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REVIEW ESSAY

The Tension between International Law and International Justice
Jon Holbrook, London

Crimes Against Humanity: The Struggle for Global Justice
Geoffrey Robertson QC
Penguin Books, 2002 (2nd edition)
PBK: ISBN: 0141010142 £10.99
pp. 688 (including: bibliogaphy and index)

The International Criminal Court and the Transformation of International Law: Justice for the New Millennium
Leila Nadya Sadat
Transnational Publishers, 2002
HBK: ISBN: 1 57105 133 3, £100.99
pp. 606 (including: bibliogaphy and index)

From Nuremberg to The Hague: The Future of International Criminal Justice
Philippe Sands QC (ed)
Cambridge University Press, 2003
HBK: ISBN: 0 521 82991 7, US$55.00
PBK: ISBN: 0 521 53676 6, £14.95
pp. 206 (including: chapter references)

The World Court in Action: Judging Among the Nations
Howard N. Meyer
Rowman & Littlefield Publishers, 2002
HBK: ISBN: 0 7425 0923 0, £57.00
PBK: ISBN: 0 7425 0924 9, £20.95
pp. 320 (including: bibliogaphy and index)

From Kosovo to Kabul: Human Rights and International Intervention
David Chandler
Pluto Press, 2002
HBK: ISBN 0 7453 1884 3, £45.00
PBK: ISBN 0 7453 1883 5, £14.99
pp. 268 (including: foreword, references and index)

Jurisprudence of Humanitarian Intervention: The Humanitarian dimension
Nikolaos Tsagourias
Manchester University Press, 2000
HBK: ISBN 0 7190 5465 6, £45
pp. 137(including: bibliogaphy and index)

In July 1998 a United Nations Diplomatic Conference in Rome adopted the Statute that would lead to the creation of a permanent International Criminal Court (ICC). Three months later Senator Pinochet was arrested in London, in response to a Spanish extradition warrant, to face charges relating to his time as President of Chile. And in May 1999 President Milosevic of the Federal Republic of Yugoslavia became the first serving head of state to be indicted by an international criminal tribunal - for crimes allegedly committed in Kosovo.

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These three events, that grabbed headlines around the world during a ten-month period starting in 1998, have continued to shape international criminal law. In July 2002 the ICC came into existence. Based in The Hague the new court has jurisdiction over genocide, crimes against humanity and war crimes committed on or after 1 July 2002. In March 2000 Pinochet was spared extradition to Spain but only on the grounds that he was too ill to face a Spanish trial. As a result of the United Kingdom House of Lords ruling in the Pinochet case many other past and present political leaders have sought to avoid being prosecuted for 'international crimes' with carefully negotiated travel arrangements. Following a popular uprising in the Federal Republic of Yugoslavia President Milosevic could not avoid his indictment and his trial before the International Criminal Tribunal for the Former Yugoslavia started in The Hague in February 2002. The prosecution case is expected to finish in late 2003 and judgment is not expected before 2006.

A number of books on the developing subject of international criminal law have been written. Broadly speaking their authors can be divided into two camps: those who embrace the developments and those who do not. Geoffrey Robertson, Leila Sadat and Philippe Sands fall into the first camp. In *Crimes Against Humanity* the barrister Geoffrey Robertson QC argues that the strength of the human rights movement has pushed society to the brink of a new era – the age of human rights enforcement. Professor Sadat's book, *The International Criminal Court and the Transformation of International Law*, is more narrowly focussed on the International Criminal Court but before commentating on its founding Statute she considers the historical development of international criminal law. Professor Sands QC has contributed to and edited a series of essays, *From Nuremberg to The Hague*, that focus on recent developments in international criminal law since its post-Second World War origins at Nuremberg.

Each of these three books is thoroughly researched, easy to read and would be a welcome addition to the bookcase of any student or practitioner of international criminal law. Indeed anybody who wishes to grapple with the issues thrown up by the creation of the International Criminal Court and the criminal proceedings against Pinochet and Milosevic will need to engage thoroughly with the arguments presented in these three books. Two themes pervade them. First, that international criminal law has developed as the sovereignty of nations has weakened and secondly that this development is indicative of an international community that is willing to allow justice to prevail.

