

# Immunity, Individuals and International Law.

Which Individuals are Immune from the Jurisdiction of National Courts under  
International Law?

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## **Declaration**

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## Abstract.

State immunity under international law extends to protect some individuals from criminal prosecution before national courts. This thesis aims to identify which individuals are immune from prosecution before the English courts, for what conduct, and for what period. The justifications for immunity are examined, and the extent of immunity *ratione personae* and immunity *ratione materiae* are explored.

This thesis argues that immunity *ratione personae* is only narrowly available to high state officials, and that the immunity accorded, by consent, to special missions is sufficient to cover other official visits.

In Pinochet (No 3) all seven judges agreed:

1. An ex-head of state is immune from prosecution for murder and conspiracy to murder alleged to have been committed in the forum state.
2. All state officials no matter how minor are entitled to continuing immunity

This thesis analyses state practice in arresting or prosecuting foreign state officials, and argues that both of these statements are incorrect. This thesis argues that immunity does not attach to conduct alone, for a person to have continuing immunity *ratione materiae* they must have had immunity *ratione personae*. The forum state must have agreed to the official being present on its territory, and agreed to the purpose of the visit. Those officials present on the territory of a foreign state with the consent of that state who have immunity *ratione personae* have continuing immunity *ratione materiae* only for official conduct, *acta jure imperii*. This does not extend to acts of violence.

Finally the development of the regime for the prosecution and punishment of international crimes by national courts is considered. The conflict with immunity is examined, and a possible reconciliation between the two principles is suggested by using the complementarity principle in the statute of the International Criminal Court.

## Prologue.

On 16 October 1998 I was Deputy Chief Clerk at Bow Street Magistrates Court, and I was the clerk responsible for advising Metropolitan Stipendiary Magistrate Nicholas Evans and preparing the provisional warrant issued for the arrest of Senator Pinochet Ugarte. I was also the clerk during the committal proceedings heard by Metropolitan Stipendiary Magistrate Ronald Bartle in October 1998. The arrest of Pinochet and the litigation thereafter introduced me to an area of law hitherto unknown to me, and started me on a path of study which has led eventually to this thesis. During the decade that has passed many things have changed. Bow Street Court has closed, and Metropolitan Stipendiary Magistrates are now District Judges. Magistrates' Courts are no longer small independent organisations as Her Majesty's Court Service has been created as part of the Ministry of Justice and I am now a civil servant. My role remains substantially the same despite all the changes, and I continue to encounter challenging cases and applications, some of which are material used in this thesis. All of the cases quoted in this thesis from Bow Street and City of Westminster Magistrates' Court were heard in open court and are in the public domain.

I wish to thank the District Judges at the City of Westminster Court and in particular the Senior District Judge (Chief Magistrate) Tim Workman for his kindness and support. I wish to thank Professor Greenwood, who was my supervisor until February 2009 when he was appointed as a judge at the International Court of Justice, for his generous patience and his continued gentle guidance.

I also say thank you to my family, my children Thomas and Katherine, and my husband James without whose continued assistance and encouragement this thesis would never have been completed.

# **Immunity, Individuals and International Law.**

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## Introduction

*“Henceforth, all former heads of government are potentially at risk”.<sup>1</sup>*

On the sixteenth of October 1998 a warrant was issued for the arrest of Senator Augusto Pinochet Ugarte, a Chilean national and former head of state. Pinochet was in hospital in London for medical treatment. The warrant was issued in Spain, alleging that Pinochet had committed genocide in Chile, and asserting that Spain had jurisdiction to try Pinochet for that conduct. At that time Spain and the United Kingdom (UK) were both parties to a multi-lateral extradition treaty, the European Convention on Extradition (1957), and had agreed to extradite persons accused of serious criminal conduct. In cases of urgency a warrant, known as a provisional warrant, could be issued for the arrest of a person before the receipt of the formal request for extradition. In such cases the requesting State would have 40 days from the arrest to submit the formal request for extradition. The judicial authority in Spain asked the English authorities to arrest Pinochet for extradition to Spain.

The Metropolitan Police, who believed that Pinochet was due to leave the UK, made an application for a provisional warrant. Shortly before 9 pm on Friday 16 October 1998 Metropolitan Stipendiary Magistrate, Nicholas Evans issued such a warrant alleging murder of Spanish citizens in Chile.<sup>2</sup> Pinochet was arrested later that evening. Although it was not apparent on the face of the warrant, the allegation was that Pinochet committed the offences as commander of the army, and later as head of state, using the apparatus of the state. He was President of the Government Junta of Chile from 11 September 1973 until 26 June 1974, and Head of State of the Republic of Chile from 26 June 1974 until 11 March 1990. At the time of his arrest he was a Life Senator.

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<sup>1</sup> Margaret Thatcher Lords Hansard Home Page. 6 Jul 1999. Column 800 & 801.  
<http://www.parliament.the-stationery-office.co.uk/pa/ld199899/ldhansrd/vo990706/text/90706-20.htm>

<sup>2</sup> The English warrant did not allege genocide as an extradition crime as was alleged in the Spanish warrant. As the definition of genocide in English law was narrower than the Spanish definition of the offence, as it did not include the extermination of a political group, and at that time was restricted to offences which occurred in the United Kingdom.

It was alleged that he gave orders to eliminate, torture and kidnap persons and to cause others to disappear, through the actions of the secret service, the Direction de Inteligencia Nacional (DINA), as part of an operation known as “Condor”, the aim of which was to eliminate political opponents of his regime. The agents of DINA were specially trained in torture techniques, and were said to be directly answerable to General Pinochet. It was alleged that they undertook the killings, disappearances and torture on the orders of General Pinochet. Pinochet was charged with using the powers of the state of which he was head to torture, murder and cause disappearances.

This case was of ‘*considerable general importance internationally*’<sup>3</sup> as it was the first case in which a local domestic court, refused to afford immunity to a former head of a foreign state on the grounds that there can be no immunity against prosecution for certain international crimes. The above quotation from Mrs Thatcher demonstrates the consternation the arrest caused.

On 24 March 1999 the House of Lords gave its final judgment<sup>4</sup> as to whether Pinochet was immune from the criminal jurisdiction of the domestic courts of states, other than Chile, for offences committed whilst he was head of state. Before the case was heard in the House of Lords for the second time, the formal request for extradition was received from Spain, and the allegations against Pinochet included murder and conspiracy to murder in Italy, France, Spain and Portugal as well as the widespread persecution of his own citizens in Chile. The allegations of murder and conspiracy to murder were alleged to have occurred not only in Chile, but also on Spanish territory. The House of Lords did not fully consider whether this criminality within the territorial jurisdiction of another state negated his immunity.

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<sup>3</sup> R. v. Bow Street Metropolitan Stipendiary Magistrate and others, ex parte Pinochet Ugarte (No. 3) [2000] 1 AC 147. Lord Browne-Wilkinson at 201 D.

<sup>4</sup> The question as to whether Senator Pinochet could be the subject of these extradition proceedings was considered twice by the House of Lords because the lawyers for Senator Pinochet successfully applied to the House of Lords to have the first decision overturned on the basis that one of the adjudicating Judges Lord Hoffman was associated with Amnesty who intervened.

In the judgment given on 24 March 1999 six of the judges were agreed that Pinochet was immune from prosecution for the offences of murder and conspiracy to murder, only Lord Millett dissented on the basis that there could not be immunity for offences which were alleged to have taken place in the requesting state, that is Spain. Lord Browne-Wilkinson said *“As to the charges of murder and conspiracy to murder, no one has advanced any reason why the ordinary rules of immunity should not apply and Senator Pinochet is entitled to such immunity.”* The question this poses is why should offences of murder and conspiracy to murder carry immunity? What are the ‘ordinary rules of immunity’ which apply to such offences?

The transcript<sup>5</sup> of the argument before the House of Lords, in those proceedings, records that on Tuesday 4 February 1999, the last day of the hearing, the following submissions were made by Professor Greenwood, counsel for the Kingdom of Spain. Miss Montgomery was counsel for Pinochet, and Dr Collins counsel for Chile.

Professor Greenwood: *“It is for the Respondent and for Chile to make good their case in respect of immunity. It is for them to show that there is a duty under international law for this country to accord Senator Pinochet immunity. What they have invited your Lordships to do is to take as a starting-point in the analysis that all officials and former officials enjoy immunity in respect of their official acts. Miss Montgomery put it that there was no reason to distinguish between a former head of state and other officials, and Dr Collins was even more categorical in his submissions that the principle of immunity applied to the official acts of all officials and therefore, by extension to all former officials and that it was then for the Appellants to show that there was an exception to that principle of immunity and then to look to see whether either the immunity has been waived or there is an exception to it which covers the facts of this case.”*

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<sup>5</sup>Pages 43 – 44 transcript. I am very grateful to Professor Christopher Greenwood who lent me the transcript.

*My Lords, we submit that that starting-point is wrong. It is, first of all, a starting point of quite extraordinary breadth. If Dr Collins' submissions are accepted in full, it would mean that for well over a century states have been wrongly trying foreign spies, people who in their own territory commit on behalf of other states, murders, attacks, abduction of people, sabotage, acts of that kind. One needs only look at a handful of the cases of the last few years: the Rainbow Warrior case in New Zealand, French agents convicted and sentenced to prison for manslaughter for blowing up a trawler in Auckland Harbour."*

Lord Browne-Wilkinson: *"Did the French Government claim immunity"*

Professor Greenwood: *"My Lord, I checked the report of the case in the New Zealand Law Reports. No, the French Government did not."*

Lord Browne-Wilkinson: *"This is one of the difficulties because when the state officials get up to high jinks, no immunity is claimed by their state; in fact, to the contrary."*

Professor Greenwood: *"Quite so, my Lord, but if I might suggest, that is a piece of state practice of quite considerable importance. France was clearly extremely aggrieved at the imprisonment of its two agents. The matter did eventually go to international arbitration and the one man and one woman were eventually released into French custody. The Prime Minister of Israel, according to yesterday's reports in the newspapers, has said that Israel will do everything it can to get back from Cyprus the two Mossad agents who have been imprisoned there. But if Dr Collins is right, why do they not assert immunity in those circumstances. The fact that they never do, the fact that Dr Collins could not take us to a single case of an offence committed in the territory of State A by an official of State B in which State B successfully asserted immunity, does actually suggest that perhaps this is a case of the whole regiment being out of step except Albert. There is, in fact, no immunity to assert."*

Lord Millett: *“Speaking for myself, I cannot see how State A can claim immunity for criminal acts done in State B, the forum state, because the most important exercise of sovereignty must be maintenance of law and order in your own state. That must override anything except *ratione personae*, must it not?”*

Professor Greenwood: *“Yes, my Lord, and, of course, a diplomat who is admitted to the territory of the forum state with the permission of that forum state’s government is in a different position from the undercover agent who comes here and commits an assassination, the person who comes here to assassinate a political dissident. If one takes the rationale for immunity put forward by Dr Collins in the Republic of Chile’s case, a central feature of his analysis of the policy lying behind immunity is the principle that one state should not intervene in the internal affairs of another but there is no possible way in which a state can claim that it was a matter of its own internal affairs that its operatives had gone and killed somebody in the territory of another state. It is the state where the offence took place whose internal affairs have been interfered with in violation of international law, and that would be true whether the offence took place in the forum state or in a third country.”*

The final decision of the House of Lords was that Pinochet was not entitled to immunity from prosecution for offences of official torture committed after 8 December 1988, the date when Spain, Chile and the UK had all ratified the torture convention. Six of the seven judges decided that Pinochet, as a former head of state, was entitled to immunity from prosecution for offences of murder, and conspiracy to murder, even where the allegation was that the conduct had taken place in Spain. What was being considered was Pinochet’s entitlement to immunity, as an aspect of the immunity of the state of Chile from the jurisdiction of the courts of other states. This is state or sovereign immunity which one state must afford another state before its municipal courts. This immunity is usually from civil jurisdiction, immunity from being sued, but some individuals are immune from prosecution because of state immunity. The basic principle being that if conduct is attributable to the state, then the official should be entitled to the same immunity. The officials and the state are equated one with another.

Apart from the passages quoted above, it was accepted by all parties, and also by the judges, that Pinochet was entitled to immunity from prosecution for ordinary crimes, as opposed to the international crime of torture, no matter where these offences occurred. Even if they occurred on the territory of a foreign state. Professor Greenwood's argument is not dealt with in the judgment of the House of Lords, and appears to have been forgotten.

If, as Lord Millet stated, the primary function of sovereignty is to preserve the peace and security within a state's territory, and if the purpose of immunity is to prevent the interference of one state in the affairs of another state, then immunity surely cannot subsist for offences committed on the territory of another state. The acceptance of the premise that all officials are immune from the jurisdiction of other states for offences which are official conduct is sweeping and wide, and was never properly considered by the House of Lords.

The discussion quoted above highlights a number of questions regarding the concept of state or sovereign immunity from criminal prosecution.

1. Does state immunity apply to all state officials, or does it only apply to some officials?
2. If it only applies to some officials, how do we decide which officials are entitled to immunity?
3. If an official has immunity does that continue after an official has left office?
4. Is there a difference between conduct in the forum state, and conduct in an official's own state?
5. Is an official who is entitled to immunity safe from prosecution no matter what the alleged conduct, or is some conduct so iniquitous that immunity cannot apply?
6. What is the purpose of immunity? It is to protect a state, but from what, and in what circumstances?

The question of the immunity of state officials from foreign criminal jurisdiction is still debated, and is now included in the long-term programme of work of the International Law Commission (ILC). In July 2008 the ILC considered the Special Rapporteur's preliminary report<sup>6</sup> and a memorandum by the ILC Secretariat on the subject.<sup>7</sup>

The purpose of this thesis is to examine the questions, 'Why is there immunity from prosecution,' and then to determine 'Who is immune from the criminal jurisdiction of other States?' There are three main considerations here. First, why is immunity asserted? Immunity is emphatically asserted, and vigorously protected by states, but what is its purpose? It is only when we understand the purpose of the concept, that it can properly be applied. Secondly, which individuals are entitled to immunity, and is that immunity limited to certain conduct, or for certain purposes? Thirdly does this immunity continue, or is it limited in time?

An associated question is whether immunity has to be asserted, or whether the forum state should give effect to it *proprio motu*, either by refraining from prosecution or by the court of trial dismissing the charges. In civil proceedings immunity has to be accorded whether or not it is asserted by the state in question.<sup>8</sup> But is this the case in criminal proceedings? Does immunity have to be claimed by the state in question, or does the prosecuting state have to recognise an individual's right to state immunity even though it is not claimed? Another related question is whether it is enough for the individual to claim immunity or whether his state must take some action on his behalf.

State immunity is one of the oldest principles of international law. It is also a fundamental principle, as not being subject to the jurisdiction of another state, is one of

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<sup>6</sup> U.N. Doc A/CN.4/601.

<sup>7</sup> U.N. Doc A/CN.4/596.

<sup>8</sup> Article 6.1 of the United Nations Convention on Jurisdictional Immunities of States and Their Property. A state shall give effect to state immunity under article 5 by refraining from exercising jurisdiction in a proceeding before its courts against another state and to that end shall ensure that its courts determine on their own initiative that the immunity of that other state under article 5 is respected. Section 1(2) State Immunity Act 1978. A court shall give effect to the immunity conferred by this section even though the state does not appear in the proceedings in question.

the essential attributes of the independence of states. A state is immune from the jurisdiction of the courts of other states because all states are independent and equal,<sup>9</sup> and therefore one state cannot adjudicate upon the conduct of another state. For one state to scrutinise the conduct of another state before its courts, and to pass judgment thereon, would mean that the adjudicating state was deciding the legitimacy, or legality, of the actions of another state, and was substituting its own opinion for that of another state, thereby making its own decisions superior to that of the second state. Therefore the second state could not be equal or independent. This principle of public international law that one state cannot claim jurisdiction over another state is expressed by the Latin phrase, *par in parem non habet imperium*.<sup>10</sup>

The fact that one state could not be impleaded before the internal courts of another state, and enjoyed absolute immunity from the domestic jurisdiction of another state was customary international law until the mid-twentieth century, when the restrictive doctrine of immunity in civil cases became accepted.<sup>11</sup> This is an exception to state immunity for the enforcement of commercial contracts entered into by states. It gradually became agreed in the interests of stability and fairness in commerce. As international customary law progressed to give effect to this commercial exception, the immunity of states was limited to *acta jure imperii*, that is acts performed in the exercise of sovereign or governmental authority. Whereas *acta jure gestionis*, acts of a commercial or private nature, which a private person may perform, do not attract immunity. A second exception to state immunity also developed at this time, for torts attributable to a state, mainly because of the use of motor vehicles by state officials. The restrictive doctrine of immunity has now been articulated and agreed in a number of

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<sup>9</sup> Article 2(1) Charter of the United Nations. The Organisation is based on the principle of the sovereign equality of all its members. The principle is elaborated the GA Res 2625 (XXV) (1970).

<sup>10</sup> An equal has no power over an equal.

<sup>11</sup> See *The Philippine Admiral* [1977] AC 373, *Trendtex Trading Corp. v Central bank of Nigeria* [1977] QB 529, and *I Congreso del Partido* [1983] 1 AC 244 for acceptance in English common law.



international conventions<sup>12</sup> and has been incorporated into statute.<sup>13</sup> This concept of restricted immunity applies to civil matters, not criminal matters.<sup>14</sup>

### **Immunity from Criminal Prosecution.**

It has long been established that state immunity extends to cover some state officials, and protects them from all litigation, and proceedings in foreign states. Historically the head of state, usually a monarch, and the state were seen as synonymous; and the immunity of the state was that of the monarch.<sup>15</sup> Such a head of state has always been immune from the jurisdiction of the domestic courts of other states.<sup>16</sup> But does the fact that a state is immune from civil liability mean that an individual is immune from criminal prosecution. A state can be liable under civil law, but it cannot be prosecuted.<sup>17</sup>

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<sup>12</sup> European Convention on State Immunity (1972). United Nations Convention on Jurisdictional Immunity of States and Their Property, 2004. GA Res 59/38 of 2 December 2004. (The UN Convention). In *Jones v Ministry of the Interior Al-Arabiya as Sudiya and another; Mitchell and Others v Ali-dali and Others* [2006] UKHL 26, 14 June 2006, the House of Lords at paragraph 8 and 47 accepts that the UN Convention is an authoritative statement of customary international law.

<sup>13</sup> Section 1(1) UK State Immunity Act 1978. ILM 17 (1978) p. 1123. Section 1604 United States Foreign Sovereign Immunities Act 1976. ILM, 15 (1976) 1388. Section 3(1) Singapore State Immunity Act 1979 reproduced in *State Immunity. Selected Materials and Commentary*. Edited by Dickinson, Lindsay and Loonan p. 504. Section 3(1) Pakistani State Immunity Ordinance No. VI of 1981 reproduced in *State Immunity. Selected Materials and Commentary*. Edited by Dickinson, Lindsay and Loonan p 496. Section 2(1) South African Foreign State Immunities Act No 87 of 1981 reproduced in *State Immunity. Selected Materials and Commentary*. Edited by Dickinson, Lindsay and Loonan p. 513. Section 3(1) Canadian State Immunity Act 1982. ILM, 21 (1982) p. 798. Section 9 Australian Foreign States Immunities Act 1985. ILM, 22 (1986), p. 715.

<sup>14</sup> Section 16(4) UK State Immunity Act 1978. Section 17 Canadian State Immunity Act 1982. Section 3 Australian Foreign States Immunities Act 1985. Section 19(1)(b) Singapore State Immunity Act 1979. Section 17(2)(b) Pakistani State Immunity Ordinance No. VI of 1981.

<sup>15</sup> See Sir Arthur Watts, "The Legal Position in International Law of Heads of State, Heads of Government and Foreign Ministers", *Receuil des Cours de l'Academie de droit international de la Haye*, vol. 247 pp 9 -136, Part IV Protection, Privileges and Immunities (1) General where he discusses the relationship between a sovereign and his state. He says "*In many respects the state could almost be seen as the property of the ruler, and it was to a considerable degree the ruler's personal attributes of sovereignty which gave his state the quality of being a sovereign state, rather than the other way round.*"

<sup>16</sup> See Sir Arthur Watts "The Legal Position in International Law of Heads of States, of Governments and Foreign Ministers", footnote 15 at p. 54.

<sup>17</sup> Oppenheim's International Law. Ninth Edition. Volume 1 PEACE Edited by Sir Robert Jennings and Sir Arthur Watts Introduction and Part 1 p 533 – 534 says that a state may bear criminal responsibility for egregious violations of international law and refers to the ILC YBILC (1976), ii. pt 2, pp 361 – 457. There is at present no international convention agreeing that states should be prosecuted for crimes. There is no law in England which provides a procedure whereby a state may be prosecuted.

Criminal liability is the liability of an individual for his own unlawful actions.

Nonetheless state immunity has covered the criminal actions of certain state officials in the past, and continues to do so today. Although the concept of 'The State' has changed fundamentally since the seventeenth century and the days of King Louis XIV of France who ruled on the principle that 'L'Etat c'est Moi,' state immunity continues to extend to individuals and protect them from prosecution.

There are some foreign nationals who are immune from prosecution before the courts of England and Wales.<sup>18</sup> The Arrest Warrant Case,<sup>19</sup> in which the International Court of Justice (ICJ) gave judgment on 14 February 2002, confirmed that heads of state, heads of government and also foreign ministers are entitled to complete immunity from prosecution while they are in office. They cannot be arrested, nor can a warrant be issued for their arrest. Diplomats have immunity on the territory of the receiving state and whilst travelling to and from that state. Articles 29 to 36 of the Vienna Convention on Diplomatic Relations 1961 provide for the privileges and immunities of diplomatic agents, and are accepted to be declaratory of customary international law. Serving diplomats cannot be prosecuted by the receiving state, in the absence of a waiver of immunity by the sending state. They are expected to abide by the laws of their host country, but if they contravene those laws they cannot be prosecuted. If a diplomatic agent transgresses the criminal law of the receiving state, the sanction available to the receiving state is to expel the offender, unless the sending state agrees to waive the immunity.<sup>20</sup> Consular officials have a more limited protection which applies to acts performed in the exercise of their official functions.<sup>21</sup>

State officials do not usually visit other states intent on committing crimes, and articles 41 of the Vienna Convention on Diplomatic Relations 1961, 55 of the Vienna

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<sup>18</sup> England hereafter will be used to refer to both England and Wales.

