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PART I

History

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Victors' justice

There is an ironic background to this essay on the future of international criminal jurisdiction.

It was to have been delivered as the Lionel Cohen lecture at the Hebrew University of Jerusalem in June 2002. At the end of March that year, as I was preparing it, the Israeli attack on Jenin occurred. Friends (Jewish friends as it happened) forwarded to me an eyewitness account of appalling events which Israel then and since has refused to allow to be independently investigated. I am among the many Jews worldwide who feel shame at Israel's repeated violations of international law, and I withdrew from the lecture.

Among the messages which reached me from Israel were some from scholars who felt as I did and had hoped for support. To them I apologise: perhaps I should have gone and spoken my mind. Others pointed out to me that, whatever its faults, Israel is a democracy. To them I replied that in a democracy protests count, and this was my protest.

A few days later the Plymouth Law Society invited me to give that year's Pilgrim Fathers lecture, and I delivered in Devon the paper I had intended to give in Jerusalem. It was published subsequently in the *London Review of Books*.

On 11 August 1942 Joseph Bursztyn, a doctor in the French Resistance, was executed as a hostage in reprisal for Resistance attacks on German troops occupying Paris. The previous month his wife had been arrested by the Vichy police and deported to the German death camps. Their small daughter, Claire, who was saved by neighbours, has lived to see Maurice Papon, who was responsible for her mother's deportation, released after less than three years in prison.

On a summer's day in 1944, with France newly liberated, Henri Boleslawski, who during the Vichy years had worked quietly as an official in the prefecture of Tulle forging identity documents for the Resistance and for the Allied airmen they were sheltering, put his daughter, Liliane,

on his shoulders to watch the execution of a collaborator in the Place du Champ de Mars. For Henri, it was a moment of historic justice; for Liliane, it was an image of cruelty which has never left her.

My purpose in recounting these things is not only, out of the hundreds of thousands of courageous individuals who lost or risked their lives throughout Occupied Europe, to mark the memory of two who happen to have been members of my family. It is to point up the complex meaning of justice in a world broken apart, as the twentieth century world was, by conflicts in which justice and power were inexorably and repeatedly collapsed into one another. In a militarily occupied country, versions of justice necessarily start from opposite and irreconcilable premises. The occupying power builds on its *de facto* authority, the occupied nation on its moral legitimacy. Who tries and executes whom in such a conflict depends on the momentary possession of power, nothing else. Justice follows; it does not lead.

When responsibility for conflict is audited, as responsibility for the Second World War was audited in Nuremberg and Tokyo, it has historically been the prerogative of the victors to determine where justice lies. When in 1960 Adolf Eichmann was tracked down in Argentina and kidnapped by Israel, the want of any international court to try him and the want of any solid basis in international law for the exercise of jurisdiction by Israel were not allowed to stand between him and the gallows. The watching world, myself included, asked itself only which was worse: to try him or to let him go. For the rest, justice once again followed in the wake of power.

That, and very much more, was the twentieth century, the bloodiest yet. It has been estimated that 187 million people perished in its wars. The twenty-first century is fully capable of surpassing it; but I am not willing to assume that it will be a race to the bottom. Without becoming a proleptic Whig historian, I want to look at the almost counterfactual emergence in very recent years of an institutional shift towards the recognition and enforcement by impartial tribunals of individual responsibility for the kinds of crime which, for most of the twentieth century, were perpetrated in the name of states and regarded as almost entirely beyond the reach of legal process.

I say 'almost entirely' because, while the Allies' tribunals at Nuremberg and Tokyo dispensed individual justice on charges of levying a war of aggression and of crimes against peace, much wider preparation had in fact been made for a new judicial order in the event of an Allied victory. In January 1942 the Declaration of St James had placed among the Allies'

principal war aims the punishment of those who, at whatever level, had been responsible for civilian massacres and the execution of hostages; though by the end of the war the UN War Crimes Commission was in doubt as to whether the taking of hostages was itself a war crime – oddly, since the point of taking hostages is to be able to execute them. In the end, it was the newly liberated states and the Allied powers who conducted local war crimes trials on a now forgotten scale: by the early part of 1948 almost two thousand Germans and Japanese who had had positions of command had been sentenced to death by these tribunals for atrocities against civilians or prisoners. The trials ran on into recent years as some of the surviving war criminals – Barbie, Touvier and Papon in France, for example – were finally flushed out.

