

REVIEW ESSAY

HOW SHALL WE PUNISH THE PERPETRATORS? HUMAN RIGHTS, ALIEN WRONGS AND THE MARCH OF INTERNATIONAL CRIMINAL LAW

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International Criminal Law by Kriangsak Kittichaisaree (Oxford: Oxford University Press, 2001) pages i–v, 1–482. Price A\$99.95 (softcover). ISBN 0 19 876577 0.

The Pinochet Papers: The Case of Augusto Pinochet in Spain and Britain by Michael Ratner and Reed Brody (eds) (The Hague: Kluwer Law International, 2000) pages i–v, 1–505. Price A\$278.95 (hardcover). ISBN 90 411 1404 1.

Torture as Tort: Comparative Perspectives on the Development of Transnational Human Rights Litigation by Craig Scott (ed) (Oxford: Hart Publishing, 2001) pages i–vii, 1–731. Price £69.00 (hardcover). ISBN 1 84113 060 5.

I

In an essay written in the infancy of the United Nations, international jurist Georg Schwarzenberger diagnosed international lawyers as suffering from a ‘professional disease against which other members of the legal profession are remarkably immune.’¹ International lawyers, he complained, are afflicted by an over-zealous evangelism that confounds laudable values with existing realities, and he considered those jurists that asserted the existence of an ‘international criminal law’ to be among the most deluded. How can international criminal law exist, he queried, when ‘international society still lacks any of the conditions on which the rise of criminal law depends’?² In Schwarzenberger’s unhappy assessment, the most important but unfulfilled precondition for the existence of

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¹ Georg Schwarzenberger, ‘The Problem of an International Criminal Law’ (1950) 3 *Current Legal Problems* 263, 263.

² *Ibid* 293.

international criminal law *stricto sensu* was a neutral and consistent enforcement mechanism divorced from the corrupting influence of Cold War power politics.³

More than fifty years have passed since Schwarzenberger's sceptical criticism. Were he alive today, Schwarzenberger would note with chagrin that, despite his protestations, international lawyers' enthusiasm for the concept of international criminal law has only increased, with the term entitling numerous textbooks and articles.⁴ But perhaps he would also begrudgingly accept that the prospects for the enforcement of international criminal law are better than at any time since 1945. The last decade has witnessed the first international criminal tribunals since Nuremberg, the establishment of the International Criminal Court, and an unusually large number of domestic prosecutions of international crimes under the principle of universal jurisdiction.

As a helpful recent review of developments in the *Harvard Law Review* noted, the literature on the theory, law and practice of prosecutions of international crimes is becoming unmanageably voluminous, reflecting the extent to which the topic continues to overexcite the imagination of international lawyers.⁵ Not unlike 'human rights-ism', 'international justice' at times appears in danger of becoming a panacea for the problems of contemporary international order, allegedly fulfilling a cornucopia of objectives from historical verification to deterrence and to the restoration of the rule of law. Empirical evidence supporting the efficacy of prosecutions in achieving any of these objectives is far from persuasive,⁶ raising the question of whether advocates of 'internationalised justice' risk undermining the credibility of prosecution processes by overstating their likely consequences. Among victims and their families from Rwanda to East Timor, disillusionment with internationalised justice processes — in the wake of unrealistically high expectations — is not difficult to find.⁷ As David Rieff has acerbically observed, overblown rhetoric can give hope a bad name.⁸

³ Ibid 296.

⁴ See, eg, Steven Ratner, 'The Schizophrenias of International Criminal Law' (1998) 33 *Texas Law International Law Journal* 237; John Dugard and Christine van den Wyngaert (eds), *International Criminal Law and Procedure* (1996); Christine van den Wyngaert (ed), *International Criminal Law: A Collection of International and European Instruments* (1997); Jordan Paust et al, *International Law: Cases and Materials* (1996).

⁵ 'Developments in the Law: International Criminal Law — The Promises of International Prosecution' (2001) 114 *Harvard Law Review* 1943, 1957.

⁶ See, eg, Sanja Kutnjak Ivkovic, 'Justice by the International Criminal Tribunal for the Former Yugoslavia' (2001) 37 *Stanford Journal of International Law* 255; The Human Rights Center and the International Human Rights Law Clinic, University of California, Berkeley and the Center for Human Rights, University of Sarajevo, 'Justice, Accountability and Social Reconstruction: An Interview Study of Bosnian Judges and Prosecutors' (2000) 18 *Berkeley Journal of International Law* 102; Patricia Wald, 'The International Tribunal for the Former Yugoslavia Comes of Age: Some Observations on Day-to-Day Dilemmas of an International Court' (2001) 5 *Washington University Journal of Law and Policy* 87, 117.

⁷ For Rwanda, see Samantha Power, 'Rwanda: The Two Faces of Justice', *The New York Review of Books* (New York), 16 January 2003, 47. For East Timor, see Nehal Bhuta, 'East Timor and the Vicissitudes of Externalized Justice' (2003) 12 *Finnish Yearbook of International Law* (forthcoming).

⁸ David Rieff, *A Bed for the Night: Humanitarianism in Crisis* (2002) 10.

II

But ‘high-minded concepts’ form the foundations of international criminal law, and perhaps for this reason it inspires the evangelism of which Schwarzenberger complained. Schwarzenberger himself noted that, in order for conduct to be classified as an ‘international crime’ or ‘crime under international law’ leading to individual criminal responsibility, it would include ‘in all likelihood only acts of subjects or objects of international law which strike at the very roots of international society’.⁹ An early study commissioned by the League of Nations similarly concluded that international criminal jurisdiction was activated by conduct ‘against international public order’.¹⁰ In the epoch when the high seas were the primary means of intercourse between nations, piracy was unsurprisingly considered a crime against all nations.¹¹ The acknowledgment of large-scale assaults on life and bodily integrity as acts jeopardising public international order is more recent. In a legal system historically concerned with the rights and liabilities of states, the impetus for imposing international criminal responsibility on *persons* developed in the aftermath of the First World War. The still greater atrocities of the Second World War, and the post-war recognition of ‘human rights’ as among the foundational principles of the international community, inaugurated the movement towards accepting widespread and severe violations of human life and bodily integrity as a threat to the international community.¹²

The post-Second World War classification of genocide, war crimes and crimes against humanity as conduct attracting individual criminal responsibility is rightly regarded as flowing not from settled principles of positive law,¹³ but from a moral imperative to punish and deter such conduct. As two early commentators on the Nuremberg legacy concluded:

the Tokyo and Nuremberg trials were a manifestation of an intellectual and moral revolution which will have a profound and far-reaching influence upon the future of world society ... They maintain that the international moral order must be regarded as the cause, not the effect, of positive law...¹⁴

Nuremberg thus helped to initiate public international law’s increasing incorporation of values of human solidarity and justice as the *theoretical* cornerstones of the international legal order. It is probably no coincidence that the progressive development of principles of international criminal law went hand in hand with academic formulations of the idea of *jus cogens* norms and obligations *erga omnes*; indeed, arguments made for the importance of prosecuting international

⁹ Schwarzenberger, above n 1, 272.