<sup>19</sup> ICJ 14 February 2002. Case Concerning the Arrest Warrant of 11 April 2000. (Democratic Republic of Congo v Belgium). 128 ILR 1.

<sup>20</sup> Article 9 and 32 Vienna Convention on Diplomatic Relations 1961. Articles 23 and 45 Vienna Convention on Consular Relations 1963. Article 41 Convention on Special Missions 1961.

<sup>21</sup> Article 43 paragraph 1 Vienna Convention on Consular Relations 1963

Convention on Consular Relations 1963, and 47 of the New York Convention on Special Missions 1968 impose an obligation upon officials visiting a foreign state to abide by local law. Nevertheless visiting officials sometimes do commit crimes inadvertently or otherwise, and have been held to be immune. Between 2003 and 2007 seventy seven serious offences, that is offences which carry a penalty of twelve months imprisonment or more, were alleged to have been committed in the UK by persons entitled to diplomatic immunity.<sup>22</sup> There are other individuals who are entitled to immunity from criminal prosecution because they are state agents and the purpose of this thesis is to identify the extent of their entitlement to immunity both as regards conduct and time.

Immunity is an exception to the jurisdiction which a state has over its territory, and all persons on that territory. *Par in parem non habet imperium* used to mean that one state had no jurisdiction over another state and its recognised officials, but during the twentieth century states agreed that such immunity was no longer absolute. This exception to the public international law principle results in a limitation on the exception of jurisdiction in domestic law. State immunity is an exception to the jurisdiction of states, and the restrictive doctrine limits that exception to *acta jure imperii*, that is an exercise of sovereign or governmental authority, as opposed to *acta jure gestionis*, acts of a private nature, which a private person may perform.

Immunity is therefore an exception to the ordinary rules of jurisdiction. It is also an aspect of the principle *par in parem non habet imperium*; that is the principle that all sovereign states are equal, and one state cannot claim jurisdiction over another state. The principle is given effect by being an exception to territorial jurisdiction. A state has jurisdiction over its territory and all persons on that territory. A visitor to a foreign country agrees to be subject to the laws and legal system of the visited country for the duration of the visit. The visitor agrees to observe the laws of that state, and to accept responsibility for his actions during his visit, by entering the territory of that state he is

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<sup>22</sup> Written statement by David Miliband, Secretary of State for Foreign and Commonwealth Affairs, Lords Hansard Text. 26 June 2008. Column 36WS.

accepting that he is subject to the jurisdiction of that state. The principle *par in parem non habet imperium* developed before the growth of the assertion of extra-territorial jurisdiction by states. A person entering the territory of a foreign state is accepting that he is subject to the jurisdiction of that state including any lawful extraterritorial jurisdiction asserted by that state. So a visiting foreigner may be prosecuted for offences which did not occur in the territory of the state he is visiting. Indeed he may be prosecuted for offences which occurred on the territory of his own state.

Extraterritorial jurisdiction is also an exception to the principle of the independence of states. A state is responsible for its own internal affairs. For one state to assert jurisdiction over the territory of second state, without the consent of the second state, is interference in that second state's internal affairs, and a breach of that state's independence.<sup>23</sup> Civil law jurisdictions have traditionally asserted jurisdiction over crimes committed by their own nationals in other states, and this adoption of jurisdiction based on nationality is also asserted by common law jurisdictions in some circumstances. For example, section 9 of the Offences Against the Person Act 1861 provides for the courts of the UK to have jurisdiction over offences of murder and manslaughter committed by '*any subject of Her Majesty*' anywhere in the world. The implementation of this legislation does not prevent the prosecution of the British national by the forum state, and it is a parallel jurisdiction, rather than a substitute. A prosecution for extraterritorial offences where jurisdiction is based upon nationality requires the assistance of the forum state in the collection of evidence, and therefore in practice does not lead to any breach of the independence of states.

During the latter part of the twentieth century the concept of extraterritorial jurisdiction developed. Before that time piracy was the only crime of universal jurisdiction. This was piracy on the high seas, the area of the sea to which no state could lay claim, and did not apply to piracy in territorial waters. During the twentieth century a number of international conventions were signed regarding crimes of international concern. State

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<sup>23</sup> See "Jurisdiction: Changing Patterns of Authority over Activities and Resources." D.W. Bowett. BYIL. 1982 p. 1-26.

parties agreed to assert extraterritorial jurisdiction over crimes such as torture, war crimes, and terrorist offences, and to prosecute if the alleged perpetrator was on their territory.<sup>24</sup> This extraterritorial jurisdiction has also been agreed for other offences of international concern such as drugs offences, corruption and money laundering.<sup>25</sup> Some of the treaties went further than an agreement to assert jurisdiction, they introduced the principle *aut dedere aut judicare*, that is, extradite or prosecute. States agreed that if an alleged perpetrator of crimes was on their territory, and he was not extradited, then the case should be referred to their prosecuting authorities for prosecution. The purpose of this principle is to prevent criminals being able to hide in foreign states and evade justice.<sup>26</sup>

There is a conflict between extraterritorial jurisdiction and immunity. If states have agreed that states can try offences committed on the territory of another state, then why should state officials of a contracting state be immune from prosecution in the territory of other contracting states? More so if the states have agreed that if an alleged criminal is on their territory, then the case should be referred to the prosecuting authorities. There is a conflict or tension between these principles of immunity, and extradite or prosecute. These conventions were originally believed to be hortatory, but any agreement between states has to be more than an aspiration. When a state enters into a convention, that state is then bound by the principle of good faith, to give effect to the convention.

Although there are not many trials in the UK of foreigners committing offences abroad, there have been some. For example on 1 April 1999 at the Central Criminal Court, Anthony Sawoniuk was convicted under the War Crimes Act 1999 of murder in circumstances constituting a violation of the laws and customs of war. He was convicted of two offences of murdering Jews in 1942 during World War II, in Belarus after the

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<sup>24</sup> See for example, article 5 Torture Convention 1984, article 7 Montreal Convention 1971, article 7 Convention on Crimes Against Internationally Protected persons 1973, article 7 International Convention for the Suppression of Terrorist Bombings.

<sup>25</sup> Article 4 United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances 1988. Article 42(4) United Nations Convention Against Corruption 2003.

<sup>26</sup> See for example Oppenheim's International Law. See footnote 17 at p. 953, and Problems & Process. International Law and How We Use it. Rosalyn Higgins at p. 65.

Nazi invasion. He was sentenced to life imprisonment.<sup>27</sup> Another example is Faryadi Sarwar Zardad who, on 18 July 2005 at the Central Criminal Court, was convicted of charges of conspiracy to torture and conspiracy to take hostages in Afghanistan between 1992 and 1996, and sentenced to twenty years imprisonment.<sup>28</sup> Both Anthony Sawoniuk and Faryadi Sarwar Zardad were habitually resident in England, and both were convicted of crimes committed on the territory of foreign states when the territory was not occupied by the UK.

A visitor may be the subject of extradition proceedings, if the country he is visiting has an extradition agreement with a country which wishes to try him for an offence. He can be extradited even though the offences did not occur on the territory of the state requesting extradition, so long as they are extradition crimes. His extradition may even be requested for offences which occurred on the territory of his own state, and this is what happened in the case of Pinochet, the former Chilean head of state. In 1988 when he was visiting London in 1988 his extradition was requested by Spain, for offences of torture, alleged to have occurred in Chile. He was arrested, and the English courts had to decide whether he was immune from criminal proceedings. The case has a complicated history, but in the final judgment, *Pinochet (No. 3)* in the House of Lords on 24 March 1999, as will be shown in later chapters of the thesis, all seven adjudicating Law Lords were agreed on two principles; the first that if Pinochet had still been head of state he would have been immune from prosecution; and secondly, that, subject to certain exceptions, all state officials are immune from prosecution for offences committed as part of their official function.

This immunity from prosecution for high state officials, for even the most serious of allegations, has also been confirmed by the ICJ, in the *Arrest Warrant Case*.<sup>29</sup> That Court stated that certain high state officials are immune from prosecution before the

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<sup>27</sup> *R v Sawoniuk* [2000] 2 Cr App Rep 220.

<sup>28</sup> *R v Zardad* [2007] EWCA Crim 279.

<sup>29</sup> 128 ILR 1. See also A. Cassese "When May Senior State Officials Be Tried For International Crimes? Some Comments on the *Congo v Belgium Case*." 13 EJIL 853. Campbell McLachlan "Pinochet Revisited." (2002) ICLQ. 51 959. Decisions of International Tribunals. (2003) ICLQ 2003 52 775.

domestic courts of other states, and that this immunity for individuals applies to the head of state, the head of government, the foreign minister. The reasoning used by the ICJ, that such immunity is granted to enable the official to perform his function, means that state immunity arguably applies to other ministers of state. This thesis will examine this argument.

Although some individuals are immune from prosecution, the extent of that immunity is not clear, and this thesis is asking ‘which foreign nationals cannot be prosecuted before the criminal courts of England because they are entitled to state immunity?’ In other words when is a court prevented from issuing a warrant or summons because the proposed defendant is protected by state immunity? Are there individuals who cannot be arrested because they are inviolable? Who cannot stand trial? Does it matter what they are alleged to have done, or when they did it?

These are questions which have practical consequences. Cases which are decided before the House of Lords, or the ICJ, started as applications for warrants or summonses before courts of first instance; and in England this is the Magistrates’ Courts. In recent years there have been applications for warrants of arrest for serving or retired foreign state officials, for example Robert Mugabe, the President of Zimbabwe,<sup>30</sup> Shaul Mofaz<sup>31</sup> the Minister of Defence of Israel and Bo Xilai<sup>32</sup> the Minister of Overseas Trade of China, and in these cases warrants were refused because the person was immune.

Who is immune, and who is not, is a matter of international law, which is primarily concerned with relations between states. Immunity is a protection for the state, not the individual, and as such it is a matter for the state concerned, not the individual alleged to have committed a crime. The state may assert immunity on behalf of the official, or a state may decide not to claim that immunity. A state may decide to waive immunity, and

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<sup>30</sup> *Tatchell v. Mugabe* 14 January 2004 Bow Street Magistrates Court. (unreported). See also “Immunity and International Crimes in English Law”. Colin Warbrick. ICLQ vol. 53, July 2004 pp 769 – 774.

<sup>31</sup> 128 ILR 709.

<sup>32</sup> 128 ILR 713.

abandon an individual official who was acting in an official capacity. Human rights conventions are that part of international law concerned with the protection of individuals from the actions of states, particularly the state of which they are a national, but no human rights convention considers the criminal responsibility of an individual acting in an official capacity and his liability for criminal conduct. The decision whether to waive immunity is entirely that of the state concerned, and the individual official accused of criminal conduct has no say whether his immunity is waived or not.<sup>33</sup> This is because the immunity is not his, but that of the State. In a recent example in 2003 Colombia waived the immunity of a diplomat Jairo Soto-Mendoza, a military attaché at the Colombian embassy in London, who was accused of murdering Damian Broom who had mugged Mr Soto-Mendoza's son Valencia. Mr Soto-Mendoza was tried at the Central Criminal Court and found not guilty on 22 July 2003.<sup>34</sup> Another example is Hissene Habre who was President of Chad between 7 June 1982 and 1 December 1990. He is accused of crimes against humanity and torture in Chad during that time, and is presently under house arrest in Senegal pending prosecution by Senegal or extradition to Belgium. On 7 October 2002 Chad waived any immunity to which Habre may be entitled.<sup>35</sup>

State immunity is an exception to the territorial application of law, and personal immunity is an aspect of state immunity, that is the immunity a sovereign state has from the jurisdiction of other states. Although it protects the individual, its purpose is to protect the state, and it only protects the individual to the extent that the state considers it necessary to protect him. If a state waives the immunity of an individual then the individual has no recourse in the forum state, he cannot claim that this is unfair. It is for the state to claim or to waive, and states guard the right to claim immunity.

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<sup>33</sup> *Dickinson v Del Solar* [1930] 1 K.B. 376.

<sup>34</sup> 23 July, 2003, *The Times*, p.7

<sup>35</sup> ILR 125 579. See also the Case Concerning Questions Relating to the Obligation to Prosecute or Extradite (*Belgium v Senegal*) ICJ 2009 No 144. Belgium is requesting the ICJ to declare that Senegal is obliged to bring proceedings against Habre, and failing prosecution, Senegal is obliged to extradite Habre to Belgium for trial. Belgium made a request for the indication of provisional measures which was refused on 28 May 2009. <http://www.icj-cij.org/docket/files/144/15149.pdf>. At the time of writing no issue of immunity is being raised before the ICJ.



### **The Immunity of Individuals is Considered Important by States.**

Immunity is a principle of great importance to states; they are willing to expend resources by taking the preliminary point of entitlement to immunity, rather than by defending an easily winnable case. This could be said to be protecting states in that the conduct alleged is not subject to scrutiny, as the court is not deciding whether the allegation is true. But when considering immunity the court has to consider whether the individual is immune on the assumption that the alleged conduct actually took place and that the individual possessed the required mens rea, and therefore the allegations are rehearsed and repeated. In the Pinochet case lawyers for Pinochet emphasised throughout the proceedings that Pinochet asserted his innocence, but this is lost in the reporting of the case. The allegations of widespread torture and murder, abduction and disappearances perpetrated by Pinochet's regime against his own population have been repeated many times. If Pinochet had been extradited to Spain and had been found not-guilty the fact would have been reported, but he and the Government of Chile chose to fight extradition, and leave the world believing that he was guilty of the crimes alleged.

In the Arrest Warrant case the Democratic Republic of Congo considered that the issue of state immunity was of such importance that resources should be deployed to take the matter to the ICJ, and to ask that court to decide whether the issue of the warrant of arrest was a breach of the immunity of the Congo. The Congo proceeded with the case even though Mr Yerodia, against whom the arrest warrant was issued, ceased to be Minister of Foreign Affairs in November 2000, and ceased to hold any ministerial office before the ICJ heard the case. Even though Mr Yerodia was no longer a minister the Congo instructed an Ambassador, supported by seven counsel and advocates and a counsellor to defend the case. The ICJ agreed that the issue of immunity was a legal dispute and decided that this change in the status of Mr Yerodia did not deprive the application of its object, and that the case was not moot.<sup>36</sup> No political problems would

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<sup>36</sup> 128 ILR 1 paras. 32 & 44.

have been caused in the Congo after Mr Yerodia ceased to be a minister, yet the Congo, a war torn country with many other pressing problems, continued with the case.

Why do states defend immunity, and protect the concept. Would the idea of the sovereign state change and the international order be different if state immunity did not exist? Immunity is a fundamental principle, in that immunity is part of the sovereign equality which defines a state; but would the concept of a state be different if immunity did not exist, or is it such a fundamental part of what it is to be a state, that it has to be part of international law?

### **The Extent of Immunity needs to be Clear.**

The purpose of international law is to facilitate peaceful relations between states, and state immunity is one of the mechanisms whereby states avoid conflict. It prevents one state from questioning and criticising the policy of another state. Instituting criminal proceedings is a statement that behaviour is illegal. The act of commencing proceedings is a declaration that the alleged conduct is prohibited, and therefore wrong. In a case where the policy of another state is the issue, then the very fact that an investigation has been undertaken, or proceedings commenced is a criticism of that state.

For a state to arrest a person who is entitled to immunity is, at the very least, an embarrassment to that state. The arrest may also be perceived as an insult and an affront to the dignity of the second state, and may cause an international incident. International incidents disrupt international discourse, and the most serious international incidents involve a resort to armed force. International incidents should be avoided if possible. Therefore it is important to identify who is entitled to immunity and for what conduct.

If an official is arrested, it is difficult for that official to carry on the functions of government. If a minister, or officials accompanying a minister on a state visit were in danger of being arrested then the visit would not take place. In the Arrest Warrant Case the ICJ noted at paragraph 71 of its judgment that '*Mr Yerodia on applying for visas to*

*two countries learned that he ran the risk of being arrested and he travelled by roundabout routes’ and the issuance of the warrant ‘was liable to affect the Congo’s conduct of its international relations’.*

The United Nations (UN) Charter prohibits disputes between states being decided by force.<sup>37</sup> One state should not force another state to agree with it, or to do as it says. By article 2.1 the UN is based on the principle of the sovereign equality, and by article 2.7 the UN should not intervene in matters which are essentially within the domestic jurisdiction of any state. Each state is required to respect the internal arrangements of other states. The function of courts is to decide legal questions, and thereby avoid conflict. Therefore one state should respect the decisions of the domestic courts of another state. If the domestic courts of one state consider matters which are internal matters for another state, without that state’s consent, then the second state may not accept any decision of the court, and it may be viewed as an insult to the dignity of the first state.

It is important to identify the extent of immunity for the international legal order, for enforcement agencies, and also for individuals. Individuals are entitled to know whether or not they will be protected by immunity before they embark upon a course of conduct, and to what extent that immunity will continue to protect them. It is also important for the integrity of the system of international criminal law. If the criminal law is to have a deterrent effect, the first consideration must be whether there is a possibility of prosecution. For the system to have integrity and be trusted it must be seen to be fair, not just as the imposition of ‘victor’s justice’ or ‘might means right.’

### **Determining Immunity is Important for International Relations.**

The extent of immunity under international law is important for the international legal order, and for the maintenance of good relations between states. Failure to respect

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<sup>37</sup> Articles 2.3, 2.4 and Chapter VI United Nations Charter. See also The Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations (1970). GAR 2625 (XXV)

immunity and inviolability under international law is a breach of an international obligation, and the responsibility for this lies with the state. A court which issues a warrant, or brings proceedings against a person who is inviolable and entitled to immunity, is involving the responsibility of the state. A state can be asked to justify its conduct if a warrant is issued by its judiciary for the arrest of a foreign official. This is what occurred in the Arrest Warrant case where the ICJ found that the issuance of a warrant of arrest for a serving foreign minister was a breach of international responsibility.

On 12 July 1999 in a debate in the House of Lords after the arrest of Pinochet, Lady Thatcher expressed the fear of heads of state and governments, when she said “*those still in government will be inhibited from taking the right action in a crisis, because they may later appear before a foreign court to answer for it*”<sup>38</sup>. Is this a justified fear that political enemies, or the victors in a conflict, will take revenge and pretend it is justice? Are the decisions to be taken by those in power so difficult and fraught with danger that they cannot be answerable to the law? Or is it a licence for the most powerful people in the world to act in a manner unrestrained by law or morality. Is it a licence for genocide and torture or a legitimate protection from political enemies?

If immunity is a screen protecting those who are guilty of the worst crimes then the inhibition described by Mrs Thatcher is a justification for removing immunity, as it will make those in power consider carefully what they are planning before they oppress others. The possibility of prosecution should act as a deterrent preventing the creation of future despots.

Mrs Thatcher then continued “*in a final ironic twist, those who do wield absolute power in their countries are unlikely now to relinquish it for fear of ending their days in a prison*”. This is a justification not for allowing the continuation of immunity, but for removing the immunity enjoyed by high state officials. Any privilege which is so

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<sup>38</sup> See footnote 1.

egregiously abused should not be allowed. If immunity assists in the creation of megalomaniacs and supports tyranny then it should be limited.

Pinochet's supporters, who spoke in the debate in the House of Lords, considered the decision to prosecute Pinochet to be a political act, rather than as a fulfilment of international obligations. The UK, on being requested by Spain, another party to the European Convention on Extradition, to arrest Pinochet for extradition, had an obligation to arrest him. Whereas Pinochet asserted that the UK had a duty in international law to respect his immunity. Here there are international obligations in conflict with each other. The obligation to arrest and either prosecute or extradite under the torture convention, the obligation to extradite to Spain under the European Convention, and the obligation to Chile under customary international law to respect state immunity and the principle not to interfere with the internal affairs of another state.

What the Spanish authorities were asserting was a right to try Pinochet for criminal conduct which occurred not in Spain, but in Chile. The courts of one country were seeking the extradition of an ex-head of state from a second country, for offences allegedly committed in a third country. Lord Lamont said in the same debate in the House of Lords *"Justice has to be related to a time and place. The Senator's case can be considered only by Chileans in Chile. The decision of the Home Secretary is an affront to the sovereignty of Chile, a country with its own system of courts and its own democracy"*.<sup>39</sup> What Lord Lamont did not explain was that Pinochet had granted himself and the other members of his junta immunity from prosecution in Chile.<sup>40</sup>

Here complex issues, regarding principles and obligations under treaty and customary international law are intertwined, and are not easily understood. The issuing of a warrant for the arrest of a person may be very urgent, and it always involves considerations regarding the timing and manner of the arrest. The law of immunity needs to be clear so

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<sup>39</sup> See footnote 1 at Column 797.

<sup>40</sup> Executive Decree No. 2191. 18 April 1978 (Amnesty Act)

that decisions which have to be made under pressure of time, and which have implications for international relations can be made correctly.

### **Determining Immunity is Important to Individuals.**

In the House of Lords on 12 July 1999 in the debate regarding the arrest of Pinochet Ugarte by the metropolitan police, the former Prime Minister Lady Thatcher said, *“Henceforth, all former heads of government are potentially at risk”*.<sup>41</sup> She was expressing a concern shared by others who have exercised power that they may be brought to account for their actions after they have left office.

The debate was after the final decision of the House of Lords and after the Secretary of State had decided that the proceedings should continue, and he had issued an authority to proceed. The committal proceedings were fixed to commence on the 27<sup>th</sup> September 1999 at Bow Street Magistrates’ Court. Mrs Thatcher was expressing the concern that immunity no longer protected a head of state or government, for actions performed as head of state or government, after leaving office.

A person who is alleged to have committed crimes should know whether they can be arrested and prosecuted in a state or not. Any individual is entitled to know whether he may be prosecuted and punished for his actions. For this reason human rights conventions provide that no-one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed.<sup>42</sup> There are also practical consequences for the accused individual, who may well be restricted in where he or she can travel, if they are liable to arrest.