There remain, however, stronger criticisms of the war crimes tribunals than the laxity of procedure which so enraged Norman Birkett, the alternate British judge on the Nuremberg court. The composition of the tribunals had no semblance of impartiality: every judge was a national of one of the victorious Allies. The dissent of the Indian judge at Tokyo, Justice Rahabinod Pal, still stings in its denunciation of the retrospective criminalisation of aggressive war (meaning, inevitably, the war waged by the loser); but his equally passionate denunciation of individual criminal responsibility for acts of state rings less true today. It is nevertheless a peculiar irony, in the light of the crisis now afflicting the newborn International Criminal Court, that one reason why Justice Pal was able to hold that there was no customary law making officers of state personally responsible for atrocities committed under their orders was that, in 1919, the two American members of the fifteen-man commission appointed to report to the Preliminary Peace Conference had refused to support any notion that the violation of the norms of war or the 'elementary laws of humanity' could be a crime. Their view that these were questions only of 'moral law' had resulted in the exclusion from the Treaty of Versailles of any provision for the trial of crimes against humanity, notwithstanding the availability of potent evidence of such crimes, the Turkish massacre of the Armenians among them.

From the aftermath of some of the most calamitous wars in human history, not forgetting that it was from the ashes of the war of 1939–45 that the great human rights instruments of our era emerged, let me move to another time and place: London, 25 November 1998. Senator Augusto Pinochet Ugarte has been arrested, in the course of one of his occasional visits to London, on two provisional warrants issued by metropolitan

stipendiary magistrates in response to an international warrant issued by the central criminal court in Madrid on charges of murder committed between 1973 and 1983 and of torture between 1988 and 1992. A divisional court presided over by Lord Bingham has quashed both warrants on the ground that, as a former head of state, Pinochet is by statute immune from prosecution, but has stayed the quashing of the second – the torture warrant – in order that the Commissioner of Metropolitan Police and the Government of Spain can appeal to the House of Lords. Working at remarkable speed (Pinochet was arrested in mid-October), the judicial committee of the House is ready to give judgment.

We do not televise court proceedings in this country. The hearing before the Law Lords took place, as it almost always does, in an upstairs committee room in the Palace of Westminster. But because the Law Lords are, constitutionally speaking, a committee of the upper legislative house, it is in the chamber of the House of Lords that they assemble to vote on the outcomes of the cases they have been hearing. It was simply because both houses of the legislature are equipped with television cameras for the broadcasting of debates that the cameras were rolling as the Law Lords rose in turn to vote on the outcome of the appeal. I mention this because it has come to be believed that, in a sudden rush of PR-consciousness, special arrangements were made to televise the delivery of the first Pinochet judgment in the House of Lords. The truth is that its dramatic worldwide impact was one of those pieces of historical good fortune in which Britain specialises.

Few who watched it, whether live or on the news, will forget how, with the escalating tension of a penalty shoot-out, Lord Slynn and Lord Lloyd rose in turn to vote for the dismissal of the appeal; and how Lord Nicholls, Lord Steyn and Lord Hoffmann then rose one by one to cast their votes for allowing it. The extradition proceedings were to go ahead: there was to be no hiding place in the civilised world for torturers, whatever their status.

Satellites carried the words and images round the world. In Chile tens of thousands of people watched the judgment on open-air screens, erupting in either jubilation or anger at the outcome. And although this decision had to be unmade and then re-made by a differently constituted committee of the House, the key outcome was the same: Senator Pinochet must face the accusation of torture (not, ironically, that of murder), because the adherence of Chile along with the UK and Spain to the Convention Against Torture had obliged it from, at the latest, 8 December 1988 to withdraw any state immunities from torturers. In spite of the significant differences of legal reasoning between the first and third judgments of the

House, due at least in part to the different ways in which the appeal was argued, the epoch-making message remained. On the allegations of torture and conspiracy to torture which postdated December 1988, Senator Pinochet could be extradited.

Subsequently the Home Secretary accepted that Senator Pinochet was medically unfit to face trial in Spain, and he was allowed to return to Chile. But Britain's sense of pioneering rectitude, justified though it may be, has tended to eclipse the role of the Chilean judiciary. In particular, it is widely believed in this country that it was our extradition process which finally kickstarted legal proceedings against Pinochet in his home country. In fact, in addition to having been under investigation in Spain since 1996 for the killing and torture of Spanish nationals, Pinochet was already under investigation for genocide and other crimes in his own country when he was arrested in London. In January 1998, nine months before his arrest here, after he had relinquished his presidential status and while he was in the process of exchanging his command of the armed forces for a life senatorship, a complaint was laid against him in Santiago by Gladys Marín. Under the Chilean constitution, holders of high public office – bishops, senators, generals, judges and the like – are immune from the automatic investigation which such a complaint ordinarily triggers. The modern purpose of the privilege (though it has a dubious past) is to prevent the harassment of public figures by baseless complaints: but the immediate effect of the lodging of a complaint against a holder of high office is that, instead of an ordinary examining magistrate, a member of the senior judiciary is appointed to inquire into it. If this judge finds evidence both of a crime and of the implication in it of the accused public figure, the constitutional immunity can be lifted.

