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International Law Transformed? From Pinochet to Congo . . . ?

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Abstract

Drawing from the *Pinochet* and *Congo v. Belgium* judgments, this paper addresses issues arising from the question of which courts (national or international?) are best suited to exercise jurisdiction over individuals accused of crimes against humanity, war crimes, or genocide. It begins by looking at the approach taken in the Statute of the International Criminal Court. It moves on to discuss established views on the matter in general international law and the opposing visions of this relationship depicted in the *Pinochet* and *Congo v. Belgium* cases. It closes by addressing the consequences of the prevalence of one or the other view for the future of international law and the prosecution of international crimes.

Key words

Congo v. Belgium case; immunity from jurisdiction; International Criminal Court; national courts and international courts; *Pinochet* case

On 27 November 1998, a short letter was published in the *Guardian* UK newspaper. It read:

> The Cambodian couple in my street can't wait for Henry Kissinger's next visit.[1]

The letter was published two days after the landmark first decision of the Judicial Committee of the House of Lords, ruling that Senator Augusto Pinochet was not entitled to claim immunity from the jurisdiction of the English courts in respect of a Spanish extradition request to face criminal charges for torture and other crimes against humanity carried out whilst he was the Chilean head of state.[2] The *Guardian* letter and the Pinochet judgment were premised on a theoretically simple – but politically explosive – premise: no rule of international law existed to prevent the arrest in London (whether for the purposes of prosecution before the English courts or for extradition to a third state) of an American or Chilean national for acts occurring outside the United Kingdom and involving no real connection with the territory or nationals of the United Kingdom.

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1. *Guardian*, Features, 27 November 1998, 25.
2. *R v. Bow Street Metropolitan Stipendiary Magistrate Ex p. Pinochet Ugarte* (HL (E)) [2000] 1 AC 61 (Judgment, November 1998); also reported as *R v. Bartle and the Commissioner of Police for the Metropolis and Others Ex p. Pinochet*, 37 ILM 1302 (1998) (House of Lords).

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The Pinochet judgment was a landmark because it emphasized the role of national courts – Spanish and English – for the prosecution of the most serious international crimes. It relied on three principles:

First, that there are certain crimes that are so serious that they are treated by the international community as being international crimes over which any state may, in principle, exercise jurisdiction;

second, that national courts, rather than international courts only, can – and in some cases must – exercise jurisdiction over these international crimes, irrespective of any direct connection with the acts; and

third, that in respect of these crimes it can no longer be assumed that immunities will be accorded to former sovereigns or high officials, and the 1984 Torture Convention is incompatible with such immunities.

These principles reflect a changing approach to the rules of international public law, and to its role. They indicate changing conceptions of the role of different actors, recognition of the emergence of new courts, and a willingness to engage with a more systemic vision of the various strands of international law.[3] In this lecture I should like to take some of the issues posed by the Pinochet proceedings in the English courts, reflecting competing views on the role of different courts – national and international – and their respective roles.

I address some of the issues which arise when we ask the general question: which courts – national or international – are best suited to exercise jurisdiction over individuals accused of crimes against humanity, war crimes, and genocide? In posing that question, I should state at the outset that I proceed on the basis that criminal justice dispensed through courts (national or international) can be an appropriate way – although not the only way – of dealing with the most serious international crimes. That is not an assumption which is universally held, as a growing literature on the subject indicates. Criminal law in general – and international law in particular – will never be a panacea for the ills of the world. And there are other means for dealing with the gravest crimes: they can be ignored; they can be the subject of national amnesties; they can be addressed through processes which have come to be known as 'truth and reconciliation'; they can be the subject of extra-judicial means providing for summary justice; and they can be the subject of diplomatic arrangements.

But for better or worse, and whatever theoretical or policy justifications may be found (whether deterrence, or punishment, or the 'seeking of the truth') the international community has determined that the gravest crimes are properly the subject of criminal justice systems. That is one clear consequence of the creation of the International Criminal Court (ICC):[4] with the ICC Statute the international community has determined that criminal courts (as opposed to civil courts, or administrative courts, or human rights courts) are to be a principal means for the

3. See P. Sands, 'Turtles and Torturers: The Transformation of International Law', (2001) 33 NYU JILP 527–58.
4. Statute of the International Criminal Court, Rome, 17 July 1998, in force 2 July 2002; (1999) 37 ILM 999.

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enforcement of international criminal law, and that national courts (within the state in which the crimes are committed and in third states) and international courts have a role to play.

In recent years national courts have become more prominent in these matters. They are faced with different circumstances. In most situations national courts will deal with cases relating to facts which have occurred within the geographic area in which they are located. But it has become clear that national courts will only rarely try their own nationals where war crimes are concerned, and even more rarely where crimes against humanity or of genocide are concerned. In some cases national proceedings are concerned with acts occurring outside the state seeking to exercize jurisdiction, when the sole connection is the presence of the defendant within the geographic jurisdiction of the state. That was the Pinochet case,[5] and the case against Hissène Habré, the former Chadian leader, in Senegal.[6] In other cases indictments have been issued when the defendant is not even present in the jurisdiction: that is the case for the indictment by a Belgian prosecutor of Ariel Sharon, the Prime Minister of Israel,[7] and of a Foreign Minister of Congo,[8] a case to which I shall return, as well as the proceedings in France against President Muammar Gaddafi of Libya.[9] And states have been creative in finding other means: the Lockerbie proceedings in a Scottish criminal court (and then an appeals court) relocated to the Netherlands.[10] And internationalized national courts are established or being established to deal with international crimes in Bosnia, in East Timor, in Sierra Leone, and in Cambodia.[11]

Against this background I shall explore the relationship between national courts and international courts, by reference to the differing approaches of the House of Lords in *Pinochet* and the International Court of Justice (ICJ) in its recent judgment in *Democratic Republic of Congo v. Belgium*. The international community has determined that both levels of the judiciary should play a role in combating impunity.