There is no doubt that international criminal law has developed in recent years. Indeed if international criminal law is defined as the prosecution of individuals for 'international crimes' such as war crimes or crimes against humanity then there was no such law for most of the twentieth century. At the eve of the twentieth century attempts to regulate warfare in the Hague Conference of 1899, and again in 1907, were constrained by notions of State sovereignty. As the Nuremberg judges pointed out in 1946 'the Hague Convention nowhere designates such practices [methods of waging war] as criminal, nor is any sentence prescribed, nor any mention made of a court to try and punish offenders' (Cited by Andrew Clapham in Sands, p. 31).

By what Andrew Clapham, Professor of Public International Law at the Graduate Institute of International Studies in Geneva, described as 'a remarkable bout of judicial activism' (p. 32) the Nuremberg judges declared that international law was not static and had adapted to follow the needs of a changing world. Accordingly, Robertson, Sadat and Sands are able to argue that the Nuremberg prosecutions represented the first example of defendants being prosecuted for 'international crimes'. Robertson says that:

> the logic of the crime against humanity, first defined in Article 6(c) of the Nuremberg Charter, was that future state agents who authorized torture or

> genocide against their own populations were criminally responsible, in international law, and might be punished by any court capable of catching them (p. xxii).

Many have argued that the Nuremberg and Tokyo tribunals did not administer any international criminal law on the grounds that the tribunals were military courts, established by military victors, following the unconditional surrender of the Axis powers. 'The only debate between the Allies was a strategic one of show trial or summary execution' (Chandler, p. 141).

But, even if it were accepted that the Nuremberg and Tokyo tribunals were international tribunals that convicted their defendants for international crimes, it is a fact that any such precedent was not then followed for nearly fifty years. The situation changed in 1993 when the United Nations Security Council opted to set up the International Criminal Tribunal for Former Yugoslavia in The Hague and, the following year, agreed to set up a similar tribunal in Arusha in respect of crimes committed in Rwanda. Robertson, Sadat and Sands are at one in concluding that what kept international criminal law at bay for most of the twentieth century was the concept of state sovereignty.

In law, according to Sadat, sovereignty means that the ruler of a State exercises sole authority over the territory of that State; all States are juridically equal; and States are not subject to any law to which they did not consent (p. 23). The sovereignty of states meant that no nation agreed to allow another state or international body to prosecute its citizens for crimes that would now be considered to be war crimes or crimes against humanity. Treaties that states consented to, such as the Hague Conventions of 1899 and 1907 and the Geneva Conventions of 1949 that were concerned with the conduct of war, did not create international criminal laws but merely required the state of the offending individual to take appropriate action. Robertson denounces such a system graphically by quoting a Sarajevo joke from about 1994: 'When someone kills a man, he is put in prison... when someone kills 200,000 people, he is invited to Geneva for peace negotiations' (p. 303).

There can be no doubt that the recent development of international criminal law has happened at the expense of sovereignty. But what is more controversial is the notion that this development has been in the interests of justice. The sub-title of the books by Robertson, Sadat and Sands indicates their belief that justice has been the winner in the recent development of international criminal law: *The Struggle for Global Justice* (Robertson); Justice for the New Millennium (Sadat); *The Future of International Criminal Justice* (Sands). Indeed the justice that these three books champion is a justice that triumphs over state sovereignty. 'The movement for global justice has been a struggle against sovereignty' claims Robertson (p. xxx). Accordingly, what is important for the authors of these books is not sovereignty but the notion that when an atrocity is committed the international community has a responsibility to ensure that somebody is tried for it. To this end, in recent years, the offence of 'crime against humanity' has been revived and developed since Nuremberg to signify a crime that is so serious that it entitles any state to claim jurisdiction. This professed right of international jurisdiction can trump any right of immunity held by state officials.

Spain's attempted extradition of Senator Pinochet caused the United Kingdom's House of Lords to find in favour of international crimes. Pinochet applied for *habeas corpus*, on the grounds that, as a former head of state, he had immunity from the jurisdiction of English courts. Not so, ruled the House of Lords on the grounds that the 1984 Convention Against Torture, to which Chile, Spain and the United Kingdom were all parties, had deprived a former head of state to any right of immunity (even though the convention made no such claim). Since the 19th Century courts around the world had upheld such

immunities on the basis that they were 'essential to preserve the peace and harmony of nations'. It was with these words that, for example, the State Supreme Court of New York dismissed a claim from Mr Hatch against the former President of the Dominican Republic who had journeyed to New York in 1876 (*Hatch v Baez*, in Sands p. 90).

