and human rights law. It broadens the elements of the crimes of deportation and imprisonment, includes sexual slavery, enforced prostitution and forced pregnancy, enforced sterilization and rape under the category of sexual violence, and also adds enforced disappearances and the crime of apartheid to the list.[24] Each of these crimes will be prosecutable by the International Criminal Court, whether committed in armed conflict or in peacetime.

Grave breaches of the Geneva Conventions cannot be committed in internal armed conflicts.

That customary international law has not yet developed to the point of extending its coverage of grave breaches to internal armed conflicts is evident from the Statutes of the International Criminal Tribunals. This was confirmed by the Appeals Chamber in the *Tadic* case, which concluded that "in the present state of the development of the law", its jurisdiction to prosecute grave breaches applies only to offences committed in the context of international armed conflicts.[25]

22 *Prosecutor v. Tadic*, Case IT-94-1-T, Opinion and Judgment, 7 May 1997, para. 652.

23 Rome Statute, Article 7, paras. 1 and 2(a). *Tadic* (Judgment), *loc. cit.* (note 9), paras. 635, 646, 653-655.

24 Rome Statute, Art. 7, para. 1 (a)-(k).

25 *Tadic* (Jurisdiction), *loc. cit.* (note 9), paras. 79-84.

The current position of the law of grave breaches is also reflected in the Rome Statute which, in relation to war crimes, separates the laws applicable to international armed conflicts from those applicable to internal armed conflicts.

Finally, it has been established since 1948 that genocide is a crime in internal and international armed conflicts, as well as in peacetime. The International Court of Justice in 1996 confirmed that the obligation on States under the Genocide Convention to prevent and punish the crime of genocide applies equally whether the conflict in question is international or internal.[26]

Through customary law, international humanitarian law has evolved to meet the realities of modern warfare. Article 3, introduced as a minimum humanitarian standard to be respected by the parties to internal armed conflicts, now has the force of international criminal law behind it. The customary law extension of an as yet indeterminate number of the laws and customs of war to internal armed conflict imports the concept of war crimes into internal armed conflicts. The precise scope of this extension will be determined by how the law is developed by, and outside, the jurisprudence of the International Criminal Court. It is now evident that customary law imposes individual criminal responsibility for all violations committed in internal armed conflicts. Of course, customary law also has the effect of extending the reach of international humanitarian law to States that are not parties to the various Conventions. While this is not as critical with respect to the 1949 Geneva Conventions which are by now almost universally accepted, it is important for the Hague Convention IV of 1907 with its Regulations respecting the Laws and Customs of War on Land and, to a lesser extent, for the two Additional Protocols of 1977.

Universal jurisdiction

What are the implications of these developments for the principle of universal jurisdiction? It is now accepted that crimes

26 Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide, 1948 (*Bosnia-Herzegovina v. Yugoslavia*), I.C.J. Reports, 1996, para. 32.

against humanity are subject to universal jurisdiction.[27] The Genocide Convention makes provision for persons accused of genocide to be tried only by a competent tribunal of the State in which the crime was committed or by an international penal tribunal. But as genocide is also an international crime under customary international law, it may now be a principle of customary international law that all States have jurisdiction to prosecute the perpetrators of genocide, wherever committed.[28] If violations of Article 3 common to the Geneva Conventions and of the laws and customs of war applicable to internal armed conflicts are international crimes, then they must also be subject to universal jurisdiction.[29] Such violations are not subject to the mandatory universal jurisdiction provided for grave breaches of the Geneva Conventions. However, States party to the Conventions are additionally required to take "measures necessary for the suppression of all acts contrary to the provisions of the [Conventions] other than the grave breaches (...)".[30] Suppression can include prosecution and punishment. The concept of universal jurisdiction is permissive by definition, allowing any State "to apply its laws to certain offences even in the absence of territorial, nationality or other accepted contacts with the offender or the victim".[31] It might be said that States have a right to exercise universal jurisdiction in respect of violations in internal conflicts and certainly a number of examples of State practice tend to support this.[32]

27 Meron, *op. cit.* (note 7), p. 569.

28 *Ibid.*

29 On this point see Moir, *op. cit.* (note 13), p. 169. See also the approach of the US Appeals Court, Second Circuit, in *Kadic v. Karadzic*, 70 F 3d 232 (2d Cir 1995).

