Musings on *The Future of International Criminal Justice*

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Since time immemorial, war has brought unspeakable misery to millions, yet vexing problem of enforcing criminal responsibility upon perpetrators of na aggression and mass violations of human dignity that amount to genocide, crimes or crimes against humanity, has been addressed only recently. R governing the war-time protection of women, children, elderly, sick and priso originate in the ancient customary law of China, India, Greece and Rome, actual respect for these strictures has been the rare exception rather than norm.[1] To make matters worse, great strides in the sophistication of technol and weaponry, transportation and communications as well as refinement of art of military tactics have made the use of armed force ever more lethal.[2] Ir many armed conflicts, commanders seem to deploy their fighting forces : machines to multiply the toll of dead and wounded rather than to minimise civi casualties. Gone is the tradition of waging war in distant fields: by the 1930s, Spanish Civil War showed the horrible results of the direct targeting of civilian undefended towns and villages. A few years later, the Nazi Government shoc the world with the sheer intensity, magnitude and systematic character of its F

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1 See generally Timothy L H McCormack, 'War Crimes and the Development of Internatic Criminal Law', (1997) 60 *Albany Law Review*, pp 681-732.

2 See Stephen Rose, 'The Coming Explosion of Silent Weapons', Moore and Turner ed (1995) 68 *Readings on International Law from the Naval War College Review*, pp 501-5 and John Keegan, *A History of Warfare* (New York: Vintage, 1993).

Solution mass extermination policies, and its brutal aggression against entire nations that plunged the world into debilitating ruin.

Hard as it is to imagine the human cost of World War II, it is perhaps even more difficult to reckon with the fact that since 1945 humanity has failed miserably to prevent, deter and punish perpetrators of systematic and severe violations of human rights. War seems to have become ever bloodier in spite of the consolidation of the international humanitarian community and the rise of universal human rights standards in the 20th century. Despite the spread of democratic forms of government the world over in an age of fast cars, planes and trains, internet and personal satellite dishes, the persistence of massive violations of human dignity can seem almost incredible. Yet rivers of human blood continue to soak the pages of post-World War II history. Just think of Aceh, Kalimantan and Papua in (Indonesia); Abkhazia-Georgia; Afghanistan; Algeria; Angola; Armenia; Azerbaijan (Nagorno-Karabakh); Bangladesh, Bosnia; Burma; Burundi; Cambodia; Chechnya; Colombia, Congo (Brazzaville); Dagestan, Democratic Republic of the Congo; East Timor; Ethiopia and Eritrea; Georgia; the Kashmir conflict; Iraq; Israel-Palestine; Liberia; Peru; Philippines; Rwanda; Sierra Leone; Somalia; Sri Lanka and Sudan and Vietnam, to mention only a few places.[3]

Why has all this gone on for so long? Where the breakdown or disintegration of the State diminishes domestic political stability and undermines regional peace and security, individuals become exposed to the raw power and cruelty of the worst of brutes who grab society's reigns in a time of terror and chaos. In such cases, the only effective check on the use and abuse of power can come only from other States, but it has taken centuries for States to view themselves more as a members of a true 'international community' with legal rights and obligations vis-à-vis other States, rather than as purely independent and sovereign entities beholden to no one. Thus, the institution of international law itself has always been very decentralised and inherently weak in the sense that it has no supranational organ capable of making and enforcing the law and punishing wrongdoers for transgressions. That is why the Nuremberg and Tokyo International Military Tribunals stand out as monumental achievements in enforcing the rule of law against criminals hostis humanis generis.

Even before World War II came to a close, the Allied Powers resolved to establish the criminal responsibility of the Axis leaders and organisers and to send the message that the international community would prosecute the perpetrators of grave injuries to the international body politic. Indeed, the United Nations Organization was established mainly to enforce a global system of collective security and, as proclaimed in the UN Charter's preamble, to 'save succeeding generations from the scourge of war', 'to reaffirm faith in fundamental human rights, in the dignity and worth of

[3] See generally Melvin Small and J David Singer, *Resort to Arms: International and Civil War: 1816-1980* (Beverly Hills, California: Sage, 1982).

the human person, in the equal rights of men and women and of nations larg small', to strengthen international law and justice, and 'to promote social pr and better standards of life in larger freedom'. Yet we all know that Colc rivalry froze the Security Council's power to prevent or halt the brea international peace and locked the entire system of collective security into a of suspended animation. The global climate of impunity for the most seric crimes could continue to prevail even in the United Nations era becaus enforcement of individual criminal responsibility for Heads of State, mi commanders and other powerful officials of State, requires solid multil cooperation to restrain State officials who perpetrate, support or tolerate r violations. Through the long Cold War years, the landmark Nuremberg and T trials receded on the temporal horizon and faded from the consciousness c public imagination.[4]