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<sup>41</sup> See footnote 1

<sup>42</sup> Article 11.2 Universal Declaration of Human Rights 1948. Article 7 European Convention on Human Rights 1950

Any individual state official, state employee, or national of a state obeying orders from his state should know whether or not he is liable to prosecution for his actions before he undertakes them. If he is not immune, or there are doubts about his immunity, then he may be pursued for the rest of his life by those who wish him to be prosecuted, and he may be unable to travel without fear of being arrested. A person is entitled to know, when their state demands something of them, whether they are making themselves liable to prosecution or not. Some of those alleged to have committed offences will spend the rest of their lives taking advice on where they can travel, and in the most extreme examples having a campaign for their prosecution mounted against them.

This happened to Henry Kissinger who was the United States National Security Adviser from 1969 to 1975, and Secretary of State from 1973 to 1977. He served under Presidents Richard Nixon and Gerald Ford. His movements were followed closely by human rights activists for years, as he was implicated in war crimes committed during his term of office, particularly in connection with the 1973 Chilean coup. In 2001 the journalist Christopher Hitchens' book 'The Trial of Henry Kissinger'<sup>43</sup> presented a case for Kissinger's prosecution relating to his involvement in Indochina, Bangladesh, Chile, Cyprus, East Timor and Washington DC terrorist attacks.

Also that year a French Magistrate Roger LeLoire summonsed Mr Kissinger to answer questions about his involvement in the political killings in Chile,<sup>44</sup> and Judge Juan Guzman in Chile considered making a request to the USA for Mr Kissinger's extradition regarding the death of the American film-maker and journalist Charles Horman, who was killed by the military days after the coup in 1973.<sup>45</sup> In 2002 the declassification of US state department documents led to claims that Mr Kissinger gave his approval to the "dirty war" in Argentina in the 1970s, and in March 2002 it was reported that he had cancelled a trip to Brazil as it was feared that a judge might detain him.<sup>46</sup> Whilst Mr

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<sup>43</sup> The Trial of Henry Kissinger. Christopher Hitchens. Verso Press 2001.

<sup>44</sup> The Daily Telegraph 31 May 2001.

<sup>45</sup> The Guardian Wednesday 12 June 2002

<sup>46</sup> Miami Herald 30 August 2002

Kissinger was on a visit to London in April 2002 Peter Tatchell made an application before Mr Nicholas Evans, Metropolitan Stipendiary Magistrate sitting at Bow Street Magistrates' Court for a summons or warrant for the arrest of Mr Kissinger alleging offences under the Geneva Conventions Act, that between 1973 and 1977 when he was USA Secretary of State he commissioned, aided and abetted and procured war crimes in Vietnam, Laos and Cambodia. The application was refused because Mr Evans was not satisfied that a warrant was necessary to ensure the attendance of Mr Kissinger, and therefore the consent of the Attorney-General was required before a summons could be issued. Mr Evans did not consider it necessary to decide whether Mr Kissinger was entitled to immunity as he was not going to issue a warrant.

It was reported by Duncan Campbell in the Guardian on 6 December 2003 that "*Mr Kissinger does not travel abroad without consulting his lawyers about the possibility of his arrest*". The uncertainty in the law affected Mr Kissinger's ability to travel, and put him to expense and inconvenience. This uncertainty will continue to have practical consequences for politicians who have taken controversial decisions whilst in power, particularly as the House of Lords confirmed in 2006 that aggression is an international crime recognised by international customary law.<sup>47</sup>

### **Does Immunity mean Impunity?**

Immunity is perceived as being fundamentally unfair, and fostering a culture of impunity. Making individuals responsible for their criminal conduct is believed to be one way of promoting a law abiding and peaceful international community. The preamble to the Statute of the International Criminal Court (ICC) says the State Parties are '*determined to put an end to impunity for the perpetrators of international crimes, and thus to contribute to the prevention of such crimes.*'<sup>48</sup> By this reasoning immunity promotes armed conflict and international crimes, as the most powerful individuals in the world are protected from prosecution.

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<sup>47</sup> R v Jones (Margaret) & Others. [2006] UKHL 16 at paragraphs 12 – 19.

<sup>48</sup> <http://www.un.org/law/icc/statute/romefra.htm>.



The opposing view is that immunity protects the interests of sovereign states, as individual states must be free to take decisions unfettered by the political machinations of other states. To prosecute a state official for official conduct is a political act, and therefore immunity is one of the mechanisms by which states avoid conflict. For one state to question the conduct of another state's official is a criticism of that state and will lead to conflict between those states. If one state questions the official conduct of another state and scrutinises it before its domestic courts in public, then international relations will be strained, and international incidents caused. Both sides of the argument assert that the peace and stability of the world are at stake.

Immunity is seen to lead to impunity when state officials commit crimes for which their own state will not hold them responsible. In the absence of a will to prosecute in the territory where crimes occurred, victims turn to other states in their quest for justice. This has not been a very successful strategy. Pinochet was eventually not extradited; the Secretary of State ordered his discharge on the grounds of ill health. There have been a number of applications for warrants of arrest in the English courts which have been refused. The applications for the warrants for the arrest of President Mugabe of Zimbabwe, Ariel Sharon then PM of Israel, Narendra Modi Chief Minister of Gujarat, General Shaul Mofaz of Israel, Mr Bo Xilai, a Chinese Minister will be discussed later in this thesis.

The concern regarding impunity has led to the setting up of the international tribunals, the International Criminal Tribunal for the former Yugoslavia (ICTY), the International Criminal Tribunal for Rwanda (ICTR), later the Tribunals for East Timor and Sierra Leone, and more recently the ICC. These have been established in different ways and have different limits to their jurisdiction. These are a very expensive answer to the problem of impunity, and they have been only partially successful. The International Tribunals are not seen as the sole answer to the question of impunity, and the most

recent the ICC is expressed to be complementary to national jurisdictions. It is only if national courts are unwilling or unable to prosecute that the ICC has jurisdiction.<sup>49</sup>

### **What this Thesis is not Considering.**

The international tribunals have been created either with the consent of states, or by the Security Council acting under chapter VII of the UN Charter, and therefore the question of immunity from the proceedings before these tribunals does not arise.<sup>50</sup> The statutes of the tribunals all specifically provide that the status of defendants does not provide for protection from prosecution. The concept of state or sovereign immunity does not apply to the international tribunals,<sup>51</sup> and therefore this thesis will not be looking at state immunity and prosecution before an international tribunal, except insofar as it impacts upon the jurisdiction of national courts. The question of immunity can arise if a person appears before a national court with a view to being transferred to the ICC. Article 98.1 of the Rome Statute says that the ICC may not proceed with a request for surrender or assistance which would require the requested state to act inconsistently with its obligations under international law with respect to the state or diplomatic immunity of a person of a third state, and therefore this aspect of state immunity will be considered later in this thesis.

A second area that this thesis will not be considering, except insofar as it throws light upon state immunity, is diplomatic immunity. Diplomatic immunity was originally an

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<sup>49</sup> Article 17 Rome Statute of the International Criminal Court (1998)

<sup>50</sup> Prosecutor v Radovan Karadzic. IT-95-5/18-PT, Decision on the Accused's Second Motion for Inspection and Disclosure: Immunity Issue, at para 17, <http://www.icty.org/x/cases/karadzic/tdec/en/081217.pdf>.

<sup>51</sup> In the Prosecutor v Taylor 128 ILR 239 ex-President Taylor argued that the warrant issued for his arrest by the Special Court for Sierra Leone should be withdrawn as it was issued when he was head of state. The Special Court decided that as it is created by treaty it is an international criminal court, rather than a national court. The court decided that as its statute expressly provides that official status is not a bar to prosecution it had power to issue the warrant. The decision can be criticised on the basis it did not consider the position of officials of non parties to the treaty. The court said at paragraph 38 "*Agreement between the United Nations and Sierra Leone is thus an agreement between all the members of the United Nations and Sierra Leone. This fact makes the agreement an expression of the will of the international community*".

aspect of state immunity. It developed at a time when the envoy of the sovereign was his personal representative, and took on some of the characteristics of the sovereign, including those of immunity and inviolability. Now the immunity of diplomats and consuls is a separate and mature area of international law, with well developed clear rules which are accepted by all states. The Vienna Convention on Diplomatic Relations 1961 and the Vienna Convention on Consular Relations 1963 are both accepted as being declarative of customary international law.

A third topic, with which this thesis is not concerned, except when it is relevant to immunity from criminal prosecution, is the immunity from civil liability. Both corporate entities and individuals can be civilly liable, thus both a state, and the officials of a state, can be responsible and liable for damages in a civil court. There have been many cases brought against states, and state officials, claiming liability for wrongs inflicted. The body of law which has built up on this subject is substantial, and will be referred to, as the principles developed in the civil courts are relevant to criminal liability. The history of the limiting of civil liability, and the development of exceptions to what was an absolute immunity casts some light on how the law may develop regarding the present conflicting principles of immunity and impunity. When a criminal prosecution is not possible, an action for damages may well serve the purpose of apportioning blame. When individuals cannot be brought before a criminal court, then efforts to make a state and its officials liable before a civil court will place the facts of what happened in the public domain.

### **The structure of this thesis.**

The question this thesis is discussing is which individuals are immune, under international law, from the jurisdiction of the English courts. This immunity of individuals is an aspect of state or sovereign immunity and therefore this thesis will have to look at state immunity. The reasons for immunity should be clear, simple and easily understood, so that the purpose of immunity is transparent. The groups of persons to whom it extends should be clearly identified, and the conduct which cannot be

prosecuted understood. Only then will immunity be accepted as legitimate part of international law.

If the primary function of sovereignty is to preserve the peace and security within a state's territory, and if the purpose of immunity is to prevent the interference of one state in the affairs of another state, then immunity surely cannot subsist for offences committed on the territory of another state. The acceptance of the premise that all officials are immune for the jurisdiction of other states for offences which are official conduct is sweeping and wide and this proposition will be considered.

In a good legal system cases are not appealed because the principles are understood and generally agreed. The law relating to immunity from criminal jurisdiction is not good in this sense. In the last decade there has been the Pinochet case in the House of Lords<sup>52</sup> and The Arrest Warrant<sup>53</sup> and Djibouti v France<sup>54</sup> cases in the ICJ and the concept is still debated.

Before looking at the specific situations in which immunity will or will not be accorded to individuals this thesis will look at the justifications for immunity, why it is said that immunity exists, and consider whether the reasons given are legitimate. It is only by understanding why the concept exists, its purpose, and whether that purpose is legitimate, will it be possible to understand its limits and apply it properly.

This thesis will look at the limits of immunity, what is clear and what is uncertain, and how this area of the law has been developing. This thesis will try and identify the limits of immunity, what is confirmed by the practice of states and what is not. One chapter will consider immunity *ratione personae*, that is who is absolutely immune because of their status, the office they hold in a state. Another chapter will look at immunity *ratione*

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<sup>52</sup> R v Bow Street, ex parte Pinochet Ugarte (No 3) [2000] 1 AC 147.

<sup>53</sup> 128 ILR 1.

<sup>54</sup> Case Concerning Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v France) ICJ <http://www.icj-cji.org/docket/files/136/14550.pdf>.

materiae, that is, immunity because of the official nature of the conduct. Finally the question of whether there is a conflict between the concepts of immunity and impunity will be considered, and whether the two concepts can co-exist in a coherent way in international law. The first chapter will review the applicable law. This immunity of individuals is a principle of international law which is applied by the domestic courts of states, and the first chapter will look at international law relating to immunity and how it is applied in English courts.

## **Immunity Before National Courts.**

### **A Question of International Law as Interpreted by National Law.**

*“The law of nations is part of the law of the land.”<sup>55</sup>*

The UN has been working to codify international law relating to the immunity of states. On 2 December 2004 by resolution 59/38 the General Assembly adopted the United Nations Convention on Jurisdictional Immunities of States and Their Property, (the State Immunity Convention). This Convention is not yet in force. It was signed by the UK on 30 September 2005 but has not been ratified at the time of writing.<sup>56</sup> It has been accepted by the English Courts as codifying international law on this subject.<sup>57</sup>

The State Immunity Convention codifies the immunity of states and their property in civil proceedings, but it does not reflect the law relating to immunity in criminal proceedings.<sup>58</sup> There are still many areas of international law which have not been codified, and one such area is the immunity to which individuals are entitled from criminal prosecution in foreign states. The fact that the law is not contained neatly in one international instrument does not mean that there is no international law which applies.

The immunity accorded to individuals before national courts, by reason of their being agents of a state, is granted because such agents are entitled to immunity under international law. The immunity accorded to such individuals is therefore the result of the interplay between national and international law. How these two bodies of law connect with each other, and which takes precedence over the other is not always easy to decide. This thesis is looking at the immunity afforded to individuals under international

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<sup>55</sup> Blackstone, Commentaries on the Laws of England, Book IV, ch 5.

<sup>56</sup> United Nations Treaty Collection.  
[http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=III-13&chapter=3&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=III-13&chapter=3&lang=en)

<sup>57</sup> AIG Capital Partners Inc. v Republic of Kazakhstan. [2005] EWHC 2239 (Comm). Jones v Ministry of Interior. HL [2006] UKHL 26. Lord Bingham at para. 8. Lord Hoffman at para. 27.

<sup>58</sup> GAR 59/38 para. 2.

law in English courts. This means that the law that is being applied is English law, and international law is applicable insofar as it is part of English law. This thesis is not about the sources of international law and the complex questions posed regarding the making of international law, but questions are raised in this thesis about how to recognise and identify the law relating to immunity. This chapter is looking at the law that is applicable, and how it is identified.

### **English law and International Law.**

The UK has an obligation to ensure that the English courts apply the law in a manner which is consistent with international law, to the extent that international law applies. In England the sources of law are statutes and secondary legislation, and the common law as expressed in judicial decisions. Acts of Parliament are the primary source of law;<sup>59</sup> this is of particular importance in criminal law, as only a statute can create a new offence.<sup>60</sup> If there is a conflict between a statute and international law then an English court has to abide by the words of the statute. There is a presumption of construction that legislation should be interpreted to avoid a conflict with international law.<sup>61</sup>

The sources of law of international law are not as simple and certain as those of English law. International society is horizontal, with no centralised government, or law making body which can impose laws. Consequently international law is created largely by the consent of states. The United Nations is the pre-eminent body in international society, and all 192 states which have achieved general recognition are now members of the UN.

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<sup>59</sup> *Moretensen v Peters* (1906) 8 F.(J.) 93.

<sup>60</sup> *R v Jones (Margaret) & Others*. [2006] UKHL 16. Lord Bingham of Cornhill at para 29 “*an important democratic principle in this country: that it is for those representing the people of the country in Parliament, not the executive and not the judges, to decide what conduct should be treated as lying so far outside the bounds of what is acceptable in our society as to attract criminal penalties.*” And Lord Hoffman at para 57 “*Aggression not a crime in English domestic law, firstly the democratic principle that it is nowadays for Parliament and Parliament alone to decide whether conduct not previously regarded as criminal should be made an offence. The law concerning safe conducts, ambassadors and piracy is very old. But new domestic offences should in my opinion be debated in Parliament, defined in a statute and come into force on a prescribed date. They should not creep into existence as a result of an international consensus to which only the executive of this country is a party.*”

<sup>61</sup> *Salomon v Commissioners of Customs and Excise*. [1967] 2 QB 116, at 143

The UN Charter “*has become the basic legal instrument for the international community*”<sup>62</sup>, and obligations under the Charter prevail over any other obligations under any other international agreement.<sup>63</sup> The UN, acting under Chapter VII of the Charter, can create obligations which are binding upon States, but the UN cannot create laws in the way that a parliament can. The UN has been working towards clarifying and codifying international law through the ILC and establishing norms of international law by resolutions passed by the General Assembly, and through sponsoring multi-lateral treaties.

The ICJ was created by Chapter XIV of the UN Charter, and is the principal judicial organ of the UN. The statute creating the ICJ is annexed to the UN Charter and forms an integral part of the Charter.<sup>64</sup> Only states can be parties to contentious cases before the court, and the function of the court is to decide in accordance with international law such disputes as are referred to it, or to give advisory opinions if requested by authorised bodies. The court has to apply international law, and in so doing is required by article 38 of its statute to apply:

- (a) international conventions, whether general or particular, establishing rules expressly recognised by the contesting states;
- (b) international custom, as evidence of a general practice accepted as law;
- (c) the general principles of law recognised by civilised nations;
- (d) subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

These four categories are generally accepted as the sources of international law.<sup>65</sup> They are the ways in which international law is determined, and they identify the processes

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<sup>62</sup> Oppenheim’s International Law. See footnote 17 at page 31.

<sup>63</sup> Article 103 UN Charter.

<sup>64</sup> Article 92 UN Charter.

<sup>65</sup> Oppenheim’s International Law. Ninth Edition. See footnote 17 at p. 24.



used to create international law. The ICJ adjudicates upon disputes between states, and in so doing declares what international law applies, thereby contributing to the development and understanding of international law. The decisions of the ICJ have no binding force except between the parties, and in respect of that particular case,<sup>66</sup> but the law which is defined or explained in such decisions does have binding force. As the highest judicial organ of the UN the decisions of the judges of the ICJ are a powerful and persuasive body of opinion, not just as a subsidiary means for determining the rules of law, but as statements of what is customary international law. What is declared to be customary international law in such judgments is compelling unless there are persuasive indicators that the law has changed.

The first source of international law is international conventions, that is, treaties which have been agreed by states. A treaty is not automatically incorporated into English law.<sup>67</sup> If the UK becomes party to a treaty which has to be implemented in domestic law, then an Act of Parliament has to be passed incorporating the treaty into English law. This is usually done by the provisions of the statute giving effect to the treaty, or specified articles of a treaty are annexed to the statute and thereby become part of English law.

The second source of international law is “*International custom, as evidence of a general practice accepted as law*”, known as customary international law. This means the practice of states, which is accepted as law by states. There are two elements the first of which is ‘*a general practice*,’ and this has been emphasised by the ICJ in a number of cases.

In the North Sea Continental Shelf Cases that court said, “*an indispensable requirement would be that within the period in question, short though it might be, State practice, including that of States whose interests are specially affected, should be both extensive*

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<sup>66</sup> Article 59 Statute of the ICJ 1945.

<sup>67</sup> JH Rayner (Mincing Lane) Ltd v Department of Trade and Industry. [1990] 2 AC 418 pp 476D, G-477A, 483C, 499F – 500D.

*and virtually uniform.*”<sup>68</sup> And in the Nicaragua (Merits) Case, the ICJ confirmed that when deciding a case on the basis of general customary international law, it must discover that law from the practice of states as a whole, and said, “*The court must not disregard the essential role played by general practice.*”<sup>69</sup> Such state practice must be general, and consistently repeated over a period of time. In the Asylum Case<sup>70</sup> in 1950 the ICJ explained that a rule of customary international law must be “*in accordance with a constant and uniform usage practised by the States in question.*” If a practice has been undertaken for only a short time, and all states have not been involved in the practice, this does not mean that particular practice is not law. It is recognised that the length of time that a practice has to be undertaken before it becomes law may not always be long, and that the practice of powerful and influential states may be more important.

State practice, that is the element of conduct, what states have done, does not have to conform absolutely to the rule. States vary in their conduct, particularly when a rule is becoming established. In the Military and Paramilitary Activities case<sup>71</sup> the ICJ said that it is sufficient for a rule of international customary law for the conduct of states in general to be consistent with the rule, and inconsistent state conduct should generally be treated as a breach of the rule, not as an indication of the recognition of a new rule.

If there is settled state practice it is then necessary to look and see if that practice is accepted as law. This is known as *opinio juris sive necessitates* or *opinio juris*, and is described as a belief that the practice is obligatory under international law. States are made up of many individuals of varying beliefs, and a state is not an entity which can believe anything itself. Rather the practice has to have “*occurred in such a way as to show a general recognition that a rule of law or legal obligation is involved.*”<sup>72</sup> In other words, how were the actions carried out, does the practice of states show that the actions

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<sup>68</sup> ICJ Rep 1969, p. 3. para. 74.

<sup>69</sup> ICJ Reports 1986 p. 14. para. 184.

<sup>70</sup> ICJ Rep. 1950, p. 276.

<sup>71</sup> ICJ Rep. 1986, p. 14.

<sup>72</sup> North Sea Continental Shelf Cases ICJ reports 1969. p. 3 para. 74.

are considered to be legally binding. Is there a general consensus that the practice is a matter of law?

Custom therefore is deduced from the practice and behaviour of states and state agents. It is an area of law which responds as states react to changes in international society. All states may take part in its formulation. If a state is not directly affected it may still take part in the formulation of the law, or try to change the law by stating whether it agrees that a certain practice is lawful or not.

Article 38 does not restrict international custom to the practice of states, and since the creation of the United Nations there has been a growth in the importance of international organisations. The primary international organisation is the UN itself. The General Assembly has adopted a number of Conventions and made resolutions which are declaratory of existing law, or aim to create new law. As these resolutions are adopted by states, the resolution itself can be seen as both the practice of states, and an expression of *opinio juris*.<sup>73</sup> The UN Secretary General is an international person who commissions reports, and sometimes acts as an arbitrator. The Secretary General uses international law, and therefore his practice can contribute to the creation and confirmation of international customary law.

Customary international law is part of the common law of England. The leading text Oppenheim explains at page 56 regarding the UK “*all such rules of customary international law as are either universally recognised or have at any rate received the assent of this country are per se part of the law of the land*” and quotes a line of cases supporting this. International customary law is part of English law and does not have to be incorporated by an act of parliament. This was approved by Lord Lloyd in *Pinochet* (No 1).<sup>74</sup>

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<sup>73</sup> The ICJ in the *Legality of the Threat or Use of Nuclear Weapons* Case, Advisory Opinion ILR 110 para. 70 General Assembly Resolutions may “provide evidence important for establishing the existence of a rule or the emergence of an *opinio juris*.”

<sup>74</sup> [2000] 1 AC at 90 E.

