

## **Crimes Against Humanity: The Struggle for Global Justice**

**Geoffrey Robertson, Penguin Books London (2nd Edition) 2002**

The first edition of Geoffrey Robertson's book was completed in early 1999. Since then, the world has witnessed some tumultuous events that have, quite literally, refocused the way in which the international community views the role of international justice. The Pinochet case, the NATO bombing of Kosovo and Serbia, the fall and subsequent trial (still ongoing) of Slobodan Milosevic, the violence in East Timor, the tragedy in Sierra Leone, the September 11 attacks, the US action in Afghanistan, the use of 'Camp X-ray' in Guantanamo Bay, the establishment of the International Criminal Court and the actions of the so called 'Coalition of the Willing' in Iraq have all in their own way provided added stimulus (if any was needed) to the debate as to the appropriate structure and nature of a globalisation of justice. Geoffrey Robertson refers to such events as heralding a 'third age of human rights' — the first having been ushered in by the American and French revolutions of the 18th century and the second being the Nuremberg Judgment and the resultant 'International Bill of Rights'.<sup>1</sup>

It is in this respect, particularly bearing in mind recent events in Iraq, that an updated edition of this book is very timely. Indeed, although its publication pre-dates Operation 'Iraqi Freedom', the author provides some interesting and prescient observations as to possible future action to oust the Saddam regime. One of his central themes is that the evolution of the 'crime against humanity' as a legitimate and important element of international law has given rise to important 'new' international rights and obligations for States. The United Nations system, established at the conclusion of the Second World War, imposed a regime of international decision-making that Robertson believes is no longer appropriate and satisfactory, at least in relation to the pursuit of those guilty of gross violations of human rights. He suggests that notwithstanding the limitations against the use of force outlined in the United Nations Charter, there exists a right of collective action to stop crimes against humanity as long as specific conditions are met. In his opinion

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1 The 1948 Universal Declaration of Human Rights, together with the 1966 International Covenant on Civil and Political Rights and the 1966 International Covenant on Economic, Social and Cultural Rights are often collectively referred to as the International Bill of Rights.

this would possibly have provided a legal framework for eventual confrontation with Iraq outside of the Security Council regime — a justification not, however, taken up by the United States and its allies, who preferred (to their current embarrassment) to rely on the weapons of mass destruction program allegedly being undertaken by the Saddam regime.

The fundamental premise of Robertson's book is both remarkably simple and powerful. The existence of crimes against humanity as a legal doctrine, first defined at Nuremberg, is the key to 'unlocking the closed door of sovereignty' (p xiii). According to the author, the legacy of Nuremberg has been revived by recent events and could (should) now be actively used to promote an end to the culture of impunity and unaccountability that for too long existed, particularly during the Cold War period of 1945-1990. The major difference now is that the human rights movement, emboldened by the fact that the weight of international sentiment is shifting towards a more universal promotion of justice, has 'gone on the offensive' (p 535). If one accepts, as Robertson convincingly asserts, that the prevention of this type of crime gives rise to a right of intervention against what were regarded as the traditional realms of sovereignty, then the future (and current) tyrants of the world can no longer act without first giving serious consideration to the consequences of such actions.

In addition, his assertions represent a challenge to the necessity of Security Council support (in the absence of a clear right of self-defence) before a legitimate use of force can be undertaken. Robertson is certainly highly critical of the United Nations as an institution — recent events have shown that in this he is not alone — referring to the General Assembly as the 'trade union' of States (p 164) and condemning the Security Council for its systemic failure to commit to justice as a necessary precondition to peace (p 183).

Like the first edition, this edition begins with an interesting and easy to read historical account of the 'human rights story', which saw its roots in England as a counter to the divine rights of kings. Even though most university human rights law courses begin in earnest from the post-World War II period — and indeed the framework for international human rights law as we know it really evolved from that time — this deeper historical perspective supports the author's firm belief in the fundamental nature of human rights. Robertson points to history and the nature of humankind to dismiss assertions of cultural relativism that are often raised, usually unconvincingly, to justify traditions such as female genital mutilation, widow burning and the stoning of adulterers. The universal nature of these fundamental norms represents the essence of why the possible commission or continuance of a crime against humanity demands of States that they should act to prevent such crimes.

