
Where do we stand following *Pinochet*, the indictment and trial of Slobodan Milosevic and the founding of the International Criminal Court (ICC)? These are the key questions examined in *Justice for Crimes Against Humanity*. The book consists of a collection of contributions on a variety of hot topics in international criminal law.

While developments such as the acceptance of extra-territorial jurisdiction in *Pinochet* and the establishment of the ICC represent a sea change in international criminal law, many big fish still swim in the sea of impunity. Think Botha, Mugabe, Yerodia. But where national trials have had little success in prosecuting heads of state and other senior officials responsible for serious international crimes, the International Criminal Tribunals for Yugoslavia and Rwanda have shown significant progress. In addition to putting Milosevic on trial, the ad hoc Tribunals have convicted former Rwandan Prime Minister Jean Kambanda and former president of the Republika Srpska, Biljana Plavsic.

The themes of head-of-state immunity, universal jurisdiction and the relationship between national and international jurisdictions run through this collection of essays. The collection examines and illustrates the development of international criminal law and growing relevance of this body of law. Various contributors examine the gap between the now existing law and the political will to implement international criminal law (what Mark Lattimer calls ‘the ever-expanding gap between normative expectation and delivery’ (387)).

Lattimer and Sands collected eighteen contributions by scholars, practitioners and the late Judge Richard May. Part I is entitled ‘Atrocity, Impunity, Justice’. The opening chapter by Benjamin Ferenz, a former Nuremberg prosecutor, is one of the most interesting in the collection. It lends the book a certain authenticity from ‘one who was there’. He gives a first-hand account of the development of international criminal law from Nuremberg to the ICC. He writes of the successful trials conducted before American judges at Nuremberg after the International Military Tribunal had closed and discusses his involvement in the work to secure compensation for Holocaust survivors. Christopher Keith Hall next analyses the concept of universal jurisdiction, emphasising that universal jurisdiction is nothing new and tracing the development of universal jurisdiction to the sixth century Code of Justinian. He is of the opinion that none of the objections to universal jurisdiction has merit. Brigitte Stern writes on the entitlement of heads of state to claim jurisdictional immunities from criminal proceedings. Timothy LH McCormack contributes ‘Their Atrocities and Our Misdemeanours: The Reticence of States to Try Their “Own Nationals” for International Crimes’.

McCormack’s is one of the most exciting contributions in the collection. He looks at the reasons for the willingness or unwillingness of states to
subject their nationals to municipal justice for international crimes. His historical review leads him to identify three circumstances which influence the likelihood of domestic proceedings in the home state: whether there has been a change in political regime; the existence of the possibility or threat of international proceedings; and whether the violations relate to violations by a state's own armed forces outside the territory of the state. According to McCormack the critical distinction in determining the likelihood of domestic proceedings is the 'us' and 'them' distinction. States usually seem unwilling to prosecute their 'own' nationals. It is more likely that the 'other' will be prosecuted (141). In his view, the Greek, Argentinian, Ethiopian, Guatemalan, Haitian and post-World War II trials, to varying degrees, affirm his theory. In the Israeli trials of members of the Judenrat or the Jewish kapas, as well as the Austrian post-World War II trials, the 'other' were traitors who sided with an occupying, enemy Power and were complicit in the perpetration of atrocities against their own fellow citizens.

Part Two considers 'Justice in International and Mixed Law Courts'. In this section the late ICTY Judge Richard May addresses questions surrounding the collection of evidence in international criminal trials. Diane Orentlicher looks at the growing number of criminal tribunals throughout the world which combine international and national elements. If tribunals and other fora for prosecution proliferate which must have priority? She suggests an approach called 'universality plus'. This entails that priority should be given to the jurisdictional claims of states that have substantial nationality link with the defendant.

The Pinochet litigation forms a leitmotiv. (The book was conceived while the editors were engaged in the Pinochet proceedings: Sands as counsel for Human Rights Watch and Lattimer in his capacity as Communications Director for Amnesty International UK). Lattimer writes of the 'Pinochet effect' – a term used by human rights organisations for the string of subsequent cases around the world inspired by Pinochet and based on extraterritorial jurisdiction (412). Geoffrey Bindman writes that Pinochet should have been subject to criminal prosecution in the UK as an alternative to the extradition proceedings he was subjected to. Clare Montgomery's chapter looks at the implications of Pinochet No 31 for the enforcement of other international crimes within national jurisdictions. The extent of universal jurisdiction over international crimes in the absence of national legislation creating a jurisdictional base remains a perplexing question.