In 2007 in *Regina v Jones (Margaret) and Others*<sup>75</sup> the House of Lords considered the question whether the crime of aggression was a crime under customary international law, and whether the crime was recognised by, or formed part of the domestic law of England. The defendants were claiming that the Iraq war was unlawful, and therefore they were not guilty of charges of aggravated trespass and criminal damage relating to military bases. Lord Bingham of Cornhill considered the question whether customary international law is, without the need for any domestic statute or judicial decision, part of the domestic law of England. At paragraph 11 of the judgment he said that there was old and high authority for the general truth of the proposition, but he also thought there was truth in the contention that international law is not a part, but one of the sources of English law. He decided that he was prepared to accept the general truth of the first proposition for the purposes of the case he was deciding, and this fine distinction does not affect this thesis. Whether customary international law is a source of English law, or automatically part of it, it is the law which applies when immunity is not provided for by statute.

English law accepts that customary international law changes as time changes. Lord Sankey LC explained in 1934 in *Re Piracy Jure Gentium*<sup>76</sup> “*International law was not crystallised in the seventeenth century, but is a living and expanding code*”. This causes a problem as regards the rule of stare decisis, as there may be a conflict between unchanging binding precedent and changing customary international law. Can an inferior court give effect to changes in customary international law, or is the court bound until the House of Lords accept the change? In 1977 the Court of Appeal was faced with just such a dilemma in *Trendtex Trading Corporation v Central Bank of Nigeria*.<sup>77</sup> The Central Bank of Nigeria was claiming state immunity from being sued on a letter of credit. The doctrine of restrictive immunity had been adopted by many countries, but

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<sup>75</sup> [2006] UKHL 16.

<sup>76</sup> [1934] AC 586 at 592. In this case the Full Court of Hong Kong acquitted Chinese nationals of the offence of piracy on the high seas because they had not actually committed robbery. The decision was overturned by the Privy Council on the basis that actual robbery was not an essential element of the offence of piracy jure gentium, and a frustrated attempt was sufficient.

<sup>77</sup> [1977] QB 529.

English case law firmly asserted the doctrine of absolute immunity. Lord Denning discussed the two schools of thought regarding the adoption of the rules of international law into English law. Incorporation, by which customary international law is automatically part of English law, and transformation which says that customary international law is only part of English law in so far as it has been adopted and made part of the law by the decisions of judges, or by act of parliament, or long accepted custom. Lord Denning decided that as the rules of international law change, and that courts have given effect to these changes without any Act of Parliament it followed “*inexorably*” that the changing rules of international law are part of English law. He stated at 554H “*International law knows no rule of stare decisis*”, and decided that if the court was satisfied that customary international law had changed then it could apply that change. Shaw LJ agreed with Lord Denning and said at 579F-G that what is immutable is the principle of English law that the law of nations must be applied in the courts of England. He said that the English courts must at any given time discover what the prevailing international rule is and apply that rule. Lord Stephenson did not agree and said at 571H-572A that the court was bound by previous decisions as to what is international law until altered by the House of Lords or the legislature. As Lord Stephenson was in the minority the principle as enunciated by Lord Denning and Shaw LJ that stare decisis does not apply to customary international law is now binding on lower courts.

Having discussed the relationship between English law and international law, this chapter will now look at what international law on the subject of the immunity of individuals from prosecution has been incorporated into English law.

### **International Law on Immunity Incorporated into English Law.**

In English law a number of acts of parliament give effect to treaties regarding state immunity to which the UK is a party. The immunity of diplomatic agents and consular agents as agreed in the Vienna Convention of Diplomatic Relations 1961, and the Vienna Convention on Consular Relations 1963, are incorporated in English law to the

extent that parliament considered necessary, in the Diplomatic Privileges Act 1964 and the Consular Relations Act 1968.

Both of these acts provide that specific articles of the treaties shall have the force of law. Section 2(1) of the Diplomatic Privileges Act 1964 provides that articles 1, 22, 24, 27 to 40 and 45 of Vienna Convention of Diplomatic Relations 1961 have the force of law. Therefore article 29 which provides that the person of a diplomatic agent shall be inviolable, and that he shall not be liable to any form of arrest or detention, article 31 which provides that a diplomatic agent shall enjoy immunity from the criminal jurisdiction of the receiving state, and article 39.2 which provides that with respect to acts performed by a person in the exercise of his functions as a member of the mission, immunity shall continue to exist are part of English law.

Similarly the Section 1(1) of the Consular Relations Act 1968 provides that articles 1, 5, 15, 17, 27, 31 to 33, 35, 39, 41, 43 to 45, 48 to 55, 57 to 62, 66, 67, 70 and 71 of the Vienna Convention on Consular Relations 1963 have the force of law. Therefore article 43 which provides that consular officers and consular employees shall not be amenable to the jurisdiction of the judicial or administrative authorities of the receiving state in respect of acts performed in the exercise of consular functions, article 53.4 which provides with respect to acts performed by a consular officer or a consular employee in the exercise of his functions, immunity from jurisdiction shall continue to subsist without limitation of time, and article 41 which provides for the personal inviolability of consular officers, and says that consular officers shall not be liable to arrest or detention pending trial, except in the case of a grave crime and pursuant to a decision by the competent judicial authority are part of English law. Section 1(2) of the Consular Relations Act 1968 says ‘grave crime’ shall be construed as meaning any offence punishable, on a first conviction, with imprisonment for a term that may extend to five years or more, or with a more severe sentence.

The European Convention on State Immunity 1972 is concerned with the immunity of states and not the immunity of individuals. As the preamble explains the signatory states

were “*Desiring to establish in their mutual relations common rules relating to the scope of immunity of one State from the jurisdiction of the courts of another State.*” The State Immunity Act 1978 enabled the UK to give effect to the European Convention on State Immunity, and, by section 1, a state is immune from the jurisdiction of the UK except as provided by the provisions of part 1 of the Act. Sections 2 to 11 set out circumstances in which a state may be the subject of proceedings in the civil courts. By section 14(1)(a) references to a state includes references to the sovereign or other head of that state in his public capacity. The act is not creating legislation relating to immunity from criminal prosecution, and Section 16(4) says in terms that part 1 of the act does not apply to any criminal proceedings.

Section 20 of the State Immunity Act 1978 legislates for the immunity of sovereigns or other heads of state from both civil and criminal proceedings as that section is in Part III of the Act, and therefore not subject to the limitation in section 16(4). Section 20(1) provides:

*“Subject to the provisions of this section and to any necessary modifications, the Diplomatic Privileges Act 1964 shall apply to*

- (a) a sovereign or other head of state;*
- (b) members of his family forming part of his household, and*
- (c) his private servants,*

*as it applies to the head of a diplomatic mission, to members of his family forming part of his household and to his private servants.”*

The effect of these provisions as regards civil proceedings is that if a head of state is sued in his own right, he has the same immunity as an ambassador, but if he is sued as the representative of the state then he has the same immunity as the state.<sup>78</sup>

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<sup>78</sup> See Geoffrey Marston. “The Personality of the Foreign State in English Law”. 56 Cambridge L.J. vii (1997) p. 374 describing the development of the state as a legal person in civil litigation from the ambassador or prince acting in person to the position that executive recognition creates the capacity for a foreign state to act at the plane of English law.

The head of a diplomatic mission is entitled to complete immunity from criminal jurisdiction, and is inviolable and therefore cannot be arrested, but once he has left his post he has a reasonable time to leave the country and then his immunity ends.<sup>79</sup> The effect of this provision regarding the criminal liability of an ex-head of state was considered by the judges in Pinochet (No. 3) who found its construction difficult. After consideration they all decided that customary international law applied. The section and the phrase ‘any necessary qualification’ was described by Lord Browne-Wilkinson at 202H as “*a strange feature of the United Kingdom law*”. He said that he found the correct way in which to apply 39(2) of the Vienna Convention to a former head of state baffling, because he was unable to say which functions should be regarded, or when they cease, as a former head of state “*almost certainly never arrives in the country let alone leaves it.*” He said “*It is hard to resist the suspicion that something has gone wrong,*” and a search of the parliamentary history of the section confirmed his suspicion. The original section 20(1)(a) read ‘*a sovereign or other head of state who is in the United Kingdom at the invitation or with the consent of the Government of the United Kingdom.*’ This was changed by a government amendment, as it was said that the clause as introduced “*leaves an unsatisfactory doubt about the position of heads of state who are not in the United Kingdom.*” The amendment was to ensure that heads of state would be treated like heads of diplomatic missions “*irrespective of presence in the United Kingdom.*”

All seven judges considered the provisions and they all decided that the immunity to which Pinochet was entitled as a former head of state was that to which he was entitled under customary international law.<sup>80</sup> It is submitted that in this the judges were correct; it is customary international law that determines the extent of immunity for former heads of state.

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<sup>79</sup> Article 39(2) Vienna Convention on Diplomatic Relations 1961.

<sup>80</sup> Pinochet (No. 3) [2000] 1 AC 147. Lord Browne-Wilkinson at 203B-F, Lord Goff at 209H-210B, Lord Hope at 240H, Lord Hutton at 251A, Lord Saville at 265F-H, Lord Millet at 268H-270D and Lord Phillips at 292C.



These statutes are concerned only with diplomats, consuls, heads of state and their families and households. The immunity of other state officials is not addressed by these Acts. There is no UK legislation regarding the immunity to be afforded to other state officials. This thesis has to determine what is the applicable customary international law, to ascertain who is entitled to immunity and for what conduct, at what time.

### **Customary International Law Relating to Immunity from Prosecution.**

This question that this thesis is asking is which individuals are immune in international law from the criminal jurisdiction of England, and this is an area where customary international law applies. This thesis therefore will have to ascertain from state practice what is the customary international law that applies. The practice will have to be extensive, and virtually uniform, and to have occurred in such a way as to show a general recognition that a rule of law is involved. This is not an easy matter, and is complicated by the fact that prosecution is a permissive jurisdiction. If there is a permissive rule of international law then English law may not extend as far as international law permits.<sup>81</sup>

A permissive rule does not have to be implemented by states, but the fact that all states do not implement the law does not mean that the rule is not a rule of customary international law. Regarding criminal prosecutions, the fact that a state does not prosecute a person does not mean that the state cannot prosecute that person. There are many good reasons why persons are not prosecuted for crimes. This thesis will look at where states prosecute, and where they do not, where states have asserted the right to arrest and prosecute state agents, and whether this assertion was challenged by other states on behalf of their agents? What was the justification for such a challenge; was it on the basis that the agent was entitled to state immunity, and if so, what was the outcome? Do states prosecute, do they assert immunity, and do they object to arrests or prosecutions on the grounds of state immunity?

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<sup>81</sup> R v Keyn. (1876) 2 ExD 63.

One aspect of state behaviour that will be explored is when states do not object to prosecutions of their officials by other states. By not objecting and by not asserting immunity, states are accepting that immunity does not apply. Whether states do or do not object to prosecutions of state officials, for what can be described as official conduct, is state practice and evidence of customary international law. If states consistently do not object to a practice, then there can be no rule of customary international law forbidding such practice.<sup>82</sup> That is, if states consistently prosecute foreign state officials, without complaint from the state to which the official belongs, then there is no rule against such prosecutions. This is true even if not every official who could be prosecuted is prosecuted.<sup>83</sup> Assertion of a right and acquiescence therein is state practice, and an example of *opinio juris*. The converse may also apply, a state asking for immunity before taking action, or requesting a pardon, or clemency, is an indication that there is no immunity.

Judicial decisions and the teachings of leading academics are subsidiary means for the determination of rules of international law. The writings of leading academics will be referred to in this thesis but they have to be treated with care as such writings are not evidence of international law in the absence of state practice.<sup>84</sup>

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<sup>82</sup> *Moretensen v Peters* (1906) 8F(J) 93 pp 108. Sir Gerald Fitzmaurice BYIL 30 (1953) p 1 ‘The Law and Procedure of the International Court of Justice, 1951 – 54: General Principles and Sources of Law’ at p 68 “*consent is latent in the mutual tolerations that allow the practice to build up at all; and actually patent in the eventual acceptance (even if tacit) of the practice, as constituting a binding rule of law.*” MacGibbon (1954) 31 BYIL 143 ‘The Scope of Acquiescence in International Law’ at p 182 “*Acquiescence is equivalent to tacit or implied consent. It takes the form of silence or absence of protest in circumstances which ... demand a positive reaction.*” MacGibbon ‘Customary International law and Acquiescence’ 33 BYIL (1957) 115 at 145 The general acceptance or recognition “*has frequently assumed the form of acquiescence.*”

<sup>83</sup> *S.S. “Lotus” (France v Turkey)*, PCIJ Series A, No. 10, 1927 at p 28. Even if the rarity of the judicial decisions to be found among the reported cases were sufficient to prove in point of fact the circumstances alleged .. it would merely show that states had often, in practice, abstained from instituting criminal proceedings, and not that they recognised themselves as being obliged to do so; for only if such abstention was based on their being conscious of a duty to abstain would it be possible to speak of an international custom.” This passage quoted with approval and followed in *North Sea Continental Shelf Cases* (Federal Republic of Germany v Denmark; Federal Republic of Germany v The Netherlands) ICJ Reports 1969 p 3 para. 79.

<sup>84</sup> *Arrest Warrant case*. ICJ. Joint Separate Opinion of Judges Higgins, Koojimans and Buergenthal, 128 ILR 119 at para 44 in the context of universal jurisdiction. “These writings, important and stimulating as they may be, cannot of themselves and without references to other sources of international law, evidence the existence of a jurisdictional norm.

Judicial decisions of national courts in the context of the law of state immunity are examples of state practice and may be evidence of *opinio juris* as regards immunity from prosecution.<sup>85</sup> The very fact that persons are prosecuted by states, or that they are accorded immunity is the basic state practice which has to be considered. The statements of judges in ordering prosecution, or according immunity are evidence of *opinio juris*. The practice of states in prosecuting, or according immunity, has been researched for this thesis both by identifying reported cases on immunity, and also by making extensive searches for prosecutions of those who are state agents engaged on state business. Key word searches were conducted of electronic legal resource sites, Lexis Nexis and Westlaw, using the terms 'state immunity' and 'sovereign immunity' to identify relevant reported cases. There are also cases from this writer's own knowledge as Senior Legal Adviser to the International Jurisdiction Office at Bow Street Magistrates' Court and the City of Westminster Magistrates' Court. Key word searches were also made of electronic records of reputable news reports, Keesing's World News Archive, Times Digital Archive, The Times and Sunday Times 1990 - 2003, and Times Online using key words, 'state', 'official', 'spy', 'espionage', 'trial', 'arrest' and 'prosecution'. The criteria used to select cases regarding arrests and prosecutions from news reports are as follows: -

1. The person arrested must clearly be a state actor, as opposed to a terrorist or a secessionist, or a person acting alone, or as part of a group acting for ideological reasons;
2. The person must be a foreign national, in many instances the nationality of the person arrested is not reported, and such cases have not been included.
3. The person has to clearly acting on behalf of one state, in what can only be described as state activity, in a second state. Cases involving

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<sup>85</sup> For example see *Jones v The Ministry of Interior* [2006] UKHL 26 at paras. 10, and 59 – 63.

the drug trade or other criminal activity<sup>86</sup> are excluded, as are those involving missionaries or other religious figures as the motivations of all involved are mixed. Cases where it is unclear on whose behalf a person is acting have also not been included.

4. The assertion of the state where the conduct took place that the activity was on behalf of another state has been taken as sufficient. It is the understanding of the prosecuting state that is of importance. Does the state prosecuting assert that the criminal conduct alleged was performed by and on behalf of a foreign state, and that there is the right to prosecute. The denial of the allegation by the foreign state does not affect the assertion of the right to prosecute.
5. The person must have been arrested, or charged, and may be tried and sentenced. There is clearly no duty upon states to try foreign nationals who commit offences on their territory, and often states expel persons involved in undesirable conduct. The fact that persons are not tried does not mean that states cannot try them; there are many reasons why a state may not wish to try a particular person such as lack of evidence, political embarrassment, or public interest immunity considerations.

Judicial decisions and the teachings of the most highly qualified publicists of the various nations are a subsidiary means for the determination of rules of law. Therefore judicial decisions may be evidence both of customary international law, and also a subsidiary means for determining international law. Judicial decisions will be considered in this thesis together with the writings of respected legal writers to assist in determining what

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<sup>86</sup> E.g. The case of Dr. Ralph Pinder-Wilson, a British citizen employed as the head of the British Institute of Afghan Studies in Kabul, was sentenced on July 9, 1982, to 10 years' imprisonment for allegedly collecting information and passing false rumours about Afghanistan to the United Kingdom and 'collaborating with counter-revolution and with imperialist states against the Democratic Republic of Afghanistan'. Dr Pinder-Wilson was also thought to have been accused of removing ancient Afghan coins to London, but to have claimed that they were being returned to Afghanistan after cleaning; he was released on July 14 after apparently being forced to make a confession and to request a pardon, and left the country immediately.

is international law relating to the immunity of individuals.<sup>87</sup> The decisions of national courts have to be considered with some caution, as national courts should apply international law, rather than progress it. As Lord Hoffman said in *Jones v Ministry of the Interior*<sup>88</sup> at paragraph 63 “*It is not for a national court to ‘develop’ international law by unilaterally adopting a version of that law which, however desirable, forward looking and reflective of values it may be, is simply not accepted by other states.*” The distinction between *lex lata* and *de lex ferenda* is not always self-evident, and national courts have a difficult job applying the international law of immunity as will be seen in the cases considered later in this thesis.

The third source of international law is “*the general principles of law recognised by civilised nations*”. The next chapter will look at the justifications for individuals being entitled to state immunity to see if general principles of law can be deduced for such immunity. It is only if the purpose and justification for immunity is understood that the law can be applied fairly.

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<sup>87</sup> Examples of references to respected legal writers are by Lord Hoffman in *Jones v the Ministry for the Interior* [2006] UKHL 26 at para. 84, and Lord Phillips in *Pinochet (No 3)* [2000] 1 AC 147 at p 283 – 4.

<sup>88</sup> [2006] UKHL 26.

## **Why should Individuals be Immune under International Law from Criminal Jurisdiction?**

### **What is the Justification for Immunity?**

*“The only stable state is the one in which all men are equal before the law”<sup>89</sup>*

International law recognises, as an aspect of state immunity, that certain classes of people are immune from the criminal jurisdiction of the domestic courts of states of which they are not nationals. State immunity is upheld by both national courts and international tribunals. In 1999 in *Pinochet (3)*<sup>90</sup> the House of Lords held that Pinochet had continuing immunity for offences of murder and conspiracy to murder. In 2003 the ICJ in the *Arrest Warrant Case*<sup>91</sup> said that the immunity which protects high state officials, heads of state and heads of government, also extends to foreign ministers. The purpose of this chapter is to examine what is the justification for the principle. Immunity is criticised for promoting impunity and allowing a class of persons to be unaccountable for their actions,<sup>92</sup> so why is immunity allowed? It is only when the rationale for state immunity is clear, and its purpose understood, that intelligible arguments can be made regarding the extent of immunity.

Immunity is a principle that is as old as international law itself. The foundation for the principle is to be found in the concept of monarchy, and the idea of the sovereign.

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<sup>89</sup> Aristotle.

<sup>90</sup> [2000] 1 AC 147.

<sup>91</sup> 128 ILR 1.

<sup>92</sup> See *Immunity v Accountability*. The Redress Trust. December 2005. <http://www.redress.org/publications/StateImmunity.pdf>. The preamble to the Rome Statute for the International Criminal Court says that the States Parties are determined to put and end to impunity for the perpetrators of atrocities and thus contribute to the prevention of such crimes.

## **Sovereignty and Equality. “L’Etat C’est Moi.”**

Modern international law has its roots in the monarchies of pre-French Revolution Europe, and it is from the archaic identification of the sovereign with his state that the modern law of immunity has developed.

The first justification for immunity stems from this time, when the sovereign was the embodiment of the state.<sup>93</sup> As such he was above the law, as he was the entity which created the law, the person from whom the law emanated. The sovereign and the state were perceived as one and the same thing. The state, that is the territory and the persons on that territory, were the property of the sovereign, and the attributes of the sovereign were that of the state. A sovereign personified the state; his dignity was that of the state; an affront to the state was also an affront to the sovereign, and likewise an action which offended a sovereign caused offence to the state.

Sir Arthur Watts, describes such pre-French Revolution states as:

*“monarchies, whose rulers were regarded as possessing personal qualities of sovereignty. In many respects the state could almost be seen as the property of its ruler, and it was to a considerable degree the ruler’s personal attributes of sovereignty which gave his state the quality of being a sovereign state... The older law frequently made no clear distinction between the Head of State on the one hand, and the state itself on the other.... Issues of sovereign immunity were mainly concerned with protecting the position of the Head of State.”*<sup>94</sup>

At this time international travel was not common, but if one sovereign were to visit another, one all powerful being would be entering territory where another all powerful

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<sup>93</sup> Wheaton’s Elements of International Law. 9<sup>th</sup> Ed by W B Lawrence p 35. “Wherever, indeed, the absolute or unlimited monarchical form of government prevails in any state, the person of the prince is necessarily identified with the state itself.”

<sup>94</sup> Sir Arthur Watts. ‘The Legal Position in International Law of Heads of State, Heads of Government and Foreign Ministers’, see footnote 15 at p. 35

being had absolute jurisdiction. It was unthinkable that one such being should have jurisdiction over the other. They were equal, and their subjects were inferior. Therefore the rules pertaining to the ordinary citizens of a state could not apply to a visiting monarch, and a different set of rules were required for such visits, to ensure that the majesty of the visiting sovereign was respected. The sovereign who was being visited accepted that the visiting sovereign could not be made the subject of his domestic laws and courts, because the visiting sovereign was superior to those laws. The sovereign whose territory was visited accepted he could not exercise his jurisdiction over the visiting sovereign.

Sovereigns would send envoys to other states, and these envoys were the predecessors of present day diplomats. As the envoy of a sovereign, an envoy carried with him some of the attributes of the sovereign, including the fact that he was above the domestic jurisdiction of the foreign state that he was visiting. Such envoys had to be treated with appropriate pomp and circumstance to reflect the majesty of their master. To slight, embarrass or otherwise offend the dignity of the envoy, was an affront to the sovereign who sent him, and the state he represented.