In Chapter 2 of the book, Robertson reviews the post-Second World War period and the establishment of the international legal system, as well as the treaties dealing with human rights and the treaty bodies they created. The 1948 Universal Declaration of Human Rights laid the foundation for a pool of regulation that was generally accepted by diplomats in the knowledge that they would have little practical and legal effect due to a powerless United Nations Committee system. However, despite the weaknesses of the formalised system — which Robertson suggests was designed to protect rather than challenge existing notions of sovereignty — the human rights movement has gathered strength not because of the existence of these rules but because they had become more widely known largely through the work of NGOs and the advent of ‘live’ media coverage of unfolding events.

In this context, it is necessary to understand the framework of existing rules, and hence their weaknesses. Robertson describes some of the fundamental human rights (freedom from state sponsored death and torture, arbitrary arrest, the right to a fair trial, the rights of minorities, the illegality of the death penalty, the protection of civilians during war) in Chapters 3-5. It is on the issue of the threat or use of nuclear and other weapons of mass destruction that Robertson reserves particularly harsh criticism for the United Nations system. The five permanent members of the Security Council were the first to establish their own nuclear arsenals, which promoted in other countries (Israel, Pakistan, India) a perceived political imperative to do the same. Even when the issue was referred to the International Court of Justice in the *Legality of the Threat or Use of Nuclear Weapons Case*,<sup>2</sup> the world court produced ‘300 pages of juridical cowardice’ (p 208) because they found the issue too political to be resolved by reference to the law of nations.

The author’s criticism of the international legal system is all the more poignant given that, as he asserts, the foundation of appropriate ‘tools’ to more effectively deal with gross violations of human rights have long existed, certainly from the end of Second World War. Under the ironic heading ‘An End to Impunity?’, Chapter 6 describes how the Nuremberg and (to a lesser extent) Tokyo military tribunals, despite their shortcomings, introduced landmark concepts into international humanitarian law. The ‘great achievement’ of Nuremberg was the embodiment of the crime against humanity as an ordinary crime that, as subsequent jurisprudence was to confirm, could be committed in peacetime as well as in war and by civilian (and not necessarily government) as well as military personnel. For its part, the Tokyo trials introduced the notion of ‘command responsibility’, though, as Robertson points out,

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2 (1997) 35 ILM 809 and 1343.

the prevailing political dynamics meant that the supreme commander of the Japanese forces during the Second World War, Emperor Hirohito, was accorded immunity from prosecution, subsequently 'touring in 1971 to meet Queen Elizabeth II and in 1975 to meet Mickey Mouse and Dr Kissinger' (p 242).

Robertson laments the fact that these principles were largely ignored until the 1990s, though, as described in Chapter 7, during the 1980s this widespread apathy towards significant human rights abuses was beginning to face challenge. The United States courts dusted off the 1789 Alien Torts Act<sup>3</sup> in *Filartiga v Pena-Irala*<sup>4</sup> to allow for civil proceedings against actions that contravened 'the law of nations' — a forum recently used to exact a jury award of US\$745 million to the victims of abuses orchestrated by the currently indicted Radovan Karadzic.<sup>5</sup>

Moreover, in the 1988 landmark *Velasquez Rodriguez* case,<sup>6</sup> the Inter-American Court of Human Rights found that a State had a legal duty to take reasonable steps to prevent human rights violations and to investigate and punish perpetrators as well as compensate victims. Robertson builds upon these obligations in the remainder of the book.

However, it is the establishment of the ad hoc Tribunals for the Former Yugoslavia and for Rwanda in the early 1990s that sets in motion a process of reinvigoration of the Nuremberg legacy. Robertson is highly critical that the international community did not react earlier in a positive sense to prevent or at least mitigate the imminent tragedies in both of those conflicts. The two Tribunals were set up by the Security Council in an effort 'to pretend to an anxious and appalled world that something was being done' (p 304). Indeed, the Rwanda genocide represented 'an all-time low for the United Nations, and at every level' (p 78).

Yet, once they were established, Robertson acknowledges in Chapter 8 that the Tribunals have developed a momentum of their own despite the resistance of diplomats. The jurisprudence that has emerged has clarified and expanded fundamental notions of humanitarian law. As an example, the acknowledgement that rape could constitute a war crime represented a major step forward from Nuremberg, where rape did not feature in the indictments (Robertson makes the point that Russian troops allegedly raped over 2 million women in the closing stages of the Second World War). Subsequent cases in the Tribunals have confirmed that

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3 28 USC s 1350.

4 630 F 2d 876 (1980); (1980) 19 ILM 966 US Circuit Court of Appeals, 2nd Circuit.

