Fifth Annual St. Thomas More Lecture Dinner
No Impunity for Sovereigns: Thomas More and International Humanitarian Law

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22 June 2009

Two Portrayals

You have before you two images, one of Henry VIII and one of Slobodan Milosevic.

That of Henry VIII, a Head of State looking totally assured, confident in the robes and appurtenances of sovereignty – the true monarch, the embodiment of autocratic rule answerable to no authority outside his realm.

That of Slobodan Milosevic, a former Head of State making a point during the course of his trial, enjoying no status other than that of an accused, before a Tribunal constituted by a supranational authority to which he was bound to submit.

Allow me to read from two documents which might explain those portrayals of two very different situations.

Henry VIII

The context of the first document takes us to 1529. A Tribunal of the Church meeting at Blackfriars failed to resolve the question of the validity of Henry's marriage to Catherine of Aragon and it referred the matter to the Holy See in Rome for adjudication. Henry was furious that he was being called upon to subject himself to the determination of a foreign court.

Hence the Act in Restraint of Appeals, 1533. Here are some extracts: "… England is an Empire … governed by one supreme head and king … with plenary jurisdiction … without restraint or provocation to any foreign princes or potentates of the world …"

This was designed to make it abundantly clear that the imperial sovereign of England was not subject to any judicial system or purported exercise of judicial or penal power by any institution outside the realm of England.

This line was, of course, famously enlarged on in the Act of Supremacy of 1534, which expressly rejected the claims of any 'foreign authority' over the 'Anglicana Ecclesia'.

Slobodan Milosevic

The context of the second document is the TV age of the early 1990s. Graphic images of the civil war in the former Yugoslavia: murderous attacks on the civilian populations of villages and cities, the ethnic cleansing of whole regions, the use of sexual violence against women as an instrument of terror, and genocidal attacks on members of religious or racial groups, were flashed around the world.

Hence the Statute given to the International Criminal Tribunal for the former Yugoslavia (ICTY) by the Security Council of the United Nations on 25 May 1993. In particular we can note Article 7(2): "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."

The absolute autonomy and untrammelled sovereignty of the Head of State as assumed by Henry VIII is overridden by the new repository of international power, the Security Council in New York.

And, in fact, it was an Australian judge, the Honourable David Hunt (who had conducted the Backpackers Trial in New South Wales) who utilised Article 7(2) and confirmed the indictment and issued the arrest warrant for Slobodan Milosevic whilst he was Head of State and during the course of the Kosovo conflict.

This was an extraordinary moment in international law and politics, a great advance in world civilisation.

As we know, Slobodan Milosevic was eventually surrendered to the Tribunal by the Serbian government and his ill-fated trial ensued. It was ill-fated and probably ill-conducted in the sense that the prosecution made the fatal error of trying to cover the whole of the conflict which covered the former Yugoslavia rather than focusing on a few easily evidenced situations in particular theatres of conflict. (The prosecutor of Saddam Hussein did not make that mistake!)

International Humanitarian Law and Juridic Structures

The confirming of the indictment against Slobodan Milosevic whilst he was Head of State, and his subsequent arrest and trial may be said to be a remarkable instance of what Pope John Paul II and now Pope Benedict XVI have been advocating.

Pope John Paul II had supported the establishing of the International Criminal Court. And, in his 2008 World Day of Peace Message, Pope Benedict XVI called for a "global juridic culture" to be instituted so that values grounded in the Natural Law might be effectively vindicated. He particularly noted that this has been happening, "albeit in a fragmentary way", in the field of International Humanitarian Law (IHL).

IHL is the set of legal principles which attempt to constrain the conduct of armed conflict, especially requiring observance of the distinction between combatants and non-combatants so as to preserve the latter from attack.

This is particularly clear in the case of the aptly named Crimes Against Humanity. These crimes, which require a widespread or systematic attack on the civilian population, have been described by the ICTY as crimes which "transcend the individual because when the individual is assaulted, humanity comes under attack and is negated".

