Ending Impunity: How International Criminal Law Can Put Tyrants on Trial

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Geoffrey Robertson QC†

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Introduction

How far has international law come, in what our forebears, back in 1649, called “the great business” of denying impunity to tyrants accused of mass murdering their own people?

Slobodan Milošević sits in a dock in The Hague; he has been strutting and fretting his time on this televised stage since his trial began—as long ago as February 2002. The prosecution case took three years to finish. It will be several more years before the judgment is entered, and more years still before the appeal process will be completed. In the meantime, his popularity in Serbia soars, his party almost won the last election, his approval rating is much higher than when the trial began. He dominates the court, which sits only two days a week to accommodate his illness and allow his right to self-defence. He manifests contempt for the judges, and he insults the witnesses and victims. The presiding judge has died—from causes doubtless exacerbated by exasperation. The Prime Minister of Serbia, who courageously surrendered him, has been assassinated. Milošević has managed to turn his dock into a soap box, from which he declaims remorselessly and without remorse.

The next head of state to stand at the bar will be Saddam Hussein. Because America, effectively the sponsor of his trial, does not like what it

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sees of the Milošević trial, he will be denied the right of self-defence. Although he has been charged with international crimes, he will not be appearing before international judges. He will be tried by Iraqi judges who have no experience of trials of this kind. Several have themselves been jailed by Saddam, so questions of bias will arise. They will try him not in the safety of The Hague, but in the lethal environment of Baghdad, where one of them has already been assassinated. Many of these judges took their judicial oaths under the old Iraqi Constitution, which provided the President—Saddam Hussein—with absolute immunity from any prosecution for crimes committed while in office, so on that technicality they will be asked to acquit him.

But if, as a result of these trials, both men are convicted of mass murder—what then? For Milošević, the comparative comfort of a Scandinavian cell with extensive visiting rights, free telephone, internet and 140 television channels, many showing pornography. From there, he could still play an important role in Serbian politics. For Saddam, most likely a public hanging in some dusty square where his statue once stood. He will die a martyr's death on the gallows. What greater incitement for his supporters to step up the ferocious civil war?

I raise these problems at the outset, not because I despair of the trial and punishment of tyrants, but because I firmly believe in ending their impunity. It has been a very long and difficult struggle—legal, political and diplomatic—to hold political and military leaders accountable for crimes against humanity. It was only very recently that the legal problem of sovereign immunity was solved, so it is hardly surprising that we have not yet found the right procedures for delivering international criminal justice fairly, expeditiously and effectively. In order better to appreciate the scale and the novelty of these problems, let me introduce the trials of Milošević and Hussein by telling the story of the struggle against impunity in history and in international law. We can date the difficulties of bringing a head of state to trial from the time when modern international law began, in October 1648, with the Treaty of Westphalia, ending thirty years of war on the European continent.

I. Sovereign Immunity: Before Nuremberg

The Treaty of Westphalia was based on the sovereignty of states and the sovereign immunity of heads of state—kings and princes who could do no wrong—and the inviolability of their ambassadors and diplomats. Immunities of this kind, stemming from heraldic principles, had existed from time immemorial, but the Treaty set in legal stone the immunity of the sovereign and his representatives, whether from liability to their own people or to prosecution by other states or alliances of states. It embodied the philosophy of Machiavelli and of Jean Bodin: the prince was untouchable, above the law.

The best thing about the Treaty of Westphalia was that England was not a party to it. By England, I include America—the Puritan colonies of
New England, which play an important part in this story.\(^1\) The Puritans, some 30,000 of them, had left Britain in the 1630s in search of John Winthrop's Bible Commonwealth, his "city on a hill."\(^2\) They had been persecuted by the Star Chamber; their worship had been banned by Anglican bishops, and their parliament had been closed down by Charles I. Many of them—including most of Harvard's first graduates—returned from America in the 1640s to fight the civil war on Cromwell's side. It was a war begun by King Charles I, in 1642, in support of his claim to absolute rule: his right to dismiss judges at his pleasure; to imprison political opponents; his right to tax and govern without Parliament. He commanded troops who under his direction committed war crimes by plundering towns, killing civilians and torturing prisoners of war. Charles was captured but he refused Parliament's offer to share power; from his captivity, he fomented a second war. He lost that one as well and one in ten adult Englishmen had lost their lives by the time he began planning a third. That was when the Puritans decided to put him on trial. Their leaders included Hugh Peters, a founder of Harvard, and Sir Henry Vane, a former governor of Massachusetts. The first use of the word "impunity" in its modern sense is found in the statute that set up the court for this first trial of a head of state. This special High Court of Justice, said our Parliament—yours and mine, all those years ago—was established, "[t]o the end that no chief officer or magistrate may hereafter presume traitorously or maliciously to injure or imagine or continue the enslaving or destroying of the English nation, and expect impunity for so doing."\(^3\)

There are some extraordinary parallels between the trial of Charles I and the trials of Milošević and Saddam. Saddam, when he first appeared before a judge in 2004, used language in English translation that was almost identical to that used by Charles I: "By what authority—legal, I mean—do you sit as a court to judge me?"\(^4\) Charles I relied upon the rule that the King, as the source of law, is necessarily above it—sovereign immunity in the true sense—and upon the rule in the Magna Carta that guaranteed trial by peers—as the King, he could have no peers. But Parliament and the army set up the court with a presiding judge and about seventy jurors drawn from the most influential sections of society. The prosecutor, John Cooke, drew upon Magna Carta, the law of nations, and of the Bible to charge him with a crime that only kings or other heads of state could commit: a crime called tyranny, committed by a ruler who mass murders his own people and denies them civil and religious liberties. Charles had abolished Parliament and denied his people "democracy," although in those days democracy was only for men and only if they were in possession of property.

\(^1\) It is told in full in Geoffrey Robertson, The Tyrannicide Brief (2005).
\(^3\) Robertson, supra note 1, at 12.
\(^4\) Id. at 6.
Cooke had plenty of compelling evidence: intercepted correspondence, witnesses who had seen the King directing torture of prisoners and so on. The King had access to the best lawyers in the land—Matthew Hale, still venerated today, was ready to defend him. But Charles refused to plead, and with a courage and nobility that he had never shown in his life, he attacked the lawfulness of the court and all its proceedings. He showed utter contempt for the judges, abused them, and eloquently refused to recognise their jurisdiction over him. The court had to apply the contemporary rule that a refusal to plead was in law a confession of guilt: they had no alternative but to convict him of tyranny and treason and sentence him to death. He went bravely to the scaffold, playing the martyr’s part to perfection. As Andrew Marvell put it:

“He nothing common did or mean
Upon that memorable scene.”