5 *Kadic v Karadzic* (1995) 70 F 3d 232.

6 (1988) 9 HRLJ 212.

rape could also constitute a crime against humanity or even genocide.<sup>7</sup> Furthermore, in *Tadic* the ICTY makes it clear that the distinction between an international and internal conflict has become far less relevant for the purposes of bringing a perpetrator of these crimes to justice. This naturally will mean a far greater degree of legal accountability.

The author also rejoices in the fact that the ad hoc Tribunals demonstrate the need for an impeccably fair trial for those accused of grave international crimes. From his viewpoint, the true 'victory' for international criminal justice, as illustrated in the *Milosevic* trial, is that it can be fair even to 'demonized' defendants and can provide an appropriate 'adversarial forum' to allow for an objective review of the evidence and a clear finding of the truth, so that subsequent historical rewriting of events can not be possible. For Robertson (and many others) the surrender of Milosevic to The Hague in June 2001 was a turning point in the 'success' of the Tribunals, despite the fact that they had been established through an imperfect system that was far too sovereignty-centric.

Robertson also holds out some optimism for the recently established International Criminal Court, which he discusses in Chapter 9. He recognises the political constraints that limited the drafting of the Rome Statute<sup>8</sup> — 'the best deal the human rights movement could do with the *realpolitik* of state power' (p 351) — but welcomes the 'authoritative' definition of crimes against humanity in art 7, which, apart from paragraph 3 (for which he is fiercely critical of 'The Vatican, and other homophobic Catholic and Islamic states') (p 360), represents its 'high point'.<sup>9</sup> He believes that the scope of jurisdiction given to the court by this Article will allow it to deal with the most heinous offences, provided, of course, that sufficient political will exists.

Despite this, however, there is still much to criticise in the Rome Statute. Many of the compromises in the document were designed to placate the United States (among other States) in the negotiations. The treaty makes no provision for reparations to be made by States — only perpetrators. For Robertson, this reflects an ongoing weakness in the philosophy guiding the current international justice movement,

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7 See, for example, the decision of the International Criminal Tribunal for the Former Yugoslavia (ICTY) in *Furundzija* and the decision of the International Criminal Tribunal for Rwanda (ICTR) in *Akayesu*.

8 Rome Statute of the International Criminal Court (1998) 37 ILM 999.

9 Article 7(3) of the Rome Statute provides:

'For the purposes of this Statute, it is understood that the term 'gender' refers to the two sexes, male and female, within the context of society. The term 'gender' does not indicate any meaning different from the above.'

which concentrates on individual criminal responsibility but denies a notion of 'collective' responsibility. Where crimes against humanity are committed, he believes that 'the two are not mutually exclusive' (p 386).

Robertson then discusses the *Pinochet* case<sup>10</sup> in detail (Chapter 10). For once he is able to praise the political process (more accurately non-process) by commending British Home Secretary Jack Straw for not interfering in the claims against Pinochet. As a result, the case represented the 'most important test for international law since Nuremberg' (p 414). The House of Lords decision confirmed the enforceability of international human rights law in national courts and reinforced the imperative of States to act to avoid, or punish, gross violations of human rights.

In this regard, Robertson then develops further his assertion of the right of States to act to prevent the commission of crimes against humanity (Chapter 11 — 'The Guernica Paradox — Bombing for Humanity'). He argues that there is a clear right of humanitarian intervention — indeed it would be an 'obscenity' if international law did not allow for this (p 428) — which is not abrogated by the United Nations Charter. In fact, he goes further by arguing that this evolving right of humanitarian necessity may even override the non-intervention principle, which has traditionally been regarded as an absolutely fundamental rule of international law. For Robertson, the moral imperative of preventing crimes against humanity gives rise to a legal right that is not dependent on the political will of the five permanent Security Council members.

In what appears to echo some of the recent statements of Prime Ministers Blair and Howard and President Bush, Robertson believes that extreme circumstances — such as the Serb actions in Kosovo in 1998 and early 1999 — may give rise to a 'just and lawful war' (p 451). He therefore suggests that the NATO bombing of Serbia and Kosovo between 24 March and 9 June 1999 (Operation Allied Force) was legally justified. Whilst this may be the case, it is clear that the rules of humanitarian law would (and should) still apply to this form of intervention. In this sense, Robertson does gloss over those events that transpired during the NATO operation, which may have been in breach of the rules of armed conflict, accepting all too readily the Prosecutor's report of the bombing campaign. He asserts, for example, that the mistakes made by NATO forces, including the use of cluster bombs dropped from perfect safety (15,000 feet) were 'isolated misjudgements' (p 442).<sup>11</sup>

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10 *R v Bow Street Metropolitan Magistrate and others, Ex Parte Pinochet Ugarte* (Amnesty International and others intervening) (No 3) (1999) 2 All ER 897 (HL).