5. *R v. Bow Street Metropolitan Stipendiary Magistrate Ex p. Pinochet Ugarte* (No. 3) (HL(E)) [2000] 1 AC 147.
6. Cour de Cassation (Senegal's Court of Final Appeals), Judgment of 20 March 2001, upheld the Court of Appeals' decision to dismiss the charges.
7. *The Complaint Against Ariel Sharon*, Cour d'Appel de Bruxelles, Chambre des Mises en Accusation, Pen. 1632/01, Judgment of 26 June 2002.
8. *Democratic Republic of the Congo v. Belgium, Case Concerning the Arrest Warrant of 11 April 2000*, ICJ, General List No. 121, Judgment of 14 February 2002: www.icj-cij.org/icjwww/idocket/iCOBE/icobejudgment/icobe_ijudgment_20020214.PDF.
9. Arret, Cour de Cassation, 13 March 2001, No. 1414. See also Arret, Cour d'Appel de Paris – Chambre d'accusation, 20 October 2000: www.sos-attentats.org. For a discussion of this case see S. Zappala, 'Do Heads of State in Office Enjoy Immunity from Jurisdiction for International Crimes? The Ghaddafi Case Before the French Cour de Cassation', (2001) 12(3) EJIL 595–612.
10. *Her Majesty's Advocate v. Megrahi*, No.1475/99, High Court of Justiciary at Camp Zeist (Kamp van Zeist), 31 January 2001, www.scotcourts.gov.uk/index1.asp. See also O. Y. Elagab, 'The Hague as the Seat of the Lockerbie Trial: Some Constraints', (2000) 34(1) *International Lawyer* 289–306; S. D. Murphy (ed), 'Contemporary Practice of the United States Relating to International Law: Verdict in the Trial of the Lockerbie Bombing Suspects', (2001) 95(2) AJIL 405–7.
11. See for example the following articles for a discussion of these proposals: R. Cryer, 'A "Special Court" for Sierra Leone?' (2001) 50(2) ICLQ 435–46; B. Kondoch, 'The United Nations Administration of East Timor', (2001) 6 *Journal of Conflict and Security Law* 245; see for a discussion of international courts in general: C. P. R. Romano, 'The Proliferation of International Judicial Bodies: The Pieces of the Puzzle', (1999) 31 NYU JILP 709.

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1. The International Criminal Court

It is appropriate to begin with the International Criminal Court. The Statute emphasizes 'that the International Criminal Court established under this Statute shall be *complementary* to national criminal jurisdictions'.[12] The Statute thus gives effect to what is now referred to as the 'principle of complementarity'. This means that the ICC will not be entitled to exercise jurisdiction if the case is being investigated or prosecuted by a state which has jurisdiction over it, or if the case has been investigated by a state which has jurisdiction over it and the state has decided not to prosecute for genuine reasons, or if the person has already been tried 'by another court' for conduct which is the subject of the complaint.[13] The 'principle of complementarity' means that in the emerging institutional architecture of international criminal justice the jurisdiction of the ICC will not be hierarchically superior to that of national courts. Indeed, the ICC Statute gives primacy to national courts. This reflects a desire to maintain a degree of respect for traditional sovereignty. It means that it will be primarily for these courts to act; the ICC will play a residual role, serving as a long-stop in the event that justice is inadequately dispensed at the national level.

The policy here being applied is not an accidental one, but rather the product of deliberation and negotiations carried on over many years. There are several rationales for that policy: first, it recognizes that national courts will often be the best placed to deal with international crimes, taking into account the availability of evidence and witnesses, and cost factors; second, it recognizes that the human and financial burdens of exercising criminal justice have to be spread around, they cannot be centralized in The Hague; third, it creates an incentive for states, encouraging them to develop and then apply their national criminal justice systems as a way of avoiding the exercise of jurisdiction by the ICC; and fourth, in the expectation that that will happen, it might allow more states to become parties to the ICC Statute, reassured by the knowledge that they have it within their own power to determine whether or not the ICC will exercise jurisdiction in cases relating to their territory or their nationals.

It should be mentioned that the primacy accorded by the ICC Statute to national courts has not been the governing principle for other international courts. The Statutes of the International Criminal Tribunal for Rwanda (ICTR)[14] and for the former Yugoslavia (ICTY)[15] recognize the concurrent jurisdiction of national courts in Rwanda and the former Yugoslavia in relation to the crimes over which those two international criminal tribunals have jurisdiction. In both cases, however, the

12. *Supra* note 4, Preamble.
13. *Ibid.*, Art. 17(1)(a), (b) and (c), and Art. 20(3).
14. UN Sec Res 955, (1994) 33 ILM 1598.
15. Contained within Secretary-General's Report on Aspects of Establishing an International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia, (1993) 32 ILM 1159; adopted by UN Sec Res 827 (1993), (1993) 32 ILM 1203.

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international criminal tribunals will have primacy if they so decide.[16] Each tribunal's Statute provides that 'At any stage of the procedure, the International Tribunal may formally request national courts to defer to the competence of the International Tribunal in accordance with [its] Statute and the Rules of Procedure and Evidence.'[17]

The Constitution of the Nuremberg Tribunal did not address the relationship with national courts. However, it established the right of the competent authority of any signatory of the Constitution to bring individuals to trial for membership of criminal groups or organizations, before national, military, or occupation courts.[18]

In summary, the constituent instruments of these various international courts and tribunals indicate the trend towards a greater role for national courts: at Nuremberg and Tokyo, the international jurisdictions were exclusive, and even established the jurisdiction of the national courts; in the cases of Rwanda and Yugoslavia, the exercise of international jurisdiction is concurrent with the jurisdiction of the local courts, but the international courts have primacy; the new International Criminal Court, however, will only have a residual jurisdiction and will not be able to trump the proper exercise of national criminal jurisdiction, assuming that it has been properly exercised. The ICC will have primacy, however, in determining whether or not a national investigation or prosecution has been properly carried out.