When Gladys Marín laid her complaint, the appeal court judge whose name stood next on the rota for such tasks was Juan Guzmán Tapía. Guzmán has always been open about his initial support, as a citizen, for the Pinochet regime. But as a judge he set about his task impartially and conscientiously, and the evidence he uncovered was horrifying. A Chilean investigating judge in homicide cases fulfils among his other functions those of a coroner in our system, and Guzmán's room in the law courts gradually became stacked with dozens of boxes of human remains as he tracked the course of the 'caravan of death'. By the time of Pinochet's return to Chile, his constitutional immunity had been lifted by the Supreme Court, Guzmán and his family were under 24-hour armed guard and a major indictment was in preparation, charging

Pinochet and senior army officers with conspiracy to kidnap and to murder.

The lifting of Pinochet's constitutional immunity was itself a mark of the sea change which the later 1990s had witnessed in the structure and ethos of the Chilean Supreme Court. It was a court which had acquired a reputation for quiescence in the face of official abuses (it had managed to hold that even though Chile had from 1974 been officially in a state of war, the Geneva and Hague Conventions did not apply to it): but more recently it had withheld the benefit of a general amnesty from five senior military officers implicated in the 'caravan of death' because the amnesty did not cover aggravated kidnapping. The completeness of military impunity had already been punctured by the conviction, under pressure from Pinochet's main initial backer, the United States, of the head of the secret police, General Manuel Contreras, for organising the assassination in Washington in 1976 of the exiled Chilean politician Orlando Letelier and an American colleague. (I mention this not only because it shed some valuable light in a dark place but because it illustrates one of the paradoxes to which I shall return: the contrast between the sensitivity of the United States to anything affecting its own citizens or territory and its seeming indifference to similar sensibilities on the part of other states.) But it is the view of commentators both in and outside Chile that the stand taken by the House of Lords did as much as anything to bring about the momentous decision of the Chilean Supreme Court to lift Pinochet's constitutional immunity so that Guzmán could proceed with his indictment.

Pinochet's legal advisers now advanced the same case of physical and mental frailty that had persuaded the British Home Secretary to discharge him. Guzmán, having read the reports from the UK with a critical eye, bespoke fresh ones. They satisfied him that, whatever the penalty might turn out to be, the Senator was fit to stand trial. Pinochet appealed against this decision. Last summer, after an inexplicably long delay, the Supreme Court upset the judge's finding by four votes to one and held Pinochet unfit to face the trial to which a now formidable body of evidence was pointing. The indictment is proceeding nevertheless against the other accused, and their eventual trial may reveal to what extent, if any, Chile's ordeal of torture, disappearance and killing was Pinochet's responsibility.

Although the question of universal jurisdiction was raised in the Pinochet proceedings before the House of Lords, it was not found necessary to determine it. Universal jurisdiction is the power vested in states

by customary international law to allow them to try certain grave crimes no matter where or by whom or against whom they were committed. It afforded probably the best legal foundation for Israel's trial of Eichmann. But universal jurisdiction under customary international law tends to be marginalised in modern state practice by the incorporation of treaties either by automatic constitutional assimilation, as in the monist system of France, or by the domestic enactment of treaty provisions in common law countries such as the UK. The 1984 Torture Convention and the 1979 Hostages Convention have both been carried into the UK's law, vesting universal jurisdiction in the UK's courts as the conventions themselves require; though at least two of the law lords in the Pinochet cases were prepared to hold that the prohibition of torture was already a peremptory norm of international law which it required no treaty to criminalise.

Thus the domestic courts of states remain the primary forums for the prosecution of crimes against humanity. States have not merely the power but the obligation to prosecute offenders. In this situation the immunity of state officials becomes of critical importance, and it was on this immunity that Pinochet relied: his acts, whatever their criminality, had been the acts of a head of state and for that reason, he contended, were not justiciable at the instance of any other state. This argument the House of Lords accepted, but only up to the time when the Torture Convention took this defence away. The majority drew a distinction between crimes committed by a head of state in a personal capacity and crimes committed in an official capacity: international crimes committed in a personal capacity would be justiciable, as US courts had held in relation to General Noriega, the former Panamanian head of state now serving a life sentence in the US for narcotics crimes committed while in office; those committed in an official capacity would not be. There is something odd, indeed odious, about this. If, instead of trafficking privately in drugs, Noriega had used the apparatus of the state to do it, would he have been entitled to immunity? What moral or legal logic accords immunity only to the criminal who manages to subvert and abuse the powers of the state, so that the very magnitude of his crime (torture apart) becomes his shield?