¹⁰ *Procès-verbaux* of the proceedings of the Advisory Committee of Jurists, Council of the League of Nations (1920) cited in United Nations, *Historical Survey of the Question of International Criminal Jurisdiction (Memorandum Submitted to the Secretary-General)* (1949) 3, 8–12.

¹¹ Ian Brownlie, *Principles of Public International Law* (4th ed, 1990) 238–9; *In re Piracy Jure Gentium* [1934] AC 586, 589 (Viscount Sankey LC).

¹² H H Jescheck, ‘International Crimes’ in Rudolf Bernhardt (ed), *Encyclopedia of Public International Law* (1995) vol 2, 1119, 1120; Josef Kunz, *The Changing Law of Nations* (1968) 149.

¹³ H Kelsen, ‘Will the Judgment in the Nuremberg Trial Constitute a Precedent in International Law?’ (1947) 1 *International Law Quarterly* 153, 164.

¹⁴ Joseph Keenan and Brendan Brown, *Crimes against International Law* (1950) v–vi.

crimes rely almost entirely upon the conceptual vocabulary of *jus cogens* and *erga omnes* principles.¹⁵

Jus cogens norms are those rules which protect the overriding interests and values of the international community, and cannot be derogated from by the subjects of international law.¹⁶ *Jus cogens* rules represent ‘conspicuous common interests’¹⁷ that express shared criteria for what is right and good in human life;¹⁸ they presuppose that the international community shares certain universal objects and moral imperatives, which form the basic rules for an international public order.¹⁹ Conversely, the obligation of any given state to observe *jus cogens* norms is owed to the international community as a whole. Formulated in this way, the conceptual kinship between *jus cogens* norms and obligations *erga omnes* is clear: *erga omnes* obligations are those owed to

the international community as a whole ... In view of the importance of the rights involved, all States are held to have a legal interest in their protection ... Such obligations derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person ...²⁰

Schwarzenberger’s definition of an international crime — conduct which threatens the international community — is thus given a philosophical foundation, and the prohibitions on genocide, aggression and slavery become paradigmatic examples of *jus cogens* norms giving rise to *erga omnes* obligations.

III

The notion of a ‘universal interest’ in repressing and deterring conduct that ‘shocks the conscience of humankind’ has been the guiding philosophical principle in the formulation of international criminal law and an influential rhetorical strategy for dedicated advocates of prosecutions. But for most of the post-1945 period, the ‘common interests’ purportedly protected by international criminal law — and its conceptual cousins, *jus cogens* norms and obligations *erga omnes* — were acclaimed primarily through the writings of international jurists and academic authors, rather than in the conduct of states or the deliberation of courts. To borrow a term popularised by Habermas, the principles existed as the ‘idealizing presuppositions’ for the very notion of an international public order: a counterfactual that, if we thought about it, we could not avoid presup-

¹⁵ See, eg, M Cherif Bassiouni and Edward Wise, *Aut Dedere Aut Judicare: The Duty to Extradite or Prosecute in International Law* (1995) 29.

¹⁶ Lauri Hannikainen, *Peremptory Norms (Jus Cogens) in International Law: Historical Development, Criteria, Present Status* (1988) 5.

¹⁷ Michael Byers, *Custom, Power and the Power of Rules: International Relations and Customary International Law* (1999) 162.

¹⁸ Martti Koskenniemi, ‘The Pull of the Mainstream’ (1990) 88 *Michigan Law Review* 1946, 1953.

¹⁹ H Mosler, ‘The International Society as a Legal Community’ (1974) 140 *Recueil de Cours: Academie de Droit International* 17, 33.

²⁰ *Barcelona Traction, Light and Power Co Ltd (Belgium v Spain)* [1970] ICJ Rep 3, 33 (President Bustamante y Rivero, Judges Fitzmaurice, Tanka, Jessup, Morelli, Padilla Nervo, Gros, Ammoun, Petrn, Onyeama and Lachs).

posing, but hitherto having no concrete existence in reality.²¹ A related consequence was that a body of jurisprudence applying and developing the principles of international criminal law through concrete cases was not developed.

Kriangsak Kittichaisaree's text *International Criminal Law* is an indication of how far we have come in the ten years since the creation of the International Criminal Tribunal for the Former Yugoslavia ('ICTY')²² and the International Criminal Tribunal for Rwanda ('ICTR').²³ Kittichaisaree's work is a textbook on the subject which can be favourably compared to textbooks on the laws of tort, contract, property or other developed fields of domestic law: that is, a text oriented towards the interpretation and application of the legal principles by legal practitioners.

The text has been written with a view to interpreting the substantive jurisdiction of the International Criminal Court ('ICC'), as contained in arts 5–8 of the *Rome Statute of the International Criminal Court*,²⁴ and to consolidating the many developments in international criminal law that have occurred in the last ten years. The book begins with three short chapters outlining the modern origins of the field of 'international criminal law', briefly discussing the importance of the concepts of *jus cogens* and obligations *erga omnes* discussed above and summarising the long process by which 'crimes against international law' were codified through the work of the Sixth Committee of the General Assembly.²⁵ One chapter also provides an overview of the creation and functioning of the ad hoc international criminal tribunals for Rwanda and Yugoslavia, which in many ways created a foundation of practical experience that would be indispensable for the design of a permanent international criminal court.

The majority of the book is taken up with a detailed discussion of the jurisdiction *ratione materiae* of the ICC, with a chapter devoted to the discussion of each of the crimes defined in arts 6–8 of the *Rome Statute*. Kittichaisaree has previously served as the head of Thailand's delegation to the ICC's Preparatory Commission, and thus is able to draw extensively on the states parties' positions concerning the formulation of the elements of crimes. This *travaux préparatoire*-like material is integrated with jurisprudence from judgments of the ICTY and ICTR, which have contributed an important body of substantive and procedural law that has transformed the field of international criminal law. Some

²¹ See generally Jürgen Habermas, 'What is Universal Pragmatics?' in Jürgen Habermas, *On the Pragmatics of Communication* (1998) 21.