There are obviously good reasons for preferring national courts to international courts, particularly if the courts are in the state in which the criminal acts occurred. The evidence – and the witnesses – are likely to be more easily accessible, at least in a geographic sense, and that will make the criminal justice process more cost-effective. But when one talks about national courts one is no longer considering only the courts of the state in which the acts occurred. 'National courts' means also

16. Art. 9 of the ICTY Statute provides:

> 1. The International Tribunal and national courts shall have concurrent jurisdiction to prosecute persons for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1 January 1991.
> 2. The International Tribunal shall have primacy over national courts. At any stage of the procedure, the International Tribunal may formally request national courts to defer to the competence of the International Tribunal in accordance with the present Statute and the Rules of Procedure and Evidence of the International Tribunal.

Art. 8 of the ICTR Statute provides:

> 1. The International Tribunal for Rwanda and national courts shall have concurrent jurisdiction to prosecute persons for serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens for such violations committed in the territory of neighbouring States, between 1 January 1994 and 31 December 1994.
> 2. The International Tribunal for Rwanda shall have primacy over the national courts of all States. At any stage of the procedure, the International Tribunal for Rwanda may formally request national courts to defer to its competence in accordance with the present Statute and the Rules of Procedure and Evidence of the International Tribunal for Rwanda.

See B. Brown, 'Primacy or Complementarity: Reconciling the Jurisdiction of National Courts and International Criminal Tribunals', (1998) 23 YJIL 383, 386.

17. *Ibid.*
18. Charter of the International Military Tribunal, Part I, Constitution of the International Military Tribunal, Art. 10, Annexed to the London Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, London, 8 August 1945.

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other national courts, in states which may have only a limited connection with the crime – perhaps because the perpetrator or the victim is a national of another state, or the perpetrator happens to be present in another state. In those situations the logic behind the grant of jurisdiction is not based on considerations of cost or access to evidence, but relates to the connection between a state and its own nationals. The principle that a state may exercise 'long-arm' criminal jurisdiction over its own nationals is well established. What is more recent is the idea that certain crimes are so horrendous that the international community has determined that any state is entitled to exercise jurisdiction over them, in the quest to avoid impunity. This is sometimes referred to (not entirely accurately) as the principle of universal jurisdiction. The application of the complementarity principle assumes that national courts are able to exercise jurisdiction and are not precluded, for example, by immunity rules.

2. International law promotes a role for national courts

The general principle has been that states only exercise criminal jurisdiction over offences which occur within their geographical boundaries. However, that has changed, as the House of Lords recognized in *Pinochet No. 3*:

> Since the Nazi atrocities and the Nuremberg trials, international law has recognized a number of offences as being international crimes. Individual states have taken jurisdiction to try some international crimes even in cases where such crimes were not committed within the geographical boundaries of such states.[19]

Until 1945 the rules of public international law were very limited. There were rules governing the methods and means of warfare, which among other things established protections for civilians. And there were rules governing the treatment of aliens (non-nationals). But there were no international treaties and conventions establishing minimum standards of human rights to place limits on what a state could do or permit to be done to its own people. There was no clearly articulated international rule of law prohibiting the most serious crimes, such as genocide, or torture, or the disappearance of people. Article 6 of the Constitution of the Nuremberg International Military Tribunal was of singular importance because it restated the crimes over which the tribunal would have jurisdiction, and in so doing effectively set down a code.[20] It had jurisdiction over crimes against peace, war crimes, and crimes against humanity.

In the period after Nuremberg the United Nations Charter provided a forum for the adoption of new international conventions which would flesh out more detailed rules criminalizing these acts. These rules were developed in the framework of an international legal order in which there was no international criminal court. The enforcement of the rules would have to be a matter for national courts.

In 1948 the UN General Assembly promulgated the first of several instruments which the International Court of Justice in The Hague has recently characterized

19. *Supra* note 5, at 189 *per* Lord Browne-Wilkinson.
20. *Supra* note 18, Art. 6.

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as reflecting an 'extension of jurisdiction',[21] namely the 1948 Convention on the Prevention and Punishment of the Crime of Genocide.[22] Article I of the 1948 Convention confirmed that genocide was 'a crime under international law' which the parties undertook to prevent and punish.[23] The fourth 1949 Geneva Convention established protections for civilians in times of war.[24] A 1973 Convention declared that apartheid was a crime against humanity.[25] A 1979 Convention criminalized the taking of hostages. A 1984 Convention committed parties to take effective measures to prevent acts of torture in any territory under their jurisdiction.[26] These instruments did not merely criminalize the acts which they addressed. They committed their parties to take judicial measures to prevent and to punish these crimes. And they did so in broadly similar ways. Article VI of the 1948 Genocide Convention states:

> Persons charged with genocide or any of the other acts enumerated in [the Convention] shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction.[27]

In this provision we see, for the first time, a commitment to prevent impunity reflected in the obligation to prosecute before national criminal courts (although it is limited to such acts as occurred in the territory of the state), but without expressly limiting the right to states to exercise a more extensive jurisdiction. The 1949 Geneva Convention on the protection of civilians went a step further. It too commits parties to enact 'any legislation necessary to provide effective penal sanctions for committing, or ordering to be committed, ... grave breaches of the ... Convention'.[28] But it then goes on to establish a further obligation, a positive obligation on parties to

> search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts. It may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another [party] concerned, provided such [party] has made out a *prima facie* case.[29]

The difference between the 1948 Genocide Convention and the 1949 Geneva Convention is that in the latter there is no geographic limitation: the obligation to prosecute is not limited to acts which occur within the territory of the state required