His followers in England came to regard him as a saint. Eleven years later, after Cromwell’s death, his son Charles II was restored as an absolute monarch. In 1660, the King’s judges were themselves put on trial at the Old Bailey. The prosecution alleged that fanatical American religious terrorists—the Puritan preachers in Massachusetts—had plotted the King’s death and sent Peters and Vane across the Atlantic to conspire with Cromwell. The judges, along with the prosecutor Cooke and the “Americans,” Peters and Vane, were sentenced to death by hanging, drawing, and quartering. In public at Charing Cross, their privates were cut off and thrown to the dogs, they were disembowelled and their intestines were burnt in front of their goggling eyes before they died.

The trial of Charles I was compulsory reading for the French revolutionaries when they put Louis XVI on trial in 1792. Louis had very good lawyers who studied David Hume’s accounts of the trial of the British Head of State and advised him to adopt the same tactic of denying jurisdiction, since the French constitution guaranteed his inviolability, but the King doggedly insisted upon trying to establish his innocence. That was a big mistake. Louis was unanimously convicted by Parliament—a National Assembly that had already declared him guilty (so much for the fairness of trial by politicians). The vote to have him executed, however, was close. Tom Paine was an honorary delegate (a tribute to his role in the American Revolution) and urged that the King should instead be exiled to America, where he might be reformed and become a democrat. Marat jumped up to accuse Paine of being a Quaker and opposed to the death penalty on principle, while Robespierre shouted that humanity could not pardon mass murdering despots and St. Just adopted John Cooke’s argument that all kings were tyrants and this King must die so that the monarchy would die with him. Jacobin censorship ensured that Louis did not become a martyr: they even directed drummers to interrupt his speech from the guillotine.

When the British defeated Napoleon, they knew better than to put him on trial. He was exiled to St. Helena, a small island in the South Atlantic from which escape is still impossible, visiting rights are limited since a ship visits only once a month and there is no television.

International law in the nineteenth century defined two international law crimes capable of commission by individuals—piracy and slave trading—and there was a customary right to punish enemy soldiers who violated the laws of war, but heads of state were impervious to this dawning universal jurisdiction. Sovereign immunity was perceived as a diplomatic necessity; leaders would be less willing to surrender or settle if there was any likelihood that they would be put on trial and executed. This doctrine was, of course, congenial to rulers. It appears to have first been comprehensively challenged by the British Attorney General, F. E. Smith, who became convinced of the moral imperative of trying Kaiser Wilhelm II for war crimes—notably for his approval of the unprovoked invasion of Belgium and the use of unrestricted submarine warfare. Smith's argument was that diplomatic expediency must give way to justice—it was morally wrong to punish sailors for sinking passenger ships if those who gave the orders were immune—and to deterrence—"you strike at the whole corps if you strike at the head."7

At a meeting of the Imperial War Cabinet, Smith's eloquent plea for command responsibility was accepted,8 but the U.S. delegation at Versailles regarded the principle of sovereign immunity as immutable. Secretary of State Lansing argued that international crimes were nonjusticiable; "[t]here is no fixed and universal standard of humanity" and hence no hope of an objective and unbiased judge.9 As a concession to the concerns of Britain and the Commonwealth, Article 227 of the Versailles Treaty provided for the establishment of an international special tribunal, comprised of judges from the United States, Great Britain, France, Italy, and Japan, to put Wilhelm II on trial.10 In the meantime, however, the ex-Kaiser had been granted refuge by the Dutch government, which permitted him to live happily ever after in Holland until his death in 1941.

8. A commission appointed by the Allies to examine the responsibility of the "authors of the war" rejected the sovereign immunity of high officials and urged that "[a]ll persons belonging to enemy countries, however high their position may have been, without distinction of rank, including Chiefs of States, who have been guilty of offences against the laws and customs of war or the laws of humanity, are liable to prosecution." Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties, Report Presented to the Preliminary Peace Conference, 14 AM. J. INT’L. L. 95, 98, 117.
II. Nuremberg

Head of state immunity was not permitted to prevail in the Nuremberg Charter, the outcome of the Four Power Agreement signed in London on August 8, 1945. It provided for "an International Military Tribunal for the trial of war criminals whose offences have no particular geographical location."\(^{11}\) Article 7 of the Charter expressly rejected sovereign immunity for military and political leaders: "The official position of defendants, whether as heads of state or responsible officials in government departments, shall not be considered as freeing them from responsibility or mitigating punishment."\(^{12}\)

Article 7, and indeed the Nuremburg Charter itself, only came to pass as the result of an excruciating behind-the-scenes debate between the Allies as to the fate of the Nazi leaders. This time, national positions were reversed. Churchill repudiated F. E. Smith's views and demanded summary execution for "world outlaws" like Hitler, Himmler and fifty of their henchmen: his real fear was that if put in the witness box they would use it as a soap box to propagate their policies or as a place of privilege from which to make accusations against the Allies. To this pragmatic objection by the British, President Truman and his chief adviser, Supreme Court Justice Robert Jackson, took a celebrated stand on principle, which was subsequently supported by the Soviet Union and France:

[Undiscriminating executions or punishments without definite findings of guilt, fairly arrived at ... would not sit easily on the American conscience or be remembered by our children with pride. The only other course is to determine the innocence or guilt of the accused after a hearing as dispassionate as the times and horrors we deal with will permit, and upon a record that will leave our reasons and motives clear.]

As the Nuremberg tribunal pointed out, its Charter was "the expression of International Law existing at the time of its creation; and to that extent is itself a contribution to International Law."\(^{14}\) Jackson, the prosecutor, opened his case with a proclamation that the privileges attaching in international law to the State should never again shield human beings from retribution for their own wickedness, at least before an international court:

These defendants were men of a station and rank which does not soil its own hands with blood. They were men who knew how to use lesser folk as tools. We want to reach the planners and designers, the inciters and leaders ... The idea that a state, any more than a corporation, commits crimes, is a

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\(^{13}\) ROBERT JACKSON, THE NUREMBERG CASE 8 (Knopf 1971); See also ANNE & JOHN TUSA, THE NUREMBERG TRIAL 66 (1983). Jackson's report to Truman is dated June 1, 1945.