²² *United Nations Security Council Resolution 827 on Establishing an International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law in the Territory of the Former Yugoslavia*, SC Res 827, 48 UN SCOR, 3217th mtg, UN Doc S/Res/827 (1993); 32 ILM 1203.

²³ *United Nations Security Council Resolution 955 (1994) Establishing the International Tribunal for Rwanda*, SC Res 955, 49 UN SCOR, 3453rd mtg, UN Doc S/Res/955 (1994); 33 ILM 1598.

²⁴ Opened for signature 17 July 1998, 37 ILM 999 (entered into force 1 July 2002) ('*Rome Statute*').

²⁵ See, eg, the successive drafts of the *Draft Code of Offences against the Peace and Security of Mankind: Report of the International Law Commission to the General Assembly on Its Sixth Session*, UN GAOR, Supp No 9, UN Doc A/2693 (1954), reprinted in *Yearbook of the International Law Commission* (1954) vol 2, 140; *Report of the International Law Commission on Its Forty-Eighth Session*, UN GAOR, 51st sess, Supp No 10, UN Doc A/51/10 (1996), reprinted in *Yearbook of the International Law Commission* (1996) vol 2, 15.

crimes, such as genocide, crimes against humanity, persecution and ‘war crimes’, have already been the subject of important decisions by the ICTY²⁶ and the ICTR,²⁷ and the collation of principles from this jurisprudence (given that the judgments themselves often run to three hundred pages) is of great assistance to anyone considering how the definitions contained in the *Rome Statute* might be applied.

On the other hand, the definitions of crimes against humanity and war crimes set out in the *Rome Statute*²⁸ also enumerate acts that amount to such crimes, such as enslavement, enforced disappearance, medical experimentation upon prisoners or forced population transfer. Many of these acts have not been subject to judicial clarification (for example, the crime of ‘apartheid’) and, at this stage in the development of the law, we must rely primarily upon the ‘Elements of Crimes’ formulated by the Preparatory Commission for the ICC.²⁹ Here, the utility of Kittichaisaree’s book is found in the way in which it summarises the Preparatory Commission deliberations on the elements of crimes and the final text of the Elements themselves, giving us at least some guidance on the way in which the definitions may be applied. The result is a synthesis of treaty interpretation and the relevant case law, allowing one to form a view (firmer for some crimes than others) about the approach that the ICC may take in interpreting its subject-matter jurisdiction. Areas of international criminal law to which ‘actually existing’ international criminal tribunals have made an important contribution in recent years are defences to individual criminal responsibility, and the crime of ‘complicity’. Due to the hybrid civil law–common law structure of the ad hoc tribunals, the application of domestic law principles to either of these questions is not straightforward, and the relative paucity of prior precedent meant that the ad hoc criminal courts were compelled to develop their own standards. The final chapters of *International Criminal Law* bring together these standards and place them in the context of the *Rome Statute*.

While not as detailed in its analysis of substantive case law as other recent publications,³⁰ and largely eschewing philosophical and political questions concerning the future operations of the ICC, *International Criminal Law* is a timely book that is reasonably comprehensive in its treatment of both procedural and substantive aspects. It will be an invaluable resource for non-specialists trying to make sense of the legal controversies that will doubtless arise in the early years of the ICC.

²⁶ See, eg, *Prosecutor v Blaskic (Trial Chamber Judgment)*, Case No IT-95-14-T (12 May 1999) (crimes against humanity); *Prosecutor v Tadic (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction)*, Case No IT-94-1-AR72 (2 October 1995) (war crimes).

²⁷ See, eg, *Prosecutor v Jean-Paul Akayesu (Trial Chamber Judgment)*, Case No ICTR-96-4-T (2 September 1998) (genocide).

²⁸ Opened for signature 17 July 1998, 37 ILM 999, arts 7 and 8 respectively (entered into force 1 July 2002).

²⁹ Preparatory Commission for the ICC, *Rome Statute of the International Criminal Court* (2002) app 2.

³⁰ See, eg, Gabrielle Kirk McDonald and Olivia Swaak-Goldman (eds), *Substantive and Procedural Aspects of International Criminal Law: The Experience of International and National Courts* (2000).

IV

An interesting historical observation made by Kittichaisaree is that a proposal to try alleged war criminals before an international criminal court after the First World War failed in part due to United States opposition.³¹ It remains to be seen whether the ICC can successfully resist determined efforts by the current US government to undermine its credibility. With the first judges of the Court elected in February 2003, and a prosecutor to be nominated and elected in April, it is possible that hearings could commence by the middle of 2004. If the history of the ICTY and ICTR holds any lessons, however, it may be some years before the ICC becomes an effective and fully functional tribunal. The first President of the ICTY once described the ICTY as an

armless and legless giant that needs artificial limbs to act and move. These limbs are the state authorities ... the national prosecutors, judges and police officials. If state authorities fail to carry out their responsibilities, the giant is paralysed, no matter how determined its efforts.³²

Despite the fact that the parties to the *Rome Statute* have voluntarily accepted their obligations of cooperation with the Court, it is not clear that it will be able to escape all of the difficulties that the ad hoc tribunals encountered, which included a serious lack of funding,³³ corruption and mismanagement,³⁴ and a shortage of qualified personnel. Another salutary experience was the extent to which those states outwardly supportive of the tribunals withheld crucial diplomatic and military assistance when pressed.³⁵ Anyone who has dealt with United Nations' institutions would be aware that it is an organisation whose structure and membership predispose it to inertia, recurrent failures of institutional learning and an incapacity to see beyond the next budget cycle. While this may be excusable in light of the complexity of the tasks that it is called upon to perform, it means that where institutional bottlenecks develop, it can take several attempts at reform before the right combination of people and resources is found.³⁶

As we wait for the ICC to reach its stride, it is likely that proponents of prosecutions will continue to look to the domestic laws in third countries that permit

³¹ Kriangsak Kittichaisaree, *International Criminal Law* (2001) 15.

³² Antonio Cassese, President of the ICTY, 'Dayton Four Months On: The Parties' Co-Operation with the International Criminal Tribunal for the Former Yugoslavia (ICTY) under the Dayton Peace Agreement' (Speech delivered at the Parliamentary Assembly of the Council of Europe, Strasbourg, 25 April 1996).