Not until the Berlin Wall fell could the revived spirit of international cooper resuscitate the project to establish a permanent international criminal cou deter, halt and punish perpetrators of mass slaughter in unfortunate places draft Code of Crimes against the Peace and Security of Mankind and the Statute for an International Criminal Court had languished for more than decades in the UN International Law Commission until 1989 when Trinidac Tobago raised the issue of establishing an international criminal court that c enforce criminal responsibility for the illicit traffic in narcotic drugs. In the post-Cold War climate, certain States warmed to the concrete propos establishing an international criminal code and court to enforce individual cri responsibility for the worst violations of human dignity. In 1993, the Sec Council boldly created the ICTY to prosecute individuals for mass rape, genc war crimes, and a range of crimes against humanity being viciously perpetrat the territory of the former Yugoslavia. In 1994, the Council added the ICT

[4] See Arnold C Brackman, *The Other Nuremberg: The Untold Story of the Tokyo War C Trials* (New York: William Morrow and Co, 1987); Roger Clark and IA Lediakh, Influence of the Nuremberg Trial on the Development of International Law' in Ge Ginsburgs and VN Kudriavtsev eds, *The Nuremberg Trial and International Law* (Dord Martinus Nijhoff, 1990) pp 249-283; Benjamin B Ferencz, 'International Criminal C the Legacy of Nuremberg', (1998) 10 (Summer) *Pace International Law Review* p George Finch, 'The Nuremberg Trial and International Law,' (1947) 41 (July) *Am Journal of International Law*, pp 20-37; Duane W Layton, 'Forty Years after the Nurer and Tokyo Tribunals: The Impact of the War Crimes Trials on International and Na Law,' (1986) 80 (April) *American Society of International Law Proceedings*, p 56; F B Sc 'The Nuremberg Trial and the International Law of the Future,' (1947) 41 (Oct *American Journal of International Law* pp 770-794; Telford Taylor, *The Anatomy Nuremberg Trials: A Personal Memoir* (Boston: Brown and Co, 1993); and Quincy W 'The Law of the Nuremberg Trial,' (1947) 41 (January) *American Journal of Interna Law*, pp 38-72.

response to the genocidal slaughter of around one million Tutsis and Hutus.[5] The establishment of these ad hoc international criminal tribunals – the first since those of Nuremberg and Tokyo – transformed the international legal landscape and spurred efforts to establish a permanent international criminal court that could fight impunity on a global basis.

The entry into force of the Rome Statute of the International Criminal Court on 1 July 2002 – just less than four years after it was adopted at the historic Diplomatic Conference of Plenipotentiaries in Rome – raised the hopes of everyone concerned about international criminal justice.[6] As of 31 August 2003, the Rome Statute had been signed by 139 States and ratified by 91 States. The establishment of the International Criminal Court has also given rise to a prodigious volume of academic literature on international criminal law, including *From Nuremberg to The Hague: The Future of International Criminal Justice*, which brings together essays based on five lectures presented in London between April and June 2002 by a number of international legal experts. This book deserves a close look and critical commentary, mainly because it provides a very refreshing treatment of important themes running through the modern development of international criminal law in a way that practitioners and students will appreciate.

In the opening piece, Professor Richard Overy takes us back to the critical events and decisions that lead to the prosecution of twenty-two European Axis Power defendants by the International Military Tribunal at Nuremberg for crimes in connection with World War II. It is always worth recalling just how important were the Nuremberg and Tokyo trials and to revisit the Allied leaders' decision to try individuals whom many in victor countries considered to be worse than animals. Remarkably, leaders of the time found the courage not to inflict the quickest sanction by simply shooting enemy leaders without trial – a policy that Prime Minister Winston Churchill and Foreign Secretary Anthony Eden had indeed initially considered in 1942 – but rather to conduct public international military trials of Axis leaders and organisers according to principles of fairness and justice.

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5 See *The United Nations and Rwanda: 1993-1996*, (New York: United Nations Department of Public Information Blue Book Series, 1996); Lyal S Sunga, 'The Commission of Experts on Rwanda and the Creation of the International Criminal Tribunal for Rwanda/A Note', (1995) 16 (Nos 1-3) *Human Rights Law Journal* pp 121-124; and Lyal S Sunga, 'The First Indictments of the International Criminal Tribunal for Rwanda', (1997) 18 (Nos 9-12) *Human Rights Law Journal*, pp 329-340.

6 Rome Statute of the International Criminal Court, adopted in Rome in a non-recorded vote, 120 in favour, 7 against and 21 abstaining, on 17 July 1998, entered into force on 1 July 2002; (A/CONF 183/9).

If we consider the enormous scale of suffering brought about by Axis aggre and the emotional exhaustion at the end of such a devastating war, the ic enforcing a summary execution policy can perhaps be understood. One l remember that there was always a chance that clever defence counsel could sor equalise Axis and Allied moral and legal responsibility and muster suff reasonable doubt to produce acquittals of the top leaders and commar including of Hitler himself – perhaps on the ground of sovereign immunity. (notes that it was the US Secretary of War Henry Stimson that argued f extension of criminal justice and fair trial safeguards for Axis leader commanders instead of summary executions.