\(^{14}\) 22 TRIAL OF GERMAN MAJOR WAR CRIMINALS: PROCEEDINGS OF THE INTERNATIONAL MILITARY TRIBUNAL SITTING IN NUREMBERG GERMANY 444 (1946) [hereinafter PROCEEDINGS].
It was the judgment at Nuremberg which heralded the removal of the shield of state sovereignty for crimes against humanity:

It was submitted that... where the act in question is an act of state, those who carry it out are not personally responsible, but are protected by the doctrine of the sovereignty of the state. In the opinion of the tribunal (this contention) must be rejected... Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced... [T]he principle of international law, which under certain circumstances protects the representative of the state, cannot be applied to acts which are condemned as criminal by international law. The authors of these acts cannot shelter themselves behind their official position in order to be freed from punishment in appropriate proceedings.16

The Nuremberg trial actually set a precedent for putting on trial a former head of state because one defendant, Admiral Karl Doenitz, had occupied that position for a brief period between the Fuhrer's suicide and the German surrender. Article 7 was replicated in the law under which the Allies prosecuted war crimes after Nuremberg17 and in the Charter for the Tokyo trials of Japanese war criminals,18 although there it was watered down to disguise the uncomfortable fact that General MacArthur had, for political reasons, decided to give practical immunity to the Japanese Head of State. Emperor Hirohito is now regarded by historians as bearing ultimate responsibility for approving Japanese aggression: that his omission from the indictment went without serious protest (other than by the Australian and French judges) is an indication of the contemporary uncertainty over a head of state's immunity to prosecution.19

Shortly after the judgment at Nuremberg, however, the United Nations General Assembly formally adopted a resolution "affirm[ing] the principles of international law recognized in the Charter of the Nuremberg Tribu-

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15. 7 THE TRIAL OF GERMAN MAJOR WAR CRIMINALS BY THE INTERNATIONAL MILITARY TRIBUNAL SITTING AT NUREMBERG GERMANY, OPENING SPEECHES OF THE CHIEF PROSECUTORS 42 (1946).
16. PROCEEDINGS, supra note 14, at 446-47.
17. See Allied Control Council Law Number 10, Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity art. 4a, December 20, 1945, 3 OFFICIAL GAZETTE OF THE CONTROL COUNCIL FOR GERMANY 49 (1945), reprinted in BENJAMIN FERENCZ, AN INTERNATIONAL CRIMINAL COURT: A STEP TOWARD WORLD PEACE 488 (1980).
19. The presiding Australian judge, Sir William Webb, actually argued that because "the leader of the crime, though available for trial, had been granted immunity," his accomplices should have their death sentences commuted. On the politics behind the provision of effective immunity to the Emperor, see generally JOHN W. DOWER, EMBRACING DEFEAT: JAPAN IN THE WAKE OF WORLD WAR II (1999).
nal and the judgment of the Tribunal."\textsuperscript{20} As Lord Browne-Wilkinson explains in \textit{Pinochet No. III}, "At least from that date onwards the concept of personal liability for a crime in international law must have been part of international law."\textsuperscript{21}

On December 9, 1948 the U.N. General Assembly adopted the Genocide Convention, which envisaged an "international penal tribunal" to try this worst of all crimes and included a provision that convicts "shall be punished whether they are constitutionally responsible rulers, public officials or private individuals."\textsuperscript{22} The very next day—December 10, 1948—it adopted the Universal Declaration of Human Rights, a pledge to protect human rights through the rule of law without exception or immunity for any "state, group or person."\textsuperscript{23}

In 1950, the International Law Commission adopted the principles of international law recognized in the Charter of the Nuremberg tribunal. It defined Nuremberg Principle 3 as follows: "The fact that a person who committed an act which constitutes a crime under international law acted as Head of State or responsible Government official does not relieve him from responsibility under international law."\textsuperscript{24}

III. After Nuremberg

It was doubtless due to Cold War \textit{realpolitik} that no head of state was held responsible in international law thereafter, until the indictment of Jean Kambanda, Prime Minister of Rwanda during the genocide months of 1994.\textsuperscript{25} But the influential lectures on the legal position of heads of state, delivered at the Hague Academy in that year by Sir Arthur Watts confidently stated, "the idea that individuals who commit international crimes are internationally accountable for them has now become an accepted part of international law."\textsuperscript{26} In 1993, the International Criminal Tribunal for the former Yugoslavia (ICTY) was established, followed the next year by the International Criminal Tribunal of Rwanda (ICTR). Their statutes provided that "[t]he official position of any accused person, whether as Head of State or Government or as a responsible Government official, shall not not

\begin{itemize}
\item \textsuperscript{22} \textit{The Convention on the Prevention and Punishment of the Crime of Genocide} arts. IV, VI, Dec. 9, 1948, 102 stat. 3045, 78 U.N.T.S. 277.
\item \textsuperscript{26} Sir Arthur Watts, \textit{The Legal Position in International Law of Heads of States, Heads of Governments and Foreign Ministers}, 3 \textit{RECUEIL DES COURS} 82 (1994) (emphasis in the original).
\end{itemize}
relieve such person of criminal responsibility nor mitigate punishment.”  

Slobodan Milošević was indicted whilst he was incumbent President of the Federal Republic of Yugoslavia and charged in relation to acts allegedly committed whilst he served as head of state. The ICTY Trial Chamber has rejected his claim to be immune from prosecution and in doing so has observed that the rule set out above in Article 7(2) of its Statute, “at this time reflects a rule of customary international law.”  

The Rome Statute of the International Criminal Court (ICC) solidified the principle that there can be no head of state immunity in an international criminal court; it entered into force on July 1, 2002, and Article 27 comprehensively provides:

[O]fficial capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute . . . . Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person.  

