The Law of Universal Conscience: Genocide and Crimes Against Humanity

Diane F. Orentlicher[1]

The subject about which I have been asked to speak--the law of crimes against humanity and genocide--is, in a very real sense, the law of universal conscience. Both the development and enforcement of this law have depended above all on the determined commitment of communities of conscience. Those communities were given a powerful new voice several years ago when the United States Holocaust Memorial Council created its Committee on Conscience "to alert the national conscience, influence policy makers, and stimulate worldwide action to confront and work to halt acts of genocide or related crimes against humanity." With others, I have been inspired by and grateful for Tom Buergenthal's leadership of the Committee, and so it was with special pleasure that I accepted his invitation to participate in this conference.

The Law of Conscience: Transforming the Realm of Politics

One of the more remarkable events of our time took place--or, I should say, began--less than two months ago, when former Chilean dictator Augusto Pinochet was arrested by British authorities at the request of a Spanish magistrate who has been investigating human rights crimes committed while General Pinochet was Chile's head of state. To many observers, what was astonishing was the possibility that British authorities could *lawfully* arrest General Pinochet for his conduct while president of another sovereign country. To international lawyers and human rights professionals, what was astonishing was that well-established principles of law were at last being enforced through international collaboration.

Some of the core principles underlying General Pinochet's arrest had long been honored

more “in principle” than through enforcement. The type of enforcement that was involved in the arrest of General Pinochet had been so rare--and had never before been undertaken in quite this way--that the legal developments in the United Kingdom have already contributed to major advances in the law itself.

The most important legal foundation for the legal proceedings against General Pinochet was established through the Nuremberg and other postwar prosecutions of Nazi war criminals for crimes against humanity, as well as more recent legal developments that build upon the Nuremberg legacy. The latter include, in particular, the work of the international criminal tribunals for the former Yugoslavia and Rwanda and the adoption this past summer in Rome of a statute for a permanent international criminal court. Other important precedents include a growing number of national prosecutions of persons suspected of committing serious violations of international humanitarian law in another country. It is these developments, beginning with Nuremberg, that I have been asked to speak about this morning.

The developments surrounding General Pinochet bring into sharp focus one of the crucial issues relating to the law derived from Nuremberg--why enforcement has proved so difficult for so long. In view of the central importance of this issue I would like to begin by recalling the most common explanation for why the law of Nuremberg was rarely enforced until recently (at least, that is, outside the historical context of World War II itself) and remains inadequately enforced today. It is commonplace to observe that states lack the political will--or at least too often lack sufficient will--to enforce the universal code of conscience. To the contrary, it is often noted, states may in fact have powerful disincentives to enforce that law against officials of another state. Consider, for example, recent articles concerning the U.S. government’s failure to

support the proceedings against General Pinochet instituted by Spanish magistrates. Many have speculated that the United States is reticent to support the proceedings in part out of fear that the precedent established could later be used to support proceedings against a former U.S. head of state. Others have suggested that U.S. officials may be concerned lest the proceedings against General Pinochet bring to the foreground of public attention U.S. connivance in the coup that brought General Pinochet to power.

As for the United Kingdom, among the factors thought to be relevant in its resolution of the Pinochet case are concerns about the impact of General Pinochet's arrest on British relations with Chile, a strategic ally and major trading partner. Political leaders in the U.K. who oppose General Pinochet's arrest have also argued that his prosecution would have a destabilizing effect in Chile--a point repeatedly pressed by Chilean officials.

In the light of these and other political considerations that make up the environment in which General Pinochet's legal fate will be resolved, many have urged British authorities to "let the law take its course," the implication being that Pinochet might well face prosecution if the legal proceedings against him were insulated from political processes. Yet of course proceedings of this type never unfold in isolation from political processes.

The proceedings against General Pinochet exemplify this point. When a British divisional court ruled on October 28 that General Pinochet enjoyed head of state immunity, it was widely believed that the decision stood virtually no chance of being reversed. Less than a month later, the Law Lords in fact did reverse that decision--by the slimmest majority. In the short time between the two rulings, the political landscape surrounding Pinochet's arrest had changed radically. In that period, several West European countries lined up after Spain to bring

criminal charges against General Pinochet, significantly transforming public attitudes and expectations relating to the Law Lords' ruling.

There is a deeper sense in which the proceedings in the United Kingdom and Spain remind us that the law that has been brought to bear with respect to General Pinochet cannot be neatly set apart from the province of politics. That law does not so much occupy a category that is separate and apart from politics, but is profoundly concerned with the legitimate scope of political acts.

This issue was, in fact, at the heart of the Law Lords' ruling in the Pinochet case. Whether Pinochet was entitled to residual head of state immunity ultimately turned on whether the acts for which he was charged--barbaric acts of state-sponsored violence--should be deemed to have been committed in the exercise of sovereign authority. Two Justices thought that they should and that General Pinochet's acts were therefore entitled to absolute immunity from the legal process of other sovereign states. Three justices thought otherwise, finding, in the words of Lord Steyn, that, in view of international law's condemnation of the acts charged as international crimes, it cannot be maintained that "the commission of such high crimes may amount to acts performed in the exercise of the functions of a Head of State."[2]

In short, not only is enforcement of the law of conscience profoundly affected by the prevailing political environment, but the law itself is deeply concerned with questions relating to the legitimate exercise of political authority. Otto Kirchheimer captured some measure of this notion when he wrote that the Nuremberg prosecutions for crimes against humanity "define[d] where the realm of politics ends"--but then he stops, and quickly corrects himself, continuing: "or, rather, [where the realm of politics] is transformed into the concerns of the human condition,

the survival of mankind in both its universality and diversity."[3]

With these considerations in mind, as I trace the development of the law concerning crimes against humanity and genocide, I will try to bring to the foreground some of the key respects in which that law seeks to transform the domain of politics. At the same time, I will highlight key points at which political actors--the states that create international law--have shrunk from the prospect of too narrowly circumscribing governments' political prerogatives through the way that states have both defined and enforced crimes against humanity and genocide.