What the Pinochet case highlighted was the tension between international justice and international law. Justice may have required Pinochet to be tried but international law traditionally limited itself to a framework that sought to preserve the peace and harmony of nations. If international law sanctioned a right to states to prosecute state officials of a foreign state then friction between states could result. Justice was to be delivered by nation states and not by foreign states. A respect for the sovereign equality of nations was the legal means by which this peace and harmony of nations was to be facilitated.

The limited role of international law has been evident in the history and practise of the International Court of Justice (ICJ). The World Court, as it has become known, is the focus of Howard N. Meyer's book, *The World Court in Action: Judging Among the Nations*. Meyer, a lawyer and social historian, traces the formation of the ICJ back to The Hague Conference of 1899 and charts its development through World War I, the League of Nations and into the post-War world when it was formed in its modern guise in The Hague as the principal judicial organ of the United Nations. Meyer stresses the essential differences between the ICJ and other organisations such as The International Criminal Tribunal for the Former Yugoslavia and the International Criminal Court. In the ICJ only nations, as opposed to individuals, can sue or be sued and the ICJ's jurisdiction is based on the consent of the affected states. This, Meyer points out, has been because each state is sovereign in that a state 'was the exclusive representative and guardian of its people and institutions' (p. 7).

With the recent demise of state sovereignty it was inevitable that the ICJ would be called on to consider the judgment given by the UK House of Lords in the Pinochet case. After all the rest of the world is not required to accept a judgment of a UK court as to the nature of international law. The problem thrown up by the Pinochet judgment is that if a nation state is not solely responsible for the prosecution of alleged offences committed by its leaders on its territory then what is to stop other states from seeking to prosecute alleged offenders? If Pinochet and other state officials, past and present, cannot claim immunity from foreign prosecution then what is to prevent other states from seeking to prosecute them? A year after the House of Lords gave judgment against Pinochet a Belgian judge issued an international arrest warrant against the Minister of Foreign Affairs of the Democratic Republic of Congo, Mr Yerodia, on the grounds that he had committed war crimes in the Congo. The Congo asked the ICJ to require Belgium to annul the arrest warrant on the grounds that (a) Belgium's purported claim to be able to exercise universal jurisdiction violated the sovereignty of the Congo and (b) by failing to recognise Mr Yerodia's immunity it was unlawful under international law. The ICJ declined to rule on the right of Belgium to be able to exercise universal jurisdiction but it did uphold Mr Yerodia's right to immunity.

Unfortunately Meyer's book was written shortly before the ICJ gave its judgment in the Yerodia case. But the judgment is considered by Sands in his essay, 'After Pinochet: the role of national courts'. He criticises the judgment on the grounds that a broad presumption in favour of immunities will lead to 'a watered-down system of international criminal justice' (p. 108). For Sands the House of Lords was correct to treat international law 'as a set of rules the primary purpose of which is to give effect to a set of broadly shared values, including a commitment to rooting out impunity for the gravest international crimes' (p. 103). This approach he claims is to be preferred to that expressed by the ICJ in the Yerodia case that 'sees the rules of international law as being

intended principally to facilitate relations between states, which remain the principal international actors' (p. 103).

For Sands the relationship between international law and international justice is one of balance and as is clear from his comments about the Yerodia case it is a balance that he weighs in favour of international justice. David Chandler's book, *From Kosovo to Kabul*, is written from a different perspective. Chandler, a senior lecturer in international relations at the University of Westminster, argues that international law is based upon equality. In the context of international law this means 'equality of derivation and equality of application' (p. 151). Sovereignty is the quality that makes this equality possible because when it comes to the formation and implementation of international law weak states have the same rights as powerful ones. International law based upon the sovereign equality of states cannot be foisted on weak states by strong ones.