30 First Geneva Convention, Article 49, para. 3; Second Geneva Convention, Article 50, para. 3; Third Geneva Convention, Article 129, para. 3; and Fourth Geneva Convention, Article 146, para. 3. See Meron, *op. cit.* (note 7), p. 569.

31 *Ibid.*, p. 570.

32 For a comprehensive survey of State practice in relation to the right to exercise universal jurisdiction over "war crimes" committed in internal armed conflicts, see Thomas Graditzky, "Individual criminal responsibility for violations of international humanitarian law committed in internal armed conflicts", *IRRC*, No. 322, March 1998, pp.29-56.

But if indeed Article 3 and Protocol II and the other laws and customs of war encompass obligations *erga omnes,* do States not have a corresponding obligation *erga onmes* to enforce these rules? That there is an obligation to exercise universal jurisdiction with respect to violations committed in internal armed conflicts finds support in the Rome Statute. Without distinguishing between the crimes over which the International Criminal Court will have jurisdiction, the Preamble to the Statute recalls "that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes (...)". If this is the case, then all States have a duty to prosecute and punish all violations of international humanitarian law, including those committed in internal armed conflicts. In view of the way the law has developed, it may be argued that the express application of mandatory universal jurisdiction only to grave breaches does not exclude the possibility of a similar obligation for other breaches.

The Pinochet legacy

Senator Pinochet's arrest in London on 16 October 1998 was effected pursuant to a provisional warrant following the issue of an international arrest warrant by Spanish authorities. The warrant alleged the Senator's involvement in the murders of Spanish nationals in Chile between September 1973 and December 1993. A second provisional arrest warrant was issued on 22 October 1998 with respect to allegations of torture, hostage-taking and conspiracy to commit these crimes, as well as conspiracy to commit murder, between January 1976 and December 1992.

Following an application by the Senator's legal representatives for judicial review, both provisional arrest warrants were quashed by the High Court.[33] Murder of Spanish nationals in Chile was held not to constitute an extradition crime under British law. In relation to

33 *R v. Evans and Another*, ex parte *Pinochet Ugarte*; *R v. Bartle*, ex parte *Pinochet Ugarte*, Judgment, 28 October 1998.

the remaining charges the court accepted the Senator's claim that as a former head of State he was entitled to immunity under British law for acts committed in the performance of his official functions while head of State. The High Court stayed the quashing of the second warrant pending an appeal to the House of Lords for determination of the "proper interpretation and scope of the immunity of a former head of state from arrest and extradition proceedings in the UK for acts committed while he was head of state". On 5 November the Penal Chamber of the Audiencia Nacional ruled 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. A formal request for Senator Pinochet's extradition was issued in Spain on 11 November 1998 and was followed by extradition requests by Switzerland, France and Belgium.

The House of Lords delivered its judgment on 25 November 1998 and held, by a three to two majority of the panel of law lords set up to examine the extradition requests, that the Senator was not entitled to immunity. While a former head of State would continue to enjoy immunity with respect to acts performed in the exercise of the functions of a head of State, torture and hostage-taking could not be regarded as part of those functions.[34] The acts to which immunity attached were those recognized by international law as the functions of a head of State. "But international law had made plain that certain types of conduct, including torture and hostage-taking, were not acceptable conduct on the part of anyone. This applies as much to heads of state, or even more so, as it does to everyone else: the contrary conclusion would make a mockery of international law".[35] Taking into consideration the rulings of the Audiencia Nacional and the House of Lords, the Home Secretary decided to issue authority for extradition proceedings to continue.

34 *R v. Bow Street Metropolitan Stipendiary Magistrates Court and Others*, ex parte *Pinochet Ugarte* [1998] 4 All England Law Reports 897.

35 Per Lord Nicholls, pp. 939-940.

On 17 December 1998, however, the House of Lords held that its ruling should be set aside on the grounds of the possible appearance of bias on the part of one of the law lords who had supported the majority ruling because of his undeclared connections with a human rights organization that had been permitted to intervene in the appeal.[36] As a result, the appeal from the High Court would have to be reheard.