Challenge to the Doctrine of Sovereign Immunity

With the break-up of Christendom and the emergence of national states, each claiming absolute independence (what Henry VIII called 'an empire'), an international law doctrine called 'Sovereign Immunity' arose. Basically, it provided that no Head of State could be subject to any judicial system outside his own nation. Certainly he or she could not be punished and therefore enjoyed "***impunity***". This was a rule designed to lessen the occasions of warfare between nation states.

I suppose most Australians became aware of the challenge to this doctrine with the Pinochet case. Many of you will recall the unwise visit in the mid 1990s of the former Head of State of Chile, Senator Pinochet to the United Kingdom. A Spanish Magistrate attempted to have him extradited to Spain on charges of murder and torture of his political opponents.

The House of Lords held that because the United Kingdom, Chile and Spain had all ratified the **Torture** Convention, it was legally possible to extradite him on the **torture** charges. But it is clear from the judgements that Pinochet could take the benefit of the doctrine of sovereign immunity in relation to the **murder** of his political opponents by state officials acting on the President's authority.

But, there is no doubt that in the popular mind the Pinochet case signalled that Heads of State, current or former, were vulnerable to legal proceedings in foreign courts in a way which had never been countenanced before.

Something was afoot and Australia somewhat unwittingly was preparing to play a major role in the movement to challenge the impunity of sovereigns. In the late 1980s to early 90s the Australian government had to deal with allegations that after World War II individuals who had committed war crimes in collaboration with the Nazis had been allowed into Australia.

A Special Investigation Unit was established and prosecutions undertaken. After three prosecutions failed, the process was disbanded. But when the Security Council passed its resolution establishing the ICTY Australia was just about the only nation with the relevant investigation and prosecutorial expertise. In fact Graham Blewitt became the Deputy Prosecutor driving the ICTY Prosecution Branch. Officers from the AFP and the NSW Homicide Squad led the investigations into the alleged breaches of international humanitarian law. And Sir Ninian Stephen, former High Court Judge and Governor General, sat on the first trial chamber. Australia's contribution to this phase of world civilisation cannot be underestimated.

A Head of State on Trial

Slobodan Milosevic was put on trial for war crimes, crimes against humanity and genocide. He chose to conduct his own defence, but the point is that he ***did*** have to defend himself before a tribunal established with all the authority of the international community.

And it was precisely his status as sovereign Head of State which brought him to this pass. Henry VIII would not be pleased!

Let me read an extract from the Kosovo indictment.

> Para 84. "In as much as he has authority or control over the VJ and Police units, or other units or individuals subordinated to the command of the VJ in Kosovo, Slobodan Milosevic, as President of the FRY, Supreme Commander of the VJ and President of the Supreme Defence Council, is also, or alternatively, criminally responsible for the acts of his subordinates, including members of the VJ and aforementioned employees of the Ministries of Internal Affairs of the FRY and Serbia, pursuant to Article 7(3) of the Tribunal Statute."

That is the background to the photo of Slobodan Milosevic. What a contrast to the painting of Henry VIII! Slobodan Milosevic was not pleased. In the photo, the accused is gesticulating as he conducted his defence. I attended several days of that trial and well recall that typical aggressive pose and the look of withering contempt as he surveyed the court and onlookers.

Another Head of State in Jeopardy

As you may know, the International Criminal Court was established by way of a Treaty between nation states (the Rome Treaty). It came into force on 1 July 2002. Australia ratified just in time to be a founding state party to the Treaty.