Those who elevate 'justice' and 'human rights' above sovereignty, argues Chandler, destroy the equality upon which international law has been built. So, for example, the attempt to secure Pinochet's extradition to Spain shows that universal jurisdiction 'means that the decisions of the Chilean people on the path of democratic transition are considered to be illegitimate' (p. 152). Chandler says that the ICC will, like its *ad hoc* predecessors 'be little more than the backdrop for show trials against countries like Rwanda and the former Yugoslavia' (p. 147). Chandler, ironically, quotes Robertson for observing that the combatants who are likely to appear in the International Criminal Court will be those without superpower support (Chandler p. 148, Robertson p. 350).

Whereas Sands saw the relationship between international law and international justice as one of balance Chandler sees the promotion of international justice as being at the expense of international law: 'The problem that the advocates of "international justice" have to grapple with is that without sovereign equality there can be no international law' (p. 153) International justice based upon a diminution of sovereignty authorises international relations based on power and what is then claimed to be an exercise of international law is in reality an exercise of power masquerading as law. Chandler cites as a recent example of an exercise of power against a sovereign state NATO's military campaign against Yugoslavia concerning Kosovo. Even NATO's Secretary-General, Lord Robertson, was moved to observe that this was not simply a question of international law when he described it as an ongoing process of 'balancing law, morality and the use of force' (p. 155) More recently of course there has been the ongoing debate about the legality of war in Iraq – an action that would have been unthinkable in legal terms had the sovereign equality of nations not withered over the last decade.

The relationship between international law and international justice is considered by Tsagourias, a lecturer in law at the University of Derby, in his book *Jurisprudence of International Law*. In the context of Kosovo he cites with approval the former Czech President Václav Havel who wrote that the military action happened 'out of respect for the law, for a law that ranks higher than the law which protects the sovereignty of states. The alliance has acted out of respect for human rights as both conscience and international legal documents dictate' (p. 18). And the French President Jacques Chirac justified the Kosovo intervention with reference to 'une conscience universelle de ce que sont les Droits de l'Homme' (p. 18). What these comments show is that when international law is defined in terms of what some state leaders believe to be just and conscionable then international law has been stripped of any principle. This is a jurisprudence of international law that yields to the pragmatic requirements of powerful states. And as the recent debates about military intervention in Iraq show even the powerful states of the world will not always agree on what is just or conscionable and hence lawful.

Chandler goes on to consider the problem posed by the erosion of state sovereignty in circumstances where 'no universal framework of law is offered in its place' (p. 153). He views the events of 1998/1999 concerning the International Criminal Court, Pinochet and Milosevic critically. Recent events would tend to support Chandler's analysis. The International Criminal Court has been vehemently opposed by America which has engaged in exercises of brute diplomacy to seek bilateral deals with numerous states to secure war crimes immunity deals for Americans. The assumption of universal jurisdiction in respect of war crimes and crimes against humanity by Belgium's legal system resulted in complaints being filed against US President George W Bush, UK Prime Minister Tony Blair and Israeli Prime Minister Ariel Sharon and the Americans had threatened to block further funding for Nato's new headquarters in Belgium until the law was restricted. The prosecutions in The Hague and Arusha continue but with unhelpful political consequences. Few Serbs see the prosecution of Milosevic as legitimate and the Serbian government co-operates with the tribunal in order to receive millions of dollars of economic aid. In April 2003 the *Women of Srebrenica* issued a statement saying that NATO had expressed 'hatred ... for Muslims across the world' when The Hague tribunal indicted Naser Oric, a soldier viewed as a war hero by most Bosnian Muslims (Osborn, 2003). In Arusha, Britain and America have been pushing for the chief prosecutor, Carla Del Ponte, to be replaced before she indicts Rwandan army officers that the British and Americans see as important allies in a volatile area.

International law and international justice, it seems, continue to make a bad mix. The authors of each of the books reviewed for this essay recognises that international criminal law has developed significantly over the last few years as international law based upon the sovereign equality of nations has weakened. But only Chandler argues that this development has unfortunate consequences. His book provides a powerful critique of the development of international criminal law and should be required reading for anyone who is concerned to further the peace and harmony of nations.

Reference

Osborn, Andrew (2003), 'Srebrenica "hero" faces torture trial', *The Guardian*, April 12th 2003, http://www.guardian.co.uk/international/story/0,3604,935219,00.html