IV. The ICJ Decision in D.R.C. v. Belgium  

The ICTY, ICTR, and the ICC are courts vested with international penal jurisdiction. Can that jurisdiction be exercised by hybrid courts, like that in Sierra Leone, or by national bodies like the Iraqi Special Tribunal? The answer lies embedded in the recent International Court of Justice (ICJ) case of D.R.C. v. Belgium. In this case, the court considered the scope of the immunity of a minister for foreign affairs—by necessary implication, the immunity of heads of state and government leaders—in the context of an arrest warrant which had been issued against an incumbent by a foreign national court. Two facts were crucial to the ICJ decision that this warrant was unlawful: the fact that the minister was in office at the time and the fact that the court in question was a national court, exercising a jurisdiction bestowed by national legislation. The majority opinion—that such leaders are, while serving, absolutely immune from any exercises of


30. See Case Concerning the Arrest Warrant of 11 April 2000 (D.R.C. v. Belg.), 2002 I.C.J. 121 (Feb. 14) [hereinafter DRC]. Decisions of the International Court of Justice are binding only between the parties; nonetheless they are entitled to great respect insofar as they elucidate rules of international law.
criminal jurisdiction by national courts, whether or not the crime charged is also a crime under international law and whether or not the offending action was taken in an official or private capacity—does not apply to bar their prosecution:

i. by national courts in their own country for acts committed at any time,
ii. in a foreign national court if the state waives immunity,
iii. in a foreign national court after they cease to hold office, for acts committed before or after tenure or even during that tenure if such acts were committed in a private capacity,
iv. in an international criminal court, for acts committed at any time.

Courts in the first three categories are easy to identify, but the fourth category requires closer examination. The ICJ decision was joined by thirteen judges, but eight of these appended separate concurring opinions and three others dissented. The most important of the separate concurring opinions, which deals with jurisprudential issues which the majority opinion did not cover, was rendered jointly by Judges Higgins, Kooijmans and Buergenthal, and indicates a more restricted view of sovereign immunity. This view finds an echo not only in the three dissents but in at least two of the separate individual opinions (by Judges Koroma and Ranjeva). Considerable persuasive weight can therefore be given to the three-judge concurring opinion.

The case arose from the action of an investigating judge for a first-instance court in Belgium, who received a dozen complaints—several from Belgian nationals—that the Foreign Minister of the Congo, Abdoulaye Yerodia Ndombasi, had made speeches in the Congo which had incited racial hatred and led to mass killings. Having investigated, the judge issued and transmitted to INTERPOL an "international arrest warrant in absentia" charging Yerodia with crimes against humanity, under a universal jurisdiction given to the court by Belgian law to punish war crimes "wheresoever they may be committed." This jurisdiction had been used effectively and unexceptionally to convict Hutu nuns who had subsequently settled in Belgium for their part in the Rwandan genocide. But other than shared nationality with a few complainants and perhaps historical guilt over King Leopold, Belgium had no connection with the alleged crimes, the alleged criminal (who had never visited Belgium) or his alleged victims. The "investigating judge," equivalent in function to an American prosecutor, did not have to satisfy a Belgian court as to the credibility of his evidence. The "hate speech"

31. Id. ¶ 61.
32. Id. (Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal).
33. Id., ¶¶ 13, 15.
charge was in any event controversial and difficult to link causally with subsequent killings. The facts were not, in other words, a good test for the important argument that universal jurisdiction can be bestowed on national courts for prosecution of crimes against humanity in cases where the international community turns its back. Prior to the judgment, Mr. Yerodia was reshuffled to become Minister of Education—an available precaution for any government which finds its foreign minister unwelcome in foreign capitals. This change in circumstances should have made it unnecessary for Belgium to cancel the warrant, but the Democratic Republic of Congo insisted, in the dated language of ceremonial affront, that it had suffered “moral injury” from the fact that one of its ministers had been proceeded against in defiance of the immunity.

The court grounded the immunity, and inferred its scope, from the nature and work of the ministry in question:

In customary international law, the immunities accorded to Ministers for Foreign Affairs are not granted for their personal benefit, but to ensure the effective performance of their functions on behalf of their respective States. In order to determine the extent of these immunities, the Court must therefore first consider the nature of the functions exercised by a Minister for Foreign Affairs. He or she is in charge of his or her Government's diplomatic activities and generally acts as its representative in international negotiations and intergovernmental meetings.

The Court accordingly concludes that the functions of a Minister for Foreign Affairs are such that, throughout the duration of his or her office, he or she when abroad enjoys full immunity from criminal jurisdiction and inviolability. That immunity and that inviolability protect the individual concerned against any act of authority of another State which would hinder him or her in the performance of his or her duties.

Furthermore, even the mere risk that, by travelling (sic) to or transiting another State a Minister for Foreign Affairs might be exposing himself or herself to legal proceedings could deter the Minister from travelling (sic) internationally when required to do so for the purposes of the performance of his or her official functions.

This approach may be criticized as somewhat anachronistic (foreign ministers have no vital need to travel to states where they may be indicted; they can send emails or ambassadors or hold a video conference) and as ignoring the sensible state practice of reshuffling foreign ministers who run into international legal difficulties. In many states, indeed, it is regarded as a minister’s duty to stand down and clear himself of a criminal charge before resuming office. At least the ICJ’s functional approach confines the scope for immunity to the needs of representative government.

The court denied that its decision that national courts had no power to proceed against serving foreign ministers meant impunity from prosecution for crimes against humanity or war crimes. Its key finding at paragraph 61, summarized above, must be quoted in full:

36. DRC, supra note 30, ¶ 53–55.
Accordingly, the immunities enjoyed under international law by an incumbent or former Minister for Foreign Affairs do not represent a bar to criminal prosecution in certain circumstances.

First, such persons enjoy no criminal immunity under international law in their own countries and may thus be tried by those countries' courts in accordance with the relevant rules of domestic law.

Secondly, they will cease to enjoy immunity from foreign jurisdiction if the State which they represent or have represented decides to waive that immunity.

Thirdly, after a person ceases to hold the office of Minister for Foreign Affairs, he or she will no longer enjoy all of the immunities accorded by international law in other States. Provided that it has jurisdiction under international law, a court of one State may try a former Minister for Foreign Affairs of another State in respect of acts committed prior or subsequent to his or her period of office, as well as in respect of acts committed during that period of office in a private capacity.