That it was the War Department that assumed the more enlightened sta this question should not be considered too surprising given the long tradit honour and justice in professional armies. By the time of the Second Worlc the laws of war had assumed a recognisable form, starting with the first Interna Committee of the Red Cross Convention for the Amelioration of the Woun Armies of the Field of 1864, the standards set out in the Lieber Code of 186 1899 Hague Conventions and Regulations[8] and the two 1929 Geneva Conver Soldiers and commanders know very well that they can fall into the hanc hostile Power and that their best hope for humane treatment is based on the pri of reciprocity whereby each belligerent extends to its prisoners of war the standard of treatment it expects for its own nationals taken prisoner by e Powers. Interestingly, it was the Soviet Union that pushed most insisten trials and this position tipped the balance among the Allies in favour of trial summary executions.

Overy rightly remarks that the Soviets considered the Nuremberg proce as show trials of the kind that Stalin commissioned during the famous p That is true, but at least the Soviet authorities seem to have been much diligent in prosecuting thousands of war criminals after the war through military courts following the signal judgements in Nuremberg and Tokyo, western governments appear to have systematically ignored or neglected war prosecutions in order to trade intelligence from ex-Nazi officers and soldi impunity,[9] something Overy does not mention. He does however throw li the factors that guided the selection of defendants for prosecution – a highly p process that bordered on the arbitrary. Overy also observes that the Soviet auth

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7 The Lieber Code (General Orders No 100) of 24 April 1863, or *Instructions Government of Armies of the United States in the Field.*

8 Hague Convention respecting the Rights and Duties of Neutral Powers and Per Case of War on Land, adopted 18 October 1907, in International Committee of t Cross, *International Law Concerning the Conduct of Hostilities: Collection of Hague Con and Some Other Treaties* (Geneva: ICRC, 1989) p 144.

9 See David Matas and Susan Charendoff, *Justice Delayed: Nazi War Criminals in* (Toronto: Summerhill Press, 1987); and Charles Ashman and Robert J Wagman, *T Hunters* (New York: Pharos Books, 1988).

were setting up concentration camps in the USSR while prosecuting the Nazis at Nuremberg for concentration camp violations. He could have mentioned also the British incendiary bombing of the undefended city of Dresden on 13 February 1945 with 773 Lancasters, followed by American bombing over the next two days with more than 527 heavy bombers, to break German morale, but which had no possible military justification whatsoever, or the mass starvation of German nationals in Allied concentration camps in France immediately after the end of the war, or indeed the indiscriminate annihilation of 135,000 civilians at Hiroshima on 6 August 1945 and 64,000 at Nagasaki three days later. Tragically, today's military operations still involve heavy American and British reliance on high altitude bombing that inevitably results in large numbers of civilian casualties and massive 'collateral damage' from outright negligence. Will the world ever learn how many Afghan and Iraqi civilians were killed and wounded from aerial bombardment in Operations Enduring Freedom and Iraqi Freedom to topple the Taliban and Saddam regimes?[10]

Concerning the retroactive effect of criminal law, I quite agree with Overy's view that the Nuremberg Tribunal violated this principle, particularly with respect to the legal categories of 'crimes against peace' and 'crimes against humanity'.[11] The Prosecution at Nuremberg and Tokyo squeezed as much normative juice as possible out of the few pre-World War II fruits of early international law-making in this area, arguing that the 1928 Kellogg-Briand Pact[12] not only outlawed the use of aggressive war as an instrument of national policy, but that it prescribed the enforcement of individual criminal responsibility for such action, notwithstanding

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[10] The Campaign for Innocent Victims in Conflict (CIVIC) has conducted house-to-house surveys in Afghanistan and Iraq in order to tally accurately the numbers of civilians killed and wounded as well as the scale of property damage in these countries resulting from Operations Enduring Freedom and Iraqi Freedom. On 22 May 2003, the Christian Science Monitor reported that the empirical evidence from CIVIC's surveys suggest that between five and ten thousand Iraqi civilians were killed in the war on Iraq initiated on 20 March 2003. Pressure from a number of other NGOs led to the inclusion of provisions in the US bill enabling further expenditures on the war, for funds to be allocated to assist civilians suffering harm from military operations. *See* Peter Ford, 'Surveys Pointing to High Civilian Death Toll in Iraq' in *Christian Science Monitor*, 22 May 2003. It has been estimated that the US aerial bombardment of Afghanistan killed between three and four thousand civilians. See Seumas Milne, 'The Innocent Dead in a Coward's War: Estimates Suggest US Bombs Have Killed at Least 3,767 Civilians', *The Guardian Newspaper*, 20 December 2001, p 16.

[11] See further Lyal S Sunga, *The Emerging System of International Criminal Law: Developments in Codification and Implementation* (The Hague: Kluwer Law International, 1997); and, Lyal S Sunga, *Individual Responsibility in International Law for Serious Human Rights Violations* (Dordrecht: Martinus Nijhoff, 1992).