Part Three is titled 'Justice in National Courts'. Fiona McKay looks at the prospects of US-style (Alien Tort Claims Act) civil proceedings in the United Kingdom and Europe. Andrew Clapham discusses and criticises the DRC v Congo case. 2 Eric David considers the extent to which the

1 R v Bow Street Metropolitan Stipendiary Magistrate ex parte Pinochet (No 3) [2001] 1 AC 147.
2 Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium) Preliminary Objections and Merits, Judgment, ICJ Reports 2002, 3.
practice of the International Criminal Tribunals have contributed to the progressive development of international criminal law. Finally, Lattimer looks at some of the reasons for failed national prosecutions. In his view the two most important reasons for failed prosecutions are the practical obstacles inherent in domestic criminal justice systems and the wariness on the part of the executive branch of governments (413). The doctrine of ‘complimentarity’ adopted by the ICC Statute raises many outstanding issues. Can senior officials of a foreign state continue to claim diplomatic protection in a national prosecution? How broad is the ICC Prosecutor’s discretion to decide that it is not in the interest of justice to proceed with an investigation or prosecution? Lattimer predicts that questions such as these will form the subject of extensive litigation.

Lattimer writes of an enforcement crisis in the international system of human rights protection. The incidence of serious international crimes such as torture and forced disappearances escalated sharply since the end of the Cold War. Lattimer writes of a ‘crisis’ in international human rights protection (387).

Herein lies one of the few shortcomings of the book. In light of this crisis – the failure of national courts to successfully prosecute (as described in many of the chapters) – one would expect greater scepticism from at least some of the contributors. Instead the general tone is almost too optimistic. Even in a field as inherently noble and idealistic as international criminal law, there is room for sceptics and stronger criticism of what has become known as the system of international criminal justice.

The style of individual authors can be criticised. When given an audience international criminal lawyers can sound self-congratulatory. The opening chapter by Ferencz makes for fascinating reading. It is unnecessary for him to inform us of the following: ‘Since I have fought harder and longer than anyone I know to have aggression subject to punishment in an international court, I welcomed its inclusion [in the ICC statute] on any basis.’ (44) There are more examples. This stands in stark contrast to the mocked, almost comical figure of Raphael Lemkin who coined the term ‘genocide’ and fought for the recognition of the crime, never receiving personal recognition in his lifetime.

Alex Boraine’s piece on PW Botha can be criticised for providing a mere descriptive account of the unsuccessful efforts to bring Botha before the Truth and Reconciliation Commission. A legal analysis of the charges against Botha would have fit with the analytical nature of the other contributions. Boraine concludes that in spite of failed attempts to hold Botha accountable, the Botha episode shows that no one is above the law (346). But does the fact that none of the senior members of the previous government was successfully prosecuted not show exactly the opposite?

But these are minor flaws. Justice for Crimes against Humanity will be accessible and interesting both to the initiated and uninitiated. The book
informs and entertains. It also shows the variety within international criminal law – a variety reflected in the choice of authors and topics. Eric David writes that, after Pinochet, the legal weapons of international criminal law are ‘no longer locked in old wardrobes or in the studies of university professors who were regarded as dreamers’ (335). Although the book was published in 2003 the topics remain fresh, even cutting-edge. International criminal law is still the flavour of the decade and individuals and institutions will benefit from a greater familiarity with the subject.

The contributions on PW Botha and on Hastings Banda (the latter by Sadakat Kadri) are placed next to each other in the section called ‘Personal Perspectives’. The juxtaposition of these two pieces intrigues. In 1995 the Malawian dictator Hastings Banda and others were tried for shooting and hammering to death four blindfolded politicians. The prosecution in DPP v Banda$^3$ failed to discharge its burden and the defendants were unanimously acquitted. Direct proof that the killings had been ordered by Banda was impossible since the two ‘human links’ between him and his security apparatus were already dead by the time of the trial (350). Banda died peacefully on 25 November 1997, his name unblemished by criminal conviction.

Kadri asks whether the Banda trial was worth it. He writes that it is not self-evident that trials contribute to truth regardless of their outcome. In his view the Malawian experience shows that not-guilty verdicts can lead to cynicism rather than catharsis (353). It is unfortunate that the impact of similar trials in South Africa will remain unknown.

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$^3$ Director of Public Prosecution v Banda (Kamuzu) and Others MSCA Criminal Appeal No 21 of 1995.