Fourthly, an incumbent or former Minister for Foreign Affairs may be subject to criminal proceedings before certain international criminal courts, where they have jurisdiction. Examples include the International Criminal Tribunal for the former Yugoslavia, and the International Criminal Tribunal for Rwanda, established pursuant to Security Council resolutions under Chapter VII of the United Nations Charter, and the future International Criminal Court created by the 1998 Rome Convention. The latter's Statute expressly provides, in Article 27, paragraph 2, that "[i]mmunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person."37

So far as it goes, the fourth proposition in paragraph 61 of DRC represents the rule of international law applicable to the assertion of an immunity in an international criminal court. The ICJ clearly states that no such immunity can bar prosecution in the ICTY, the ICTR or the ICC, and that these are only examples of the "certain international criminal courts" which may proceed against incumbent high officials "where they have jurisdiction."38 What is not certain, however, is the meaning of "certain" in that crucial phrase. A sensible reading of paragraph 61 is that the "certain international criminal courts where they have jurisdiction" denotes courts which are a) international and b) possess, by virtue of their statutes, jurisdiction which expressly overrides immunity claims. The ICTY, ICTR and ICC all have this feature in common—a commonality relevantly spelled out by the ICJ's citation of Article 27(2) of the Rome Statute. This citation must be the key to what is meant by the phrase "where they have jurisdic-

37. Id. ¶ 61.
38. Id. The ICJ decision was delivered on February 14, 2002. Understandably, it makes no mention of the Special Court for Sierra Leone, which was established by an agreement concluded only a few weeks before, and which had not been implemented at that stage. The Appeals Chamber of the Special Court for Sierra Leone has subsequently held that it falls within paragraph 61. See Prosecutor v. Charles Taylor, Case no. SCSL-03-01-1-059, Decision on Immunity from Jurisdiction, ¶ 42 (May 31, 2004), available at http://www.sc-sl.org/Documents/SCSL-03-01-1-059.pdf (outlining the status of the court).
tion" which in turn defines the "certain" courts, rather than the somewhat throwaway reference to Chapter VII of the U.N. Charter when describing the origin (but not the jurisdiction) of the ICTY and ICTR. This interpretation permits the inclusion of the Nuremberg Tribunal amongst the "certain" courts, since its Charter contained an equivalent provision overriding sovereign immunity and it was established before the U.N. itself came into existence. Nobody doubts that it had jurisdiction to override any claim of immunity for Admiral Doenitz, Reich Marshal Goering and the other Nazi leaders.

The interpretation is consistent with the context of the DRC Judgment: the fourth proposition in paragraph 61 is foreshadowed by the court’s emphasis, in paragraph 47, on Congo’s position that “the fact that an immunity might bar prosecution before a specific court . . . does not mean that the same prosecution cannot be brought, if appropriate, before another court which is not bound by that immunity . . . . It concludes that immunity does not mean impunity.”

V. The Concurring Minority in D.R.C.

This interpretation of the ICJ’s elliptically expressed fourth proposition in paragraph 61 of DRC does accord with principle and with dicta in other cases such as Pinochet, as well as the approach in the opinion of the ICJ concurring minority, who explain that immunity depends not only on the status of the official but also upon “what type of jurisdiction, and on what basis” the prosecuting authorities seek to assert it. “One of the challenges of present day international law” they write “is to provide for stability of international relations and effective international intercourse while at the same time guaranteeing respect for human rights.” State practice, as enshrined in treaties, evinces “a common endeavour in the face of atrocities” by way of a duty to prosecute certain international crimes, such as genocide, torture and grave violations of the Geneva Conventions, which “open[ed] the door to a jurisdiction based on the heinous nature of the crime rather than on links of territoriality or nationality.” Hence “the international consensus that the perpetrators of international crimes should not go unpunished is being advanced by a flexible strategy, in which newly-established international criminal tribunals, treaty obligations and national courts all have their part to play” in ending impunity for crimes against humanity. Against this background, immunity is an exception to the exercise of a jurisdiction to punish crimes against human-

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40. DRC, supra note 30, ¶ 48.
41. DRC, supra note 30, ¶ 3.
42. Id. ¶ 5.
43. Id. ¶ 46.
44. Id. ¶ 51.
ity. As an exception its value must always be balanced against the normative value of ending impunity:

[A] trend is discernable that in a world which increasingly rejects impunity for the most repugnant offences, the attribution of responsibility and accountability is becoming firmer, the possibility for the assertion of jurisdiction wider and the availability of immunity as a shield more limited. The law of privileges and immunities, however, retains its importance since immunities are granted to high State officials to guarantee the proper functioning of the network of mutual inter-State relations, which is of paramount importance for a well ordered and harmonious international system.45

This approach is consistent with the fourth proposition in paragraph 61, namely that an international criminal court competently established (whether by treaty or by the Security Council under Chapter VII) may exercise its jurisdiction to override immunities if so directed by its statute; The Special Court for Sierra Leone is so directed, for example, by Article 6(2) of its Statute.46

All immunities from criminal jurisdiction should be narrowly interpreted or "recognized with restraint"47 and in consequence a national court exercising an international or extraterritorial jurisdiction (as in extradition) should not recognize them in respect of an ex-head of state, because there can be no realistic interference with government functions by so doing. This was the result in the Pinochet proceedings, at least in respect of extradition pursuant to the Torture Convention. The majority in DRC, contemplating a situation when the high official has ceased to hold office (proposition 3, paragraph 61), would permit his prosecution "in respect of acts committed during that office in a private capacity."48

VI. The Pinochet Precedent

If the Pinochet cases, Nos. I and III, established anything, it is the unworkability in criminal law of the distinction between "public" (or "official") acts and "private" acts—a distinction which the Court in U.S. v Noriega presciently predicted "may prove elusive."49 It is easy to accept that Noriega's drug trafficking whilst head of the Panamanian government could not constitute public acts done on behalf of the Panamanian State. But compare the charges against Pinochet—his alleged direction of systematic torture by army, police and secret service of his political opponents, and his agreement with other governments to eliminate "leftists" in the region through "Operation Condor." In the view of the two judges in the minority in Pinochet No. I, it was pellucidly clear that these were acts committed in an official, sovereign capacity which in consequence attracted

45. Id. ¶ 75.
47. DRC, supra note 30, ¶ 79.
48. DRC, supra note 30, ¶ 61.
immunity from criminal process. The inevitability of this conclusion, as a matter of commonsense, was avoided by the three majority judges on the ground that immunity was a doctrine of international law and precluded prosecution only:

in respect of acts performed in the exercise of functions which international law recognises as functions of a head of state, irrespective of the terms of his domestic constitution . . . [and it hardly needs saying that torture of his own subjects, or of aliens, would not be regarded by international law as a function of a head of state . . . .] International law has made plain that certain types of conduct, including torture and hostage-taking, are not acceptable conduct on the part of anyone. This applies as much to heads of state, or even more so, as it does to anyone else; the contrary conclusion would make a mockery of international law.