Crimes Against Humanity and Genocide: The Legal Regime

Turning to the subject at hand, it may be helpful if I first briefly summarize core elements of the law of crimes against humanity and genocide, and then trace some of the critical developments in the evolution of that law. First, a legal--though not highly technical--definition. While crimes against humanity have been defined somewhat differently in various international instruments, they in essence comprise inhumane acts such as murder, torture, enslavement and persecution committed as part of a widespread or systematic attack against a civilian population. Although linked to interstate war in the Charter of the Nuremberg Tribunal, crimes against humanity no longer must be connected to armed conflict, whether international or internal.

Crimes against humanity are crimes under international law for which individuals may be prosecuted. And they are subject to universal jurisdiction. Thus, any state has the *power* under international law to prosecute crimes against humanity, wherever committed and whatever the nationality of the perpetrator and victim, as long as the prosecuting state has been able to assert personal jurisdiction over the defendant.

Although some writers believe that all states are legally *required* to prosecute or extradite

persons in their territory suspected of having committed crimes against humanity, I am not convinced that such a duty is clearly established in international law, unless we mean to include the sort of "soft law" reflected in General Assembly resolutions.[4]

Genocide is an international crime in its own right, and is also considered the most serious crime against humanity. The authoritative definition of genocide is the one set forth in the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, which defines genocide as one of five types of act committed with the intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such. The acts that constitute genocide when committed with this intent are generally directed at the physical destruction of the group. For example, acts of genocide include killing members of the targeted group and deliberately inflicting on the group conditions of life calculated to bring about its physical destruction, in whole or in part. Like other crimes against humanity, genocide is subject to universal jurisdiction. In addition, parties to the Genocide Convention--and perhaps all states--are required to punish genocide at the very least when it is committed in their own territory.

Both crimes are included in the jurisdiction of the ad hoc tribunals for the former Yugoslavia and Rwanda, which were created by the United Nations Security Council several years ago. The permanent international criminal court whose statute was approved this summer in Rome will also have jurisdiction over these two crimes once the court is established.

As I will elaborate, the law of crimes against humanity and, to a lesser but nonetheless significant extent, the law of genocide have undergone several transformations. The most important transformations in the law of crimes against humanity were concentrated in two periods: the early postwar years and the past several years.

The key transformations in the postwar period were threefold. The first was the transformation of crimes against humanity from its initial rendering as, in essence, an adjunct to war crimes to its later rendering as a stand-alone crime--one that would be considered an international crime even when committed in peacetime.

The second, related, transformation was from an initial conceptualization of crimes against humanity as being an offense against *principles of humanity* in the sense of humane treatment of persons to a broader understanding of the crime as an offense against *mankind* in the sense of the universal community. This development reinforced the implication that universal jurisdiction exists with respect to crimes against humanity.

The third transformation in the postwar years was the crystallization of the crime of genocide as a crime against humanity and also as a crime in its own right. A byproduct of this process was something of a displacement of international concern in the postwar period from the further legal development of crimes against humanity to the more narrowly defined crime of genocide.

Crimes Against Humanity

Crimes against humanity were first recognized in positive international law in the Nuremberg Charter, which was adopted by the four Allied Powers on August 8, 1945. But the first use of the term of which I am aware occurred more than half a century earlier. As Adam Hochschild recounts in his book about the Congo during the period of King Leopold's grotesquely inhumane rule, George Washington Williams, a black American minister, lawyer and historian, traveled to the Congo in 1890 with high expectations but ended up being the first person to chronicle and condemn Leopold's brutal regime. In a letter to the U.S. Secretary of

State, Williams wrote that King Leopold's state was guilty of "crimes against humanity."[5]

The second time the phrase is known to have been used was in May 1915, when the governments of France, Great Britain and Russia made a declaration regarding Turkey's massacres of its Armenian population at the beginning of the First World War, denouncing them as "crimes against humanity and civilization" for which members of the Turkish Government would be held responsible, together with its agents implicated in the massacres.[6] International prosecution of Turkish perpetrators for the Armenian genocide would have provided a strong precedent for the prosecution of Nazi war criminals on charges of crimes against humanity as they related to German victims. But although the first peace treaty with Turkey included a provision contemplating such prosecutions, that treaty was not ratified and was replaced by a treaty that made no provision for punishment; to the contrary, it was accompanied by a Declaration of Amnesty.[7]

But the most important legal wellspring of "crimes against humanity" as that term was used in the Nuremberg Charter is the Martens Clause, which was included in the preambles to both the 1899 and 1907 Hague Conventions. The version that appears in the 1907 Convention provides:

> Until a more complete code of the laws of war has been issued, the High Contracting Parties deem it expedient to declare that, in cases not included in the Regulations adopted by them, the inhabitants and the belligerent remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilized peoples, from *the laws of humanity*, and the dictates of the public conscience.[8]

The aim of this clause, in Professor Meron's words, "is to substitute principles of humanity for the unlimited discretion of the military commander" in situations that are not covered by existing codifications of humanitarian law.[9] As Professor Meron's observation underscores, the Martens

clause is part of the laws and customs of war. To appreciate the significance of the fact that crimes against humanity derived above all from the laws of war, it is necessary first to recall how this crime came to be included and defined in the Nuremberg Charter.