21. *Supra* note 8, at para. 59.
22. 78 UNTS 277; Annex to G.A. Res 260-A (III) of 9 December 1948.
23. *Ibid.*, Art. I.
24. Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Geneva IV) (1950) 75 UNTS 287–417.
25. International Convention on the Suppression and Punishment of the Crime of Apartheid, adopted 30 November 1973, 1015 UNTS 243; Annex to GA Res 3068 (XXVIII).
26. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted 10 December 1984, G.A. Res. 39/46, 39 UN GAOR Supp. (No.51) at 197, UN Doc. A/39/51 (1985); (1984) 23 ILM 1027; substantive changes noted in (1985) 24 ILM 535.
27. *Supra* note 29, Art. VI.
28. *Supra* note 24, Art. 146.
29. *Ibid.*

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to prosecute. So if a person commits a grave violation of the 1949 Convention – for example wilful killing or torture of a civilian – in France and is then discovered to be in the Netherlands by the relevant authorities, he or she must be 'searched for' and brought before the Dutch courts or handed over to another concerned party, for example France. The commitment to root out impunity is extended towards what has come to be known as 'universal criminal jurisdiction': the right of a state to exercise national jurisdiction over a criminal act irrespective of where it occurred. This is not a new development – international law had long recognized universal jurisdiction for piracy and slavery, for example – but it marks an extension of the traditional principle into a new subject area. The same commitment is to be found in other international conventions subsequently adopted, such as the 1973 Apartheid Convention.[30]

The further development of this broad, universalizing approach is to be found in the 1984 Torture Convention, which came to assume singular importance in the proceedings involving Senator Pinochet. The Convention requires parties to establish jurisdiction over offences of torture when the offence is committed in its territory, when the alleged offender is one of its own nationals, or when the victim is one of its nationals if it considers it appropriate.[31] It also requires the parties to establish jurisdiction over Convention offences 'in cases where the alleged offender is present in any territory under its jurisdiction and it does not extradite him'.[32] In relation to each of these cases the parties must prosecute or extradite all such persons.[33] The principle behind the approach is clear: there is to be no impunity for torturers, wherever they may be found. Messrs. Burgers and Danelius (respectively the chairman of the United Nations Working Group on the Torture Convention and the draftsman of its first draft) say in their authoritative *Handbook on the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* that it was 'an essential purpose [of the convention] to ensure that a torturer does not escape the consequences of his acts by going to another country'.[34]

These instruments were adopted in the absence of any international criminal court. They confirm the commitment of the international community to criminalize certain acts and to impose the obligation to prosecute before national courts individuals who are alleged to have committed the criminalized acts. The promotion of national jurisdictions is consistent with the trend I have described earlier, which promotes the ICC as a court of last resort. But a number of questions are left open, one of the most important being: which persons are entitled to claim which immunities before which courts?

30. *Supra* note 25, Art. V. Note that the language is 'may' rather than 'shall'. International penal tribunals may also exercise jurisdiction.
31. *Supra* note 26, Art. 5(1).
32. *Ibid.*, Art. 5(2).
33. *Ibid.*, Art. 7(1).
34. H. Burgers and H. Danelius, *The United Nations Convention Against Torture: A Handbook on the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (1988), 131.

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3. Pinochet

Senator Pinochet was arrested on 16 October 1998. He made an immediate application for habeas corpus, on the grounds that as a former head of state he was entitled to immunity from the jurisdiction of the English courts. The basis for that argument was reflected in classical principles of international law, going back over a century, for example the decision of 1876 of the State Supreme Court of New York in *Hatch v. Baez*.[35] That court was faced with a claim from a plaintiff, Davis Hatch, that he had suffered injuries in the Dominican Republic as a result of acts done by the defendant, Buenaventura Baez, in his official capacity of President of the Dominican Republic. When Hatch learned that former President Baez was present in New York he brought proceedings. The court found that it could in principle exercise jurisdiction, given the defendant's presence in New York. But it ruled in favour of his claim to immunity from its jurisdiction on the grounds that such immunity was 'essential to preserve the peace and harmony of nations', because the acts alleged sprang from the capacity in which the acts were done, and because they emanated from a foreign and friendly government.[36] The decision was unexceptional, based on a traditional judicial respect for the sovereignty of a foreign state.

The approach reflected in the 1876 decision was broadly followed by the court of first instance which upheld Senator Pinochet's claim to immunity.[37] On appeal to the House of Lords in November 1998, however, that ruling was overturned by three votes to two, on the grounds that customary international law provided no basis to uphold the claim to immunity.[38] The significance of the ruling was evident from the fact that it made front-page news around the world, most of which was positive.[39] That judgment of the law lords was later annulled, for other reasons, but there followed a further judgment which made a similar finding although on narrower grounds, namely that the loss of immunity arose not under customary international law, but rather from the coming into force in late 1988 of the 1984