Although the authority of Pinochet No. I may be questionable in United Kingdom domestic law since one of the judges in the majority was subsequently disqualified, this analysis appears correct as a matter of international criminal law at this juncture. The "retirement immunity" referred to in the third proposition in paragraph 61 of DRC cannot protect against charges of crimes against humanity because the commission of such crimes is outside any official function. In this way, as the concurring ICJ minority explains, the door is opening in municipal law to a jurisdiction based on the heinous nature of the crime rather than on territorial or nationality links.

The third proposition in DRC, which denies retirement immunity "in respect to acts committed during that period of office in a private capacity" should be read with the Pinochet No. I qualification that heads of government who have, whilst in office, harnessed the sinews of the state for the commission of crimes against humanity will be characterized or deemed in international law as having acted in a private capacity.

Although the United States Supreme Court has said in Nelson (like the minority in Pinochet No. I) that acts of torture by police, army and security services are quintessentially "official" acts, this now requires further analysis. They are acts by officials, certainly, but they are not legitimate actions for officials to take. Because sovereign immunity is an international law rule, the functions of the sovereign cannot sensibly include behavior which is contrary to jus cogens, and which therefore every sovereign has an erga omnes obligation to the international community to foreswear. Hitler was acting "officially" when ordering the Final Solution, but his personal immunity could not subsequently have availed him against prosecution for a crime against humanity. A head of state who kills

51. Id. at 108-9 (Lord Nicholls) (emphasis added).
52. See generally Saudi Arabia v. Nelson, 507 U.S. 349 (1993) (holding that the United States did not have jurisdiction over Saudi Arabia under the Foreign Sovereign Immunities Act of 1976 because such acts were not commercial activities).
his gardener in a fit of rage, or tortures for the pleasure of watching the
death agonies of his victims (Montaigne’s somewhat dated definition of the
furthest point in cruelty) could always have been prosecuted after his over-
throw for these “private crimes,” because they are outside his retirement
immunity, which is restricted to acts relating to his official functions.53

Different approaches were taken in the individual opinions of the
seven judges who decided Pinochet No. III where the head of state immu-
nity issue was affected by interpretation both of United Kingdom national
immunity legislation and of the Torture Convention. There was, however,
consensus that customary international law now justifies states in appre-
hending and punishing “common enemies of mankind” who commit cer-
tain “high crimes” prohibited by a rule of international law with jus cogens
force. The proposition advanced by Sir Arthur Watts in 1994 was
endorsed:

[T]he idea that individuals who commit international crimes are internation-
ally accountable for them has now become an accepted part of international
law. Problems in this area—such as the non-existence of any standing inter-
national tribunal to have jurisdiction over such crimes, and the lack of agree-
ment as to what acts are internationally criminal for this purpose—have not
affected the general acceptance of the principle of individual responsibility
for international criminal conduct . . . . It can no longer be doubted that as a
matter of general customary international law a Head of State will person-
ally be liable to be called to account if there is sufficient evidence that he
authorized or perpetrated such serious international crimes.54

This principle, as all judges in Pinochet Nos. I and III accepted, must
apply to cases “where the international community has established an
international tribunal in relation to which the regulating document
expressly makes the head of state subject to the tribunal’s jurisdiction.”55
The examples given (Nuremberg and Tokyo tribunals, ICTY and ICTR,
ICC) were of “cases in which a new court with no existing jurisdiction is
being established” and where the constitutive documents expressly provide
jurisdiction which overrides immunity.56

The Special Court for Sierra Leone, established with Article 6(2) in its
statute, answers this description, although the Iraqi Special Tribunal does
not. The actual decision in Pinochet No. III concerned the immunity of an
ex-head of state in criminal proceedings brought in a national court and
the judges found in the Torture Convention a basis for universal jurisdic-
tion over that crime in the courts of nations which have ratified it. Since
that Convention defined “torture” as an act committed by a public official,
it was strictly unnecessary to decide whether the guilty official had been
acting in a public or private capacity. Although two of the six-judge major-

53. See examples given by Lord Steyn in Pinochet No. I, supra note 50.
54. Watts, supra note 26, at 82–84.
55. Pinochet No. III, supra note 21, at 204(E) (emphasis in the original).
56. Id. at 204. Also note that the dissenting judges in Pinochet No. I, (Lords Slynn
and Lloyd) regarded the immunity as ineffective against proceedings brought before an
international criminal tribunal.
ity thought that torture ordered in the interests or for the benefit of the State retained its characteristic as an official act, two others demurred: "How can it be for international law purposes an official function to do something which international law itself prohibits and criminalises?" A fifth judge, Lord Phillips, pointed out that "an international crime is as offensive, if not more offensive, for the international community when committed under colour of office. Once extra-territorial jurisdiction is established, it makes no sense to exclude from it acts done in an official capacity."

VII. The Present Rule

This historical excursus demonstrates that the provision in Article 6(2) of the Special Court for Sierra Leone Statute, namely, "the official position of any accused person, whether as Head of State or Government or as a responsible Government official, shall not relieve such person of criminal responsibility nor mitigate punishment," is now so entrenched in state practice and international jurisprudence that it reflects a rule applicable before international courts. Although Sir Arthur Watts in his 1994 lectures regarded the rules about immunity as "in many respects still unsettled," they have now, a decade on, crystallized precisely in the form stated in Article 6(2) in respect of the power of international courts to exercise international jurisdiction over heads of state and other political and military leaders.

This power is unvarnished and unrestricted in the sense that it has no place for distinctions which have been made in the municipal laws governing immunities, e.g. distinctions between absolute immunity (ratione personae) which exists for all acts committed during a head of state or ambassador's tenure of office, and the more limited immunity (ratione materiae) which applies to ex-heads and lesser officials, protecting them from acts performed as part of their official functions but not for acts done for private gratification. Such distinctions may be meaningful when the immunity is asserted in national law: they can have no place in a system of international criminal justice aimed at "the planners and designers, the inciters and leaders." These are people of power or wealth or both and their motivation for widespread and systematic abuse of power, whether private greed or public aggrandizement, is irrelevant. Indeed the very fact that the act was "official" state policy would make it more serious in international law, with its object of punishing those who wield state power for criminal ends.