Judgment was delivered on 24 March 1999 and a panel of seven law lords again ruled in favour of extradition, by a six to one majority, but adopted a more restricted approach to the case on the basis of British extradition law.[37] The judges acknowledged that the systematic use of torture on a large scale and as an instrument of state policy is a crime against humanity, possessing the character of *jus cogens* and justifying States in taking universal jurisdiction over torture wherever committed.[38] They felt, however, that statutory authority is required to allow the British courts to exercise extra-territorial jurisdiction over such crimes. The requisite authority is provided by legislation enacted on 29 September 1988, which incorporated the 1984 Torture Convention into UK law. Extra-territorial torture became a crime under UK law and subject to prosecution in the UK from this date. However, under current extradition law, the UK cannot extradite for a crime that was not a crime under British law and the law of the State requesting extradition when it was committed. Therefore, if extradition were to proceed, it could only do so with respect to crimes alleged to have been committed after 8 December 1988, the date on which the UK ratified the Torture Convention and by which time the Convention was in force in the three countries involved in the case.[39]

36 *R v. Bow Street Metropolitan Stipendiary Magistrates Court and Others*, ex parte *Pinochet Ugarte* (No. 2) [1999] 1 All England Law Reports 577.

37 *R v. Bow Street Metropolitan Stipendiary Magistrates Court and Others*, ex parte *Pinochet Ugarte* (No. 3)[1999] 2 All England Law Reports 97.

38 Per Lord Browne-Wilkinson, p. 108, and Lord Millett, p. 178.

39 Spain had ratified the UN Torture Convention in October 1987 and Chile had ratified it in September 1998.

This being established, their Lordships then examined the Torture Convention and held that by redefining the existing international crime of torture as acts committed "by or at the instigation or with the consent or the acquiescence of *a public official* (...)" and requiring States to punish or extradite persons responsible for its commission, the Convention effectively negates the immunity of a former head of State. The notion of continuing immunity *rationae materiae* is inconsistent with the provisions of the Convention and States parties had accepted this.

The effect of the ruling was to reduce the number of crimes for which Senator Pinochet could be extradited from over thirty to three charges relating to torture. For this reason, the House of Lords considered that the Home Secretary should reconsider his authorization for the continuation of extradition proceedings. Nevertheless, on 15 April 1999 the Home Secretary issued a second authority to proceed.

Committal proceedings commenced at the end of September and on 8 October 1999 a metropolitan magistrate ruled that the Senator could be extradited to Spain. A legal challenge against this ruling that was to be heard in March 2000 was overtaken by subsequent events. Representations were made to the Home Secretary to the effect that, given the Senator's failing health, he should be allowed to return to Chile on humanitarian grounds. On 11 January 2000, the Home Secretary announced that, having received the results of a medical examination which revealed that the Senator was unfit to stand trial, he was minded not to allow extradition to Spain. Requests for a second medical examination involving doctors from Spain and Belgium were rejected as unnecessary to the Home Secretary's decision on the Senator's fate. Challenges made by human rights organizations against the procedures followed by the Home Secretary resulted in a High Court ruling in February that the medical report should be disclosed to the countries seeking extradition. The Spanish government announced its intention not to seek judicial review of the Home Secretary's decision. On 2 March 2000 the Home Secretary confirmed his decision not to extradite the Senator to Spain, thereby permitting the Senator to return to Chile. The final outcome does not detract

from what this remarkable episode has established and confirmed in the context of domestic and international law.

The significance of the *Pinochet* case is, first and foremost, the very fact that it has happened. It has provided an unprecedented example of individual States applying the letter and the spirit of international criminal law to human rights abuses — crimes against humanity — committed in peacetime within the sovereign territory of another State and holding the former ruler of that State accountable for those crimes. It has also represented an unprecedented acknowledgement by national courts of their States' obligations under the Torture Convention. Members of the House of Lords stated that if Senator Pinochet was not extradited the UK would have to prosecute him itself. The case symbolizes the changing attitude towards State sovereignty and the rule of non-intervention, the twin pillars of the classical paradigm of the international legal order. Human rights are no longer regarded as among the matters essentially within the domestic jurisdiction of a State but are the concern of the international community as a whole, while respect for the customary law rule of non-intervention is conditional upon a State ensuring the well-being of its people.[40]

In some ways, the *Pinochet* case is a reflection of the international legal order envisaged by the drafters of the Statute of the International Criminal Court. Authorities in Spain and the UK have recognized and respected their State's duty to exercise criminal jurisdiction over an individual responsible for an international crime and did so when the State in which those acts were committed has not been in a position to exercise that jurisdiction itself.