[12] The Kellogg-Briand Pact is also known as the Paris Pact (International Treaty for the Renunciation of War as an Instrument of National Policy). It had been signed by 63 States by the time World War II broke out. Signed initially on 27 August 1928 by the representatives of 15 States, entered into force 24 July 1929, 94 LNTS 57, 46 Stat 2343, TS No 796.

the fact that nowhere does the Pact state anything about criminal responsibi Similarly, the Tribunals had very little basis in positive international law which to enforce individual criminal responsibility for so-called 'crimes ag humanity' – a rather fuzzy concept prior to its incorporation in Article 6(c) c Nuremberg Charter. Of course, the lack of existing norms in positive internat law bothered legal positivists more than those who put their faith in Natural

The issues of complexity, complicity and complementarity from Nurem to the ICC form the focus of Chapter 2 by Professor Andrew Clapham. He p out that the rise of international criminal law complicates the juridical frame because of a multiplication of responsibilities: State responsibility u international law; individual criminal responsibility under international law the criminal responsibility of certain organisations. The Nuremberg Chart Article 9, provided that: 'At the trial of any individual member of any gro organisation the Tribunal may declare (in connection with any act of whic individual may be convicted) that the group or organisation of which the indiv was a member was a criminal organisation.' Clapham's article gets partic interesting when he turns to the specific issue of criminal complicity, not so for the analysis, but for the practical implications of his argument. Viewin concept in its broadest perspective, Clapham says: 'The point is that, when diff actors label a certain activity "complicity", they deliberately evoke conceptic criminality and blameworthiness even if, strictly speaking the activity woul give rise to criminal liability in a court of law' (p 50).

Clearly, financing, encouraging, supporting and assisting crimes such as ter acts, raises issues of criminal complicity. However, Clapham takes this fu stating that the notion of 'silent complicity' connotes a sense that persons of ele influence and authority have also an elevated level of responsibility – moral cer legal perhaps. He says that:

> [T]here is a growing sense of responsibility at the international level for h rights violations that go unpunished. This is especially so where pov countries such as France and Britain do nothing to protect innocent civ from rape, slaughter and humiliation. But it also extends down to our pe sense of morality and responsibility as we consider the impact of our a as consumers, tourists, shareholders and investors (p 61).

Further on, Clapham paraphrases the UN Secretary-General's Global Cor that: 'there is now an expectation that those with power, whether in the pul the private sector, have a duty to react to human rights violations where the within their "sphere of influence". In this context, to do nothing is to be cor and he asserts that "the responsibility extends to all of us"' (p 62).

Clapham's idealism has to be welcomed, particularly in an age when h rights has shifted so markedly from the championing of lofty principles t often grey, and sometimes comparatively unimaginative stuff of implementation and enforcement. What Clapham is really talking about is

responsibility, based on the fundamental moral premise that each person owes an obligation to respect and care for every other and this duty of care extends beyond individuals to the community at large, and even other communities. Without a sense of gemeinschaft and the conviction of social solidarity to go with it, human rights efforts to alleviate personal misery arising from economic and social disparity would be rendered virtually meaningless.

Nevertheless, the challenge for Clapham is to demonstrate convincingly whether there *exists*, or there at least is *developing*, a legal relation, over and above a possible *moral* one, between the relatively strict principles of criminal responsibility and complicity that we find at the domestic and international levels on the one hand, and broader moral and ethical notions of social and political accountability that are reflected rather thinly in some UN reports, and abundantly in the self-serving rhetoric of most governments on the other hand. How to bridge the gap between the responsibility of direct perpetrator at one end of the 'cascade' as Professor William Schabas calls it, with the 'responsibility' of onlooker individuals, groups, companies, governments and States, that do nothing to stop genocide or other such horrendous crimes when they could have done so?

The classic problem is that the further we get away from the responsibility of the person who actually slashes throats, to the perhaps not-so-innocent bystander who could have intervened but chose not to do so, the more subjective, politicised and morally contentious becomes the debate. Having personally seen the results of the international community's shameful inaction to stop the Rwandan genocide as an investigator for the United Nations Security Council's Commission of Experts, it was easy for me to realise that the deployment of few human and logistical resources would have prevented the horrible slaughter of a million civilians that took place from 6 April to the end of June 1994, and with little risk to peacekeepers.[13] As I stood before thousands of corpses at any of the many massacre sites that we visited only a few weeks after the slaughter, the failure of the international community to have intervened felt like a crime in itself. Yet the picture becomes less clear when we consider the critical months as all hell broke loose with the disintegration of the former Yugoslavia or the critical months during which government collapsed in Somalia. United Nations peacekeepers were exposed to serious risk of injury and death and many lost their lives. The moral and political calculus always becomes much more difficult for a government that has to explain to families and loved ones why it sent sons and daughters abroad to fight in foreign quarrels. The Bush Administration faces this dilemma at the time of writing when

[13] I am not forgetting that Rwandese Government soldiers raped, tortured and killed Prime Minister of Rwanda Agathe Unwilingiyimana and tortured and executed 10 Belgian UN peacekeepers assigned to protect her, on 7 April 1994, which led to the immediate reduction in the force strength of the United Nations Assistance Mission in Rwanda (UNAMIR). Yet, if UNAMIR had been strengthened rather than reduced at this critical moment, and authorised to intervene, rather than to 'shoot only if shot at', the victims of the Rwandan 'low-tech' genocide likely would have been far fewer.