Article 6 of the Charter gave the Nuremberg Tribunal jurisdiction over three categories of crimes with respect to defendants who were "major war criminals of the European Axis." The three categories were crimes against peace--in essence the crime of aggressive war; war crimes, that is serious violations of the laws or customs of war; and crimes against humanity. Each of these categories presented its own issues of retroactivity, but neither of the first two categories--crimes against peace and war crimes--challenged international law's bedrock principle of state sovereignty in the way that crimes against humanity did. The first two crimes by definition entailed interstate relations--specifically, war between states. In contrast, the category of crimes against humanity included atrocities committed by Nazis against Germans, notably including German Jews, who would not be covered by the humanitarian protections of the laws of war.

To the extent that crimes against humanity included conduct by Germans against other Germans within Germany, they represented a radical innovation in international law. How a government treated its own citizens was, with some exceptions, considered by international law to be a matter of sovereign prerogative and surely not the business of other states.

How, then, did the Allies' justify this encroachment on state sovereignty? The answer has two parts: The first addresses the political impetus behind the Allies' decision to criminalize atrocities even when they were committed by state authorities against their own nationals. The second concerns the way the Allies legally rationalized their decision to do so.

The political impetus was essentially a moral impulse. In the course of the second World

War it became clear that some of the worst atrocities of Hitler's Germany did not fall within the province of classical war crimes. Yet as the Allies turned their thoughts to the question of how to punish Nazi criminals once the war was over, it soon became plain that it would be intolerable not to address these atrocities. In 1944 Henry Stimson, the United States Secretary of War, asked Colonel Murray Bernays, then head of the Special Projects Office of the Defense Department, to prepare a memorandum on how to punish Nazi criminals once the war was over. In his memorandum, Bernays observed that many of the worst Nazi practices could not be classified as war crimes, and remarked that "to let these brutalities go unpunished will leave millions of persons frustrated and disillusioned." Further, he observed, both the United States and United Kingdom were under pressure from various Jewish organizations to ensure that all such atrocities--not just those committed against Jews--should be punished.[10]

That same year, the U.S. representative to the Legal Committee of the United Nations War Crimes Commission--a body that had been constituted by the Allied nations in 1943--raised the atrocities being committed by Nazis against German Jews and Catholics. He argued that such crimes demanded application of the "laws of humanity", and urged that "crimes committed against stateless persons or against any persons because of their race or religion" represented "crimes against humanity" that were "justiciable by the United Nations or their agencies as war crimes."[11]

By 1945, the Allies resolved to establish a new category of crimes. Article 6(c) of the Nuremberg Charter gave the Tribunal jurisdiction over crimes against humanity,

> namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial or religious grounds in execution of or in

> connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.

Several aspects of this provision represented a profound rupture with international law's longstanding deference to what had been regarded the province of sovereign prerogative. First, the phrase "against any civilian population" would include Germans who suffered inhumane acts at the hands of German authorities. Further, the phrase "before or during the war" seemed to signify that the Nuremberg tribunal could concern itself with a government's treatment of its own citizens even in peacetime, at least in some circumstances. That it could do so "whether or not" the conduct was "in violation of the domestic law of the country where perpetrated" represented yet another major encroachment on sovereign authority. It seemed as though international society had been so deeply shaken by Hitler's atrocities that it could no longer bear to respect the principles of law that it had long ago shaped.

And yet. At least with respect to the Trial of Major War Criminals pursuant to the Nuremberg Charter, the Allied states were not yet prepared to endorse so radical a reversal of established doctrine. Recall that Article 6(c) of the Nuremberg Charter gave the Tribunal power to punish crimes against humanity only when they were committed "in execution of or in connection with any crime within the jurisdiction of the Tribunal"--that is, when linked to either war crimes or crimes against peace.

This nexus requirement provided the principal legal rationalization for what would otherwise be an extreme assault on the citadel of state sovereignty. The Tribunal took this limitation very seriously indeed; in fact, most of the conduct supporting convictions on the charge of crimes against humanity also constituted conventional war crimes. In the view of legal experts writing shortly after the Nuremberg trials, the Tribunal treated crimes against humanity

largely as "a subsidiary or accessory to the traditional types of war crimes,"[12] applicable mainly where a crime was not specifically covered by what was then the most important codified source of humanitarian law, the Hague Regulations of 1907.

In the light of this observation, we are now in a position to appreciate the significance of Article 6(c)'s derivation from the Martens clause. That derivation was evident in an early version of Article 6 drafted by Justice Jackson, the chief U.S. prosecutor at Nuremberg. In a report to the President dated June 7, 1945, Jackson proposed including the following charges:

> (*b*) Atrocities and offences, including atrocities and persecutions on racial or religious grounds, committed since 1933. [Justice Jackson explained:] This is only to recognize the principles of criminal law as they are generally observed in civilized states. These principles have been assimilated as a part of International Law at least since 1907. The Fourth Hague Convention provided that inhabitants and belligerents shall remain under the protection and the rule of "the principles of the law of nations, as they result from the usage established among civilized peoples, from the laws of humanity and the dictates of the public conscience."[13]

Jackson's conceptualization of crimes against humanity as an elaboration of the Martens clause foreshadowed the approach taken by the Nuremberg Tribunal, whose final judgment was summarized this way in the leading postwar article on crimes against humanity: as interpreted by the Nuremberg Tribunal, the term crimes against humanity "denotes a particular type of war crime, and is a kind of *clausa generalis*, the purpose of which is to make sure that inhumane acts violating general principles of the laws of all civilized nations committed in connexion with war should not go unpunished."[14] It was not, therefore, "the cornerstone of a system of international criminal law equally applicable in times of war and of peace, protecting the human rights of inhabitants of all countries, 'of any civilian population', against anybody, including their own states and governments."[15]