40 "It is a cliché of modern international law that the classical theory no longer prevails in its unadulterated form". Lord Millett. — William Aceves regards the *Pinochet* case as evidence of the emergence of a universal system of transnational law litigation, a system "which gains its very legitimacy by functioning within the state-centric world even as it seeks to undermine the prominence and preeminence of the nation-state". See "Liberalism and international legal scholarship: The Pinochet case and the move toward a universal system of transnational law litigation", *Harvard International Law Journal*, Vol. 41, No. 1, 2000, p. 183.

The House of Lords' ruling gives effect to the international law principle that emanated from the Nuremberg Trials that head of State immunity cannot be invoked to avoid prosecution for acts that are condemned as criminal by international law.[41] This principle also finds expression in the Genocide Convention. However, the ruling affects immunity *rationae materiae* only, showing that this customary law immunity — but also that provided under national law, such as the amnesty granted to Pinochet in 1978 and his senator-for-life status conferred in 1998 — are meaningless when their beneficiary is accused of committing international crimes. Their Lordships were unanimous in the view that if Senator Pinochet were still head of State he would enjoy absolute immunity. While the International Criminal Tribunals and the International Criminal Court are not subject to the law of immunity *rationae personae* and have power to prosecute acting as well as former heads of State and other government officials, States are still bound to respect it. The *Pinochet* ruling therefore creates an anomaly, one which "provid[es] dictators with the strongest possible incentive to keep on dictating",[42] and consequently imparts a message that the absolute immunity of acting heads of State even when they are guilty of international crimes is unsustainable.

The case recognizes the criminal liability imposed by international law for torture as a crime infringing *jus cogens*. It affirms and gives effect to the principle that crimes against humanity are subject to universal jurisdiction. This principle had already been affirmed with respect to torture in the context of civil law. In 1980 the United States Appeals Court approved a civil action brought by relatives of a Paraguayan torture victim against a former Paraguayan government

41 Nuremberg Charter, Article 7, and Judgment, pp. 41-42. Affirmed by the UN General Assembly and reiterated by the International Law Commission in its Statement of Principles of International Law recognized by the Charter of the Nuremberg Tribunal and in the judgment of the Tribunal (1950) and its Draft Code on Crimes against the Peace and Security of Mankind (1991).

42 Jan Klabbers, "The general, the Lords and the possible end of State immunity", *Nordic Journal of International Law*, Vol. 68, 1999, p. 89. See also Geoffrey Robertson, *Crimes against Humanity: The Struggle for Global Justice*, Penguin, London, 1999, p. 372.

official illegally resident in the US. The court held that torture committed under the guise of official authority is a crime under international law and that under the Alien Tort Act of 1789 the US courts have jurisdiction to provide remedies for and against aliens with respect to acts of torture irrespective of where they were committed. "For the purposes of civil liability, the torturer has become — like the pirate and the slave trader before him — *hostis humani generis*, an enemy of mankind".[43]

The *Pinochet* case, "the most important test for international law since Nuremberg itself",[44] is a persuasive precedent for other States. Although the case has been concerned with atrocities committed in peacetime, its implications naturally extend to those committed during armed conflict. Human rights organizations and victims of other oppressive regimes are working to maintain the momentum and steps are now being taken towards bringing prosecutions against a number of other former dictators in the countries in which they are now in exile.[45] Although calls for high-ranking perpetrators of crimes against humanity to be brought to justice went unanswered on two occasions while the *Pinochet* case was in progress,[46] a recent development shows that the precedent is established. On 3 February 2000, following a private prosecution, Hissein Habre, the former President of Chad exiled in Senegal, was indicted by a court in Senegal on charges of complicity in torture allegedly committed during his eight-year rule. The former President is now under arrest and, pending the completion of investigations, his trial is expected to take place at the end of this year or early next year.[47]

43 *Filartiga v. Pena-Irala* (1980), 630 F 2d (2d Cir 1980). See Peter Malanczuk, *Akehurst's Modern Introduction to International Law*, Routledge, London and New York, 1997, 7th ed., p. 114