³³ See, eg, the concerns of then Prosecutor Richard Goldstone in Raymond Bonner, 'UN Fiscal Woes Are Said to Threaten War Crime Tribunals', *New York Times* (New York), 4 October 1995, 8.

³⁴ See, eg, United Nations Office of Internal Oversight Services, *Audit and Investigation of the International Criminal Tribunal for Rwanda* (1997).

³⁵ See, eg, comments by then Prosecutor Louise Arbour in Jennifer Llewellyn and Sandra Kaponi, 'The Protection of Human Rights through International Criminal Law: A Conversation with Madam Justice Louise Arbour, Chief Prosecutor for the International Criminal Tribunals for the Former Yugoslavia and Rwanda' (1999) 57 *University of Toronto Faculty of Law Review* 83, 85.

³⁶ A contemporary example of this is the operation of the mixed international tribunal in East Timor. It functioned poorly for over two years, before several critical reviews and public dissatisfaction generated the momentum for personnel changes and an increase in material resources. See Bhuta, above n 7.

trials under universal jurisdiction. Universal jurisdiction refers to states' entitlement (and in certain situations, obligation) to exercise criminal jurisdiction based solely on the nature of the crime, without regard to where the crime was committed, the nationality of the offender, the nationality of the victim, or any other connection to the state exercising such jurisdiction.³⁷ The practical consequence of the exercise of universal jurisdiction is that prosecutors or investigating judges may open investigations and/or 'prosecute persons for crimes committed outside the state's territory which are not linked to that state by the nationality of the suspect or of the victim, or by harm to the state's own national interests.'³⁸

The international law authority for a state to exercise universal jurisdiction may arise in one of two ways: under a treaty obligation that requires all states parties to criminalise certain conduct in their domestic law, whether the conduct has occurred within their own territory or within the territory of another party to the treaty,³⁹ or where a person is suspected of a crime under international law which is regarded as so serious as to threaten the international order, entitling any state to investigate or prosecute that person should she or he come within reach of its judicial organs.⁴⁰ In the latter case, the notion of *jus cogens* norms and obligations *erga omnes* is given force through a permissive principle of jurisdiction, allowing (but not necessarily requiring) states to prosecute persons suspected of genocide, crimes against humanity, torture or war crimes.

The last decade has seen a rapid expansion in the number of criminal proceedings brought under the principle of universal jurisdiction, the majority of which have arisen in Western Europe. The dramatic arrest of Augusto Pinochet in London in 1998,⁴¹ the Belgian trial and conviction of four Rwandans for war crimes in June 2001⁴² and the extradition of an Argentinean military officer from

³⁷ Stephen Macedo (ed), *Princeton Principles on Universal Jurisdiction* (2001) 28 (principle 1). See also International Law Association Committee on International Human Rights Law and Practice, *Final Report on the Exercise of Universal Jurisdiction in Respect of Gross Human Rights Offences* (2000); Fiona McKay, *Universal Jurisdiction in Europe: Criminal Prosecutions in Europe since 1990 for War Crimes, Crimes against Humanity, Torture and Genocide* (1999).

³⁸ Amnesty International, *Universal Jurisdiction: The Duty of States to Enact and Enforce Legislation* (2001) <<http://web.amnesty.org/library/index/ENGIOR530022001>>.

³⁹ See, eg, the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, opened for signature 10 December 1984, 1465 UNTS 85 with changes at 24 ILM 535 (entered into force 26 June 1987) and the grave breaches provisions of the *Geneva Conventions: Geneva Convention for the Amelioration of the Condition of the Wounded and the Sick in Armed Forces in the Field*, opened for signature 12 August 1949, 75 UNTS 31, art 50 (entered into force 21 October 1950); *Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea*, opened for signature 12 August 1949, 75 UNTS 85, art 51 (entered into force 21 October 1950); *Geneva Convention Relative to the Treatment of Prisoners of War*, opened for signature 12 August 1949, 75 UNTS 135, art 130 (entered into force 21 October 1950); *Geneva Convention Relative to the Protection of Civilian Persons in Time of War*, opened for signature 12 August 1949, 75 UNTS 287, art 147 (entered into force 21 October 1950).

⁴⁰ Macedo, *Princeton Principles*, above n 37, 28 (principle 1.2); *Arrest Warrant of 11 April (Congo v Belgium)* (Unreported, International Court of Justice, 14 February 2002) [9] (Judge Koroma), [61]–[64] (Judges Higgins, Kooijmans and Buergenthal), [40]–[62] (Judge van den Wyngaert), [7] (Judge Al-Khasawneh).

⁴¹ See generally Nehal Bhuta, 'Justice without Borders? Prosecuting General Pinochet' (1999) 23 *Melbourne University Law Review* 499.

⁴² Vincent Ntezimana, Alphonse Higaniro, Consolata Mukangango and Julienne Mukabutera: see (Unreported, Cour d'Assises de l'Arrondissement Administratif de Bruxelles-Capital, President

Mexico to Spain on torture charges in February 2001⁴³ illustrate the potential to use universal jurisdiction to pursue criminal accountability where neither the state of nationality, nor the international community as a whole, are willing to act. Cases such as the Pinochet prosecution have also disturbed the culture of impunity within Chile and other Latin American countries, shifting the limits of the possible within these societies and encouraging a large number of domestic prosecutions.⁴⁴ The Latin American experience suggests that transnational prosecutions under universal jurisdiction can be a catalyst for change in the post-conflict society by strengthening the hand of anti-impunity movements.

The volume edited by human rights attorneys Michael Ratner and Reed Brody⁴⁵ is the most comprehensive compilation of documentation concerning the Pinochet prosecution yet published. Brody is a special counsel to Human Rights Watch, which intervened in the proceedings before the House of Lords, while Michael Ratner is presently Chairman of the Center for Constitutional Rights in New York City and has a long personal involvement in anti-impunity efforts in Latin America. The two editors' close personal involvement with proceedings against Pinochet and other former dictators means that they were uniquely situated to draw together documents concerning the case against Pinochet in Spain and Britain.

The book begins with three short introductory essays by Brody, Ratner and Richard Wilson, which summarise the proceedings and give some insight into the historical context out of which they emerge. However, the value of the book resides primarily in the fact that it compiles in one volume, and in chronological order, key documents that would not otherwise be accessible. The documents commence with the provisional British arrest warrant under which Pinochet was first arrested at the request of the Kingdom of Spain, an event which provoked deep and complex emotions amongst Pinochet's victims and jubilation among human rights activists. The historical import of this document is underlined by its reproduction in original form, including the hand-written amendments by prosecutors. Most other documents in the collection are transcribed and so do not retain their original formatting. From the initial Spanish detention request, almost every procedural and substantive step in the case is documented through the thirty-seven edited documents appearing in the collection.