35. *Hatch v. Baez*, 7 Hun 596 (NY 1876).
36. *Ibid.*, at 600.
37. *In re Augusto Pinochet Ugarte*, UK High Court of Justice, Queen's Bench Division (Divisional Court), 28 October 1998, 38 ILM 68 (1999).
38. *Supra* note 5.
39. For an example of the reaction in the press, see W. Hoge, 'British Court Rules Against Pinochet; Now Cabinet Must Weigh Extradition', *New York Times*, 26 Nov. 1998, A1; K. Roth, 'Justice for Tyrants', *Washington Post*, 26 Nov. 1998, A31; 'Pinochet: le Jour ou la Peur a Change de Camp', *Le Monde*, 27 Nov. 1998, 1; G. Duplat, 'Un début de Justice', *Le Soir* (Brussels), 26 Nov. 1998, 1; N. Hopkins and J. Wilson, 'Judgement Day Beckons', *Guardian*, 26 Nov. 1998, 1; P. Sais, 'Pinochet sin immunidad', *La Tercera* (Santiago), 26 Nov. 1998; 'Un hito en la defensa de los derechos humanos', *El Mundo* (Madrid), 26 Nov. 1998. See also the numerous subsequent law review articles, e.g. M. Byers, 'The Law and Politics of the Pinochet Case', (2000) 10 *Duke Journal of Comparative and International Law* 415; R. Bank, 'Der Fall Pinochet: Afbruch zu neuen Ufern bei der Verfolgung von Menschenrechtsverletzungen?', (1999) 59 *Zeitschrift fur ausländisches öffentliches Recht und Völkerrecht* 677; A. Bianchi, 'Immunity Versus Human Rights: The Pinochet Case', (1999) 10 EJIL 237; N. Boister and R. Burchill, 'The Implications of the Pinochet Decisions for the Extradition or Prosecution of Former South African Heads of State for Crimes Committed Under Apartheid', (1999) 11 *African Journal of International and Comparative Law* 619; M. Cosnard, 'Quelques Observations sur les Décisions de la Chambre des Lords du 25 novembre 1998 et du 24 mars 1999 dans l'Affaire Pinochet', (1999) 103 RGDIP 309; H. Fox, 'The First Pinochet Case: Immunity of a Former Head of State', (1999) 48 *International and Comparative Law Quarterly* 207; J. M. Sears, 'Confronting the "Culture of Impunity": Immunity of Heads of State from Nuremberg to Ex parte Pinochet', (1999) 42 *German Yearbook of International Law* 125.

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Convention against Torture,[40] to which Chile, Spain, and the United Kingdom were all parties.[41] The fact that the majority of the law lords relied on the 1984 Convention indicated a desire to respect state sovereignty as expressed through the consent to be bound by the Convention; the difficulty with this approach, as Lord Goff recognized in his lone dissent, was that the 1984 Convention was silent about immunity, and on that basis a loss of immunity could not be presumed.[42] But Lord Goff was unable to persuade his fellow judges to take the traditional approach, and six of the seven law lords ruled against the claim to immunity.

The ruling of the House of Lords was a landmark, and has been recognized as such. First, the majority judgments recognized the legitimate role which national courts are to play in the prosecution of those international crimes which are outlawed by instruments such as the Torture Convention and the other conventions mentioned earlier in this lecture. Second, it recognized and gave effect to the underlying policy of those conventions, which establishes the principle of extended jurisdiction over such crimes. Third, it recognized that the grant of immunity to a former head of state would be incompatible with the objectives of the Torture Convention, and that a proper interpretation of the Convention required a rejection of immunity. And fourth, it underscored the point that the commission of an international crime can never be characterized as an official function. As Lord Browne-Wilkinson put it:

> Can it be said that the commission of a crime which is an international crime against humanity and *jus cogens* is an act done in an official capacity on behalf of the state? I believe there to be strong grounds for saying that the implementation of torture as defined by the Torture Convention cannot be a state function.[43]

And Lord Phillips was unable to identify a rule of immunity upon which Senator Pinochet could rely:

> I reach that conclusion on the simple basis that no established rule of international law requires state immunity *ratione materiae* to be accorded in respect of prosecution for an international crime. International crimes and extra-territorial jurisdiction in relation to them are both new arrivals in the field of public international law. I do not believe that state immunity *ratione materiae* can coexist with them. The exercise of extra-territorial jurisdiction overrides the principle that one state will not intervene in the internal affairs of another. It does so because, where international crime is concerned, that principle cannot prevail. An international crime is as offensive, if not more offensive, to the international community when committed under colour of

40. *Supra* note 26. For more information on the Convention, see Burgers and Danelius, *supra* note 34; R. Bank, *Die internationale Bekampfung von Folter und unmenschlicher Behandlung auf den Ebenen der Vereinten Nationen und des Europates: eine vergleichende Analyse von Implementation und Effektivität der neueren Kontrollmechanismen* (1996); R. Bank, 'International Efforts to Combat Torture and Inhuman Treatment: Have the New Mechanisms Improved Protection?', (1997) 8 EJIL 613.

41. Chile became a party on 30 Sept. 1988; Spain became a party on Oct. 21, 1989; the United Kingdom became a party on Dec. 8 1988. See United Nations, Status of Multilateral Treaties Deposited with the Secretary-General, at http://untreaty.un.org/ENGLISH/bible/englishinternetbible/bible.asp (last visited March 13 2001).

42. *Supra* note 5, at 215 *per* Lord Goff.

43. *Ibid.*, at 203 *per* Lord Browne-Wilkinson.

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> office. Once extra-territorial jurisdiction is established, it makes no sense to exclude from it acts done in an official capacity.[44]

The judgment of the House of Lords opens the door to the use of one national court to prosecute an individual – even a former head of state – for acts occurring in another state. It provides strong support for the potential role of national courts, against the background of the principle of 'complementarity' found in the Statute of the International Criminal Court. But the judgment of the House of Lords has also given rise to a vibrant debate on the circumstances in which jurisdiction of a national court may be claimed and then exercised. There is, in particular, concern that inroads into the traditional immunities of foreign sovereigns might undermine the ability of states to interact, especially where traditional immunities are challenged in respect of serving heads of state or other officials.