This narrow construction also evinced what the same author, Egon Schwelb, considered a

significant concession to German sovereignty. The nexus requirement, he pointed out, meant that the Nuremberg Tribunal would have jurisdiction over crimes against humanity only when linked to "such acts as directly affected the interests of other states." He continued:

> It is by no means a novel principle in international law that the sovereignty of one state does not prevent the punishment of crimes committed against other states and their nationals. The laws and customs of war are not a restriction on state sovereignty.[16]

Yet the story does not end here. Before long other postwar tribunals began the process of de-linking crimes against humanity from interstate armed conflict. Following the war, the Allies adopted Control Council Law No. 10 to provide a uniform basis for continued prosecutions of Nazi war criminals in their respective zones of occupation. Although that law was generally modeled on the Nuremberg Charter, it omitted the language requiring a nexus between crimes against humanity and either war crimes or crimes against peace. Even so, two U.S. military tribunals concluded that they had no jurisdiction over conduct charged as crimes against humanity that occurred before the war. But two other judgments found that, under Control Council Law No. 10, crimes against humanity were not restricted to wartime.[17]

The process of de-linking continued across several decades, at first principally through successive drafts of a code of crimes against the peace and security of mankind and also through various General Assembly resolutions and U.N. conventions condemning apartheid as a crime against humanity. In more recent years, the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia, whose statute permits it to prosecute crimes against humanity when committed in armed conflict of either an international or internal character, has interpreted the customary law of crimes against humanity to require no link to armed conflict of any kind.[18] Notably, no such link is required even as a matter of jurisdiction in either the Statute

of the Rwanda Tribunal or that of the proposed international criminal court.

The issue I have just addressed is closely related to the second major transformation to which I alluded earlier. This transformation relates to the conceptualization of crimes against humanity in the postwar period.

In his 1946 article on crimes against humanity, Egon Schwelb observed that the word "'humanity' has at least two different meanings, the one connotating [sic] the human race or mankind as a whole, and the other, humaneness, i.e. a certain quality of behaviour." In his view, the word "humanity" was used in the latter sense in the Nuremberg Charter.[19]

Schwelb's view was consistent with the narrow interpretation of crimes against humanity reflected in the Nuremberg Judgment, which treated crimes against humanity principally--though not exclusively--as an extension of war crimes. As noted, the principle of humane treatment is a central norm of the body of law that defines war crimes. But legal developments shortly following the Trial of Major War Criminals at Nuremberg broadened the conceptual compass of "crimes against humanity" in a way that unambiguously encompassed the first meaning cited by Schwelb--that is, crimes against "the human race or mankind as a whole." This enlargement is evident in the decision of the U.S. Military Tribunal in the *Einsatzgruppen Case*[20]; so, too, are its legal implications.

The defendants were charged with crimes against humanity. "Not crimes against any specified country," the Tribunal emphasized, "but against humanity."[21] The defendants were being tried, the Tribunal said, "because they are accused of having offended against society itself, and society, as represented by international law, has summoned them for explanation."[22] The Tribunal made clear that, in its view, this meant that humanity could summon perpetrators to

account through universal jurisdiction:

> [T]he inalienable and fundamental rights of common man need not lack for a court . . . Humanity can assert itself by law. It has taken on the role of authority. . . . Those who are indicted . . . are answering to humanity itself, humanity which has no political boundaries and no geographical limitations.[23]

With the Nuremberg precedent, the Tribunal continued, "it is inconceivable . . . that the law of humanity should ever lack for a tribunal. Where law exists, a court will rise. Thus, the court of humanity . . . will never adjourn."[24]

The decision of another U.S. Military Tribunal signified just how radical an incursion on state sovereignty might be entailed in the system of universal enforcement envisaged in the *Einsatzgruppen* judgment. The Tribunal in the *Justice Case* affirmed that crimes against humanity encompassed inhumane acts and persecutions that were "systematically organized and conducted by or with the approval of government."[25] The implications of this aspect of its decision were not lost on the Tribunal, which observed: "Only when official organs of sovereignty participated in atrocities and persecutions did those crimes assume international proportions,"[26]—that is, become international crimes. At the same time, those charged with crimes against humanity could not escape liability by claiming the traditional immunities extended by international law to acts of state and to individuals whose official positions ordinarily entitled them to claim immunity from the jurisdiction of other states.

The broader conceptualization of crimes against humanity that was reflected in the *Einsatzgruppen Case* provided the indispensable foundation for Israel's prosecution of Adolf Eichmann in 1961, which is the most important precedent for Spanish efforts to prosecute General Pinochet.[27] Eichmann's defense counsel had argued that the Israeli law under which he was being prosecuted violated international law because it sought to impose punishment for

offenses committed outside the State of Israel. This, defense counsel argued, violated the principle of territorial sovereignty.

The Israeli law in question, which had been enacted in 1950, enabled Israeli courts to try persons who committed an act constituting a crime against the Jewish people, a crime against humanity, or a war crime during the period of the Nazi regime. The first category was drawn almost directly from the definition of genocide in the 1948 convention, but substituted "the Jewish people" for the categories of targets included in the conventional definition.