These include materials that would be impossible to obtain without first-hand involvement in the case, such as correspondence between the parties,⁴⁶ written

Maes, Judges Louveaux and Massart, 8 June 2001) <http://www.asf.be/AssisesRwanda2/fr/fr_VERDICT_verdict.htm>.

⁴³ Amnesty International, *Extradition Decision Raises Hopes in the Struggle Against Impunity* (Press Release, 5 February 2001).

⁴⁴ Naomi Roht-Arriaza, 'The Pinochet Precedent and Universal Jurisdiction' (2001) 35 *New England Law Review* 311, 315; Jose Miguel Vivanco, 'Ready for Justice', *The New York Times* (New York), 14 October 1999, 31; Clifford Krauss, 'Chilean Military Faces Reckoning for Its Dark Past', *The New York Times* (New York), October 3 1999, 1.

⁴⁵ Reed Brody and Michael Ratner (eds), *The Pinochet Papers: The Case of Augusto Pinochet in Spain and Britain* (2000).

⁴⁶ See, eg, 'Letter to the Home Secretary from Pinochet's Lawyers Seeking Cancellation of the First Provisional Warrant', 21 October 1998, *ibid* 63; 'Letters from the Home Office to the Spanish, Belgian, Swiss and French Ambassadors Announcing the Termination of Extradition Proceedings', 2 March 2000, *ibid* 465.

submissions and transcripts of hearings before the House of Lords⁴⁷ (unfortunately, the United Kingdom does not make such transcripts readily available online in the manner of the High Court of Australia), and translations of key Spanish decisions that enabled the prosecution to commence.⁴⁸ Helpfully appended to the documents are the relevant international conventions, such as the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*⁴⁹ and the *Vienna Convention on Diplomatic Relations*,⁵⁰ and British domestic laws that were the basis for the critical legal dispute about Pinochet's immunity and his eligibility for extradition to Spain. Finally, a chronology running from Pinochet's seizure of power in 1973 allows one to situate the prosecution in the longer sequence of events from the fall of Allende to the restoration of democracy in Chile.

The Pinochet prosecution was a watershed in efforts to enforce international criminal law and international human rights. In its immediate aftermath, there was understandable enthusiasm for pursuing other former dictators and grave human rights violators through the courts of Belgium and Spain. While the legal avenue remains open in principle, and some of these cases have progressed, there was also an underestimation of the hurdles raised by moving a court to investigate extraterritorial crimes and prosecute a non-national under international legal principles. An important contribution of this book is to provide practitioners who are considering embarking on such cases with a documentary record of the considerable procedural and substantive complexity of litigating a prosecution under universal jurisdiction.

States electing to exercise universal jurisdiction generally do so through enabling domestic legislation permitting national courts to investigate and try crimes committed outside the state. Approximately 120 states have enacted legislation that ostensibly empower their courts to exercise some form of universal jurisdiction.⁵¹ However, the terms upon which states choose to empower their courts to exercise universal jurisdiction vary greatly from state to state. In practice, universal jurisdiction may be under-utilised due to legal technicalities or institutional limitations of the individual state. One longer-term consequence of the 'complementarity' provisions of the *Rome Statute*⁵² may be greater uniformity in the national implementation of universal jurisdiction laws and an increased willingness to use them. Thus far, however, Western European states with civil law systems have been the favoured fora for prosecutions under universal jurisdiction. The implementation and application of universal jurisdiction principles within these states falls into two broad classes:

- 1 States which require the accused to be present in their territory and/or that there be some kind of link between the case and the forum state (such as the

⁴⁷ Ibid 109–26, 219–42.

⁴⁸ 'Order of the Criminal Chamber of the Spanish *Audencia Nacional* Affirming Spain's Jurisdiction', 5 November 1998, *ibid* 95.

⁴⁹ Opened for signature 10 December 1984, 1465 UNTS 85 with changes at 24 ILM 535 (entered into force 26 June 1987).

⁵⁰ Opened for signature 14 April 1961, 500 UNTS 95 (entered into force 24 April 1964).

⁵¹ Amnesty International, *Universal Jurisdiction*, above n 38, ch 4A.

⁵² Opened for signature 17 July 1998, 37 ILM 999, art 17 (entered into force 1 July 2002).

nationality of the victim) before an investigating judge can be seized of the case. France,⁵³ Germany,⁵⁴ the Netherlands⁵⁵ and Switzerland⁵⁶ fall into this category.

- 2 States that allow an investigating judge to be seized of the case even if the accused is not present in the territory, and are willing to seek extradition of the accused. The legislation of Belgium⁵⁷ and Spain⁵⁸ are examples, but even in these states, there seems to be a preference for a connection between the forum state and the case (such as that the victim is a national).

The success of a prosecution under universal jurisdiction will depend on the interaction of several factors, including the procedural law of the forum state, the means by which international criminal law has been incorporated into the domestic law of that state, the existence of an independent judiciary, the forum state's relationship with the accused's state of nationality, and the availability of extradition and mutual assistance treaties with states in which an accused may be present. Taken together, these raise formidable difficulties to a successful prosecution, which require both expertise and time to navigate. Due to the relative novelty of seriously pursued universal jurisdiction proceedings in most countries, courts and governments will also be on a steep learning curve in their management of such cases. Essential to the fulfilment of the promise of universal jurisdiction is the willingness of judges in these cases to take risks and adopt innovative approaches to case management and legal interpretation, such as the approach taken by Judge Baltazar Garzon in Spain.⁵⁹ Critically, victims' advocates must also exercise sound strategic judgment in the cases that they file in the formative years of this jurisprudence, and fully prepare their clients for the difficulties that they will encounter. As one experienced prosecutor has observed:

⁵³ See, eg, *In re Javor* (1996) 132 Bull Crim 379, denying jurisdiction to open an investigation into crimes committed in Bosnia because the accused was not on French territory: Bernard Oxman (ed), 'International Decisions' (1999) 93 *American Journal of International Law* 502, 525.

⁵⁴ See, eg, (1999) 3 BGHSt 215, cited in M Cherif Bassiouni, 'Universal Jurisdiction in Historical Perspective' in Stephen Macedo (ed), *Princeton Papers on Universal Jurisdiction* (forthcoming, 2003).