It had not been an easy road to ratification by Australia. The Australian Labor Party (Kevin Rudd and Robert McClelland), and the Greens were in favour. But it was only the advocacy of Alexander Downer, Daryl Williams and ultimately of John Herron which eventually swayed the Liberal Party room to agree. John Herron (one of my successors as Ambassador to the Holy See) was the last speaker in that party room. He spoke of his experience as a doctor visiting Rwanda and seeing the results of the devastating genocidal conflict there. He said that Australia must support bringing criminals responsible for such atrocities to justice. This swayed the then Prime Minister, John Howard, who took John Herron by the arm leaving the party room saying "John, I think you're right". This shows the power of a good man courageously expressing his convictions. Thomas More would have been pleased.

But to return to the Treaty. Because it is established by Treaty, the ICC generally has jurisdiction only in relation to breaches of IHL which can in certain ways be related to those nation states which ratified it.

But, under Article 13(b) of the Treaty, the Security Council can give the ICC a reference without regard to whether there is a relationship between the alleged crime and a ratifying state, and it has done so in relation to alleged crimes in the territory of the non-ratifying State of Sudan.

On 31 March 2005, the Security Council "decided to refer the situation prevailing in Darfur since 1 July 2002 to the Prosecutor of the ICC", and made it mandatory that the government of Sudan should cooperate.

What made this remarkable was that China and the United States, both of which had refused to ratify the Rome Treaty, abstained on the resolution, thus allowing its passage without veto through the Security Council.

Of course, the gathering of evidence and effective implementation of the resolution has proved, and will prove, to be extremely difficult. But on 4 March 2009, a pre-trial Chamber of the ICC did issue a warrant for the arrest of the President of Sudan, Omar Hassan Ahmed Al Bashir, having found reasonable grounds to believe that he was responsible for war crimes and crimes against humanity (though not of genocide).

The Trial Chamber focussed on his role as 'the *de jure* and *de facto* President of the State of Sudan and Commander in Chief of the Sudanese armed force … [in which position] he played an essential role in coordinating … the design and implementation of the … Government of Sudan counter-insurgency campaign (ICC, 02/05 – 01/09).

The Trial Chamber confidently did so on the basis of Article 27 of the Treaty which reads:

1. This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government …. shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence.

2. 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."

Omar Al Bashir is not pleased. Henry VIII would not be pleased.

By the way, only this morning I visited the Law Council of Australia and they handed me a letter which the President of the Law Council had written to President Obama. This followed up my suggestion at the opening of the Legal Year in Tasmania that the Law Council might write to the US Secretary of State requesting fresh support for ratification of the Rome Treaty by the United States. (President Bill Clinton had signed the Treaty in the dying days of his administration, but it was unsigned by the Bush administration.)

The Law Council has asked President Obama to accede to the Treaty. Personally, I think it is unlikely (don't forget the US Senate has to agree) but during the election campaign the then-Senator Obama had pledged financial and political support to the ICC in respect to such situations as Darfur. This augers well for US/ICC relations.

Thomas More and Supranational Legal Institutions

What would Thomas More think of all these developments?

More faced trial because he could not in good conscience agree to the aggrandizing to the King of all and final jurisdiction in matters which were hitherto regarded as vested in the See of Rome – the supranational juridic institution of the time. The withdrawal of the sovereign of the realm of England from that judicial patrimony of Christendom, the King's refusal to be subject and answerable to it, was a step too far for More.

As Pope John Paul II stated in proclaiming Thomas More patron Saint of politicians, "Thomas More did not allow himself to waver and he refused to take the oath requested of him, since that would have involved accepting a political and ecclesiastical arrangement that prepared the way for uncontrolled despotism."

Of course, we have a contemporary illustration of the vesting of political and religious power in one person in the case of the Grand Ayatollah of Iran. Despots and tyrants may prosper for a time, but if they violate the precepts of International Humanitarian Law then the global morality of humanity will increasingly be invoked by judicial tribunals for whom their status as Heads of State will count as nothing.

We are witnessing the beginning of a new phase in world civilization. Whether by treaty or by resolutions of the Security Council, the doctrine of sovereign immunity is being overridden.

"No Impunity for Sovereigns"

Thomas More would be well pleased.