Responding to Eichmann's challenge, the Jerusalem District Court ruled that, far from being in conflict with international law, the Israeli law in question "conforms to the best traditions of the law of nations."[28] It continued:

> The abhorrent crimes defined in this Law are not crimes under Israel [sic] law alone. These crimes, which struck at the whole of mankind and shocked the conscience of nations, are grave offences against the law of nations itself . . . . Therefore, so far from international law negating or limiting the jurisdiction of countries with respect to such crimes, international law is, in the absence of an International Court, in need of the judicial and legislative organs of every country to give effect to its criminal interdictions and to bring the criminals to trial. The jurisdiction to try crimes under international law is *universal*.[29]

The Israeli Supreme court affirmed this holding, concluding that "[i]t is the peculiarly universal character of [the crimes with which Eichmann was charged] that vests in every State the authority to try and punish anyone who participated in their commission."[30]

While the principles of international law affirmed in the *Eichmann* case are far-reaching, we should not lose sight of the fact that Israel's political commitment to their enforcement was of finite scope. Israel's interest in prosecuting Eichmann had everything to do with the fact that Israeli authorities regarded their citizens to be the embodiment, both literally and symbolically, of Eichmann's victims. Indeed, in addition to universal jurisdiction, the Israeli District and

Supreme Courts upheld Israeli jurisdiction on the ground that Eichmann's victims were Jews, and that as "the State of the Jews,"[31] created in large measure in response to the Holocaust, Israel was a peculiarly appropriate place to bring Eichmann to account.

Further, in common with many other countries that enacted legislation based upon Nuremberg law in the postwar years, the Israeli law reached only those crimes committed, in the terms of its legislation, "during the period of the Nazi regime." To the extent that states were willing to undertake to enforce the law of Nuremberg, many were willing to do so only in respect of World War II atrocities.[32] Thus, while Nuremberg purported to establish or affirm universal rules, enforcement of those rules was for a long time narrowly confined to the special case of Nazi crimes.

Genocide

The third major transformation in the postwar law concerning crimes against humanity involves the emergence and crystallization of the crime of genocide. The term "genocide" does not appear in the Nuremberg Charter, though it had already been coined by Raphael Lemkin. In his 1944 book, *Axis Rule in Occupied Europe*, Lemkin argued for recognition of the international crime of genocide to reflect the peculiar nature of Hitler's crimes. "New conceptions require new terms," Lemkin wrote, and so he proposed the term "genocide"--made from the Greek word "genos," meaning race or tribe, and the Latin "cide," meaning killing—to connote "the destruction of a nation or of an ethnic group."[33]

The prosecutors before the Nuremberg Tribunal used the term "genocide" in their indictment, and both the British and French prosecutors briefly referred to "genocide" in their closing arguments. But the term did not appear in the Nuremberg judgment.

But the term "genocide" appeared in the judgment of several cases decided under Control Council Law No. 10, beginning with the judgment in the *Justice Case*. That judgment described genocide as "the prime illustration of a crime against humanity" under Control Council Law No. 10.[34] Although rendered eight months before the U.N. General Assembly adopted the Genocide Convention, the judgment cited a General Assembly Resolution adopted in 1946 which affirmed that genocide was a crime under international law. In the Tribunal's view, the General Assembly's "recognition of genocide as an international crime is persuasive evidence of the fact."[35] The Tribunal explicitly found two defendants guilty of "the crime of genocide."[36]

In the meantime, postwar efforts to codify the Nuremberg law of crimes against humanity in multilateral conventions moved away from that concept itself. Although various treaties address specific aspects of crimes against humanity, such as their application to apartheid and the non-applicability of statutory limitations, there is no comprehensive convention regulating crimes against humanity. To the extent that crimes against humanity coincided with war crimes in the Nuremberg prosecutions, the relevant law was comprehensively codified in the 1949 Geneva Conventions. To the extent that crimes against humanity as they were defined in the Nuremberg prosecutions did not overlap with war crimes, the law was addressed principally through the 1948 Convention on the Prevention and Punishment of the Crime of Genocide.

The adoption of this convention 50 years ago today was a magnificent triumph for Raphael Lemkin and others who had campaigned for a treaty recognizing that genocide is an international crime--whether committed in time of peace or in time of war--and requiring States Parties to prevent the crime and, where they fail to prevent, to punish those who bear criminal responsibility. But in several respects the crime defined in the 1948 convention was narrower

than that of crimes against humanity. (It should also be noted that the definition was narrower than Lemkin's conception of genocide.) One of the most important respects in which the definition of genocide differed from that of crimes against humanity was that the final text of the Genocide Convention omitted from its scope acts committed with the intent to destroy political groups. Too many states, it seemed, were concerned about their own exposure to charges of genocide if the crime included politically-motivated persecution. In contrast, the definition of crimes against humanity set forth in the Nuremberg Charter included persecutions on political grounds.[37]

The Genocide Convention also sets forth rather narrowly circumscribed provisions on enforcement. Article I proclaims in broad terms that "the Contracting Parties confirm that genocide, whether committed in time of peace or time of war, is a crime under international law which they undertake to prevent and punish." The mandatory nature of the latter obligation is reaffirmed in Article IV, which provides that "[p]ersons committing genocide . . . shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals." But Article VI significantly narrows the scope of the obligation to punish those criminally responsible for genocide. It provides:

> Persons charged with genocide . . . shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction.

Notably missing is any reference to universal jurisdiction.