one or two US or British soldiers are killed almost every day in Iraq since Preside Bush officially declared the war over. Worse, when we contrast Big Power timid in Yugoslavia, Rwanda, Somalia, Sierra Leone, Burundi, the Democratic Repub of the Congo and any number of other places, with the eager, almost breathle pace of intervention on the part of the US and UK in oil-rich Iraq, an ugly pict of naked self-interest emerges. I am not suggesting that influential States shou do nothing consistently, but rather that they should do something, but do consistently – not on the basis of their narrow political and geo-strategic se interests – but according to the imperative of preventing human suffering in t interests of all humanity. The Big Powers have to act in concert with the rest of t international community through the United Nations which they themselves to the initiative to establish for the very reason of guarding international peace a avoiding the immense suffering that its breach incurs. This means also that, unl we place the issue of the legal relation between criminal responsibility and soc complicity explicitly into the full institutional context of multilateral cooperati through the UN, we risk leaving the door open to new forms of imperialism un the guise of humanitarian intervention.

As Clapham notes, the mere fact of one's presence has been taken in a numl of ICTY and ICTR cases to form an important inculpating element as regards aiding and abetting of mass rape, for example, where such presence was understo by the direct perpetrators of the crime as tacit approval or encouragement as in *Alfred Musema* Case, owner of the Gisovu Tea Factory who stood by while employees perpetrated a series of gang rapes. Clapham considers that: 'the complic of this type of international criminal law extends past individuals States, politi parties and State agents on towards individual private industrialists and busin people with de facto control over their subordinates, and finally towards th firms.' (p 45)

What could Clapham have meant that complicity extends towards the fir How could the Gisovu Tea Factory be held criminally responsible for gang ra Even if we speak about the issue of compensation to the victims and survivor atrocities, can we say that the firm itself was criminally complicit or only certair its individual members?

The whole question of membership in a criminal organisation raises the is of enforcing individual criminal responsibility for the crime of conspiracy. It felt at the time of the drafting of the Nuremberg Charter that the Axis Po violations were so massive and systematic in nature that it would not make se simply to punish the Nazi High Command. That meant that in order to deal fi with the extent of the atrocities, a doctrine of criminal conspiracy to commit crimes, crimes against peace and crimes against humanity, was needed. As Pomo recounted back in 1990,[14] it was Colonel Bernays of the United States Departm

[14] See Stanislaw Pomorski, 'Conspiracy and Criminal Organization' in George Ginsb and V N Kudriavtsev eds, *The Nuremberg Trial and International Law* (Dordrecht: Mart Nijhoff, 1990) pp 213-248.

of War who argued that the international military tribunal should first determine the criminal guilt of the Nazi Government, the Nazi Party and such agencies as the Gestapo, the SS and the SA and then try individuals as representatives of those organisations. These representatives could be held guilty on the sole ground of their membership in the criminal organisation and further trials could be conducted by military tribunals in each of the Allied nations. This would widen the net and lighten the Prosecution's evidentiary burden. President Harry Truman endorsed the Bernay plan in April 1945,[15] but others in the US Administration remained highly sceptical that conspiracy could stand alone as a crime in and of itself and moreover civil law countries were innocent of the concept which made it difficult to apply in Germany and to garner French and Russian support for its inclusion. Furthermore, it is worthwhile recalling that, despite his support for using the theory of conspiracy to prosecute Nazi war criminals, Justice Robert Jackson – the principal American delegate to the London Conference that drafted the Nuremberg Charter – remarked in the 1949 case of *Krulewitch v United States* that: 'The modern crime of conspiracy is so vague that it almost defies definition.' The result was that Article 6(a) of the Nuremberg Charter enforced individual criminal responsibility for the 'planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy' in connection with 'war crimes' or 'crimes against humanity', thus linking conspiracy directly to these crimes, instead of making conspiracy a crime in itself.

Practically speaking, the overly wide use of notions of complicity, conspiracy and criminal organisation risk hanging guilt by association around the necks of every member of suspicious organisations. Article 10 of the Nuremberg Charter exacerbated this potential for abuse by providing that once an organisation had been declared criminal, "the criminal nature of the group or organisation is considered proved and shall not be questioned". Unfortunately, all these issues have been revived alarmingly with the Bush Administration's aggressive counter-terrorism policies in the wake of the 9 September 2001 terrorist attacks on the World Trade Centre and Pentagon. These policies involve the naming of foreign terrorist organisations, the incarceration of Afghan fighters in Guantanamo Bay (Cuba) without the benefit either of the Geneva Conventions or the US constitutional right to fair trial, American strong-arm pressure on countries around the world to arrest and detain anyone suspected of complicity in terrorist activity, and the invasion and occupation of Iraq without Security Council backing. These days, the practical operation of complicity, conspiracy and criminal organisation can render human rights guarantees almost completely meaningless for terrorist suspects.