The State immunity of rulers or officials or ambassadors derives from a seventeenth century when states were ruled by divine right or feudal

57. Lords Hope and Saville. See Pinochet No. III, supra note 21, at 242(C), 266(F).
58. Lords Browne-Wilkinson and Hutton. Id. at 204(G), 262(B).
59. Id. at 290.
60. Statute for the Special Court of Sierra Leone, supra note 46.
61. Watts, supra note 26, at 52.
inheritance, and lacked the facilities for instantaneous communication we now take for granted. Traditional rationales—the indignity of putting a sovereign on trial or the incapacity of judges to determine political questions, carry less weight in the twenty-first century. Even the "functional" rationale of immunity, based on the need of heads of state and foreign ministers to travel abroad in order to do state business, is less crucial in the age of the e-mail and the video conference. As modern developments call traditional rationales into question, so the attitude towards international crimes has changed. International law now acknowledges the imperative need to end impunity for crimes against humanity, and the logical consequence of this imperative is to end all immunity of state officials, past and present, who are credibly arraigned on such charges by international courts.

Uncertainty still attends the power of national courts to entertain prosecutions of heads of state under municipal law or through the purported exercise of universal jurisdiction: that these powers remain restricted in criminal proceedings appears from the recent cases of DRC and Pinochet, and their very existence in civil actions is doubtful: see Al-Adsani v. U.K.62 and Tachiona v. Mugabe.63 But if a "hybrid" court is properly invested with international criminal jurisdiction, its prosecutor may indict any present or past head of state whom the evidence credibly shows to be guilty of the war crimes and crimes against humanity.

Pinochet is momentous because it was the first occasion on which a municipal court refused to afford immunity to a former head of state, on the ground that there could be no immunity against prosecution for certain international crimes. But in an area of law which is developing with extraordinary momentum, the opinions delivered in its course may appear, five years on, to bear the over-caution which often attends the early development of legal doctrine. The simple approach of Lord Phillips, for example, now seems to "cut to the chase" more effectively than the somewhat arid distinction between "private" and "public" acts, and more sensibly than the somewhat academic argument that it can never be an official function in international law (however "official" it has been in fact) to do something which international law prohibits. Torture, surely, is torture, whether committed in the interests of state or (as in Montaigne's example) for malicious pleasure. It may very much be in the interest of the state to torture those who would overthrow it: Alan Dershowitz has even argued for reversion to a Napoleonic "torture warrant" (as seen in Act II of Tosca) whereby a judge might be persuaded to authorize the infliction of physical pain as a means of extracting information from terrorists.64

The answer is that international law prohibits torture, whatever the motive, and by the most imperative force at its command (albeit couched in Latin terms—jus cogens, erga omnes, etc.—phrases incomprehensible to torturers unless they are also international lawyers). If that message is to go

62. 34 Eur. Ct. H.R. 11 (2001) (holding that state immunity was not a denial of access to court).
64. ALAN M. DERSHOWITZ, WHY TERRORISM WORKS (2002)
forth into the world, it must bear the hallmarks of clarity (a necessary quality of criminal law) and workability (in the sense of accommodating to the real world). And if international law really is to do its utmost to end impunity, then the traditional obeisance to state immunity in civil actions should be reconsidered as well.

As of 2005, the position of immunity in international criminal law is as follows:

i. No immunity may be asserted in an international criminal court to bar the indictment, arrest or trial of a serving head of state, head of government, ambassador or foreign minister or other high official for war crimes or crimes against humanity. Whether the indictee is a serving or former high official is irrelevant. All that matters is that the court is a competent international criminal court and is endowed expressly or by necessary implication with a jurisdiction to override sovereign immunities.

ii. In national criminal courts and international criminal courts which lack competence or the necessary jurisdiction, such immunity will bar any prosecution if a) asserted by the state; b) in respect of a serving high official. If the indicted official no longer holds high office, the immunity will bar prosecution for all crimes committed during tenure of that office except a) crimes against humanity as defined in Article 8 of the Rome Statute, genocide as defined in the Genocide Convention, torture under the Torture Convention and war crimes defined in Common Article 3 of the Geneva Convention, and b) crimes under the national law of the forum committed with the intention of personal gratification or enrichment.

iii. In national courts, immunity may be asserted under municipal law to bar civil claims against incumbent or retired officials which are based on the commission of criminal offences. In international civil courts or arbitral tribunals applying international law, however, there is no reason in principle why immunity claims should not be overridden when the claim is based on commission of crimes against humanity.

VIII. Curial Competence

It is not enough for a court to have an immunity-busting clause like Article 6(2) in its statute; there must be a satisfactory indication that this competence to override state immunity "bears the imprimatur of... international consensus"65 or at least requires (or has good claim on) the support of the international community. This quality is also necessary—otherwise it would be possible to envisage a court established by treaty between two allied states, in which they attempted by a provision akin to Article 6(2) to clothe it with competence to put on trial the leader of a third state. Another example would be to establish a national court onto which some international elements had been grafted, such as the presence of one international judge or the power to prosecute international crimes, like the

65. Tachiona, 169 F. Supp. 2d at 280 n.78 (as creations of the U.N. Security Council, the ICTY and ICTR bear this imprimatur).
Iraqi Special Tribunal. There must be a proper basis for the establishment of an international court, which cannot be found merely in the fact that it applies international law or has been set up as the result of an international treaty.

In the case of the ICC, that true international element is found in the Rome Statute, which did not enter into force until ratified by sixty states, and which provided for a court comprising eighteen elected international judges. It was found in the Nuremberg tribunal, notwithstanding that its charter was vouchsafed by only four states, because those states (to which the German Reich had unconditionally surrendered) represented, at that juncture in history, most of the free world. The Tokyo tribunal comprised eleven international judges and was established by the occupying power following surrender. The ICTY and ICTR were established by the Security Council, and its decision must be taken to represent the collective judgment of the international community.