This was not an oversight. During the drafting of the Convention there were proposals to include a provision establishing universal jurisdiction, but these were defeated. Opponents claimed that allowing courts to punish officials of another state would infringe national

sovereignty and could provoke international tension.[38]

Even so, it is now well established that universal jurisdiction exists with respect to genocide under customary international law. The Israeli District Court in Jerusalem relied on this when it upheld Israeli jurisdiction over Adolf Eichmann. In the Court's view, Article VI of the Genocide Convention merely established an unambiguous duty on the part of States Parties to prosecute genocide committed in their territory, but this did not deprive other states of the power to prosecute genocide committed beyond their boundaries pursuant to the principle of universal jurisdiction.[39]

Developments in the Post-Postwar Period

My remarks thus far have focused on legal developments in the immediate postwar years, which laid the basic foundation of international law concerning genocide and other crimes against humanity. For the next few decades, rather little happened in the way of international *enforcement* with the exception of continuing prosecutions of Nazi war criminals--efforts that continue to the present day.

In contrast, recent years have seen a remarkable series of initiatives to enforce the law derived from Nuremberg. The most important of these are:

- The UN Security Council's decision in May 1993 to create an ad hoc International Criminal Tribunal for the former Yugoslavia, based in The Hague;
- A similar decision by the Security Council in November 1994 to create an ad hoc International Criminal Tribunal for Rwanda, with jurisdiction over international crimes relating to the 1994 genocide in Rwanda; and
- The Diplomatic Conference held this summer in Rome, which culminated in a vote by 120 countries to adopt a statute for a permanent international criminal court.

Understandably, when both the Yugoslavia and Rwanda tribunals were created they were

regarded with widespread skepticism, for they seemed to represent little more than a proverbial fig leaf for the world's lack of resolve to stop the carnage in Bosnia and Rwanda while it was underway. Yet despite their inauspicious beginnings, the two tribunals have gradually earned public respect through their accomplishments. Among their most important achievements are their contributions to the development of international humanitarian law through the decisions they have rendered to date. Referring to those contributions, Professor Meron has observed, "There is no question that international humanitarian law . . . has grown much more during these last few years than in the half-century following Nuremberg."[40]

Time does not permit an in-depth discussion of the contributions the two tribunals have made to the law concerning genocide and crimes against humanity, but let me note a few highlights. First, as I mentioned at the beginning of my remarks, the Yugoslavia Tribunal has affirmed that crimes against humanity need not be linked to armed conflict under customary international law and that they are subject to universal jurisdiction. Significantly, one of the Tribunal's Trial Chambers has also held that, under customary law, crimes against humanity no longer must be committed pursuant to government policy. Instead, the policy element may be satisfied if crimes against humanity are committed pursuant to a policy of non-state entities, such as rebel forces that exercise de facto control over territory.[41]

Further, a Trial Chamber has confirmed an indictment charging two defendants with the crime against humanity of enslavement in connection with their alleged sexual enslavement of women in the Bosnian town of Foca. This ruling indicated the Trial Chamber's belief that the prosecutor had established a prima facie case that the suspects' conduct met the international legal definition of the crime against humanity of enslavement.[42] The ruling thus marks a

significant development of the jurisprudence relating to enslavement as a constituent crime against humanity; the postwar prosecutions charging enslavement were concerned with the Nazi slave-labor program and not crimes involving sexual violence.

In the area of genocide, a path-breaking verdict was rendered by the Rwanda Tribunal this past September. In its judgment convicting Jean-Paul Akayesu on various charges of genocide, the Tribunal ruled that widespread rapes in Taba Commune were acts of genocide when committed with genocidal intent.[43]

Perhaps the most significant development, however, is that the law of crimes against humanity and genocide is at last being enforced through international collaboration. Notably, the Rwanda Tribunal has been able to obtain custody over most of the defendants it has indicted, including high level officials, in large part due to the cooperation of states that have transferred suspects from their territory to the custody of the Rwanda Tribunal. This year a former Prime Minister of Rwanda, who had been arrested in Kenya and then transferred to the Tribunal's custody, pleaded guilty to charges of genocide.

The importance of these developments is, perhaps, best captured in the words of Sir Hartley Shawcross, spoken during his closing argument at Nuremberg:

> The Charter of this Tribunal, . . . gives warning for the future--I say, and repeat again, gives warning for the future, to dictators and tyrants masquerading as a State that if, in order to strengthen or further their crimes against the community of nations they debase the sanctity of man in their own countries, they act at their peril, for they affront the International Law of mankind.[44]

Alongside the progress of the two ad hoc tribunals, a number of Western European states have undertaken prosecutions of persons suspected of committing war crimes and other offenses in Bosnia and Rwanda. In September of last year, a German court convicted a Bosnian Serb of

genocide--the first person convicted of this crime in Germany outside the context of World War II prosecutions.[45]

The decision this past summer by 120 states to adopt a statute for a permanent international criminal court represented a major watershed in international society's commitment to enforce the law derived from Nuremberg, not only in special cases, such as World War II-era atrocities or those relating to the conflicts in Bosnia and Rwanda, but on a truly universal basis. The statute thus represents a heretofore unprecedented effort to replace the selectivity that has long characterized enforcement of the law of humanity with genuinely universal enforcement machinery.

These recent developments raise a number of questions. First, what accounts for the apparent sea change in the international community's resolve to enforce humanitarian law?

This trend doubtless derives from several developments. The first impetus for recent enactments of national legislation based on universal jurisdiction came from the advancing age of Nazi-era criminals. As the window of opportunity for settling accounts from World War II began to close, a number of states adopted legislation that would enable them to prosecute suspected Nazi war criminals in their midst. A second impetus, as already noted, was provided by the carnage in Bosnia and Rwanda and the world's shameful failure to repress the crimes while they were under way.