In 'After Pinochet: The Role of National Courts', Professor Philippe Sands considers the question as to which courts – national or international – are better

[15] See *ibid* at p 216.

suited to exercise jurisdiction over crimes under international law. The princi of complementarity guides the operation of the ICC in relation to domestic cou providing in effect that the ICC will only assume jurisdiction where dome courts are either unwilling or unable themselves to take up cases of crimes un international law that fall within their normal sphere of jurisdiction. As Sa observes, the ICC has been assigned a residual role to that of national courts in sense that national courts remain the primary organs to hear cases that are clo to them. In other words, neither international criminal law nor the ICC were intended to replace domestic courts, except where domestic courts have failec dispense criminal justice in a genuine way, and instead have entertained sh trials for the purposes of shielding the accused. Sands points out that gener international law promotes a role for national courts and that the UN Convent against Genocide[16] as well as the four Geneva Conventions of 1949, and m transnational criminal law conventions, rely on national authorities for prosecut in domestic courts. While the Genocide Convention authorises the State in wh territory the crime was committed to assert jurisdiction over the perpetrators, Geneva Conventions of 1949 oblige *all* States Parties to establish effective pe sanctions for persons committing or ordering to be committed 'grave breaches the Conventions, and furthermore, to search for persons alleged to have commit or ordered to be committed violations, and either to bring them for trial bef their own courts *regardless of their nationality* or to extradite the suspect to anot State Party for prosecution there. Similarly, the 1984 UN Torture Conventic obliges States Parties to assert jurisdiction where the alleged perpetrator is eith national of the State Party or is alleged to have committed the crime in the terri of the State Party.

Sands then turns to the rapid developments in the law relating to the quest of immunity from jurisdiction and extradition requests of high government offic implicated in gross human rights violations, examining the *Pinochet* and *Yer* cases. These cases raised hopes among human rights activists the world o encouraged by developments in international criminal law, the establishmen ad hoc international criminal tribunals and the ICC. The way seemed clear domestic courts to assume a much less conservative and cautious position on balance to be struck between classic customary principles providing Heads of S and high governmental officials immunity from the jurisdiction of foreign co on the one hand, and rapidly advancing principles of individual crimi responsibility for certain crimes under international law *regardless* of official r or capacity on the other hand.

[16] Convention on the Prevention and Punishment of the Crime of Genocide, adop unanimously 9 December 1948, entered into force 12 January 1951; 78 UNTS 277.

[17] UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatmer Punishment, adopted by consensus by the General Assembly 10 December 1984, ope for signature 4 February 1985, entered into force 26 June 1987.

The *Pinochet* decision of 28 October 1998 at the UK High Court of Justice ruled in favour of recognising Senator Pinochet's immunity from the jurisdiction of the local UK courts, following the 1876 case of *Hatch v Baez*, decided in the Supreme Court of New York. In *Hatch v Baez*, proceedings brought before the New York courts against Mr Buenaventura Baez – former President of the Dominican Republic, for acts done in an official capacity that were alleged to have injured Mr Davis Hatch, were dismissed on the grounds that immunity from jurisdiction was 'essential to preserve the peace and harmony of nations'. Pinochet lost on appeal to the House of Lords which held that customary international law did not support his claim to immunity. A later judgement of the House of Lords considered that it was not customary international law, but rather the 1984 UN Torture Convention that nullified Pinochet's claim of sovereign immunity. Sands hails the House of Lords ruling as a landmark in the struggle against impunity for crimes under international law. The case accords due recognition to the role of national courts in hearing cases of crimes under international law perpetrated by responsible officials, against foreign nationals in foreign territory even at the level of a former Head of State. This, says Sands, in effect recognised universal jurisdiction (at least with regard to parties of the UN Torture Convention) and it interpreted State obligations in the light of the objects and purposes of the Convention, rather than limiting the Convention by giving precedence to international legal principles of sovereign immunity. Encouragingly, Lord Browne-Wilkinson opined that the commission of a crime against humanity should not be considered an official State function and therefore persons cannot be shielded by immunity from prosecution.

One can share Sands' optimism, but only to a point. Lord Slynn of Hadley expressed his serious doubts as to whether there is any State practice or widely supported conventional basis making all crimes under international law subject to universal jurisdiction before domestic courts.[18] Moreover, the UK decision on jurisdiction is restricted to the conventional scope of the UN Torture Convention, and is not based on customary law principles. In other words, the operation of universal jurisdiction in Pinochet does not reflect the classic doctrine espoused by scholars that authorises any State to prosecute any individual regardless of nationality or the locus delictum. Even more disappointingly, Senator Pinochet was allowed to return to Chile where his immunity from prosecution as Senator for life was upheld and he has so far escaped punishment entirely. On the one hand, the Pinochet Case seems to signal greater willingness on the part of individual Governments to use domestic mechanisms at their disposal to ensure national

[18] See Opinion of the Lords of Appeal for Judgment in the *Cause Regina v Bartle and the Commissioner of Police for the Metropolis and Others (Appellants) Ex Parte Pinochet (Respondent) (on appeal from a Divisional Court of the Queen's Bench Division), Regina v Evans and Another and the Commissioner of Police for the Metropolis and Others (Appellants) Ex Parte Pinochet (Respondent) (on appeal from a Divisional Court of the Queen's Bench Division)* of 25 November 1998.

enforcement of international criminal law in respect of certain particularly l profile cases. On the other hand, the case also reminds us that extradition, surre and transfer of persons accused of crimes under international law is normally sul to the will of the Executive, rather than the courts, which means that inevit matters become quickly entangled in political and diplomatic considerations. often the result is that the perpetrators of grand crimes escape justice from dom courts for technical reasons or the famous excuse of 'too ill to stand trial'.