These issues will not go away for a long time yet. But we do seem to have reached a plateau from which it is possible to get a better perspective on the terrain ahead.

In April 2000 a Belgian investigating judge issued an international arrest warrant against the then Foreign Minister of the Democratic Republic of the Congo, Abdulaye Yerodia Ndombasi, alleging crimes against international humanitarian law. Congo applied to the International Court of

Justice in the Hague, which tries disputes between states, to set aside the warrant on two grounds. The first was that Belgium's assertion of universal jurisdiction was in itself a violation of the Congo's sovereignty. This ground was wisely dropped: universal jurisdiction is not such bad news. The case proceeded solely on the second ground – that the warrant violated the principle of diplomatic immunity. On this the Congo succeeded. The decision has been deplored as a setback for international humanitarian law, but in my view it is not. The rule it endorses is much less important than the exceptions with which it surrounds the rule.

The Congo's own argument involved the exemplary use of Occam's razor on a case bristling with difficulties, paring it down to the incontestable fact that Yerodia was a government minister on the day the warrant was issued. It also, I suspect, had on its side the unspoken fact that of all countries to point the finger of human rights abuse at the Congo, there could not have been a less appropriate one than Belgium. It was enough for the Congo to succeed that the court concluded that, on grounds of state convenience and comity, incumbent ministers enjoy immunity from proceedings before the courts of other nations, however grave the crimes with which they are charged. For reasons I have touched on even this seems debatable. But, importantly, the decision recognised only immunity – a temporary and localised protection – and not impunity; it accorded it to incumbent ministers, not to former ones; it accorded it to them in international law but not domestically; and it limited the immunity to proceedings before other national courts, noting that this was compatible with the absence of any such immunity before the international tribunals at Nuremberg and Tokyo and the International Criminal Tribunals dealing with events in the former Yugoslavia and in Rwanda.

This jurisprudence, important in itself, is enhanced by the separate and partly concurring opinion of three of the most influential judges on the Court: Higgins, Kooijmans and Buergenthal. They inverted the rule-and-exception paradigm, stressing that immunity was the exception and justiciability the rule. Pointing to the changing standards and scope of state immunity, they went on:

A comparable development can be observed in the field of international criminal law ... A gradual movement towards bases of jurisdiction other than territoriality can be discerned. This slow but steady shifting towards a more extensive application of extraterritorial jurisdiction by states reflects the emergence of values which enjoy an ever increasing recognition in international society. One such value is the importance of the punishment of perpetrators of international crimes ... This development

not only has led to the establishment of new international tribunals and treaty systems in which new competences are attributed to national courts but also to the recognition of other, non-territorially based grounds of national jurisdiction.

They cited Oppenheim, the leading work on international law:

While no general rule of positive international law can as yet be asserted which gives states the right to punish foreign nationals for crimes against humanity in the same way as they are, for instance, entitled to punish acts of piracy, there are clear indications pointing to the gradual evolution of a significant principle of international law to that effect.

There is, however, a downside to the expansion of national jurisdictions to try the gravest crimes. It was articulated by Lord Browne-Wilkinson in his note of reservation to the Princeton principles of universal jurisdiction issued in early 2001 by a working group of international lawyers assembled by the International Commission of Jurists:

The Princeton Principles propose that individual national courts should exercise such jurisdiction against nationals of a state which has not agreed to such jurisdiction ... If the law were to be so established, states antipathetic to Western powers would be likely to seize both active and retired officials and military personnel of such Western powers and stage a show trial for alleged international crimes. Conversely, zealots in Western states might launch prosecutions against, for example, Islamic extremists for their terrorist activities.

The critical issue of the consent of the state to which the accused belongs is, however, not limited to his or her trial before the courts of another state. It has also come to dog the greatest of all modern initiatives in this field, the International Criminal Court which came into existence last summer under the provisions of the Rome Statute of 1998.

As I have said, this development seems almost counterfactual. As long ago as 1937 the League of Nations sponsored a Convention for the Creation of an International Criminal Court, but nothing came of it. In the post-war years, both the Genocide Convention and the Apartheid Convention envisaged international tribunals to try the crimes they were directed against, but neither these provisions nor the General Assembly's request to the International Law Commission to report on the setting up of an international criminal court survived the hostilities of the Cold War.

There is, however, at least one historical precedent for an international court of criminal jurisdiction. In 1817 Britain concluded treaties with