⁵⁵ See, eg, *Bouterse* (Unreported, Hoge Raad der Nederlanden, 18 September 2001) [8.5].

⁵⁶ See *In re G* (Unreported, Military Tribunal, Division 1, Lausanne, 18 April 1997), reported in Andreas Ziegler, 'International Decisions' (1998) 92 *American Journal of International Law* 78.

⁵⁷ *Act Concerning the Punishment of Grave Breaches of International Humanitarian Law* (Belgium); see Belgian Tribunal of First Instance of Brussels, 8 November 1998 as reproduced in Bernard Oxman (ed), 'International Decisions' (1999) 93 *American Journal of International Law* 668, 700; see also *travaux préparatoires* to the Belgian law, cited in Transcript of Proceedings, *Arrest Warrant of 11 April 2000 (Congo v Belgium)* (International Court of Justice, Jacques Masangu-a-Mwanza, 23 November 2000). The Belgian Supreme Court recently upheld the jurisdiction of Belgian magistrates to open cases where the accused was not present in Belgium: see *Belgian Ruling Key Precedent for Human Rights* (2003) Human Rights Watch <<http://www.hrw.org/press/2003/02/belgium021303.htm>>. The Belgian Senate voted on 30 January 2003 to introduce new legislation confirming the power of magistrates to open investigations where the accused is not on Belgian territory: see *Belgium: Questions and Answers on the 'Anti-Atrocity' Law* (2003) Human Rights Watch <<http://hrw.org/campaigns/icc/belgium-qna.pdf>>.

⁵⁸ *Organic Law of the Judicial Power*, BOE 1985, art 23.

⁵⁹ See Margarita McLabe, *The Criminal Procedures against Chilean and Argentinean Repressors in Spain: A Short Summary* (1998) Derechos Human Rights <<http://www.derechos.net/marga/papers/spain.html>>.

Events have gone on to show that very few countries are prepared to mire themselves in the politics of high-profile extraditions. The invocation of ‘universal justice’ must be done on the basis of a full understanding of the details of international legal rules on extra-territorial jurisdiction and the political limits that circumscribe its practice ... Any such efforts must be coordinated with national initiatives for justice and must be linked to serious consultation with all parties who have an interest as victims or survivors. The idea that extra-territorial prosecutions avoid the problems of intimidation and political obstruction requires careful scrutiny ...⁶⁰

V

The complex domestic law questions raised by litigating international criminal law and international human rights law in national courts are well-illustrated by the essays in *Torture as Tort*.⁶¹ The idea that one could bring a civil claim for conduct in violation of international law owes its contemporary existence to a brief but venerable piece of American legislation: the *Alien Tort Claims Act* (‘*ATCA*’).⁶² Dating from 1789 and apparently introduced to provide a French diplomat with a remedy for a breach of his immunity — and so reduce the risk that France might declare war on the newly-formed United States to avenge the insult — the *ATCA* tersely states that federal courts have ‘original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.’⁶³ The *ATCA* thus permits non-citizens of the US to file civil suits in federal courts against any person amenable to service under US service rules, for a violation of a customary law principle or a treaty to which the US is a party.

The statute was largely unused until the case of *Filartiga v Pena-Irala*,⁶⁴ in which a torture victim of the Uruguayan junta encountered his former torturer in New York City and sued him for damages. The Second Circuit Court of Appeal held that the *ATCA* permitted a suit for damages for torture, which was clearly in violation of customary international law. Since then, the *ATCA* has been invoked against Indonesian⁶⁵ and Guatemalan military figures,⁶⁶ corporations accused of complicity in human rights abuses,⁶⁷ and non-state actors accused of crimes against humanity.⁶⁸ US rules governing service essentially require personal service, which remains effective even if the individual subsequently leaves the

⁶⁰ Paul Seils, former Legal Director of *Centro para Accion Legal en Derechos Humanos* (‘CALDH’) in Guatemala, ‘Reconciliation in Guatemala: the Role of Intelligent Justice’ (2002) 44 *Race and Class* 33, 59 fn 60.

⁶¹ Craig Scott (ed), *Torture as Tort: Comparative Perspectives on the Development of Transnational Human Rights Litigation* (2001).

⁶² 28 USC § 1350 (1789).

⁶³ § 1350.

⁶⁴ 630 F 2d 876 (2nd Cir, 1980).

⁶⁵ *Todd v Panjaitan* (Unreported, United States District Court for the District of Massachusetts, Judge Saris, 26 October 1994) (against the Indonesian General who had command responsibility for the 1991 Santa Cruz massacre in East Timor).

⁶⁶ *Xuncax v Gramajo*, 886 F Supp 162 (Mass DC, 1995) (against a Guatemalan General and former Defence Minister who had command responsibility for several massacres in Guatemala).

⁶⁷ See, eg, *Alomang v Freeport-McMoran Inc*, 718 So 2d 971 (La App 4th Cir, 1998).

⁶⁸ *Kadic v Karadzic*, 70 F 3d 232 (NY 2nd Cir, 1995).

jurisdiction.⁶⁹ Many of the cases against individuals have therefore proceeded as default judgment hearings, where the defendant has fled the country and does not participate in the proceedings. These cases often result in vast awards of exemplary damages against individuals,⁷⁰ which have hitherto been difficult to collect unless the defendant has assets in the US. Nevertheless, the cases provide a forum for the presentation of evidence by victims and witnesses and a validation of their accounts by the courts, thereby helping to restore partly their dignity. Moreover, the defendant will be effectively prevented from returning to the US while the default judgment stands against them.

In the case of defendant corporations with headquarters or offices in the US, there is a real chance that a successful lawsuit could result in enforceable orders for compensation in favour of the plaintiffs. Unsurprisingly, companies that have been the subject of suits, such as Shell, Unocal, Exxon and Coca-Cola, have vigorously defended the actions. Thus far, no suit against a corporation for complicity or participation in human rights violations has succeeded, but many remain in the early stages of litigation. Plaintiffs have successfully resisted strike-out motions brought by companies, with appeal courts holding that a corporation may in principle be liable under the *ATCA* for participation or complicity in human rights violations.⁷¹ Overall, there is a strong trend towards the increased utilisation of the *ATCA* against natural persons and corporations,⁷² provoking the concern of the current US administration.⁷³

The peculiar synthesis of public international law principles with private law remedies required by the bringing of an *ATCA* case has produced a distinctive jurisprudence that is replete with doctrinal complexities. For example, what role do common law choice of law and forum rules play in determining the admissibility of the suit in a US court? Do common law principles concerning acts of state apply to claims where the plaintiff has suffered human rights violations

⁶⁹ For a practitioner-oriented handbook, see Beth Stephens and Michael Ratner, *International Human Rights Litigation in US Courts* (1996).