The judgment in *The Schooner Exchange v McFaddon*<sup>95</sup> in 1812 discusses the relationship between sovereigns. This case is still cited<sup>96</sup> and is illuminating on the development of the rules relating to sovereign immunity. In this case it was claimed that a French vessel which entered Philadelphia harbour for repairs was an American ship, 'the Schooner Exchange', which had been seized by France on the High Seas in 1810 in accordance with a Napoleonic decree. The United States Attorney General suggested that the court should refuse jurisdiction on the ground of sovereign immunity.

In this case, Marshall CJ said:

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<sup>95</sup> 7 Cranch 116 (1812). U.S. Supreme Court

<sup>96</sup> Lord Millett in *Pinochet (3)* [2000] 1 AC 147 at p 271 described this as a seminal judgment. It is quoted in *Aziz v Aziz & Ors.* [2007] EWCA Civ 712.



*“One sovereign being in no respect amenable to another, and being bound by obligations of the highest character not to degrade the dignity of his nation, by placing himself or its sovereign rights within the jurisdiction of another, can be supposed to enter a foreign territory only under an express licence, or in the confidence that the immunities belonging to his independent sovereign station, though not expressly stipulated, are reserved by implication, and will be extended to him. This perfect equality and absolute independence of sovereigns, and this common interest impelling them to mutual intercourse, and an interchange of good offices with each other, have given rise to a class of cases in which every sovereign is understood to waive the exercise of a part of that complete exclusive territorial jurisdiction, which has been stated to be the attribute of every nation.”*

The war ship was immune because it was under the direct control of the sovereign, under sovereign command. Therefore its actions were those of the sovereign and could not be questioned by a foreign sovereign. The actions of the war ship are actions of the sovereign, and not subject to the local domestic jurisdiction.

At the same time a visited sovereign also has a responsibility to maintain order within his territory, and any private or merchant ships would be subject to the local jurisdiction on entering a foreign territory. If they were not they would pose a danger to society. In stating this the court was making the same point as Lord Millett in the discussion quoted at the beginning of this thesis, that the most important exercise of sovereignty must be the maintenance of law and order in your own state. The court found that the Schooner Exchange, the vessel in question was a war ship and therefore exempt from the jurisdiction of the United States of America.

The immunity of the sovereign, his foreign minister, and those under the direct command of the sovereign, employed in national objects, were justified because;

1. A sovereign has full and absolute territorial jurisdiction, but there is no competence to have jurisdiction over another sovereign.

2. One sovereign is in no respect amenable to another.
3. A sovereign is bound by obligations of the highest character not to degrade the dignity of his nation by placing himself or its sovereign rights within the jurisdiction of another.
4. Sovereigns have perfect equality.
5. Sovereigns have absolute independence.
6. Sovereigns have a common interest impelling them to mutual intercourse and an interchange of good offices, so that the visited sovereign waives territorial jurisdiction.

What the court is describing is a state as it was constituted at that time, and justifying immunity by reference to that description. It is also describing how states interact, and the justifying immunity as necessary to enable such interaction. States were all powerful entities with absolute jurisdiction over their territory, and all persons on their territory, which needed to interact with each other for the purposes of trade, and to enable them to resolve any disputes. Such interaction required different rules, as states have to show respect for each other in their international dealings. Without immunity there would not have been “*mutual intercourse and an interchange of good offices*”, between states. Sovereigns were entities with absolute power within their own spheres, who would resort to war as a method for resolving disputes if not treated carefully.

This reasoning has been followed in subsequent cases for example a similar explanation was made in *Le Parlement Belge*.<sup>97</sup> Brett LJ declared that a state’s refusal to exercise territorial jurisdiction over the person of the sovereign, his ambassador, or over public property destined to public use ‘*though it be within the territory*’ was a ‘*consequence of the absolute independence of every sovereign authority and of international comity which induces every sovereign State to respect the independence and dignity of every other sovereign*’.

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<sup>97</sup> [1880] 5 Prob. Div. 197 at 212.

The concept of equal sovereigns, who have dignity, and must be treated with respect, has continued to the present, but with the emphasis upon dignity as an aspect of the sovereignty of the state rather than an attribute of monarchy.<sup>98</sup>

Dignity was considered by the ICJ in the *Djibouti v France* Case.<sup>99</sup> The court at paragraph 180 of the judgment given on 4 June 2008 held that sending an invitation to give evidence to the President of Djibouti when he was in France attending an international conference was not an attack on his honour or dignity. At paragraphs 175 and 180 the court said that, in the context of an official visit by the head of state of Djibouti to France, the passing of confidential information about the criminal investigation in which he was being invited to testify, to the media, could be a violation by France of its international obligations.

Heads of state are granted special treatment because they represent the persona of modern sovereign states. The concept of the sovereign ruler was replaced by that of the sovereignty of states, and the head of state is granted special status as recognition of that sovereignty. The head of government is also granted a special status, but this is not because of he is a sovereign. The second justification for state immunity is because states are equal.

### **All States are Equal. Par in Parem Non Habet Imperium.**

All states are equal in international law, they are equal members of the international community, and consequently no state can claim jurisdiction over another state. This is expressed in the rule, *par in parem non habet imperium*, which means that that an equal has no authority over an equal, that is one sovereign state is not subject to the jurisdiction of another state.

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<sup>98</sup> In *Mariam Aziz v Aziz and Ors.* [2007] EWCA Civ 712 the publication of details of the personal life of the Sultan of Brunei was not an attack on his state's dignity.

<sup>99</sup> Case Concerning Certain Questions of Mutual Assistance in Criminal Matters (*Djibouti v France*) ICJ. <http://www.icj-cji.org/docket/files/136/14550.pdf>.

The absolute monarchies of the pre-French Revolution states have been replaced by the modern state. After the Second World War the modern system of international law was created. The United Nations was formed, with the UN Charter as the pre-eminent international instrument. One of the basic principles of modern international law is that all states are considered equal in international law. This principle is enunciated in article 2, paragraph 1, of the Charter “*The Organisation is based on the principle of the sovereign equality of all its members,*” and further elaborated in The Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the United Nations<sup>100</sup> which is declaratory of international law.<sup>101</sup> The Declaration says that all states enjoy sovereign equality. Even though states are different they have equal rights and duties and are equal members of the international community. This principle of equality applies to all states. Sovereign equality includes the principle that one state shall not interfere with the internal matters of another state.<sup>102</sup>

These concepts of equality and non interference, which are essential elements of sovereignty, mean that the internal arrangements of states should be respected by other states. International law does not prescribe how a state should be organised, and states may be very different one from another, but they are required to respect each other’s independence.

For a time the immunity of states and their envoys were absolute, but when states began trading themselves, and entering into commercial contracts with individuals, the principle was perceived as unfair, as it gave honest traders no recourse if a state breached a contract. For a time the existence of the principle of state immunity was questioned, for example in a case in the USA, *Larson v Domestic and Foreign Corpn*<sup>103</sup> in 1949, it was stated:

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<sup>100</sup> GA Res 2625 (XXV)(1970).

<sup>101</sup> *Military and Paramilitary Activities Cse*, ICJ Rep (1986), pp 89-90, 91.

<sup>102</sup> Article 2 United Nations Charter.

<sup>103</sup> (1949) 337 US 682, 703.

*“The principle of sovereign immunity is an archaic hangover not consonant with modern morality and that it should therefore be limited whenever possible”*

In 1952 in his article “The Problem of Jurisdictional Immunities of Foreign States”,<sup>104</sup> Sir Hersch Lauterpacht said that the principle of immunity had become obsolete, and unjust. He analysed the Schooner Exchange case and said:

*‘It is clear from the language of that decision that the governing, basic principle is not the immunity of the sovereign state but the full jurisdiction of the territorial state and that any immunity of that sovereign state must be traced to a waiver – express or implied – of its sovereignty of the territorial state, and must not readily be assumed.’*

He thereby emphasised that the law of state immunity is based on the consent of both states involved. The consent of the forum state being required as much as that of the state claiming immunity, and that that consent could be withdrawn if appropriate.

After a period of uncertainty in the law the restrictive theory of immunity became established whereby there is immunity for conduct performed in the exercise of sovereign authority, what is called *acta jure imperii*, but not for conduct of a private or commercial law character, *acta jure gestionis*.

Since then the principle of state immunity has been strongly re-affirmed by states, who assert it vigorously in the courts.

### **The Efficient Performance of Functions.**

As explained earlier in this chapter, the immunity of the envoy of the sovereign was originally an aspect of the immunity of the sovereign himself, but the need for diplomatic relations between states, and diplomatic missions led to this becoming a

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<sup>104</sup> (1951) BYBIL p 220.

separate area within international law, which is now established and well developed. This area of international law was codified in the Vienna Convention on Diplomatic Relations 1961 which is now accepted to be part of customary international law.<sup>105</sup> The immunities of diplomats are now seen as separate from state immunity. The regime for diplomatic immunity, although it has been grossly abused on occasion, is still upheld by states, and seen to be very important in helping maintain peaceful international relations between states.

When it was drafted, the Vienna Convention on Diplomatic Relations 1961 was partly declaratory of international customary law, and partly *lex ferenda*. In the commentary on the draft articles the ILC mentioned three theories that influenced the development of diplomatic privileges and immunities;

1. The extraterritoriality theory, according to which the premises of the mission represented an extension of the territory of the sending state;
2. The representative character theory which based such privileges and immunities on the idea that the diplomatic mission personifies the sending state;
3. The functional necessity theory, which justified privileges and immunities as being necessary to enable the mission to perform its functions.

The Commission said it was guided by this third theory in solving problems on which practice gave no clear pointers, while bearing in mind the representative character of the head of the mission and of the mission itself.<sup>106</sup> The Commission considered both function and representative character to be important.

The Preamble to the Vienna Convention on Diplomatic Relations 1961 says that the states party recalling that peoples of all nations from ancient times have recognised the status of diplomatic agents, and having in mind the purposes and principles of the Charter of the United Nations concerning:

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<sup>105</sup> Para 62. U.S. v Iran ICJ Reports 1980, p. 3.

<sup>106</sup> YBILC, 1958, II, pp. 94-95.

1. The sovereign equality of states.
2. The maintenance of international peace and security.
3. The promotion of friendly relations among nations

believe that an international convention on diplomatic intercourse, privileges and immunities would contribute to the development of friendly intercourse among nations, irrespective of their differing constitutional and social systems.

Thus the fundamental purpose of diplomatic and consular immunity is to help maintain international peace and security, by promoting friendly relations among nations by friendly intercourse, whilst recognising the sovereign equality of states.

The preamble continues that the states parties to the convention realise that the purpose of such privileges and immunities is not to benefit individuals but to ensure the efficient performance of the functions of diplomatic missions as representing states.

The logic of this being that the purpose of the privileges and immunities afforded to diplomatic staff is to assist them perform their functions efficiently, and the efficient functioning of diplomatic missions assists in friendly intercourse between nations and the maintenance of international peace and security. Therefore the immunity accorded to diplomatic staff is to help maintain international peace and security.

Why is immunity from criminal prosecution necessary to enable diplomatic staff to perform their functions efficiently? This immunity is necessary for them to function in a foreign state with a different culture, and different laws. State representatives who enter the territory of another state, where the internal arrangements may be very different from their own national state, may inadvertently infringe the criminal law through ignorance of cultural differences. They need to be protected from unintentional infringements of criminal law. Even within the European Union, which aims to create a

common area of freedom, security and justice,<sup>107</sup> predicated upon being an area where member states have the same values, there are great variations in the substantive domestic criminal law, in areas such as abortion,<sup>108</sup> the use of drugs,<sup>109</sup> and freedom of speech.<sup>110</sup> There is also the fear that the criminal jurisdiction of the foreign state could be used for political ends, or that unfamiliar criminal procedures could be unfair.

But what is it they have to do that requires such immunity? The functions of a diplomatic mission consist *inter alia* in:

- (a) Representing the sending state in the receiving state;
- (b) Protecting in the receiving state the interests of the sending state and of its nationals, within the limits permitted by international law;
- (c) Negotiating with the government of the receiving state;
- (d) Ascertaining by all lawful means conditions and developments in the receiving state, and reporting thereon to the government of the sending state;
- (e) Promoting friendly relations between the sending state and the receiving state, and developing their economic, cultural and scientific relations.<sup>111</sup>

These all seem to be perfectly reasonable and lawful activities, there is nothing here that would immediately need immunity to enable them to carry out any of these functions, except that the fourth function involves collecting information. It is emphasised that ‘all lawful means’ can be used to ascertain conditions and developments in the receiving state and indeed it is the duty of all diplomatic agents to respect the laws and regulations

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<sup>107</sup> The Treaty of Amsterdam on the European Union which came into force on 1 May 1999.

<sup>108</sup> See e.g. BBC News: 12 Feb. 2007. [www.bbc.co.uk/2/hi/europe/6235557.stm](http://www.bbc.co.uk/2/hi/europe/6235557.stm).

<sup>109</sup> There is an EU Drugs strategy, see "<http://register.consilium.eu.int/pdf/en/04/st15/st15074.en04.pdf>" but the law on the possession and supply of controlled drugs is very different in The Netherlands, where cannabis can be obtained easily and possession of other drugs is treated as a medical rather than a criminal justice matter.

<sup>110</sup> On 20 February 2006 David Irving, described as a British ‘revisionist historian’ pleaded guilty in Austria to charges of denying the Holocaust. He was sentenced to 3 years imprisonment. The Times. 21 February 2006. There is no equivalent charge in the UK.

<sup>111</sup> Article 3.1 Vienna Convention on Diplomatic Relations 1961.



of the receiving state, but the collection and reporting of information is dangerous. Spies are regularly prosecuted by states, and diplomats who are associated with spying are expelled. In many states the collection of information is illegal. The diplomatic agent may have immunity, but that does not mean that there is no sanction against those who transgress. The establishment of diplomatic relations between states, and of permanent diplomatic missions, takes place by mutual consent, and the sanction on a breach of diplomatic privilege or immunity is to exclude a diplomat or member of the mission, and the ultimate sanction is to terminate diplomatic relations. If a diplomat could be prosecuted for collecting information he would have to explain what information was collected and why. This would expose the plans and policies of his state to the scrutiny of the internal courts of a foreign state.

There is also the possibility of arrests and prosecutions being brought for political purposes. When alleged spies are arrested, and diplomats expelled, the sending state always denies the allegations, and often says that the prosecutions are brought for a political purpose. If accredited diplomats were prosecuted, then rather than assisting international relations, keeping embassies in foreign states would add to the conflict between states.

Diplomats represent their state, and if a person who represents a state is arrested or charged and brought before a court in another state then the dignity of the first state is compromised. Dignity is a difficult concept to describe, but it is certainly not in keeping with the dignity of a state, for its representative in a foreign state, to stand in the dock of a criminal court in that state, unless the sending state has agreed to this. If the dignity of a state or its representative is not respected, then friendly relations between states are not being developed, and international peace and security are threatened.

Two other conventions which are relevant are the Vienna Convention on Consular Relations 1963 and The New York Convention on Special Missions 1968. In the preambles to both conventions the states party declare they have in mind the purposes and principles of the United Nations concerning the sovereign equality of states, the

maintenance of international peace and security, and the promotion of friendly relations among nations. In both conventions immunities are granted by the states parties in the stated belief that the conventions would contribute to the development of friendly relations among nations, whatever their constitutional and social systems.

By article 43.1 of the Convention on Consular Relations consuls are granted immunity from prosecution for criminal conduct, but only from prosecution for acts performed in the exercise of consular functions, and by article 41.1 they are also inviolable and not to be arrested or detained pending trial, except in the case of a grave crime and pursuant to a decision by the competent judicial authority. The preamble to the Vienna Convention on Consular Relations recognises that the purpose of privileges and immunities is not to benefit individuals but to ensure the efficient performance of functions by consular posts on behalf of their respective states.

Article 29 of the Special Missions Convention provides that the members of a special mission shall be inviolable, and not liable to any form of arrest or detention, and article 31.1 that they shall enjoy immunity from the criminal jurisdiction of the receiving state. The preamble to this convention again says that the purpose of this immunity is not to benefit individuals but to ensure the efficient performance of the functions of special missions as missions representing the state.

All three of these conventions, which are declaratory of customary international law,<sup>112</sup> emphasise that the purpose of the immunity, and other privileges, is to ensure the effective performance of the tasks the state officials have been sent to perform on behalf of their state. This is reflected in the fact that the state can waive the immunity if the state wishes to do so.<sup>113</sup> The immunity is not that of the individual, but that of the state and its purpose is to ensure that specific actions undertaken on the behalf of the state are performed efficiently.

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<sup>112</sup> Arrest Warrant case. ICJ 128 ILR 1at paragraph 52.

<sup>113</sup> Article 32 Vienna Convention on Diplomatic Relations 1961; Article 45 Vienna Convention on Consular Relations 1963; Article 41 New York Convention on Special Missions 1968.

The ICJ emphasised the importance of the international law relating to diplomats and consuls, in the US Diplomatic and Consular Staff in Tehran Case 1980,<sup>114</sup> in which the court said that law was “*vital for the security and well-being*” of the international community. The facts of this case are not about the diplomatic staff breaking the domestic law of Iran, rather Iran failed in its duty to protect the diplomats.

On 4 November 1979 several hundred Iranians, some of whom were described as students, forcibly occupied the United States embassy in Tehran. They were protesting at the Shah of Iran being allowed to take refuge in the United States. He was allowed to enter the USA on the grounds that he needed medical treatment. The Iranian security forces did not protect the embassy. The demonstrators seized fifty two people, including fifty consular and diplomatic staff, and held them hostage, demanding the return of the Shah, and his property. The ICJ said that the state of Iran was not responsible for the initial attack as the militants did not have official status, and that public declarations by the Ayatollah Khomeini, the religious leader of the country, exhorting “*students*” to mount attacks to force the United States to return “*the deposed and criminal Shah*” did not amount to an authorisation from the state of Iran to undertake the specific operation of invading and seizing the US embassy. But, the court continued, Iran had a clear duty to protect the US embassy and consulates, and the court found that Iran was in breach of its international obligations by not restoring the status quo and offering reparation for the damage. The occupation of the embassy and detention of the hostages became acts of the state of Iran on 17 November 1979, when the Ayatollah Khomeini issued a decree asserting that the US embassy was “*a centre of espionage and conspiracy*” and that “*those people who hatched plots against our Islamic movement in that place do not enjoy international diplomatic respect*”, and declaring that the premises of the embassy and the hostages would remain as they were until the USA handed over the former Shah for trial and returned his property to Iran. At that stage the militants, the authors of the invasion and jailers of the hostages become agents of the Iranian state for whose acts the state of Iran was internationally responsible.

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<sup>114</sup> U.S. v Iran ICJ Reports 1980, p. 3.

At paragraph 91 of its judgment ICJ strongly affirmed the fundamental character of diplomatic and consular law and at paragraph 92 said this case was of very particular gravity because the government of the receiving state had disregarded the inviolability of a foreign embassy, and stated:

*“Such events cannot fail to undermine the edifice of law carefully constructed by mankind over a period of centuries, the maintenance of which is vital for the security and well-being of the complex international community of the present day, to which it is more essential than ever that the rules developed to ensure the ordered progress of relations between its members should be constantly and scrupulously respected.”*

The court said the law of diplomatic and consular immunity is an integral part of international law, which is necessary for the ordered progress of relations between members.<sup>115</sup>

State immunity and diplomatic and consular immunity although related, are two different regimes. Although the two bodies of law derived from the same source historically, the immunities of diplomats and consuls are now seen as separate from state immunity. This was emphasised in *Re P (Diplomatic Immunity: Jurisdiction)*<sup>116</sup> which concerned the custody of two children, and the removal of the children from England without the consent of the mother.

The father was an American diplomat and the family resided in London where he was posted. In 1997 the mother, a German national, commenced divorce proceedings in Germany, and she made an application in England for residence orders in respect of the children. The US government and the father successfully sought a dismissal of the English proceedings on the grounds of diplomatic immunity. The father was then

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<sup>115</sup> The hostages were being held when the ICJ gave this judgment and they were finally released in January 1981.

<sup>116</sup> [1998] 2 FCR 525, [1998] 1 FLR 1026.

ordered to return to the USA by his superiors and he duly returned taking the children with him. The mother also returned to America.

In November 1997 the mother obtained in the English family court, an *ex parte* declaration, that the removal of the children from England, by the father, was a wrongful removal. The father and the USA sought a dismissal of the proceedings on the grounds of state and diplomatic immunity. The Court of Appeal held that diplomatic immunity was not immunity from legal liability, but immunity from suit. Whilst the father could not have been prevented, at the time, from taking his children with him from England, after he had returned to the USA and his diplomatic status had been determined so far as the UK was concerned, his action in taking the children could not be considered to have been the exercise of a function as a member of the mission within article 39(2) of the Vienna Convention on Diplomatic Relations 1961. The Court of Appeal said that state immunity is a separate concept to diplomatic immunity and his actions were covered by state immunity, as immunity *ratione imperii* applies to all state officials performing state functions, and that the agent of a foreign state would enjoy immunity in respect of his acts of a sovereign or governmental nature. The father's act of taking his children back to the USA at the end of his mission, was an act of a governmental nature, and as such was subject to state immunity from legal process. The court explained the rationale for this as being the operational freedom on the part of the sending state; that one state could not be fettered by the domestic courts of another state.

Mr P was a diplomat, and therefore he was completely immune and could not be prevented from removing his children when he left England. But the court was not of the view that the removal of his children was an act in the exercise of his functions as a member of the diplomatic mission and therefore the action did not carry with it continuing diplomatic immunity. But the court considered that the act of taking his children back to the USA at the end of his mission was an act of a governmental nature since it was performed under governmental instructions and as such was subject to state immunity from legal process. Any attempt by the English courts to prevent the diplomat complying with his orders would have been to fetter the government of the United States

in managing its foreign service, and this would be an unwarranted interference in the internal matters of a foreign state, and breach the principle of the sovereign equality of states.