44 Robertson, *op. cit.* (note 42), p. 362.

45 Mary Braid, "Exiled dictators to face criminal charges for murder and torture", *The Independent*, 23 June 1999, p. 16

46 In August 1999 the Austrian government decided not to apprehend Izzat Ibrahim al-Duri, President Saddam Hussein's second-in-command, who visited Vienna for medical treatment, although a criminal complaint was filed alleging his complicity in genocide. In November, the former dictator of Ethiopia, Mengistu Haile Mariam, who is exiled in Zimbabwe and is accused of genocide and crimes against humanity by authorities in Ethiopia, was not detained when he visited South Africa. See: Human Rights Watch, "The Pinochet precedent: How victims can pursue human rights criminals abroad", www.hrw.org/campaigns/chile98/precedent.htm

47 *Ibid.*

Conclusion

The net is closing on the perpetrators of human rights atrocities. It is now evident that all serious violations of international humanitarian law, including those committed in internal armed conflicts, are international crimes that attract universal jurisdiction. The Rome Statute suggests that States are obliged to exercise jurisdiction over violations committed in internal armed conflicts although State practice has not yet reached the point of reflecting the existence of a customary law principle to this effect.[48] The International Criminal Tribunals and the new (permanent) International Criminal Court have jurisdiction to prosecute individuals of all ranks, including heads of State. The House of Lords' ruling in the *Pinochet* case provides a further boost to the principle of universal jurisdiction. By asserting that human rights abuses can never constitute legitimate official acts of a government or its representatives, the ruling may well signal a reform, if not the end, of the law of sovereign immunity.[49]

The fact that *Pinochet* is a landmark case, and the poor record of prosecutions in national courts even in the face of clear obligations to prosecute or extradite offenders, shows that the international order that has evolved since 1945 has been deficient in one vital respect. It has lacked a real commitment and political resolve on the part of most members of the international community to use their domestic systems to bring those responsible to justice. Impunity is not a natural phenomenon but the product of a failure to enforce the law.

An international court with jurisdiction over "the most serious crimes of concern to the international community" has been established. There are, however, limits to the court's jurisdiction, temporal and otherwise, and it is certain that its reach will not extend to all of the world's brutal dictators and warlords. To bring all perpetrators of human rights atrocities to justice requires affirmative action by individual States, not just until the International Criminal Court becomes operational but beyond that time. Indeed, the principle of comple-

48 Graditzky, *op. cit.* (note 32).

49 Klabbers, *op. cit.* (note 42), p. 95 (in relation to the original House of Lords' ruling).

mentarity upon which the Court is based means that the primary responsibility for prosecutions will always remain with national courts. Only when all States have acknowledged their obligation to the international community and committed themselves to prosecute and punish the perpetrators of human rights atrocities will it be possible to say that we have reached a complete and permanent end to impunity. This, without doubt, is one of the biggest challenges facing international law in the twenty-first century.

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Résumé

Mettre fin à l'impunité des auteurs d'atrocités : un défi majeur pour le droit international au 21e siècle

par MARY GRIFFIN

Pendant les dernières années du 20e siècle, la communauté internationale a fait preuve d'une détermination accrue à traduire en justice les auteurs d'atrocités. Les Statuts et la pratique des Tribunaux pénaux internationaux pour l'ex-Yougoslavie et pour le Rwanda, ainsi que le Statut de la Cour pénale internationale, permettent de clarifier et de promouvoir le droit international humanitaire. En outre, ils ont contribué à mettre plus en évidence la nécessité de veiller à l'application des droits fondamentaux de l'homme. Le droit relatif aux conflits internes a été le principal bénéficiaire de la considérable évolution enregistrée à ce jour. Plus généralement, nous assistons à un renforcement de deux des piliers du système pénal international – le principe de la juridiction internationale et celui de la responsabilité pénale des individus à tous les échelons de la hiérarchie, y compris les chefs d'État. L'éradication complète et permanente de l'impunité exige que cette évolution aille de pair avec l'entrée en fonction, dans les meilleurs délais, de la Cour pénale internationale et que les États œuvrent de concert avec la Cour en honorant l'obligation qu'ils ont de poursuivre et de punir les auteurs de crimes internationaux. Garantir cette évolution constituera probablement le plus grand des défis que devra relever le droit international au 21e siècle.