⁷⁰ See, eg, *Doe v Lumintang* (Unreported, District Court of Columbia, Kay J, 13 September 2001); see also *East Timor Action Network Hails \$66 Million Judgment in Rights Lawsuit against Indonesian General* (2001) East Timor Action Network <<http://www.etan.org/news/2001a/09lumin.htm>>.

⁷¹ See, eg, *Doe v Unocal Corporation*, 248 F 3d 915 (9th Cir, 2001).

⁷² Terry Collingsworth, 'The Key Human Rights Challenge: Developing Enforcement Mechanisms' (2002) 15 *Harvard Human Rights Journal* 183.

⁷³ In June 2001, the International Labor Rights Fund filed a suit under the *ATCA* against Exxon-Mobil, alleging that its subsidiary, Mobil Oil Indonesia, had aided and abetted the Indonesian military ('TNI') in the commission of crimes against humanity in Aceh, Indonesia. For an overview of the allegations, see Michael Shari, 'Indonesia: What Did Mobil Know?', *BusinessWeek* (Boulder, Colorado), 28 December 1998, 68.

On 7 July 2002, the US Department of State filed an opinion with the US District Court for the District of Columbia asking the Court to dismiss the claim on the grounds that the lawsuit would 'risk a potentially serious adverse impact on significant interests of the United States, including interests directly related to the ongoing struggle against international terrorism': International Labor Rights Fund, 'State Department Opinion Regarding ExxonMobil Litigation' (2002) <<http://www.laborrights.org/>>. Earlier in 2002, the Department of State filed a similar opinion with a District Court in California that was hearing a claim against Rio Tinto for human rights violations and environmental damage in Papua New Guinea. The letter also claimed that the suit would prejudice the interests of the US in its relationship with Papua New Guinea. Relying in part on the Department of State opinion, the District Court judge in California dismissed the case: see Editorial, 'Oily Diplomacy', *The New York Times* (New York), 19 August 2002, 14.

under the colour state authority? How does one characterise a ‘tort’ in violation of international law? Judicial responses to these questions — which have mostly been settled in the last fifteen years of *ATCA* litigation — demonstrate the difficulty of domesticating international law principles, generally conceived at a high level of generality, through national courts accustomed to applying case law.

The result has been a hybrid jurisprudence of international law informed by US law concepts, most aspects of which are carefully discussed by the broad-ranging essays in *Torture as Tort*. A large volume, comprising over 25 contributions, *Torture as Tort* is organised into six parts. Part one sets the context for a discussion of ‘transnational tort litigation’ with several detailed chapters that describe the existing legal framework for using tort law to achieve a remedy for violations of international human rights. In particular, Michael Swan’s essay on the experience of US courts gives an excellent introduction to the current state of *ATCA* case law for readers unfamiliar with the area, setting out the statutory framework governing the kinds of harms that have been subject to a tort claim, and the critical procedural hurdles to be overcome.⁷⁴

The papers collected in parts two and three of the volume address several doctrinal questions that have come to vex transnational tort litigation: the problems of sovereign immunity, forum non conveniens and the characterisation of harm. Because transnational tort litigation is a *domestic* remedy for violations of international law, there arises a tension between the application of common law doctrines associated with conflicts of law and private international law principles, and the universality of certain principles of international human rights law. For example, the characterisation of the prohibition against torture as a *jus cogens* norm implies that no derogation from the principle is permissible. Most states, however, legislatively confer immunity from suit upon foreign sovereigns and certain foreign officials, which would effectively prevent an action in tort being taken against them. In domestic courts bound by domestic legislation, the concepts of *jus cogens* norms and obligations *erga omnes* have little force unless somehow made binding in domestic law — something that generally requires legislation in states such as the US and Australia. Similarly, can the common language of tort adequately capture the harm engendered by conduct such as torture? While torture could easily be seen as a kind of assault and battery, this hardly seems a sufficient characterisation of conduct that is designed not only to inflict pain, but also to destroy an individual’s sense of dignity and selfhood.⁷⁵ The problem of characterisation is partially alleviated in the *ATCA* context, where US courts can apply the international law definitions appropriate to the conduct, but what if one were to try to bring a tort claim in a common law

⁷⁴ Michael Swan, ‘International Human Rights Tort Claims and the Experience of United States Courts: An Introduction to the US Case Law, Key Statutes and Doctrines’ in Craig Scott (ed), *Torture as Tort: Comparative Perspectives on the Development of Transnational Human Rights Litigation* (2001) 65.

⁷⁵ See, eg, the accounts in Lawrence Weschler, *A Miracle, A Universe: Settling Accounts with Torturers* (1998).

jurisdiction such as Canada or Australia? The papers by Wendy Adams,⁷⁶ Jennifer Orange⁷⁷ and Sandra Raponi⁷⁸ provide clarifying discussions of these difficulties, mostly based on Canadian case law.

Part four of the book contains a diverse collection of essays that broadly address the question of the responsibility of non-state actors for violations of international human rights law. Of particular interest is the contribution by Chanaka Wickremasinghe and Guglielmo Verdirame on responsibility for human rights violations in the course of UN field operations.⁷⁹ With a marked rise in UN peacekeeping and peace enforcement operations since the end of the Cold War, as well as the more recent phenomenon of placing entire territories under UN administration (such as Kosovo and East Timor), the issue of what remedies may be available for persons who suffer abuses at the hands of UN personnel would seem to be a topical one. The legal terrain is highly complex due to the various organisational immunities conferred upon the UN and its agents; the fact that a domestic legal vacuum may exist in the territory under UN control; and the difficulty of determining the right forum in which a claim could be brought. The authors of this essay contribute to a deeper understanding of these problems by clearly delineating the principles and practice (such as there is) that may be relevant to how one might seek redress for injury or damage suffered at the hands of UN forces or due to negligence by UN administrative personnel. In the last instance, however, it appears that much uncertainty remains.