4. The World Court steps in

Our story now turns away from a national court to another international court in The Hague, the International Court of Justice, which is the principal judicial organ of the United Nations. The question of immunity before national courts for international crimes was addressed by the ICJ in the case of *Congo v. Belgium*.[45]

On 11 April 2000 a Belgian investigating judge issued an international arrest warrant against the serving Minister of Foreign Affairs of the Democratic Republic of Congo (DRC), Abdualye Yerodia Ndombasi. The arrest warrant was served *in absentia*. It accused Yerodia of making various speeches in August 1998 inciting racial hatred. It alleged that the speeches had the effect of inciting the population to attack Tutsi residents in Kinshasa, which resulted in several hundred deaths, lynchings, internments, summary executions, and arbitrary arrests and unfair trials. He was charged with crimes under Belgian law concerning the punishment of grave breaches of the Geneva Convention of 1949 and their additional Protocols I and II of 1977 and the punishment of serious violation of international humanitarian law. The relevant Belgian law provided that its courts would have jurisdiction in respect of offences committed anywhere in the world. And it provided that no person would be able to claim immunity from the jurisdiction of the Belgian courts.[46] Belgium was purporting to exercise jurisdiction over acts which had taken place outside Belgium, involving no Belgian citizens, and without Yerodia being present in Belgium.

The DRC originally sought relief in respect of two matters: first, Belgium's claim to exercise a universal jurisdiction in respect of Yerodia, the serving Minister of Foreign Affairs of the DRC, and second, Belgium's violation of the immunities of its Minister of Foreign Affairs.[47] During the course of the proceedings the DRC dropped

44. *Ibid.*, at 289 *per* Lord Phillips.
45. *Supra* note 8.
46. Law of 16 June 1993 Concerning Punishment of Grave Breaches of the International Geneva Conventions of 12 August 1949 and of Protocols I and II of 8 June 1977 Additional Thereto, as amended by the Law of 19 February 1999 Concerning Punishment of Serious Violations of International Humanitarian Law, *Moniteur belge* 5 August 1993, *Moniteur belge* 23 March 1999, Arts. 7 and 5(3).
47. Judgment, *supra* note 8, para. 45.

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its first claim. Belgium did not object to the narrowing of the legal dispute before the Court.

The Court recognized that logically it should address the first claim (jurisdiction) before dealing with the second (immunities).[48] But it chose only to address the immunity issue, thereby accommodating the parties' consensus to put aside that part of the dispute which related to jurisdiction.[49]

Few international law issues currently attract more interest than that of immunity. The case before the ICJ provided an opportunity to clarify the rules of international law governing the conditions under which immunity may be claimed by a serving or former (for the case raised both aspects) foreign minister. The Court approached its task in four phases. First, it considered the general immunity of foreign ministers under customary international law (paras. 51–55). It then considered whether any immunity could be invoked in respect of a criminal allegation concerning a war crime or a crime against humanity (paras. 56–60). Next it considered whether the issuance and international circulation of an arrest was compatible with its conclusions on the first two points (paras. 61–71). Finally, it considered the issue of remedies (paras. 72–77). Here I shall deal only with the first two aspects.

As to the first element, the Court concluded that customary international law provided for a general rule entitling a serving foreign minister (when abroad) to enjoy 'full immunity from criminal jurisdiction and inviolability' (para. 54). The Court recognized that such immunity was functional, noting that immunity would protect the individual against any act of authority of another state which would hinder the performance of duties.[50] The Court's finding was plainly intended to remove any hint of a disincentive to foreign travel.[51] Few commentators will disagree with the logic of this approach. There are questions, however, about the Court's treatment of foreign ministers in the same breath as heads of state (para. 51), given the absence of state practice supporting that approach, and the clear intention of bodies such as the International Law Commission and the Institut de Droit International (in its 2001 resolution) to distinguish between heads of state and other senior government officers.[52]

And there are more profound questions (from our students at least) about the manner in which the Court refers to 'firmly established' rules of customary international law without referring to any examples of state practice, judicial authority (whether national or international), or academic commentary. Immunity is assumed by the Court, not established. The only authority which is invoked by way of direct quotation – Article 21(2) of the 1969 Convention on Special Missions – merely provides a *renvoi* to 'immunities accorded by international law' without specifying what the rule is. Judge Al-Khasawneh noted this 'unhelpful formula' in his dissenting opinion.[53]

48. *Ibid.*, para. 46.
49. See Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal, at para. 10.
50. *Ibid.*
51. *Ibid.*, para. 55.
52. See Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal, at paras. 81 and 82.
53. Dissenting Opinion, para. 1.

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The second element – the circumstances in which a general immunity might not be invoked – is the heart of the case and will be the subject of attention by scholars and practitioners, as well as national judges faced with related issues in the future. It is the issue on which the international community needed clear, authoritative, and reasoned guidance.

The Court begins by declaring (in a single paragraph) that upon examination of state practice (including national legislation and the few decisions of national higher courts) it has been

> unable to deduce from this practice that there exists under customary international law any form of exception to the rule according immunity from criminal jurisdiction and inviolability to incumbent Ministers for Foreign affairs, where they are suspected of having committed war crimes or crimes against humanity.[54]

The Court's judgment is not accompanied by an identification or assessment of the examples which were examined; the process of deduction is not explained. Without knowing what the Court looked at, or what it distinguished or applied, it is not possible to form a view as to the basis or merits of the Court's reasoning or conclusion, and in particular its assumption (by way of starting point) that a rule of immunity exists.[55] The Court's single paragraph may be contrasted with the rather more detailed reasoning provided by the European Court of Human Rights in *Al-Adsani v. United Kingdom*.[56]

In the same paragraph of its judgment the Court goes on to 'find' that the immunity rules in international instruments creating international criminal tribunals 'do not enable it to conclude' that an exception exists in relation to customary immunities, and 'notes' that decisions of various international tribunals are in no way at variance with its conclusion.[57] These findings are similarly bereft of explanation or reasoning. The overall conclusion – which may be correct, but we cannot know on the basis of what is presented – is more of an *ex cathedra* declaration than a reasoned judgment.

Three paragraphs follow, all of which should be treated as *obiter dicta* since they do not add to the substance of the Court's conclusion on the central issue, or provide an indication of its reasoning. At paragraph 59 the Court addresses the relationship between immunity and jurisdiction. The Court notes that 'jurisdiction does not imply absence of immunity, while absence of immunity does not imply jurisdiction', and states that the extension of jurisdiction in the 1984 Torture Convention (among others) on the prevention and punishment of certain serious crimes 'in no way affects immunities under customary international law'.