The Special Court for Sierra Leone fell within this category because it has been established by treaty to which the Security Council is party, it has been expressly clothed with immunity-busting jurisdiction and it comprises a majority of international judges and an international prosecutor. The U.N. Security Council initiated the establishment of the Sierra Leone court to deal with breaches of international criminal law and in order to cope with the situation that "continues to constitute a threat to international peace and security in the region." When, in Resolution 1315, the Security Council requested the Secretary-General to "negotiate an agreement with the Government of Sierra Leone to create an independent and special court consistent with this Resolution" it was acting on behalf of all members of the United Nations. Resolution 1315 recommends that the Special Court "should have personal jurisdiction over persons who bear the greatest responsibility for the commission of the crimes . . . including those leaders who, in committing such crimes, have threatened the establishment of an implementation of the peace process in Sierra Leone."

IX. The Iraqi Special Tribunal

On this analysis, the Special Tribunal is not an international court or an established Iraqi court. It was set up by appointees of the United States interim administration, and paid for at the cost of $75 million, by the

66. And possibly the court set up by General Assembly Resolution 57/228A (18 Dec. 2002) to try Khmer Rouge leaders, which is avowedly established "in the existing court structure" of Cambodia. U.N. GOAR, 57th Sess., Agenda Item 109 (b), at 1 U.N. doc. A/RES/57/228 (2002).
68. Id. ¶ 1.
69. This is plain from Article 24(1) of the Charter, under which U.N. members "agree that in carrying out its duties . . . the Security Council acts on their behalf." U.N. Charter art. 24, ¶ 1.
70. Resolution 1315, supra note 67, ¶ 3.
United States in the wake of a war which a considerable body of expert opinion considers to have been contrary to international law. It is not justifiable as a court-martial, because Saddam is not charged with war crimes related to the allied invasion or occupation of his country. He is charged both with crimes against international law such as genocide in respect of Kurds and Marsh Arabs, and crimes—murders and so forth—that are against local law.

Regrettably, the new democratically elected government has thus far declined to make the tribunal legally water-tight both in respect of its jurisdiction over a former head of state and in respect of the independence and impartiality of its judges. Both objectives could be secured through a treaty between the government of Iraq and the United Nations similar to the arrangements which have been made for the war crimes court in Sierra Leone. This would have the great advantage of permitting international judges, appointed by the U.N. and experienced in international law, to sit alongside Iraqi colleagues. International law precedents clearly endorse the legality of such a court provided it is independent of the local government and has a statute that generally complies with human rights norms. It would also overcome the objection to lack of impartiality of a court made up of Iraqi judges who had been victims of Saddam. Article 4(d) of the Tribunal Statute gives the government the authority to appoint non-Iraqi judges "who have experience in the crimes encompassed in this Statute and who shall be persons of high moral character, impartiality and integrity."\textsuperscript{71}

An international court, applying international law, would have another massive advantage. It would be able to approach the sovereign immunity issue which will be Saddam’s first line of defence from an international law perspective without being bound by the amnesty clause in the old Iraqi Constitution. That is because international law operates in a different dimension to local law and overrides pardons, amnesties and immunities when the charge is genocide or the commission of crimes against humanity. General Pinochet, when in power in Chile, consistently heaped constitutional immunities upon himself and his henchmen: they were of no avail against the “extradite or prosecute” provisions of the torture convention. The Sierra Leone Special Court has consistently held that pardons and amnesties granted in the course of the war cannot bar prosecution from international crimes.\textsuperscript{72} So establishing an international forum for the trial of Saddam will not only avoid endless technical objections which would otherwise have some substance, but would assist in persuading the wider world—including the Arab world—that he was not being railroaded by the United States.

Cynics—and there are many—have claimed that the United States government resists international input because it wants Saddam, once con-

\textsuperscript{71} Prosecutor v. Kondewa, Case No. SCSL-2004-14 AR 72(G), Appeals Chamber (May 25, 2004).
\textsuperscript{72} Id.
vicited, hanged by the neck until he is dead. That is not a sentence available to international courts, although it has been much used in Iraq, especially by Saddam himself. It is not clear that this necessarily follows from an Iraq-only trial: President Talibani, who will have the power to commute his sentence, is a life-long opponent of the death penalty. Nothing could be more calculated to make Saddam a martyr than a public execution. Of course it would be dangerous to leave him in prison in Iraq and there is obvious force in the objections by victims who do not want the grand author of their miseries to live out his life in comparative comfort under the liberal prison regime in Finland with full visiting rights, telephone access and a weekly ration of condoms.

There is a case for providing no more than the legal minimum of humane treatment to those guilty of crimes against humanity, in far-flung jails where they will never be heard from again. The British government should make St. Helena available again for this purpose, or better still the Falkland Islands, where if convicted, Slobo and Saddam might shiver away their last years in the company of South Atlantic penguins. If they are really to suffer for committing the worst crimes in the world, a harsh regime of that kind for the rest of their lives is surely more appropriate than giving them an easy and quick exit on the gallows.

Conclusion

That international criminal justice is here to stay was confirmed in March 2005, when the United States withheld its veto and permitted the Security Council to authorize the ICC to investigate and prosecute those responsible for the campaign of ethnic cleansing in Darfur. Amongst those alleged to bear greatest responsibility are leaders of the Sudanese government; if indicted, the developments outlined in this article will ensure that they can claim no immunity. The Security Council decision on Darfur came as a jolt to some states which had calculated that American antipathy to the ICC would cripple it for the foreseeable future; now it is a force that any government which mistreats its people must reckon with. The Rome Statute requires a conference in 2009 to reconsider the future of the court. It must be hoped that by that time the United States will have found international justice of sufficient benefit to become a party.

We have come far, then, and lately very fast, in the “great business” began by Cromwell, Peters, Vane, Cooke and the Harvard “class of ‘42,” in denying impunity to tyrants. “Be you ever so high, the law is above you” was their catch-cry, and it has only been entrenched, as a matter of binding international law, over the past decade. So it is little wonder that the trial of Milošević has had so many procedural hiccups, and that the trial of Saddam seems likely to be flawed. We are at last and at least making a start on the great business, and working toward a process that must eventually become expeditious, fair and efficient (and cost-efficient). At present, international criminal trials are disastrously slow. Lawyers can be mediocre and venal and the human rights of victims and witnesses are not as
secure as those of defendants. I could go on, and these practicalities now assume importance in taking the project forward. But the trials of Milošević and Saddam, for all their faults, demonstrate that the immunity problem has been solved, and usher in a period when international justice will have its own momentum.