The difficulties of prosecuting massive and systematic crimes under internati law through domestic courts, makes all the more imperative the effective opera of the International Criminal Court – a point the *Yerodia Case*[19] reinforce *Yerodia*, an investigating magistrate in Belgium issued an international warran the arrest of Mr Yerodia, who was serving as the Minister of Foreign Affairs o Democratic Republic of the Congo, on the grounds that certain of Mr Yerc 1998 speeches amounted to incitement to racial hatred. This was alleged to constituted not only a grave breach of the Geneva Conventions of 1949, but a crime under Belgian law, notwithstanding that the offence was alleg perpetrated by a foreign national against foreign nationals outside Belgian terri in other words, in a manner with no jurisdictional connection to Belgium c than that Belgian law authorised its courts to hear such cases on the basis of univ jurisdiction. The Democratic Republic of the Congo brought the case tc International Court of Justice, arguing that Belgium's arrest warrant violate fundamental principle of international law that each State is sovereign and e to every other and that the officials of one State therefore could not be bro before the courts in another State for any official State act. The ICJ held in fa of the Democratic Republic of the Congo and stated that it could not de from State practice 'any form of exception to the rule according immunity criminal jurisdiction and inviolability to incumbent Ministers for Foreign Af where they are suspected of having committed war crimes or crimes ag humanity'. The ICJ explained that there were other alternatives to the exerci universal jurisdiction available to ensure prosecution for the alleged crimes, nai prosecution by the Congolese domestic courts; a waiver of immunity on the of the Democratic Republic of the Congo; exposure to the possibility of prosecu in foreign courts once the Minister has left office with regard to acts comm prior to or after the period of office or acts committed in a private capacity during the period of office; and finally, prosecution by international crin tribunals. Judges Higgins, Kooijmans and Buergenthal concluded that 'there established practice in which States exercise universal jurisdiction pro so-called'.[20]

[19] See *Arrest Warrant of 11 April 2000* (Democratic Republic of the Congo v Belg ICJ Judgment of 14 February 2002.

[20] Joint separate opinion of Judges Higgins, Kooijmans and Buergenthal, *ibid* at para

What can account for the ICJ's marked reticence in dealing with the question of universal jurisdiction? Sands supposes that the ICJ considers that there is a presumption in favour of immunity, while a majority in the House of Lords starts from a presumption against immunity. Perhaps more than this, there lie some substantial theoretical and practical problems with the exercise of universal jurisdiction itself which the ICJ could not ignore. The main obstacle has always been that while the doctrine of universal jurisdiction has been widely advanced by human rights activists and many scholars as a solution to help rid the world of impunity for crimes under international law, State practice remains woefully lacking. Despite thousands upon thousands of potential cases since 1945 that could have been prosecuted on the sole basis of universal jurisdiction, proponents of this doctrine can point only to very few cases decided purely on universal jurisdiction. Other than Belgium, no State has seriously embraced universal jurisdiction nor seems willing to recognise the doctrine in practice. Beyond the lack of State, universal jurisdiction implies only permission to prosecute rather than a mandatory obligation to do so. Even were States to begin to assert universal jurisdiction, the wide divergence among the criminal law and practice of States would frustrate the development of coherent and consistent jurisprudence on crimes under international law. Even Belgium has been forced to repeal its universal jurisdiction law following the US Administration's threat to move NATO Headquarters out of Brussels.[21] Professor Bassiouni stated in a recent article that: 'To the knowledge of this writer, no state practice presently exists whereby states have resorted to universal jurisdiction without the existence of national legislation, even when international treaties provide for such a jurisdictional basis.'[22]

More troubling, proponents of universal jurisdiction seem to assume that it will only be courts in countries with well developed legal systems, human rights and the rule of law, that will assert jurisdiction. Yet, international law applies to all States equally which means that if we consider that universal jurisdiction really does import a customary legal obligation on all States to prosecute persons for crimes under international law, then Congo, Libya, Yemen, Burma, North Korea, and any other sovereign State can prosecute *any national* for any alleged crime under international law committed *anywhere*. Such countries might be happy to prosecute Heads of States of western governments for all sorts of alleged crimes under international law, but would such process be fair, effective and conducive to world order and international peace? Or is universal jurisdiction intended only to authorise western countries such as Britain, Belgium and Spain to prosecute delinquent nationals from Congo, Chile and other unfortunate former colonies?