The justification for the concept of state immunity *ratione personae* was considered in the Arrest Warrant Case.<sup>117</sup> The ICJ decided that the immunity to be accorded to a serving minister for foreign affairs had to be determined on the basis of the functional justification for immunity.

On 11 April 2000 an investigating judge in Brussels issued a warrant of arrest for Mr. Yerodia, the then minister for foreign affairs of the Congo, charging him with offences constituting grave breaches of the Geneva Conventions and with crimes against humanity. Mr. Yerodia was accused of having made various speeches inciting racial hatred during August 1988 in the Congo. The Congo instituted proceedings in the ICJ claiming that Mr Yerodia was immune from prosecution as he was the Congolese foreign minister, and asserting that the issue of the warrant was contrary to the principles of territorial integrity and sovereign equality, and justifying immunity by reference to these principles.

The ICJ said that as there were no specific treaty provisions relating to the immunities of foreign ministers customary international law applied. The court said that it found the two Vienna Conventions and the Convention on Special Missions to be of useful guidance, and as the immunities accorded to foreign ministers were granted, not for their personal benefit, but to ensure the effective performance of their functions on behalf of their respective states, to determine the extent of these immunities, the court had first to consider the nature of the functions exercised by a foreign minister.

The court listed the powers of a foreign minister, and what his role is, that is the court considered what a foreign minister does, and said:

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<sup>117</sup> 128 ILR 1.

1. He is in charge of the government's diplomatic activities and generally acts as its representative in international negotiations and intergovernmental meetings, and
2. Ambassadors and other diplomatic agents carry out their duties under his or her authority, and
3. The acts of the minister for foreign affairs may bind the state represented, and there is a presumption that a minister for foreign affairs, simply by virtue of that office, has full powers to act on behalf of the state.<sup>118</sup>

Then the court went on to examine what a foreign minister needed to perform those functions, and said that:

1. He would be frequently required to travel internationally, and thus must be in a position freely to do so whenever the need should arise.
2. He must be in constant communication with the government, and with its diplomatic representatives around the world, and capable of communicating at any time with representatives of other states.

The court considered what he had to do as foreign minister and how he did it, and decided that a foreign minister needed to be able to travel and communicate freely to be able to fulfil his role.

Then the court drew an analogy to heads of state and heads of government, who are recognised under international law as representatives of their state just because of the office they hold. The court noted that a minister for foreign affairs being responsible for the conduct of his state's relations with all other states, also occupies such a position and is recognised under international law as representative of the state solely by virtue of holding the office, and that as foreign minister he carries with him his own authority, and has no need for letters of credence. The court observed that it is generally the minister who determines the authority to be conferred upon diplomatic agents and countersigns their letters of credence, and it is to the minister of foreign affairs that

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<sup>118</sup> Art 7(2)(a) Vienna Convention on the Law of Treaties 1969.

charges d'affairs are accredited. In this the court is saying that the minister for foreign affairs is a particularly special representative of his state, that he personifies an aspect of his state, and that it is because of that position, and what he is required to do as that office holder, he requires immunity to perform his function. To be immune a person has to hold a particular important state position, with international responsibility, and be required to travel internationally and communicate freely.

The court is justifying the immunity conferred upon him by reference to his position, not just to ensure he can perform his functions. The immunity is justified by his status, and the power he has. It is conferred to protect him from the actions of other states, to enable him to perform his functions as one of the pre-eminent members of his state. It is about the power of a state and who represents that power; and the decision of the court was that a foreign minister whilst abroad is completely immune and inviolable from the criminal jurisdiction of other states.

The court found that both the issue of the warrant, and its circulation failed to respect the immunity of the minister for foreign affairs, and that this was a breach of an international obligation owed to the Congo.

This functional justification for immunity is that it enables officials to perform their duties. But this justification does not make sense when an official has left office as there are no functions to maintain. In any event how can it be the function of an official, whether or not he is entitled to immunity, to commit crimes? The second justification for the continuing immunity is that to prosecute the functionary would be to question the conduct of the state, and thereby circumvent the sovereign immunity of a state. The immunity of the state would be illusory if an individual could be held responsible when a state cannot. This makes sense in civil proceedings as any liability would be that of the state. But criminal proceedings are different, a state cannot be prosecuted, and individuals are responsible for their own criminal conduct; that is why an act is classed as criminal. A state in prescribing certain conduct as criminal is stating that an individual is to be punished for such actions.



## **To Promote International Relations.**

Immunity is one of the mechanisms used by the modern sovereign states to facilitate friendly relations between states, and to prevent disputes between states. States need to work together, and to do so they need to work through people such as ministers and diplomats. Such persons would be hampered in their functions if they could not feel safe in a foreign jurisdiction, or whilst travelling. Modern sovereign states are independent and equal. Their internal arrangements should not be subject to the scrutiny of other states, and their policy and public administration are not subject to interference from foreign courts. The concept of the dignity of a state and of its agents is one of the ways in which states maintain appropriate standards in their dealings with each other. International law requires that states settle their disputes by peaceful means, and to do this requires international mechanisms for the orderly management of disputes.

What is the disorderly management of a dispute? The final resort is to the use of armed force. The first stated purpose of the United Nations is “*to save succeeding generations from the scourge of war.*” In *The Charkieh (No 1)*<sup>119</sup> in 1873, a case in the Court of Admiralty regarding a collision in the Thames between two steamships the eponymous *The Charkieh*, which belonged to the Khedive of Egypt and *The Batavier*, Sir Robert Phillimore said:

*“The object of international law, in this as in other matters, is not to work injustice, not to prevent the enforcement of a just demand, but to substitute negotiations between governments, though they may be dilatory and the issue distant and uncertain, for the ordinary use of courts of justice in cases where such use would lessen the dignity or embarrass the functions of the representatives of a foreign state.”*

This same point has been made recently by Judges Higgins, Kooijmans and Buergenthal in their joint separate opinion in the *Arrest Warrant* case; at paragraph 75 they say:

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<sup>119</sup> LR 4 A&E 59 at 97.

*“The law of privileges and immunities, however, retains 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.”<sup>120</sup>*

Lord Browne-Wilkinson, one of the Judges in Pinochet (No.3), was a participant in the Princeton Project to formulate principles on universal jurisdiction. The other participants in the project were all academics, and the principles produced are aspirational. In dissenting from the Princeton Principles Lord Browne-Wilkinson said:

*“But the Princeton Principles propose that individual national courts should exercise [universal] jurisdiction against nationals of a state which has not agreed to such jurisdiction. Moreover the Principles do not recognise any form of sovereign immunity: Principle 5(1). If the law were to be so established, states antipathetic to Western powers would be likely to seize both active and retired officials and military personnel of such Western powers and stage a show trial for international crimes. Conversely, zealots in Western States might launch prosecutions against, for example, Islamic extremists for their terrorist activities. It is naïve to think that, in such cases, the national state of the accused would stand by and watch the trial proceed: resort to force would be more probable. In any event the fear of such legal actions would inhibit the use of peacekeeping forces when it is otherwise desirable and also the free interchange of diplomatic personnel. I believe that the adoption of such universal jurisdiction without preserving the existing concepts of immunity would be more likely to damage than to advance chances of international peace.”<sup>121</sup>*

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<sup>120</sup> Arrest Warrant case. ICJ. Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal, 128 ILR 119.

<sup>121</sup> [http://lapa.princeton.edu/hosteddocs/univ\\_jur.pdf](http://lapa.princeton.edu/hosteddocs/univ_jur.pdf) at page 49.

The underlying reason for immunity is that it is one of the mechanisms used by states to maintain peaceful co-existence. It assists in the development of friendly relations between states, and the settlement of international disputes between states by peaceful ends. If one state considers that an official act by another state is illegal, that is an international dispute, which should be dealt with on the international plane. The municipal law of one state, which is created by that state, is not competent to adjudicate upon the official decisions of another state, as that state is equal to and independent from the first state. For the courts of one state to decide whether another state's official acts are illegal or not is to introduce international politics into national courts. One function of international law is to manage disputes in an orderly manner, and state immunity assists by removing some disputes from the national to the international plane.

### **Conclusion.**

Some individuals are granted immunity as an aspect of the immunity of the state. It is granted because they are representative of the state to enable them to better perform their functions. It is not granted to individuals for their own benefit. The immunity protects the state, and therefore the persons or representatives who carry out that state's legitimate international functions must also be immune.

The justifications for immunity *ratione personae* and immunity *ratione materiae* are not identical. A person who is entitled to immunity *ratione personae* is completely immune during the time he is in office. This is to protect his person whilst he is in office, and to enable him to perform his functions. A high state official could not carry out his duties if he had to protect himself from arrest or defend proceedings. Such concerns would impede his ability to work. Immunity *ratione personae* protects the state by protecting the individual high state officials. Immunity *ratione materiae* protects the state and any protection thereby afforded to an individual is incidental. The purpose of immunity *ratione materiae* is to protect a state and state business from interference by other states. It protects state sovereignty and sovereign acts by preventing them being examined and questioned in the courts of other states.

The justifications for immunity are criticised, and not accepted as fair and desirable by everyone. Immunity is seen to be in conflict with the first Nuremberg principle that a person who commits an act which constitutes a crime under international law is responsible and therefore liable to punishment. There are continued attempts to prosecute those who are protected by immunity.

The following chapters will look at immunity *ratione personae* and *ratione materiae* to endeavour to establish the limits of this immunity. What kind of position has to be held, the persons who are immune, from what, and how long that immunity lasts?

## Immunity Ratione Personae.

*“All animals are equal, but some animals are more equal than others.”<sup>122</sup>*

Certain individuals enjoy immunity from the jurisdiction of other states because of the position they hold in their state. This is known as immunity ratione personae, or status immunity. It is accorded to those persons holding the highest positions within a state, and to those who are responsible for a state's international relations. This chapter will look at those individuals and the immunity they enjoy. All of the Judges in Pinochet (No. 3) agreed that if Pinochet had still been head of state he could not have been extradited because he would have been immune. Immunity which continues after leaving office and immunity and international crimes will be considered later in this thesis. This chapter will look at which high state officials are immune because of the position they hold, and the extent of that immunity.

### Head of State

The first official to whom immunity ratione personae applies is the person who holds the highest position in a state, the head of state. The head of state is a state official, but a very special one. He is the prime representative of the state, the personification of the state. A head of state holds that position wherever he is, and at all times. The immunity which a head of state enjoys attaches to him as a 'symbol' of the sovereignty of the state. As Oppenheim says he is *“The highest organ of the state, representing it, within and without its borders, in the totality of its relations, is the Head of State”*<sup>123</sup> At one time heads of state interacted with each other on the international plane, and international relations were the relationships which heads of state had with each other as individuals. Now international relations are conducted by foreign ministries as well as heads of state and heads of government, and many heads of state have only a formal constitutional role.

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<sup>122</sup> George Orwell. Animal Farm.

<sup>123</sup> Oppenheim's International Law. Footnote 17 at p. 1033.

A head of state can be either a monarch or a president. The head of state may be called by different titles, such as Chairman of the Council of State, and President of the Command Council of the Revolution. It is not the title which confers immunity, but the position which is held. The head of state may be an individual or a group of people, and he may or may not have political power. International law does not prescribe what sort of head a state should have, but howsoever constituted, that entity represents the state itself. He is the embodiment of the state, and if he were to be prosecuted the state would be insulted.

*“It would be an affront to the dignity and sovereignty of the state which he personifies and a denial of the equality of sovereign states to subject him to the jurisdiction of the municipal courts of another state, whether in respect of his public acts or private affairs. His person is inviolable; he is not liable to be arrested or detained on any ground whatever.”*<sup>124</sup>

The head of state is one of the persons who require no further accreditation to represent a state. He is one of the persons who hold full powers. Article 7 of the Vienna Convention of the Law of Treaties 1969 describes ‘full powers’ in relation to treaties and the persons who have those powers and says:

1. A person is considered as representing a state for the purpose of adopting or authenticating the text of a treaty or for the purpose of expressing the consent of the state to be bound by a treaty if:
  - (a) he produces appropriate full powers; or
  - (b) it appears from the practice of the states concerned or from other circumstances that their intention was to consider that person as representing the state for such purposes and to dispense with full powers.
2. In virtue of their functions and without having to produce full powers, the following are considered as representing their state:

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<sup>124</sup> Pinochet (No. 3) [2000] 1AC 147. Lord Millett at page 269 A – B.

- (a) Heads of state, heads of government and ministers for foreign affairs, for the purposes of performing all acts relating to the conclusion of a treaty;
- (b) Heads of diplomatic missions, for the purpose of adopting the text of a treaty between the accrediting state and the state to which they are accredited.

‘Full powers’ means a document emanating from the competent authority of a state designating a person or persons to represent the state for negotiating, adopting or authenticating the text of a treaty, for expressing the consent of the state to be bound by a treaty, or for accomplishing any other act with respect to a treaty. A head of state does not need such a document, and represents the state by virtue of his office. A head of state is also an internationally protected person as defined by article 1 of the Convention on Crimes Against Internationally Protected Persons 1973.

There is no international convention regarding the immunity of heads of state, and the immunity to be accorded to heads of state is customary international law. All the major commentators are agreed that heads of state are immune from criminal prosecution in foreign states. Oppenheim says that a head of state who is visiting a foreign state, with the knowledge and consent of its government “*is exempt*” from the criminal jurisdiction of the state.<sup>125</sup> Sir Arthur Watts writes that for criminal proceedings a head of state’s immunity “*is generally accepted as being absolute as regards the ordinary domestic criminal law of other States,*”<sup>126</sup> and Satow declares “*He is entitled to immunity – probably without exception – from criminal and civil jurisdiction.*”<sup>127</sup> All three are writing about a head of state who visits another state. The concept that one state should prosecute high state officials for offences committed in their own or a third state, other than as victorious belligerents, is a very recent idea.

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<sup>125</sup> Oppenheim’s International Law. Footnote 17 at p.1038.

<sup>126</sup> Sir Arthur Watts, “The Legal Position in International Law of Heads of State, Heads of Government and Foreign Ministers”, footnote 15 at p. 55.

<sup>127</sup> Satow, Guide to Diplomatic Practice (5<sup>th</sup>. edn, 1979) para. 2.1.

There has been very little litigation regarding the immunity from criminal prosecution of heads of state and other high state officials. The matter was not much considered until the 1990s, and there is much that remains uncertain.

One of the old cases often cited supporting the principle of the absolute immunity of heads of state is the Duke of Brunswick v King of Hanover,<sup>128</sup> in which Charles Lord Cottenham the then Lord Chancellor said:

*“The whole question seems to me to turn upon this, .... That a foreign Sovereign, coming into this country, cannot be made responsible here for an act done in his sovereign character in his own country; whether it be an act right or wrong, whether according to the constitution of that country or not”.*

Viewed from the perspective of the twenty-first century the facts of this case are very strange. This is a case which demonstrates the changes in international society over the last 150 years, and therefore has to be treated with care as to any principles enunciated. One of the very odd aspects of this case is that both parties have two characters or roles; they are both British subjects, as well as being foreign sovereigns.

After the breakdown of the Holy Roman Empire, Germany split into a number of small principalities, including Hanover and Brunswick. In 1830 the appellant Charles, was the reigning Duke of Brunswick, and he owned estates of considerable value in Brunswick, Hanover, France and elsewhere. He was very rich, but he was squandering his fortune. On 6 September 1830 his government was overthrown. Charles was not in Brunswick and he was prevented from returning. In 1830 Charles went to Hanover *“with a small retinue, with the intention of making a peaceable entry into his own dominions,”* and he was attacked by a party of armed men, and had to flee into Prussia to escape. He left behind him 24,000 crowns, or £4,500, which was a fortune at the time.

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<sup>128</sup> (1848) 2 HLC 1. 9 ER 993.



On 2 December 1830 the Germanic Diet of Confederation, which included William the Fourth, the then King of both Hanover and the UK, passed a decree, whereby Charles' brother William was invited to be the Duke of Brunswick. In February 1831, William the Fourth, and William Charles' brother published a declaration deposing Charles from the throne of the Duchy of Brunswick, and declaring William to be the Duke of Brunswick.

In 1833 His Majesty William the Fourth of Hanover, and William, Duke of Brunswick, deprived Charles of his property and appointed a guardian over him, they signed an instrument stating "*Certain facts, either notorious or sufficiently proved, have caused us to arrive at the conviction that his Highness Duke Charles is at this time wasting the fortune which he possesses ... we have consequently considered that the only method of preserving the fortune of his Highness Duke Charles from total ruin, is to appoint a guardian over him.*" A member of the English aristocracy, The Duke of Cambridge, who was also the Viceroy of Hanover, was appointed as guardian. After the death of William the Fourth, in June 1837, his brother, Ernest Augustus, who was an English peer, the Duke of Cumberland, became King of Hanover and was appointed Charles's guardian in place of the Duke of Cambridge. The Duke of Cambridge paid all the receipts from Charles's estates to him, including the money left in Hanover. As King Ernest Augustus continued to take all the receipts from the rents from what had been Charles' property.

The court was asked to declare that instruments declaring Charles, then Duke of Brunswick, as incompetent, and appointing the Duke of Cambridge, who became King Ernest I, as guardian of his fortune and property were absolutely void and of no effect. Charles wanted to regain control of his fortune.

The court decided that the English courts did not have jurisdiction over actions of a sovereign character, by foreign sovereign, in his own country. The court held that the King of Hanover, who was also a British subject, and was in England exercising his rights as such subject, could not be made to account in the English courts for acts of

state done by him in Hanover and elsewhere abroad, in virtue of his authority as a sovereign, and not as a British subject.

This is a very old case, and the facts are odd in that both parties were British citizens as well as being European royalty, and they were both England. The German States at that time were fragmented and small, and the European royals had many family ties. The fact that the head of one state was also a citizen of another state was not seen as a source of possible conflict of loyalty, rather that it created close relationships. The case is not considering a criminal prosecution, and certainly not a criminal prosecution for conduct on English territory. Now if a foreign sovereign were to be also a British citizen, and were to commit an offence in England, whilst here in a private capacity, it would be hard to argue that there would not be jurisdiction to prosecute him. If he committed an offence in his role as head of state the first question to be asked would be in what capacity was he in England? This case is important in that it enunciated neatly a principle that has been quoted with approval many times since, but the facts do not assist when considering modern cases.

There a number of cases in which criminal courts have accepted as customary international law the principle that a serving head of state is entitled to immunity from prosecution in other states. In the Pinochet case one matter that all the Judges were agreed upon is that a serving head of state is entitled, under customary international law, to complete immunity from criminal prosecution before the domestic courts of foreign states. If Pinochet has still been head of the state of Chile in 1988, when he visited London he could not have been arrested. As Lord Browne-Wilkinson said “*this immunity enjoyed by a head of state in power and an ambassador in post is a complete immunity attached to the person of the head of state or ambassador and rendering him immune from all actions or prosecutions,*”<sup>129</sup>

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<sup>129</sup> Pinochet (No. 3) [2000] 1 AC 147 at page 201E.

This was also confirmed by the ICJ in the Arrest Warrant Case,<sup>130</sup> at paragraph 51 of the judgment the court said, “*the Court would observe at the outset that in international law it is firmly established that, as also diplomatic and consular agents, certain holders of high-ranking office in a State, such as the Head of State, Head of Government and Minister for Foreign Affairs, enjoy immunities from jurisdiction in other States, both civil and criminal.*”

**Must be the Head of a State.**

To be entitled to immunity as a head of state the person afforded such immunity must be the representative of the sovereignty of the state. In *US v Noriega*,<sup>131</sup> Manuel Noriega claimed immunity as a head of state but he was not granted it by the US courts on the grounds that he had never been constitutional head of Panama.

During the 1970s and 1980s Noriega was chief of military intelligence in Panama, and he became commander of the Panamanian defence forces. He abused his position, and between 1982 and 1985 he conspired with a cartel of drug traffickers from Colombia to transport cocaine through the Panama Canal to the USA, and to transport ether for cocaine processing back from the United States.

On 4 February 1988 Noriega was indicted on drug related charges in the USA. At that time he was commander of the Panamanian Defence forces. Shortly thereafter, Panama’s president, Eric Delvalle, formally discharged Noriega from his military post. Noriega refused to accept the dismissal; he took over the government of Panama and called himself ‘President.’ Panama’s legislature ousted Delvalle from power, but the USA continued to acknowledge Delvalle as the constitutional leader of Panama. Later after a disputed presidential election in Panama, the USA recognised Guillermo Endara as Panama’s legitimate head of state.

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<sup>130</sup> 128 ILR 1.

<sup>131</sup> (1990) 746 F. Supp. 1506.

On 15 December 1989, Noriega publicly declared that a state of war existed between Panama and the USA. Within days President Bush directed US armed forces into combat in Panama for the stated purpose of “*safeguarding American lives, restoring democracy, preserving the Panama Canal Treaties, and seizing Noriega to face federal drug charges in the United States.*” There was an armed conflict during which Noriega lost effective control over Panama and he surrendered to US military officials on 3 January 1990, and he was taken to Miami to face the charges. In June 1990 he was convicted in the US District Court for Southern Florida of eight criminal charges arising out of his participation in an international conspiracy to import drugs into the United States.<sup>132</sup> Before the District Court Noriega argued that he was entitled to immunity as a head of state. That court noted that head of state immunity was grounded in customary international law, but said that in order to assert such immunity, a government official must be recognised as head of state and this had not happened with regard to General Noriega.

Noriega appealed to the US Court of Appeals. He claimed he was entitled to head of state immunity, on the ground that he had served as the de facto, if not the de jure, leader of Panama. On 7 July 1997 that court gave judgment<sup>133</sup> and upheld his convictions. The court said it had to apply principles of customary international law, but in accordance with the law and procedures of the United States. The US Court of Appeal explained the development of the law relating to state immunity in the USA. In 1812 the United States Supreme Court held in the case of the *Schooner Exchange v McFaddon* that nations had agreed to “*the exemption of the person of the sovereign from arrest or detention within a foreign territory.*” The principles of international comity outlined in the *Schooner Exchange* case led to the development of the general doctrine of foreign sovereign immunity under which the United States judiciary deferred to the executive as to whether to accept jurisdiction over actions against foreign states. Nations concerned about their exposure to judicial proceedings in the United States “*by appropriate representations, sought recognition by the State Department of their claim of immunity,*

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<sup>132</sup> US v Noriega 99 ILR 143.