It is not clear why the Court needed to go this far, particularly without making it clear that it was here only concerned with immunities of *serving* foreign ministers

54. Judgment, para. 58.
55. Compare the altogether different approach taken by the House of Lords in *Pinochet No. 3*, at *R v. Bow Street Metropolitan Stipendiary Magistrate Ex p. Pinochet Ugarte (No.3)* (HL(E)) [2000] 1 AC 147, *per* Lord Phillips at 289. ('I reach that conclusion on the simple basis that no established rule of international law requires state immunity *ratione materiae* to be accorded in respect of prosecution for an international crime. International crimes and extra-territorial jurisdiction in relation to them are both new arrivals in the field of public international law. I do not believe that state immunity *ratione materiae* can coexist with them.')
56. Judgment of 21 Nov. 2001, at paras. 52–67.
57. Judgment, para. 58.

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(or other government or state office-holders). As drafted the effect of the passage takes one beyond the case in hand: it is not hard to imagine the way in which the sentence will be used to counter the logic of the argument underpinning one of the principal strands supporting the House of Lords' conclusion that Senator Pinochet was not entitled to claim immunity (on the grounds that such immunity – for a former head of state – was inconsistent with the 1984 Convention). Whatever view one takes on that reasoning, the Court may or may not have intended to depart from that approach (it is unclear). But its formulation – and the cursory approach taken to the identification of customary international law – will not assist in developing the approach taken by the House of Lords (which has been broadly supported by commentators and received minimal criticism from any states).

The Court appears conscious about the implications of its judgment. It devotes two paragraphs (60 and 61) to pointing out that immunity from jurisdiction is not the same thing as impunity in respect of the most serious crimes. It identifies four available options for the prosecution of international criminals.

First, it notes that such persons could be tried by the national courts of their own country, since international law provided no immunities in such circumstances. Experience tells us that this option is theoretical. As Lord Browne-Wilkinson put it:

> the fact that the local court had jurisdiction to deal with the international crime of torture was nothing to the point so long as the totalitarian regime remained in power: a totalitarian regime will not permit adjudication by its own courts on its own shortcomings. Hence the demand for some international machinery to repress state torture which is not dependent upon the local courts where the torture was committed.[58]

Second, the Court considers that the state which it represents or has represented could waive immunity. This is possible (the Philippines government waived former President Ferdinand Marcos's immunity in a number of cases),[59] but exceptional. It is difficult to see many circumstances, if any, in which a state will waive immunity for a serving foreign minister.

Third, the Court notes that certain immunities before the courts of other states would cease once the person ceases to hold the office of Minister of Foreign Affairs. Assuming there is jurisdiction, a court of one state may try a former Foreign Minister of another state in respect of acts committed before or after his period of office, or acts committed during that office 'in a private capacity'.[60] But the Court provides no assistance as to what would or would not be a private act. And it does not indicate whether it agrees with the approach taken by Lord Browne-Wilkinson in *Pinochet No. 3* that acts such as torture or disappearance or genocide could never be committed in an official capacity and therefore fell to be treated as private acts:

58. *Supra* note 5, at 199 *per* Lord Browne-Wilkinson.
59. See *In Re Grand Jury Proceedings, John Doe, No. 700*, 817 F.2d 1108 (United States Court of Appeals of the 4th Circuit, 1987, also *In re Estate of Marcos Human Rights Litigation: Trajano v. Marcos and Another* 978 F.2d.493 (United States Court of Appeals for the 9th Circuit, 1992), *Hilao v. Estate of Marcos*, 103 F.3d 767, 776 to 778 (United States Court of Appeals for the 9th Circuit, 1996), *Estate of Domingo v. Republic of Philippines*, 808 F.2d 1349 (United States Court of Appeals for the 9th Circuit, 1987).
60. *Supra* note 8, para. 61.

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> Can it be said that the commission of a crime which is an international crime against humanity and *jus cogens* is an act done in an official capacity on behalf of the state? I believe there to be strong ground for saying that the implementation of torture as defined by the Torture Convention cannot be a state function.[61]

These omissions become all the more noticeable when one considers that by the time the Court came to give its judgment Yerodia was no longer Foreign Minister, and the acts which he was alleged to have committed occurred in August 1998, prior to his taking office. They cannot be considered to have been committed in an official capacity. The precise conditions which the Court identifies appear to have been satisfied. There was – and remains – nothing to stop Belgium issuing precisely the same arrest warrant again today.

And fourth, the Court confirms that its judgment would not preclude the International Criminal Court from exercising jurisdiction, since the ICC Statute expressly precludes claims of immunity by any person, including serving foreign ministers or prime ministers or presidents. The logic of this approach, which may not be erroneous, is that the drafters of the ICC Statute did not intend the principle of 'complementarity' to apply in respect of serving foreign ministers.

The fact is that the ICJ's judgment will be seized upon by those seeking to limit the role of national courts. Although one can quite see the policy logic of limiting such jurisdiction in respect of serving foreign ministers, the ICJ's language is broad enough to extend also to former government and state office holders.

5. Conclusions

The *Pinochet* and *Yerodia* cases were different – the distinction between a former president or minister and a serving president or minister is an important one. But the underlying issues are essentially the same. The judgments of the House of Lords (a national court) in *Pinochet* and of the International Court in *Yerodia* reflect, in my opinion, a struggle between two competing visions of international law. For the majority in the Lords international law is treated as a set of rules the primary purpose of which is to give effect to a set of broadly shared values, including a commitment to rooting out impunity for the gravest international crimes. The other vision, that reflected in the judgment of the ICJ, sees the rules of international law as being intended principally to facilitate relations between states, which remain the principal international actors. For the majority in the House of Lords balance is to be achieved by limiting the role of immunities, and establishing, in effect, a presumption against immunity.