A third and crucial factor has been the emergence of a powerful constituency in support of accountability for atrocious crimes--a global human rights civil society. As has often been noted, human rights advocates played an influential role in the Diplomatic Conference to establish a permanent international criminal court. Human rights advocates also played an

important role in triggering the legal proceedings against General Pinochet. The proceedings in Spain that led to his arrest in England were initiated not by the decisions of state officials, but by private parties who, in Spanish procedure, have standing to initiate criminal inquiries. Thus, where Nuremberg brought victors' justice, the proceedings against General Pinochet more nearly represent victims' justice.

A second question that has been raised in the wake of the recent arrest of General Pinochet is whether the model of universal jurisdiction is the best way to enforce the law of crimes against humanity and genocide. Many observers have voiced discomfort with what they consider a scattershot approach to enforcement of international law. In their view, a maverick magistrate in Spain got it into his head to prosecute General Pinochet and thereby almost singlehandedly provoked an international crisis. Worse, in their view, the precedent could inspire other judges to conjure up cases against foreign officials--cases that could disrupt the international system of comity.

In light of these concerns, the case against General Pinochet has had the effect of recruiting new supporters for the international criminal court. Notably, one of the Law Lords who would have conferred head of state immunity on General Pinochet suggested that a more appropriate place to try him would be the ICC, though of course he was mistaken in his suggestion that this is possible. In light of this common response to the Pinochet proceedings, I would like to raise an issue without attempting to address it in any depth: Does the ICC statute adequately address these concerns?

I would suggest that the answer may not be what many assume. One of the core principles of the Rome statute is that of complementarity. That is, the ICC will have jurisdiction

over cases only when national courts with jurisdiction are unable or unwilling to prosecute those cases; the international court is meant to be a court of last resort. Would, then, a court in a country like Spain, exercising universal jurisdiction, be able to defeat ICC jurisdiction over crimes committed in another country? Should it be able to do so?

These are difficult and important questions. But however challenging they may be, we can only welcome the opportunity to turn our attention to issues such as which court should have priority in enforcing the law of universal conscience. For too long, our principal concern has been whether any court can be moved to do so.

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[1] Diane F. Orentlicher is a Professor of Law at the Washington College of Law, American University, where she is also Director of the War Crimes Research Office. This paper was presented at the Committee on Conscience conference *Genocide and Crimes Against Humanity: Early Warning and Prevention* on December 9, 1998, at the United States Holocaust Memorial Museum.

[2] *Regina v. Bartle ex parte Pinochet* (Nov. 25, 1998) (opinion of Lord Steyn).

[3] OTTO KIRCHHEIMER, POLITICAL JUSTICE 341 (1961).

[4] A 1973 resolution on Principles of International Cooperation in the Detection, Arrest, Extradition and Punishment of Persons Guilty of War Crimes and Crimes Against Humanity provides that "crimes against humanity, wherever they are committed, shall be subject to investigation and the persons against whom there is evidence that they have committed such crimes shall be subject to tracing, arrest, trial and, if found guilty, to punishment." G.A. Res. 3074, 28 U.N. GAOR Supp. (No. 30) at 79, U.N. Doc. A/9030 (1973), *Principle I.* These crimes are, in general, to be prosecuted in the state where the crimes occurred, and with that in mind, other states are to cooperate in extraditing suspects to the territorial state. *Id., Principle V.*

[5] ADAM HOCHSCHILD, KING LEOPOLD'S GHOST: A STORY OF GREED, TERROR AND HEROISM IN COLONIAL AFRICA 111-12 (1998).

[6] *See* HISTORY OF THE UNITED NATIONS WAR CRIMES COMMISSION AND THE DEVELOPMENT OF THE LAWS OF WAR 35 (1948) [hereinafter HISTORY OF THE UNITED NATIONS WAR CRIMES COMMISSION]. This warning was later supported in the majority report of a Commission on Responsibilities relating to the first World War, but international prosecutions did not come to pass. The Commission on Responsibilities was instructed to report on "the facts as to breaches of the laws and customs of war committed by the forces of the German Empire and their Allies" during the war. The majority report concluded that the Central Empires and their allies carried out the war "by barbarous or illegitimate methods in violation of the established laws and customs of war and the elementary laws of humanity" and that "all persons belonging to enemy countries" who had been guilty of "offences against the laws and customs of war or the laws of humanity" were liable to punishment.

The dissenting report of the American members objected to references to the "laws and principles of humanity." The reasons offered for their reservations are worth noting, for they contrast significantly with the U.S. position vis-a-vis the Nuremberg Charter:

> A judicial tribunal only deals with existing law and only administers existing law, leaving to another forum infractions of the moral law and actions contrary to the laws and principles of humanity. A further objection lies in the fact that the laws and principles of humanity are not certain, varying with time, place, and circumstance, and accordingly, it may be, to the conscience of the individual judge. There is no fixed and universal standard of humanity.

Id. at 36-37.

[7] *Id.* at 45.

[8] (Hague) Convention (No. IV) Respecting the Laws and Customs of War on Land, with Annex Regulations, 18 October 1907, 36 Stat. 2277, TS 539, 1 Bevans 631.

[9] Theodor Meron, *Francis Lieber's Code and Principles of Humanity*, COLUM. J. TRANSNAT'L L. 269, 281 (1997). *See also* Theodor Meron, *On Custom and the Antecedents of the Martens Clause in Medieval and Renaissance Ordinances of War*, in RECHT ZWISCHEN UMBRUCH UND BEWAHRUNG: FESTSCHRIFT FUER RUDOLF BERNHARDT 173, 174 (Ulrich Beyerlin et al., eds., 1995).