The last two sections of *Torture as Tort* concern broader theoretical questions raised by using civil litigation to vindicate public international law principles. Jennifer Llewellyn's chapter on how a domestic law amnesty⁸⁰ (in the wake of a transition from authoritarian rule or civil conflict to democracy and peace) should be dealt with if raised as a defence to civil liability for international crimes. Her contribution to articulating criteria by which to differentiate between legitimate and illegitimate amnesty laws addresses a problem that, since its emergence in the wake of many Latin American transitions in the 1980s, still confounds jurists and governments: when should an amnesty be respected, and when should it be ignored in transnational legal proceedings?⁸¹ At a higher level

⁷⁶ Wendy Adams, 'In Search of a Defence of the Transnational Human Rights Paradigm: May *Jus Cogens* Norms Be Invoked to Create Implied Exceptions in Domestic State Immunity Statutes?' in Craig Scott (ed), *Torture as Tort: Comparative Perspectives on the Development of Transnational Human Rights Litigation* (2001) 247.

⁷⁷ Jennifer Orange, 'Tort, Tort Choice of Law, and Tolofson' in Craig Scott (ed), *Torture as Tort: Comparative Perspectives on the Development of Transnational Human Rights Litigation* (2001) 291.

⁷⁸ Sandra Raponi, 'Grounding a Cause of Action for Torture in Transnational Law' in Craig Scott (ed), *Torture as Tort: Comparative Perspectives on the Development of Transnational Human Rights Litigation* (2001) 373.

⁷⁹ Chanaka Wickremasinghe and Guglielmo Verdirame, 'Responsibility and Liability for Violations of Human Rights in the Course of UN Field Operations' in Craig Scott (ed), *Torture as Tort: Comparative Perspectives on the Development of Transnational Human Rights Litigation* (2001) 465.

⁸⁰ Jennifer Llewellyn, 'Just Amnesty and Private International Law' in Craig Scott (ed), *Torture as Tort: Comparative Perspectives on the Development of Transnational Human Rights Litigation* (2001) 567.

⁸¹ Compare the principles set out in Leila Nadya Sadat, 'Universal Jurisdiction and National Amnesties, Truth Commission and Other Alternatives to Prosecution: Giving Justice a Chance'

of abstraction, the essays by Mayo Moran⁸² and Oliver Gerstenberg⁸³ reflect on the growing interpenetration of domestic and international law, a trend accelerated by the ‘domestication’ of international law through tort litigation. After reviewing developments in British, American and Australian courts, Moran makes an observation that is of relevance not only to civil litigation, but also to the conduct of criminal cases under universal jurisdiction and under statutes enabling complementarity with the ICC:

Ultimately, the torture cases give us a glimpse into the imperatives of a future in which law — including private law — is increasingly cosmopolitan. Here, as the torture cases and the surrounding debates reveal, the limitations of the traditional conception of binding law come to seem pressing to judges ... faced with a world where legal problems are profoundly multi-jurisdictional in nature. The task of the advocate, the judge, and the law-maker no longer seems adequately captured ... by the notion of discrete mutually exclusive spheres of binding law ... [W]hat the torture cases show is a subtle, yet distinct, move away from this model and towards a more multi-faceted integrative understanding of sources and a broader persuasive approach to authority.⁸⁴

Torture as Tort provides both an overview of *ATCA* litigation and jurisprudence, and a more detailed analysis of specific practical and theoretical problems that arise from the interface of public international law and national civil litigation. While Ratner and Stephens’ handbook on *ATCA* litigation⁸⁵ provides a better starting point for practitioners interested in the area, *Torture as Tort* is an important contribution to understanding in an area of law that is perhaps not as well-known outside the US as it ought to be.

VI

In July 2002, a jury in West Palm Beach held that two former Salvadorean generals were liable under international law principles of command responsibility for acts of torture, rape and murder committed under their command during El Salvador’s brutal counter-insurgency war. The generals, who had retired in Florida with the blessing of the US, were ordered to pay US\$54.6 million to

in Stephen Macedo (ed), *The Princeton Papers on Universal Jurisdiction* (forthcoming, 2003). The question of when an amnesty should be respected will also assume critical relevance in the interpretation and application of the principle of ‘complementarity’ in art 17 of the *Rome Statute*, opened for signature 17 July 1998, 37 ILM 999 (entered into force 1 July 2002): is an amnesty to be taken as an indication of a state’s unwillingness or inability to prosecute international crimes, thereby allowing the ICC to admit the case? Or should the Court be willing to investigate the circumstances under which an amnesty was granted and refuse to admit a case if it considers the amnesty to be ‘legitimate’?

⁸² Mayo Moran, ‘An Uncivil Action: The Tort of Torture and Cosmopolitan Private Law’ in Craig Scott (ed), *Torture as Tort: Comparative Perspectives on the Development of Transnational Human Rights Litigation* (2001) 661.

⁸³ Oliver Gerstenberg, ‘Private Law, Constitutionalism and the Limits of the Judicial Role’ in Craig Scott (ed), *Torture as Tort: Comparative Perspectives on the Development of Transnational Human Rights Litigation* (2001) 687.

⁸⁴ Moran, above n 82, 683–4.

⁸⁵ Stephens and Ratner, above n 69.

three surviving victims, Neris Gonzalez, Carlos Mauricio and Juan Romagoza.⁸⁶ Although unlikely to see much of the money, one of the plaintiffs, an academic tortured for days after he was accused of being a guerrilla, stated that '[i]t was a very healing moment looking at them [the two ex-generals] in court and accusing them. It seems I am closing the circle.'⁸⁷

As the institutional and legal infrastructure of international criminal law develops, broad claims will no doubt continue to be made for the virtues of international prosecution. I think the most credible and concrete of these claims is that victims have a human right, and a human need, to some form of justice and accountability. Each of the mechanisms considered above holds out a promise of accountability and perhaps even a tangible defence of the ephemeral 'common interests' of an international community. But the ICC is in its infancy, and the use of universal jurisdiction remains comparatively limited. Whether they can fulfil the hopes placed upon them, and make at least some contribution to restoring the dignity of victims, will depend in no small part upon the determination of advocates to redeem the promise of international criminal law's 'high-minded concepts'.

⁸⁶ Duncan Campbell, 'Florida Jury Sounds Knell for Torturers', *The Guardian Weekly* (Manchester), 1–7 August 2002, 7. The claim was brought under the *Torture Victims Protection Act*, 28 USC § 1350 (1991), a more recent law that is similar to *ATCA* but exclusively concerned with providing remedies for torture.

⁸⁷ Campbell, above n 86, 7.