In 'The Drafting of the Rome Statute', Professor James Crawford provides useful background by recounting generally the context and historical development of

[21] See 'Belgium Revisits Law: Bill Would Limit War Crimes Authority,' *International Herald Tribune*, 30 July 2003.

[22] *Ibid* at p 106. See generally Cherif Bassiouni and Edward Wise, *Aut Dedere Aut Judicare: The Duty to Extradite or Prosecute in International Law* (Dordrecht: Martinus Nijhoff, 1995).

international legal norms pertaining to individual criminal responsibility and contribution of the International Law Commission's Draft Statute for International Criminal Court with which he was involved. After traversing fami ground, he makes the interesting but perhaps rather formalistic point t international human rights standards apply to individuals vis-à-vis the State jurisdiction under which they may be subject, and are therefore designed mai to guide the application of domestic criminal law to accord with universal standa 'They are not first order rules of conduct, in the way that criminal law rules (p 126). Moreover, says Crawford, human rights fora restrict the individual to position of claimant, which implies that individual's consent in the whole proc whereas 'no one consents to be a criminal accused'. The difference in kind betw international human rights fora and the rise of international criminal tribu and the ICC manifests themselves as a 'rule of law problem' says Crawford in sense that the ad hoc tribunals have had to determine what level of human rig standards to apply to their international criminal procedures. Crawford says ICTY and ICTR responded: 'Essentially in two ways: on the military tribu analogy; and on the basis that the international arena is special, and is not sub to international standards applicable to national courts.' (p 129)

He cites a passage from the Appeals Chambers Decision of 2 October 1 concerning the legality of the establishment of the ICTY by the Security Cou in aid of this contention, concluding that it 'seems wrong in principle to say t international criminal process is subject to a lesser standard than national crimi process' (p 131). Probably few people would disagree with this conclusion, this rather uncontroversial point seems nevertheless to have been arrived at rat hastily. The passage Crawford cites concerns the unusual situation whereby Security Council established the ICTY, which of course is not addressed dire by the International Covenant on Civil and Political Rights or the Europ Convention on Human Rights. In any case, the Security Council's authorit establish subsidiary bodies clearly derives from Article 29 of the UN Char although this raises further questions as to the ICTY's independence and objecti as a putative judicial mechanism from the Security Council which is a polit body. His discussion obscures the larger point that both the ICTY and ICTR h in fact borrowed heavily from the wealth of norms and jurisprudence availabl international and regional human rights law, regardless of the obvious differe in the purpose, design and structure between international human rig mechanisms and those of international criminal law enforcement. Moreover, obligation to observe international human rights standards has become an expl and mandatory one upon the ICC in Article 24(3) of the Rome Statute so tha least in principle, this issue has been squarely addressed.

In 'Prospects and Issues for the International Criminal Court: Lessons fr Yugoslavia and Rwanda' Ms Cherie Booth considers the ICC in terms of legitimacy and credibility for the future as well as its functions and the degre which it can claim to be a universal institution. Booth points out that the qua of the members of the Bench will naturally play an important role in terms of

ICC's legitimacy and credibility. In this connection, the Bench should be characterised by representation of all legal systems and geographical regions as well as 'an appropriate gender balance'. The term 'gender balance' is in itself an important term since it implies an *equality* in the number of men and women on the Bench, but in fact this term did not meet with a consensus at the Rome Diplomatic Conference because of strong opposition from many Arab States. For this reason, the rest of the Delegates had to settle for the less clear formula of 'fair representation of female and male judges' which does not necessarily imply a half-half split, but at least mandates *fairness* as a requirement in the selection process. Fortunately, the Assembly of States Parties managed to elect seven women among the eighteen judges, which although two short of equality, at least comes out far better than the proportion of women elsewhere in the overwhelmingly male international judiciary as it stands now. As Booth contends, for the sake of fair and effective international criminal justice, the ICC must appear not only to represent various legal traditions, geographic regions and gender, but do so by according due recognition to the particular gravity of mass rape, and other crimes of sexual violence. Aside from the horrible character of crimes of sexual violence, Booth reminds us that in the former Yugoslavia and Rwanda, rape has been used not only to intimidate, terrorise and humiliate the victim herself, but also, the community of which she forms part. She recounts how the intervention of Judge Pillay – the only woman judge in the ICTR at the time of the *Akayesu Case* – was crucial to the charge of rape being included in an amended indictment against Akayesu. Alarmingly, the Prosecutor had not included the charge in the initial indictment simply because investigators had neglected to pursue that line of enquiry with victims and witnesses, proving as Ms Booth rightly emphasises, that 'the ultimate beneficiaries of a 'fair representation of female judges' on the bench are the victims of sexual violence themselves' (p 171).

As the International Criminal Court prepares to consider its first cases, it is worthwhile returning to the issues that run through the historical development of international criminal law and justice. Although the contributors to *From Nuremberg to The Hague: The Future of International Criminal Justice* could have related these recurrent themes much more to the disturbing events that have transpired since 11 September 2001, the book offers students and practitioners a readable and engaging consideration of international criminal law issues with an eye to the future.