<sup>133</sup> United States of America v Noriega 121 ILR 591.

*and asked that the State Department advise the Attorney General of the claim of immunity and that the Attorney General instruct the United States Attorney for the relevant district to file in the district court the appropriate suggestion of immunity.”* And as this doctrine emerged the “*courts consistently deferred to the decisions of the political branches – in particular those of the Executive Branch – on whether to take jurisdiction over actions against foreign sovereigns and their instrumentalities*”

In 1976 the US Congress passed the Foreign Sovereign Immunities Act (FSIA) which “*contains a comprehensive set of legal standards governing the claims of immunity in every civil action against a foreign state or its political subdivisions, agencies, or instrumentalities,*” and codified the State Department’s general criteria for making suggestions of immunity. The FSIA transferred responsibility for case by case application of these principles from the executive to the judiciary. Because the FSIA addressed neither head of state immunity, or foreign sovereign immunity in the criminal context, the US Court of Appeals had to decide whether head of state immunity applied to General Noriega. That court applied the principles and procedures outlined in the *Schooner Exchange*, and the following line of cases and the court decided it must look to the executive branch for the propriety of Noriega’s claim. The court said that by pursuing and capturing Noriega, the executive had clearly demonstrated its view that he should be denied head of state immunity. The court added that were it to make an independent determination, it was unlikely that the Noriega’s head of state immunity claim would prevail given that he never served as the constitutional leader of Panama, that Panama had not sought immunity on his behalf, and that the charges related to his private pursuit of personal enrichment.

In this case the American courts interpret customary international law in their own judicial system, applying principles of international law. The US Court of Appeal was influenced by the fact that the executive had pursued and arrested Noriega, clearly demonstrating that the executive did not believe he was immune. The executive should observe state immunity. If a person is entitled to immunity, he should not be arrested. The fact that Panama did not claim immunity for Noriega also weighed with the court.

Panama may have had other very good reasons for not wanting to claim immunity for him, such not wanting a dictator back. But any immunity, if it existed, was that of the State of Panama, and Panama did not claim it. Finally the court said that the acts for which he was prosecuted were private rather than public acts, and therefore did not carry immunity. This question of continuing immunity for official acts, immunity *ratione materiae* will be considered in the next chapter. Noriega was refused immunity because he never had been entitled to it, if he had been entitled immunity was not claimed by Panama on his behalf, and any immunity would not continue for his private actions.

In the case of *Re Honecker*<sup>134</sup> the courts of the then Federal Republic of Germany had to decide whether the Chairman of the Council of State of the German Democratic Republic was entitled to immunity. In this case the Second Criminal Chamber of the Federal Supreme Court of the Federal Republic of Germany gave judgment on 14 December 1984. Between 1945 and 1990 Germany was partitioned, and comprised two sovereign States, the German Democratic Republic (East Germany) and the Federal Republic of Germany (West Germany). The two states embraced very different ideologies and were antagonistic to each other. East Germany would not allow its citizens to travel to West Germany. In 1984 Erich Honecker was the Chairman of the Council of State of the German Democratic Republic. A man who had been held as a prisoner in East Germany, instituted criminal proceedings in West Germany against Honecker as Chairman of the Council of State for 'the deprivation of liberty'. The Federal Public Prosecutor applied to the Supreme Court for determination of the competent court. The Supreme Court said the application could not be allowed as the Chairman of the Council of State of the German Democratic Republic was entitled to immunity in accordance with the rules of customary international law. The court found that the Chairman of the Council of State enjoyed the privileges and exemptions to which any head of state was entitled including immunity. The court said that the criminal proceedings against Honecker, and investigations by the police or public prosecutor were inadmissible. In a previous case<sup>135</sup> the Federal Supreme Court accepted

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<sup>134</sup> 80 ILR 365.

<sup>135</sup> 78 ILR 150 at 165.

that East Germany was a sovereign state and therefore the head of East Germany was entitled to immunity from criminal prosecution.

To establish whether the Chairman of the Council of State of East Germany was head of state the Federal Supreme Court looked at the internal law of East Germany, and also at the conduct of West Germany. The Constitution of East Germany provided that the Council of State as a whole constituted the supreme authority of that state. The Chairman of the Council of State presided over its work, nominated the authorised representatives of East Germany in other states and received the credentials and recall of the representatives of other states accredited to East Germany. The Supreme Court deduced from this that the Chairman of the Council of State was clearly looked upon as head of state in East Germany. The Court also said this was also evident from the conduct of the West German Government in its bilateral practice in relation to East Germany since the entry into force of the Treaty on the Basis of Relations of 21 December 1972.

The Supreme Court was satisfied that the Chairman of the Council of State was the head of a foreign state, and that as such Honecker enjoyed those privileges and exemptions to which a head of state is entitled, and the court stated that the foremost of which was immunity. This meant that no criminal proceedings could be instituted against him, and any inquiry or investigation by the police or public prosecutor was therefore inadmissible.<sup>136</sup> In making its decision the court looked at the role played by the Chairman of the Council of State in East Germany and also the conduct of the West German government towards East Germany which demonstrated that it accepted the Chairman of the Council of State as the head of the East German state.

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<sup>136</sup> Following the re-unification of Germany, Honecker initially left the country but later returned and was charged under the law of the Federal Republic of Germany (FRG) with various counts of unlawful homicide, on the basis that he had been responsible between 1961 and 1980 for ordering numerous measures establishing the regime in force at the Berlin wall, including the use of firearms to prevent escapes to the West. Honecker Prosecution Case 100 ILR 393.

The French Courts also considered the question of who is head of a state in the case of Gaddafi.<sup>137</sup> On 19 September 1989 a DC 10 aircraft operated by UTA airlines exploded above the desert of Tenere in Chad. Everyone on board, one hundred and fifty six passengers and fourteen crew members, died. A number of those who died were French citizens, including Laurence de Boery, Beatrice de Boery's sister. Traces of explosives were found in the wreckage, and evidence was found linking the explosion to Libya.

An investigation was opened and on 12 June 1988 six Libyan nationals were ordered to be tried before the Court of Assizes. The defendants were Colonel Gaddafi's brother-in-law, who was head of the Libyan secret service, four officers in the secret service, and an official of the Libyan embassy in Brazzaville. They were accused of murder and destruction of property by explosive substance causing death and involving a terrorist undertaking. On 10 March 1999 the six defendants were convicted in their absence, and sentenced them to life imprisonment.

After this judgment on 16 June 1999, Beatrice de Boery and the Association S.O.S. Attentats, an organisation which pursued the perpetrators of terrorist attacks, and assisted relatives of the victims, applied for criminal proceedings to be commenced in the French courts against Colonel Gaddafi, President of the Command Council of the Revolution in Libya, for complicity in murder and the destruction of property by an explosive substance, causing death and involving a terrorist undertaking. They said the involvement of Colonel Gaddafi was established by the following facts:

1. The attack was committed by Libyan officials with the logistical support of the state, thereby giving rise to the assumption that the Libyan secret services, directed by Colonel Gaddafi's brother-in-law, were operating with his backing.
2. Abdallah Elazragh left the Libyan embassy in Brazzaville suddenly without any objection on the part of the Libyan Minister for Foreign Affairs.

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<sup>137</sup> 125 ILR 490.



3. The persons accused of involvement in the attack enjoyed special protection, notwithstanding the arrest warrants which had been issued against them.
4. The Libyan authorities submitted a forged file to the examining magistrate, to establish that one of the persons concerned was dead. This involved co-ordination between a number of Libyan state departments which could only have been directed by the head of state.
5. Two of the officials accused of participation were granted exceptional promotion to the rank of lieutenant-colonel, which could only have been decided on the authority of Colonel Gaddafi himself, as a reward for the crime committed.

They were accusing Colonel Gaddafi, as head of state, of being involved in terrorism and of using the apparatus of the state for terrorism. The examining magistrate opened a criminal enquiry and the Ministre Public lodged an appeal against the decision, on the basis that the Libyan leader was entitled to jurisdictional immunity.

The Court of Appeal of Paris dismissed the appeal on 20 October 2000. That court decided that the French courts had jurisdiction as the victims were of French nationality. The Court then considered whether Colonel Gaddafi was the head of the Libyan state, and decided that he was. The court looked at Colonel Gaddafi's official position in Libya as president of the "Command Council of the Revolution", the highest authority in the Libyan Republic, in accordance with the constitutional proclamation giving him the title of "Guide of the Grand Revolution of 1 September" and decided he was effectively head of state. The court also looked at what he did, and decided that he performed effectively and continuously the normal functions reserved for heads of state. Internally he was the Supreme Commander of the Army, he had the power to shape the general policy of the country, and he presided over large national demonstrations. Internationally he participated at summit meetings of Arab or African heads of state, and he was President of the Council of the Community of States of Sahel and the Sahara, and he received the representatives of foreign states, and the letters of accreditation of their ambassadors. The court was taking notice of the fact he was the

highest state official in Libya, and he was responsible for international relations with Libya. The court decided he was pre-eminent within the Libyan State, and was head of state. The court was looking his position, and at what he did, rather than his title.

The Paris Court of Appeal then examined whether Colonel Gaddafi, as head of the state of Libya, was entitled to immunity. The court noted that the immunity from jurisdiction of a foreign head of state was not guaranteed under French legislation, or by an international treaty to which France was a party, but that such immunity was an accepted part of customary international law which was binding on France.

The court then went on to consider the extent of the immunity afforded to incumbent heads of state and said that, whilst such immunity had originally been absolute, since World War II it had become subject to limitations. A series of international conventions ratified by France precluded reliance on jurisdictional immunity by heads of state in proceedings before international tribunals for crimes against humanity, genocide and war crimes. The court was of the opinion that these conventions, rather than constituting limited exceptions to absolute immunity, reflected the desire of the international community to punish the most serious crimes, even where they had been committed by a head of state in the performance of his duties. The court described such serious crimes as '*international crimes contrary to the conscience of humanity*.' The court said that combined effect of the Preamble to, and Article 22 of, the Statute of the ICC, was to recognise that it was the duty of signatories to the ICC convention to exercise their jurisdiction over international crimes, which were not limited to those specifically mentioned in the convention, even where the person accused had the official status of a head of state. The court said that the effect of these treaty provisions, and recent judicial decisions in particular Pinochet and Noriega constituted proof of a general practice accepted as law by all states, including France, according to which immunity from prosecution only covered those public acts performed by a head of state if they were not to be regarded as international crimes. The court decided that it followed that immunity could not cover acts of complicity in murder and the destruction of property by terrorist

action, where a head of state ordered the destruction of a passenger aircraft carrying civilians.

This was muddled reasoning. The limitation of immunity before international tribunals is not evidence of an international consensus to limit immunity before national courts, and both the cases of Pinochet and Noriega did not relate to incumbent heads of State.

The Procureur General appealed to the Court of Cassation against this judgment, and on 13 March 2001 the Court of Cassation allowed the appeal and terminated the proceedings against Colonel Gaddafi. The Court of Cassation accepted that Colonel Gaddafi was head of state. The Court of Cassation gave a very short judgment and said that it had considered the general principles of international law and “*international custom precludes heads of State in office being the subject of proceedings before the criminal courts of a foreign state in the absence of specific provisions to the contrary binding on the parties concerned*”. The Court of Cassation considered that the Paris Court of Appeal misconstrued the principle of the immunity of heads of state as the alleged crime, however serious, did not constitute one of the exceptions to the principle of jurisdictional immunity of foreign heads of state in office.

It is submitted that the Court of Cassation is correct that Colonel Gaddafi was entitled to immunity as head of the state of Libya, and correct in its statement that customary international law grants immunity to heads of state in office in the absence of specific provisions to the contrary binding the parties concerned. But by saying that the alleged crimes were not one of the exceptions to the principle of immunity, implies that there are crimes which are exceptions to that principle. This is not the case; the immunity of serving heads of state from the jurisdiction of foreign states is absolute. This was confirmed by the ICJ in the Arrest Warrant Case as explained earlier. The only exception is transfer to an international tribunal.

The question of whether a serving head of state was entitled to immunity was considered by the Senior District Judge, Tim Workman, sitting at Bow Street Magistrates’ Court on

14 January 2004, (unreported) Peter Tatchell, a reporter, applied for a warrant for the arrest of Robert Mugabe, the serving head of government of Zimbabwe.<sup>138</sup> The allegation was of committing offences of official torture in Zimbabwe. The Senior District Judge gave a short written judgment declining to issue a warrant of arrest on the grounds that Mr Mugabe enjoyed state immunity. Judge Workman said:

*“The issue to which I have directed my mind is whether President Mugabe has immunity from prosecution as a Head of State. It is accepted that he is presently the Head of State of Zimbabwe. Mr Tatchell has argued persuasively that the doctrine of State immunity is not one which sits comfortably with the State’s obligation under international law to prosecute grave crimes of universal jurisdiction. Mr Tatchell has sought to persuade me that the principle of universal jurisdiction should be extended to override the immunity afforded to a Head of State. Whilst international law evolves over a period of time international customary law which is embodied in our Common Law currently provides absolute immunity to any Head of State. In addition to the Common Law our State Immunity Act of 1978 which extends the Diplomatic Privileges Act of 1964 provides for immunity from the criminal jurisdiction for any Head of State. I am satisfied that Robert Mugabe is President and Head of State of Zimbabwe and is entitled whilst he is Head of State to that immunity. He is not liable to any form of arrest or detention and I am therefore unable to issue the warrant that has been applied for.”*

A head of state is a special person who is entitled to immunity as a reflection of his pre-eminence in the state, but what about other high state officials? In the Pinochet case Lord Millet was of the opinion that such immunity attached only to the head of state, and not the head of government. Lord Millet said in Pinochet (No. 3) at 268H:

*“Immunity *ratione personae* ... is only narrowly available. ... It is not available to serving heads of government who are not also heads of state. ... It would have been available to Hitler but not to Mussolini or Tojo.”*

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<sup>138</sup> Constitution of Zimbabwe. Chapter IV, para 27. There shall be a President who shall be Head of State and Head of Government and Commander-in-Chief of the Defence Forces.

Immunity *ratione personae* is only narrowly available, but not as narrowly as Lord Millet believed. The next section of this chapter will consider heads of government and any immunity from the criminal jurisdiction of foreign courts to which they are entitled. Again there have not been many cases in national courts regarding heads of government being prosecuted before the national courts of foreign states.

### **The Head of Government**

Not all heads of state are also head of government, although some, such as the President of the USA are both head of state and head of government. In the UK, the Queen is the head of state, and as such she has a constitutional role; and the Prime Minister is the head of government. Other states use other titles for their head of government; it is the role that matters, not the title.

The head of government is a person who has full powers as defined by article 7 of the Vienna Convention on Treaties, and he does not have to furnish any evidence of his authority to legally bind his state. He is also an internationally protected person, as defined by the Convention on Crimes Against Internationally Protected persons 1973. These conventions recognise the importance of the head of government in the international arena.

In paragraph 51 of the Arrest Warrant case judgment the ICJ observed that the head of government is one of the holders of high ranking office in a state who enjoy immunity from both criminal and civil jurisdiction in other states, and that the purpose of such immunity is to enable them to perform their function.

In 2002 the Belgian Courts had to consider the immunity of a serving head of government in the case of *Re Sharon and Yaron*.<sup>139</sup> Between the sixteenth and eighteenth of September 1982 massacres took place in Palestinian refugee camps in

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<sup>139</sup> 127 ILR 110.

Lebanon. These massacres were attributed to Lebanese Phalangist<sup>140</sup> militias, and occurred during an international armed conflict, when Israeli armed forces invaded part of Lebanon. Ariel Sharon was Minister of Defence of Israel at the time, and Amos Yaron was divisional commander of forces operating at the entrance to the camps.

In 2001 twenty-four non residents of Palestinian and Lebanese origin, brought an action before the Belgian courts, on the basis of personal injuries suffered, or loss of close family members or property, in the attacks on the refugee camps. The allegation was that Ariel Sharon and Amos Yaron were complicit in the massacres, and that they failed to intervene to stop them, and therefore they were guilty of serious violations of international humanitarian law. Section 7 of the Belgian Law 1993, granted Belgian courts universal jurisdiction over a series of violations of international humanitarian law, in particular war crimes, genocide and crimes against humanity, irrespective of the place where the crimes were committed. This law gave Belgian courts jurisdiction over foreigners alleged to have committed such crimes abroad.

At the time of the proceedings Ariel Sharon was the Prime Minister of the State of Israel, and Amos Yaron was the Director General at the Ministry for National Defence of the State of Israel.

On 26 June 2002 the Court of Appeal in Brussels held that the proceedings were inadmissible under the Belgian criminal procedure rules, as the alleged perpetrators were not in Belgium, and there was no evidence they were on the point of arriving in Belgium. The applicants appealed to the Court of Cassation, and that court found that the accused did not have to be present in Belgium for the proceedings to be instigated. That court also found that customary international law prohibited heads of state and government from being the subject of proceedings before the criminal courts of foreign states, in the absence of contrary international treaty provisions binding upon the states concerned. The court considered the Genocide Convention, article 27(2) Of the Rome Statute of the International Criminal Court, the Geneva Conventions and Additional

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<sup>140</sup> A Lebanese Christian paramilitary group.

protocols thereto, and decided that none of these treaties had affected the customary international law immunity of heads of state or government from the jurisdiction of other states. The court said:

*“if this provision of Belgian municipal law were to be interpreted as setting aside the principle of immunity under customary international criminal law, it would thereby violate that principle. The rule of municipal law cannot therefore have that objective and must instead be understood as only excluding the possibility that the official capacity of a person should provide a basis for criminal non-accountability for the international crimes enumerated in that Law.”*

The court held that Ariel Sharon as Prime Minister of Israel was entitled to immunity and the proceedings against him were inadmissible. That court found that the proceedings against Amos Yaron were admissible, as he was not head of state or government.<sup>141</sup> The question of whether he was entitled to immunity *ratione personae* as Director General at the Israeli Ministry of Defence was not addressed by the Belgian Court of Cassation. Whether a defence minister is entitled to state immunity will be examined later in this chapter.

Another attempt was made to issue proceedings against Ariel Sharon in a foreign jurisdiction, in England, on 15 July 2003 at Bow Street Magistrates' Court (unreported). David Anthony Hurndall, the father of Tom Hurndall made an application for a warrant for the arrest of Ariel Sharon, who was still the Israeli Prime Minister at that time. Mr Sharon was on an official visit to London the purpose of which was *“to impress on Mr. Sharon the need for concessions on the “road map” to peace, while Mr Sharon will be seeking to rebuild Israel’s relationship”* with the UK.<sup>142</sup> Tom Hurndall, a young photographer, was shot in Rafah, Gaza on 11 April 2003 by Israeli soldiers. He later

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<sup>141</sup> In April 2003 the Belgian Parliament amended section 5(3) of the Law of 1993 so as to provide that “the international immunity attached to the official capacity of a person shall not prevent the application of this Law, within the limits laid down by international law,” thereby requiring the Belgian courts to respect the rules of customary international law on jurisdictional immunity.

<sup>142</sup> The Telegraph 14 July 2003.

died of his injuries. Mr David Hurndall was asking for a warrant of arrest for Mr Sharon under the Geneva Conventions Act 1957 for grave breaches of Geneva Convention IV. The application was made on the basis that Israeli soldiers were being protected from prosecution, and that this culture of impunity was the responsibility of the Israeli Prime Minister who was thereby implicated in the incident.

Senior District Judge Tim Workman declined to issue a warrant and said in his reasons.

*“While I have great sympathy for Mr Hurndall and his family, I am unable to link the tragic events of 22 April with Mr Sharon himself or identify an offence which the Prime Minister, in person, might have committed. I am also satisfied that Mr Sharon is a Head of State and is entitled to immunity from prosecution. I am satisfied that the issue of a warrant is part of the prosecution process whether with or without bail, and even if I had been persuaded that there was sufficient evidence linking Mr Sharon with an offence I would have declined to have issued an arrest warrant on the ground that Mr Sharon is Head of State and entitled to customary international law immunity.”*

The applicant tried to distinguish this case from that of the Arrest Warrant case by saying that if a warrant with bail were issued, then Mr Sharon could still perform his functions, and it would not interfere with his official duties. The applicant also argued that the court should commence proceedings first, and then Mr. Sharon should claim immunity. Neither argument was successful. At paragraph 70 of the judgment in the Arrest Warrant case the ICJ said that the mere issuance of the warrant was a breach of the international obligation owed by Belgium to the Congo, and the Congo was required to cancel the warrant. Judge Workman considered that issuing a warrant was part of the prosecution process, and that under customary international law Mr Sharon was entitled to complete immunity. If a warrant had been issued, even if Mr Sharon had immediately claimed immunity, the time and effort required for him to do that would have been an interference with the official duties he was undertaking.



The head of government is entitled to state immunity *ratione personae* as well as the head of state. What about other high state officials, are they entitled to immunity?

### **The Foreign Minister**

The foreign minister can act internationally on behalf of his state. He is the head of the Ministry for Foreign Affairs, the department of a state which communicates with other states, and he is in charge of his state's ambassadors and consuls. Under article 10 of the Vienna Convention on Diplomatic Relations the Ministry of Foreign Affairs has to be notified of the appointment of members of diplomatic missions, their arrival and departure, and by article 41.2, unless states agree otherwise, all official diplomatic business is conducted with the foreign ministry of the receiving state. A foreign minister is one of the persons who hold full powers, and needs no further accreditation to represent a state for the purposes of adopting or authenticating the text of a treaty.<sup>143</sup> Statements made by a foreign minister on behalf of his government are binding upon his state.<sup>144</sup> A foreign minister is an internationally protected person within the meaning of the Convention on Crimes Against Internationally Protected Persons. If a crime were committed against him it would constitute a threat to the maintenance of normal international relations.

Despite the fact that the foreign minister is obviously at the heart of diplomatic and international relations, there was doubt about his immunity *ratione personae*, which was resolved by the ICJ in the Arrest Warrant Case.<sup>145</sup> This case was brought by the Congo against Belgium “*concerning the arrest warrant of 11 April 2000.*”

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<sup>143</sup> Article 7 Vienna Convention of the Law of Treaties 1969.