For the ICJ, on the other hand, there is a presumption in favour of immunity – including before the national courts – unless it has been removed by express act. The Court's response to the Congo claim, and indirectly to the Pinochet decision, suggests a more limited role for national courts, certainly insofar as higher officials (presidents, foreign ministers, etc.) are concerned, while they are in office and

61. *Supra* note 5, at 203.

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possibly even after they have left office, depending on how the notion of 'private acts' is interpreted and applied. In effect, what the ICJ seems to be saying is that the little fish can be fried in the local courts, but for the more senior officials – for the decision makers – only the international courts will do. It is not clear that this conclusion is consistent with the principle of complementarity and the basic objectives of the ICC to prevent impunity.

Should we care about which view prevails? Will it make a practical difference for the future shape of the emerging international criminal justice system? In asking those questions I am reminded of a visit which I made to Vukovar and its surrounding villages in autumn 2000. You will recall that Vukovar is the city that was the subject of a mass atrocity in November 1991, when Serb forces entered the main hospital at Vukovar, removed the non-Serbs, transported them several kilometres away to a place called Ovcara, and there killed more than 200 persons. That place is less than two hours' flight from London. The person under whose command those killings are alleged to have taken place is called Colonel Mile Mrksić, and for those acts he has been indicted since 1995 by the ICTY for grave breaches of the Geneva Conventions of 1949, for violations of the laws of war, and for crimes against humanity.[62] The same acts are the subject of a genocide case against Yugoslavia (Serbia and Montenegro) brought to the International Court of Justice by Croatia.[63]

During our visit to a small village outside Vukovar we were introduced to a very elderly lady who took us to what remained of her home. She took us to the cellar, and described through a translator how grenades had been lobbed into the basement, killing her husband and maiming her daughter. She remained in the cellar for two days, too frightened to come out. We asked if she knew who had carried out the acts. She looked surprised, then said 'Of course.' We asked who they were. She responded that it was neighbours from the next village, whom she saw once a week when she went shopping, in the communal shop. We asked why they hadn't been arrested or prosecuted. She said because of a deal. In this way we learned of an understanding which had been reached between the UN/EU and departing Serbian forces, apparently to the effect that only a limited number of persons suspected of international crimes (we were told that the number was 25) would be prosecuted before the local courts for atrocities committed in the period between 1991 and 1995. That was apparently the price that had to be paid to obtain the voluntary departure of the Serbs.

As a result the vast majority of individuals responsible for international crimes in and around Vukovar will never be brought to justice, before the Croatian or Serbian courts, or before the national courts of any other states, or before the ICTY. Even though Croatia has ratified the Statute of the ICC, they cannot be brought before that court because it will only have jurisdiction over crimes occurring after 1 July 2002. Was impunity a price worth paying?

62. *Prosecutor v. Mrksić, Radić, Sljivaucanin and Dokmanović*, ICTY, Case No. IT–95–13a (Initial Indictment, 7 Nov. 1995): www.un.org/icty/indictment/english/mrk-ii951107e.htm.

63. *The Republic of Croatia v. The Federal Republic of Yugoslavia, Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, ICJ, General List Case No. 118.

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That question can be addressed at a number of levels. Lawyers are particularly interested in the minutiae of technical questions: is there universal jurisdiction? when can immunity from jurisdiction be claimed? and so on. But what matters to most people is a bigger question: is the emerging system of international criminal justice fulfilling its objectives? And that requires us to focus on what the objectives are. One leading commentator has identified the principal justifications as including punishment and justice (the Nuremberg and Tokyo tribunals), retribution and deterrence (the Eichman trial in the Israeli courts), historical education (the Demjanuk proceedings), and the maintenance of international peace and security (the former Yugoslavia).[64] In the sentencing phase of the *Erdemović* case the trial chamber of the ICTY observed that 'Discovering the truth is a cornerstone of the rule of law and a fundamental step on the way to reconciliation ... for it is truth ... that begins the healing process.'[65] So the real question boils down to this: if we limit or exclude the role of national courts – whether by entering into deals of the kind that may have been done at Vukovar in 1998 or by applying rules which entitle certain persons to immunities from the jurisdiction of national courts – do we undermine the system of international justice? Do we make it more difficult to do justice, to provide retribution, to deter, to educate, to deliver international peace and security, to bring reconciliation, to heal?

That is not a question that I can answer. Experience over the last fifty years – since Nuremberg – indicates that international law and the system of international justice, such as it is, are about balance.

The World Court's approach will be embraced by those calling for limits on national prosecutions – such as Henry Kissinger in his recent book[66] – on the grounds that they interfere with the conduct of foreign relations. The balance between sovereign respect and the conduct of foreign relations, on the one hand, and the prosecution of criminal justice, on the other, will always be a difficult one to reach. But broad presumptions in favour of immunities – as reflected in the ICJ's recent decision – can only lead to a diminished role for national courts, a watered-down system of international criminal justice, and greater impunity. This is all the more so when the reasons and reasoning which underpin such presumptions are not fully explained or explored.

64. G. Simpson, 'War Crimes: A Critical Introduction', in T. L. H. McCormack and G. J. Simpson (eds.), *The Law of War Crimes* (1997), 1, at 28.
65. *The Prosecutor v. Drazen Erdemović*, Case No. IT–96–22, Sentencing Judgment, 5 March 1998, Trial Chamber II, para. 21; cited in K. Campbell, 'The Trauma of Justice' (on file with the author, due to be published in *Journal of Human Rights*), n. 46 and accompanying text (unpublished manuscript).
66. H. Kissinger, *Does America Need a Foreign Policy? : Toward a Diplomacy for the 21st Century* (2001).

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