[10] ANTONIO CASSESE, VIOLENCE AND LAW IN THE MODERN AGE 108-09 (1988). In a memorandum written in 1945 for Justice Robert Jackson, who had been appointed by President Truman to head the U.S. prosecution team at Nuremberg, Colonel Telford Taylor similarly argued:

> We need not shy off because of *ex post facto*. No one will be shocked by the doctrine that people who direct or do inhuman and barbarous things in the course of losing a war will be punished. Many would be shocked by the conclusion that such people may go scot-free unless a pre-existent law or rule can be cited.

Id.

[11] HISTORY OF THE UNITED NATIONS WAR CRIMES COMMISSION, *supra* note 6, at 175.

[12] Egon Schwelb, *Crimes Against Humanity*, 23 BRIT. Y.B. INT'L L. 178, 207 (1946).

[13] Quoted in *id*. at 187.

[14] *Id*. at 206.

[15] *Id.*

[16] *Id.* at 207.

[17] *See* Diane F. Orentlicher, *Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime*, 100 YALE L.J. 2537, 2589 n.231 (1991).

[18] *Prosecutor v. Tadic*, Case No. IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, para. 141 (Oct. 2, 1995).

[19] *Id.* at 195.

[20] *United States v. Otto Ohlendorf et al.*, IV TRIALS OF WAR CRIMINALS BEFORE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10 at 411 (1950) [hereinafter

TRIALS OF WAR CRIMINALS].

[21] *Id.* at 497.

[22] *Id*. at 462.

[23] *Id.* at 498.

[24] *Id.* at 499.

[25] *United States v. Josef Altstoetter et al.*, III TRIALS OF WAR CRIMINALS 954, 973 (1951). *See also id.* at 982.

[26] *Id.* at 984.

[27] Both the Spanish and Israeli prosecutions were based on both universal jurisdiction and the principle of passive personality. The Spanish proceedings include crimes allegedly committed by General Pinochet against persons possessing Spanish nationality.

[28] *Attorney Gen. of Israel v. Eichmann*, *reprinted in* 36 I.L.R. 18, 25 (Isr. Dist. Ct.--Jerusalem 1961), *aff'd*, 36 I.L.R. 277 (Isr. Sup. Ct. 1962) [hereinafter *Eichmann District Court Decision*].

[29] *Id.* at 26.

[30] *Attorney Gen. of Israel v. Eichmann*, *reprinted in* 36 I.L.R. 277, 287 (Isr. Sup. Ct. 1962).

[31] *Eichmann District Court Decision*, *supra* note 28, at 52.

[32] French courts have narrowly interpreted Article 6(c) of Nuremberg Charter to cover crimes against humanity only when perpetrated by a "hegemonic state," thereby precluding application of the Charter law even to crimes committed by the Vichy government. The French Court of Cassation first articulated this interpretation in the *Barbie* case. *See* Judgment of Dec. 20, 1985, Cass. crim., *reprinted in* 78 I.L.R. 136, 137 (1988). This interpretation proved crucial in the later prosecution of Paul Touvier, an official of the military police of the Vichy government. A French Court of Appeals ruled that the Vichy government did not satisfy the "hegemonic state" standard. Judgment of Apr. 13, 1992, Court of Appeal of Paris, *reprinted in* 100 I.L.R. 341, 352-55 (1995). Without overturning this finding, the Court of Cassation nonetheless found that the "hegemonic state" element was established with respect to a particular charge by virtue of the fact that Touvier acted at the instigation of the Gestapo. Judgment of Nov. 27, 1992, Cass. crim., *reprinted in* 100 I.L.R. 358, at 363. The "hegemonic state" requirement was dropped in a 1992 French law on crimes against humanity and genocide.

[33] RAPHAEL LEMKIN, AXIS RULE IN OCCUPIED EUROPE 79 (1944).

[34] *United States v. Josef Altstoetter*, *supra* note 25, at 983.

[35] *Id.* at 983.

[36] *Id.* at 1128 (finding that defendant Lautz was "an accessory to, and took a consenting part in, the crime of genocide"); *id.* at 1156 (finding that defendant Oswald Rothaug "participated in the crime of genocide").

[37] But if the Genocide Convention shrank from the prospect of criminalizing politically-motivated campaigns of extermination, it nonetheless made clear that genocide as more narrowly defined in the Convention could not be considered a political offense for purposes of extradition.

[38] *See* Orentlicher, *supra* note 17, at 2564 n.106.

[39] *Eichmann District Court Decision*, *supra* note 28, at 34-39.

[40] Theodor Meron, *The Hague Tribunal: Working to Clarify International Humanitarian Law*, in *Symposium: War Crimes Tribunals: The Record and the Prospects*, 13 AM. U. INT'L L. REV. 1511, 1512 (1998) [hereinafter *Symposium*].

[41] *Prosecutor v. Dusko Tadic*, Case No. IT-94-1-T, Opinion and Judgment (May 7, 1997), at 251-252, paras. 654-655.

[42] *See* Patricia Viseur-Sellers, *Emerging Jurisprudence on Crimes of Sexual Violence*, in *Symposium*, *supra* note 40, at 1524.

[43] *Prosecutor v. Jean-Paul Akayesu*, Case No. ICTR-96-4-T, Judgment, at 294-95, paras. 731-34 (Sept. 2, 1998).

[44] *Speeches of the Chief Prosecutors at the close of the case against the individual defendants*. Published under the authority of H.M. Attorney-General by H.M. Stationery Office (Cmd. 6964), p. 63.

[45] *See* William Drozdiak, *German Court Convicts Bosnian Serb of War Crimes; Death Squad Leader Sentenced to Life in Prison*, Wash. Post, Sept. 27, 1997.