11 For a discussion of the Prosecutor's report on the NATO bombing campaign and the potential for breaches of humanitarian law by NATO forces, see Freeland S 'The bombing of Kosovo and the Miloseric trial: reflections on some legal issues' [2002] *Australian International Law Journal* 140.

Robertson then applies his suggestions regarding the broad scope of crimes against humanity to the September 11 attacks and the response of the United States. In his view, the attacks on the twin towers were 'multiple acts of murder committed as part of a widespread and systematic attack against a civilian population', thus falling squarely within the definition of a crime against humanity. Using the NATO bombing campaign as a precedent, he argues that the overthrow of the Taliban (who were shown to have aided and abetted the attack) could possibly have been classified as a 'human rights offensive to prevent and punish a crime against humanity' (p 484), assuming his preconditions had been satisfied. Once again, however, the US chose to take a different path of justification, relying instead on the well established international law principle of self-defence. While this may have been legally justified in the short term, Robertson asserts that this legal basis had probably evaporated by late October 2000 under the standard *Caroline Case* international law principles of necessity, proportionality and immediacy.<sup>12</sup>

In any event he is wary of the use of this principle, since self-defence may often represent a 'convenient excuse' for States to engage in force where it is not justified (p 516).

Rather, he argues, the 'crimes against humanity' approach is a much better way of addressing terrorist attacks of a significant nature, as long as the intention is to prevent further commission of these crimes and to put the main perpetrators on trial for their actions before a properly constituted court with an absolutely fair system of judicial process. Again the US fails his test by declaring that captured Taliban/Al-Qaeda forces sent to Camp X-ray are not entitled to the protections of the Geneva Conventions.

For Robertson, the September 11 attacks highlighted the need to accept an international 'just war rule' which gives rise to a collective right of action to stop crimes against humanity. This also includes the right to stop conspiracies to use weapons of mass destruction as a means of committing such crimes (p 511). It was on this basis that he postulates the possibility of a just war against Iraq outside of the Security Council Chapter VII route. Recent history has shown us that the prevailing circumstances may not, in the end, have justified this approach; however even without the benefit of hindsight, the Coalition of the Willing appears not to have made out a justifiable case before the attack on Iraq began in mid-March 2003.

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12 29 BFSP 1137-1138; 30 BFSP 195-196.

So what of the future? Robertson ends with a brief epilogue in which he postulates a world government of 'parliamentary peoples' to safeguard human rights (p 528), since the United Nations system is too heavily biased towards State sovereignty and, in any event, is probably beyond the reform necessary to redress this imbalance. He notes that the international community had for many years failed to take up the legacy of Nuremberg and the imperatives stipulated in the Universal Declaration of Human Rights. However, the NATO intervention in Kosovo has marked the beginning of a new era of human rights enforcement, where States can no longer stand by and watch another State commit mass and systematic murder and other atrocities on its own people. Pertinent to events in Iraq following the publication of this book, he argues that the legitimacy of intervention should not be tested by unanimity in the Security Council, since mandates from that body have, in the past, been withheld 'for politically squalid reasons which have nothing to do with justice and morality' (p 523). A major revamp of the international regulation of intervention will be necessary to address the traditional 'old enemies' of the Human Rights movement — armies, the Church and States.

This book is compelling reading for anyone interested in the enforcement of human rights and the pursuit of international justice. Many traditional 'black letter' international lawyers, diplomats and government officials will certainly not support his major propositions. Nor, despite his attempts to impose conditions before the right of humanitarian intervention can be exercised, does he provide a 'fool proof' solution to the abuse by tyrants of their own people. Where the desire exists, even the best laid plans can be open to abuse, particularly when one discusses a 'just war' principle.

Yet there is something refreshing and important in Robertson's message. The international legal system is dominated by a State-centric regime that has largely been the product of compromise and power politics. It has not, but should, adapt to the changing nature of international relations and the emergence of the rights of the individual, even in the face of State sponsored action. Robertson challenges the reader to re-evaluate the current system and question whether it remains appropriate for the 21st century. One only has to look back to events earlier this year to see the merit in his argument. ●

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