<sup>144</sup> PCIJ The case concerning the Legal Status of Eastern Greenland. A recorded and minuted declaration made by Mr Ihlen, the Norwegian Foreign Minister on 22 July 1919 informing the Danish Minister that the Norwegian Government would not make any difficulties in the settlement of the recognition of Danish sovereignty over Eastern Greenland was binding upon Norway.

<sup>145</sup> 128 ILR 1.

This warrant was issued by an investigating judge of the Brussels tribunal de premiere instance for the arrest of Mr. Yerodia who was then the serving minister for foreign affairs in the Congo. Belgian nationals and residents made complaints alleging that Mr Yerodia had perpetrated international crimes in the Congo. They asked the investigating judge to initiate proceedings against Mr Yerodia. On 11 April 2002 the investigating judge issued a warrant for the arrest Mr Yerodia. The warrant was described as “*an international arrest warrant in absentia*” as Mr Yerodia was not in Belgium. The warrant charged Mr Yerodia with grave breaches of the Geneva Conventions by making speeches inciting racial hatred and racially motivated attacks. The speeches were alleged to have resulted in several hundred deaths, the internment of Tutsi’s, summary executions, arbitrary arrests and unfair trials.

It was agreed by the parties before the ICJ that the alleged acts were committed outside Belgian territory, that Mr Yerodia was not a Belgian national, and that Mr Yerodia was not on Belgian territory at the time that the arrest warrant was issued and circulated, and no Belgian nationals were victims of the violence that was said to have resulted from Mr Yerodia’s alleged offences.

On 7 June 2000 the arrest warrant was transmitted to Interpol, the International Criminal Police Organisation. The function of Interpol is to enhance and facilitate cross-border criminal police co-operation worldwide. Interpol circulated the warrant internationally by way of a ‘Green Notice’, which is a notice which asks for States to locate suspects, not to arrest them. A ‘Red Notice’ which requests the arrest of an individual with a view to extradition was not issued. The warrant was transmitted to the Congo on 7 June 2000, and was received by the Congolese authorities on 12 July 2000. On 17 October 2000 the Congo instituted proceedings in the ICJ requesting the court to declare that Belgium shall annul the international arrest warrant issued on 11 April 2000.

In November 2000 the court was informed that, following a ministerial reshuffle in the Congo, Mr Yerodia was no longer foreign minister, and that he was minister for education. A new government was formed in the Congo in mid-April 2001 and Mr

Yerodia was not appointed as a minister. On 12 September 2001 Belgium requested Interpol to issue a Red Notice in respect of Mr Yerodia. That was after Mr Yerodia ceased to be a minister, but whilst the proceedings were still pending before the ICJ. On 19 October 2001 Belgium informed the court that Interpol had requested additional information, and no Red Notice had been circulated. When the ICJ gave judgment on 14 February 2002 Mr Yerodia did not hold ministerial office in the Congo.

The Congo initially made the claim against Belgium on two grounds. First that universal jurisdiction breached the principle that a state should not exercise its authority on another state, and the principle of sovereign authority; and secondly that non recognition of the immunity of the foreign minister was a breach of diplomatic immunity.

These submissions were refined as the proceedings continued, the Congo no longer claimed that Belgium wrongly conferred upon itself universal jurisdiction in absentia, and confined itself to arguing that the arrest warrant was unlawful because it violated the immunity from jurisdiction of its minister for foreign affairs. In its written and oral submission to the court the Congo contended that the issue of the warrant was a breach of customary international law, rather than a breach of diplomatic immunity.

The Congo requested the ICJ to find that by issuing and internationally circulating the arrest warrant, Belgium committed a violation of the rule of customary international law concerning the absolute inviolability and immunity from criminal process of incumbent foreign ministers and that Belgium thereby violated the principle of sovereign immunity among states. The Congo said that a formal finding by the court of the unlawfulness of the act would constitute an appropriate form of satisfaction, which would provide reparation for the moral injury caused to the Congo. The Congo also requested the ICJ to declare that any state, including Belgium, was precluded from executing the warrant, because both the issue of the warrant and its international circulation were violations of international law. The Congo asked the court to require Belgium to recall and cancel the arrest warrant, and to inform the foreign authorities to whom the warrant was circulated,

that Belgium renounced its request for their co-operation in executing the unlawful warrant.

Belgium requested the court, as a preliminary matter, to declare that the Court lacked jurisdiction and/or that the application was inadmissible; and if the court concluded that it did have jurisdiction to reject the submission of the Congo on the merits of the case, and to dismiss the application.

Although Belgium did not deny that a legal dispute existed between itself and the Congo when the application was filed, Belgium made much of the change in circumstances regarding Mr Yerodia, and made preliminary objections to the proceedings. The ICJ gave short shrift to all of these arguments saying that it had jurisdiction, and that the application was not moot.

The ICJ said that logically the question of immunity should be addressed after a determination of jurisdiction, since it is only where a state has jurisdiction under international law, in relation to a particular matter, that there can be any question of immunities in regard to the exercise of that jurisdiction. As the ICJ is limited to answering the matter in dispute between the parties, the court decided that it would address the question, “*whether, assuming that it had jurisdiction under international law to issue and circulate the arrest warrant of 11 April 2000, Belgium in so doing violated the immunities of the then Minister for Foreign Affairs of the Congo?*”

The Congo maintained a minister for foreign affairs in office is entitled to an absolute or complete immunity from criminal process, and that this immunity is subject to no exception. The Congo contended that no criminal prosecution may be brought against a minister for foreign affairs in a foreign court so long as he or she remains in office, and that any finding of criminal responsibility by a domestic court in a foreign country, or any act of investigation undertaken with a view to bringing him or her to court, would contravene the principle of immunity from jurisdiction. According to the Congo, the basis of such criminal immunity is purely functional, and immunity is accorded under

customary international law simply in order to enable the foreign state representative enjoying such immunity to perform his or her functions freely without hindrance. The Congo added that the immunity accorded to ministers for foreign affairs when in office covers all their acts, including any committed before they took office, and that it is irrelevant whether the acts done whilst in office may be characterised as official acts, or not.

The Congo did not deny the existence of a principle of international criminal law, that the accused's official capacity at the time of the acts cannot, before any court, whether domestic or international, constitute a "*ground of exemption from his criminal responsibility or a ground of mitigation of sentence.*" The Congo stressed that the fact that an immunity might bar prosecution before a specific court or over a specific period does not mean that the same prosecution cannot be brought, if appropriate, before another court which is not bound by that immunity, or at another time when the immunity need no longer be taken into account. The Congo concluded that immunity does not mean impunity.

Belgium maintained that while ministers for foreign affairs generally enjoy an immunity from jurisdiction before the courts of a foreign state, such immunity applies only to acts carried out in the course of their official functions, and cannot protect such persons in respect of private acts or when they are acting otherwise than in the performance of their official functions. Belgium said that Mr Yerodia enjoyed no immunity at the time when he was alleged to have committed the alleged crimes, there was no evidence that he was acting in any official capacity, and the warrant was issued against him personally.

The starting point for the ICJ in its judgement was that there is a firmly established rule of customary international law that certain holders of high-ranking office in a state, such as the head of state, the head of government and the minister for foreign affairs, enjoy immunities from jurisdiction in other states, both civil and criminal. The court then went on to examine the immunity from criminal jurisdiction and the inviolability of an incumbent minister for foreign affairs.

The court examined the Vienna Conventions on Diplomatic and Consular Relations and the New York Convention on Special Missions and said that these conventions were useful guidance on certain aspects of the questions of immunities, but as they did not contain any provision specifically defining the immunities enjoyed by ministers of foreign affairs, the court had to decide the questions relating to the immunities of such ministers on the basis of customary international law.

The court considered the preamble to the Vienna Conventions on Diplomatic Privileges and Immunities stating that the purpose of diplomatic privileges and immunities is “*to ensure the efficient performance of the functions of diplomatic missions as representing States*”, and the corresponding provision in the Vienna Convention on Consular Relations. From this the court deduced that the immunities accorded to ministers for foreign affairs are similarly not granted for their personal benefit, but to ensure the effective performance of their functions on behalf of their respective states. The court said that 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.

As explained earlier in this thesis the court then went on to look at the functions expected of a foreign minister, and how he carries out his duties. The court looked at the role and what a foreign minister is required to do. The court then observed that a minister for foreign affairs occupies a similar position to a head of state, or a head of government, as he is responsible for the conduct of his state’s relations with all other states, and is recognised under international law as representative of the state solely by virtue of his office. The court noted that a foreign minister does not require letters of credence, that it is generally the minister who determines the authority to be conferred upon diplomatic agents and countersigns their letters of credence, and that it is to the minister for foreign affairs that charges d’affaires are accredited.

Here the ICJ is looking not just at the functions performed by a foreign minister, but also at the position he holds within a state, the power of the state which he wields, and

the fact that a foreign minister has a special status in international society and that this is acknowledged in international law.

At paragraph 54 of its judgment the Court concluded 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.”*

Then in paragraph 55 the court goes on to explain how wide this immunity is:

1. No distinction can be drawn between acts performed by a minister for foreign affairs in an “official” capacity, and those performed in a “private” capacity
2. There is no distinction between acts performed before the person concerned assumed office and acts committed during the period of the office.

This is because if a minister for foreign affairs is arrested in another state on a criminal charge, he or she is clearly prevented from exercising the functions of his or her office. The risk of arrest may prevent a foreign minister from freely travelling internationally when required to do so.

The ICJ then considered whether there is an exception to this immunity for war crimes or crimes against humanity, and decided there is not. The court explained that this immunity does not mean impunity from prosecution, and described the circumstances in which a former foreign minister may be prosecuted for such offences. This aspect of the judgment is considered in a following chapter of this thesis.

The next question for the court was whether the issuance of the arrest warrant, and the international circulation of the warrant, violated the rules governing the immunity from

criminal jurisdiction of incumbent foreign ministers. The Congo asserted that the mere issuance of the warrant constituted a coercive measure, even if it was not executed. That the international circulation of the warrant was a fundamental infringement of the Congo's sovereign rights, as it significantly restricted its foreign minister who did not have "*full and free exercise*" of his international negotiation and representation functions.

The court considered the nature of the warrant and noted that it was intended to enable the arrest on Belgian territory of an incumbent foreign minister, and also the purpose of the warrant which was an order to all bailiffs and public authorities to execute the arrest warrant. The court accepted that the warrant did make an exception for the case of an official visit, and that Mr Yerodia never suffered arrest in Belgium, but said that given the nature and purpose of the warrant, its mere issue violated the immunity which Mr Yerodia enjoyed as the Congo's incumbent minister for foreign affairs. The court concluded that the issue of the warrant constituted a violation of an obligation of Belgium towards the Congo, in that it failed to respect the immunity of that minister and, more particularly, infringed the immunity from criminal jurisdiction and the inviolability then enjoyed by him under international law.

Belgium admitted that the purpose of the international circulation of the disputed warrant was to establish a legal basis for the arrest of Mr Yerodia abroad and his subsequent extradition to Belgium, but argued that there were further preliminary steps to be taken, and that no Interpol red notice was requested until Mr Yerodia no longer held ministerial office.

The court did not agree with this view. The court said that given the nature and purpose of the warrant its international circulation by the Belgian authorities:

1. effectively infringed Mr Yerodia's immunity as the Congo's incumbent minister for foreign affairs and



2. was further more liable to affect the Congo's conduct of its international relations.

Since Mr Yerodia, as foreign minister, was required to travel in the performance of his duties, the international circulation of the warrant, even in the absence of further steps by Belgium, could have resulted in his arrest while abroad. The court noted that Mr Yerodia on applying for a visa to go to two countries learned that he ran the risk of being arrested as a result of that arrest warrant issued against him by Belgium, and that the arrest warrant had forced him to travel by roundabout routes. The court concluded that the circulation of the warrant, whether or not it significantly interfered with Mr Yerodia's diplomatic activity, constituted a violation of an obligation of Belgium towards the Congo, in that it failed to respect the immunity of the incumbent minister for foreign affairs of the Congo and, more particularly, infringed the immunity from criminal jurisdiction and the inviolability then enjoyed by him under international law.

In this judgment the court is unequivocal in its finding that an incumbent foreign minister is absolutely inviolable and immune. The justification for the minister having immunity is functional, but does not require there to be an actual interference with his function. The fact that there was a possibility that he could be arrested, and that this was a factor he had to consider, was sufficient to make the issuing and circulating of the warrant a breach of his immunity.

The Congo requested the Court:

1. to make a formal finding that the issue and international circulation of the warrant, and said that this finding in itself would constitute an appropriate form of satisfaction and would provide reparation for the consequent moral injury.
2. to find that the violations of international law underlying the issue and circulation of the warrant preclude any state, including Belgium, from executing it.

3. to require Belgium to recall and cancel the warrant and to inform the foreign authorities to whom the warrant was circulated that Belgium renounced its request for their co-operation in executing the unlawful warrant.

The Congo argued that the warrant was unlawful *ab initio*, that it was fundamentally flawed, and therefore could have no legal effect, and that the termination of the official duties of Mr Yerodia in no way operated to efface the wrongful act and the injury flowing from it, which continued to exist. The purpose of its request was reparation for the injury caused; requiring the restoration of the situation which would in all probability have existed if the said act had not been committed. It stated that as the wrongful act consisted in an internal legal instrument, only the withdrawal and cancellation of the warrant could provide appropriate reparation.

Belgium maintained that a finding by the court, that the immunity enjoyed by Mr Yerodia as minister for foreign affairs had been violated, would in no way entail an obligation to cancel the arrest warrant, as Mr Yerodia was no longer the Congo's minister for foreign affairs and there was no suggestion that the warrant infringed the immunity of the Congo's minister for foreign affairs at the time the case was heard.

The court said that the issue and circulation of the arrest warrant by the Belgian authorities engaged Belgium's international responsibility. The Court considered that its findings constituted a form of satisfaction making good the moral injury complained of by the Congo. The court said that in this case "*the situation which would, in all probability, have existed if the illegal act had not been committed*" could not be re-established merely by a finding by the Court that the arrest warrant was unlawful under international law. The warrant was still extant, and remained unlawful, notwithstanding the fact that Mr Yerodia had ceased to be minister for foreign affairs. The Court said that Belgium must, by means of its own choosing, cancel the warrant in question and inform the authorities to whom it was circulated.

This decision of the court that the warrant should be cancelled was criticised in the joint separate opinion of Judges Higgins, Kooijmans and Buergenthal,<sup>146</sup> because the restoration of the status quo was not possible, as Mr Yerodia was no longer minister for foreign affairs. These three judges were of the opinion that the court erred in requiring the withdrawal of the warrant, as there was no continuing international wrong. This argument was rejected by a majority of ten judges to six, and Belgium was ordered to cancel the warrant.

The decision of the court relating to issuance and circulation of the warrant was by a majority of thirteen to three, and one of the dissenting Judges was ad hoc Judge Van Den Wyngaert, appointed by Belgium. This is a powerful statement by the court, and it is submitted that this judgment has crystallised customary international law on this point. Ministers for foreign affairs are inviolate and immune, and a warrant should not be issued for the arrest of a foreign minister even if it is not intended to be executed until he has left office. The warrant should not be issued, rather than withdrawn when immunity is claimed.

The ICJ at paragraph 51 of the judgment said that there is a “*firmly established rule of customary international law that certain holders of high ranking office in a State, such as the head of State, head of government and minister for foreign affairs, enjoy immunities from the jurisdiction of other States, both civil and criminal.*” By using the term ‘*such as*’ the ICJ was not limiting the high state officials entitled to immunity to those three offices, rather those three offices are quoted as examples of those to whom such immunity is granted. One possible explanation for this sentence is that the function of foreign ministers may be undertaken by other officials. For example the US Assistant to the President for National Security Affairs is the chief adviser to the US President on national security issues. This a position which has no direct equivalent in other states, but the function of the post is comparable to that of a foreign minister, and therefore, on the reasoning of the ICJ the holder of the post should be entitled to immunity *ratione*

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<sup>146</sup> 128 ILR 119.

personae. Another explanation for this paragraph is that other ministers of state are entitled to immunity and the following part of this chapter will consider this.

### **Other Ministers of State.**

Article 21.2 of the New York Convention on Special Missions of 8 December 1969, also implies that there are other high state officials who are entitled to immunity, as it says;

*“The Head of the Government, the Minister for Foreign Affairs and other persons of high rank, when they take part in a special mission of the sending State, shall enjoy in the receiving State or in a third State, in addition to what is granted by the present convention, the facilities, privileges and immunities accorded by international law.”*

How is a court of first instance to decide if another minister of state is entitled to immunity *ratione personae*. The ICJ said that immunity *ratione personae* is granted to such officials to ensure the effective performance of their functions, and when the court considered the nature of the functions exercised by foreign ministers the court attached importance to the authority and representative character of a foreign minister, and the fact that his actions may bind his state.

Some of these functions are specific to a foreign minister, but others are not. The foreign minister is in charge of the government’s diplomatic activities, but he may delegate the responsibility for certain activities to other ministers. Although the foreign minister generally acts as the representative of the government in international negotiations, and intergovernmental meetings, he is not the only minister to do this. As governments get larger, and international relations become more complex, different ministries become involved in different areas. For example in the UK the Home Office takes responsibility for negotiating matters relating to mutual assistance and extradition.

There is a presumption that the foreign minister can bind a state simply by virtue of his office, but other ministers may bind states too, even without formal delegation of such

powers. The ICJ had to consider whether the statements of a minister for justice before the UN General Assembly were binding upon the minister's state in the Case Concerning Armed Activities on the Territory of the Congo.<sup>147</sup> On 28 May 2002 the Government of the Congo instituted proceedings against Rwanda in respect of a dispute concerning "*massive, serious and flagrant violation of human rights and of international humanitarian law*" alleged to have been committed as a result of acts of armed aggression perpetrated by Rwanda on the territory of the Congo. The Congo asked the ICJ to adjudge and declare that all Rwandan forces should forthwith quit the territory of the Congo, and that Rwanda was under an obligation to procure the immediate, unconditional withdrawal of its armed and other forces from Congolese territory, and that Rwanda should pay the Congo compensation. Rwanda said that the ICJ did not have jurisdiction, and that the proceedings were inadmissible.

On 3 February 2006 the ICJ gave judgment on the questions of jurisdiction and admissibility. The Congo alleged that Rwanda had violated Articles II and III of the Genocide Convention, and said that the ICJ had jurisdiction to hear its claim under Article IX of that Convention. Rwanda argued that it had made a reservation to the Genocide Convention which excluded the jurisdiction of the ICJ. The Congo contended that Rwanda had withdrawn its reservation; and to evidence this cited a Rwandan *decret-loi* of 15 February 1995, that is a domestic Rwandan law, and a statement made by Rwanda's Minister of Justice at the UN Commission on Human Rights.

The ICJ said that the adoption and publication of the Rwandan domestic law did not, as a matter of international law, effect a withdrawal by that state of its reservation to Article IX of the Geneva Convention. At paragraph 45 of its judgment the court considered the legal effect of the statement made by Mrs Mukabagwiza, Minister of Justice of Rwanda, on 17 March 2005, at the Sixty-first Session of the UN Commission on Human Rights. In her statement Mrs Mukabagwiza said:

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<sup>147</sup> Case Concerning Armed Activities on the Territory of the Congo. (Democratic Republic of the Congo v Rwanda.) ICJ. ILM vol. 145 2006 562.

*“Rwanda is one of the countries that has ratified the greatest number of international human rights instruments. In 2004 alone, our Government ratified ten of them, including those concerning the rights of women, the preventions and repression of corruption, the prohibition of weapons of mass destruction, and the environment. The few instruments not yet ratified will shortly be ratified and past reservations not yet withdrawn will shortly be withdrawn.”*

The court observed that there is a well established rule of international law that the head of state, the head of government and the minister for foreign affairs are deemed to represent the state merely by exercising their functions, including for the performance, on behalf of the said state, of unilateral acts having the force of international commitments. The court noted that in modern international relations, other persons representing a state, in specific fields, may be authorized by that state to bind it by their statements in respect of matters falling within their purview. The ICJ gave the example of holders of technical ministerial portfolios exercising powers in their field of competence in the area of foreign relations, and then said this was true *“even of certain officials.”*

The court then went onto consider the specific facts of this case, and noted first that Ms Mukabagwiza spoke before the UN Commission on Human Rights in her capacity as minister of justice, and that she indicated that she was making her statement *“on behalf of the Rwandan people.”* The court further noted that the questions relating to the protection of human rights, which were the subject of that statement, fell within the purview of a minister of justice. The ICJ said at paragraph 48 of the judgment:

*“It is the court’s view that the possibility cannot be ruled out in principle that a Minister of Justice may, under certain circumstances bind the State he or she represents by his or her statements”. The court continued that such a statement “can create legal obligations only if it is made in clear and specific terms”.*

On examining the content of Mrs Mukabagwiza's statement, as well as the circumstances in which it was made, the court decided that it was made in the context of a presentation of general policy, on the promotion and protection of human rights, and that it was not made in sufficiently specific terms in relations to the particular question of the withdrawal of reservations. Therefore the court concluded that it had no jurisdiction to entertain the application. The ICJ decided on the particular facts that the statement did not bind Rwanda, but the principle that statements made by ministers may bind their state was affirmed. Whether this, of itself, is sufficient to give a minister immunity under customary international law is doubtful. Other ministers are not in charge of a government's diplomatic activities, they do not have authority over ambassadors and other diplomatic agents, and there is no presumption that other ministers have full powers to act on behalf of their state.

A case at first instance where state immunity was accorded to a defence minister is that of General Shaul Mofaz.<sup>148</sup> On 12 December 2004, an application was made to District Judge Pratt, at Bow Street Magistrates' Court for a warrant for the arrest of General Shaul Mofaz, the Israeli defence minister, who was believed to be visiting England. The application was made on behalf of the families and relatives affected by what was described as '*The Assassination Policy of Israel*' or the '*Policy of Shooting with Impunity*.' They alleged that General Mofaz, in his capacity as defence minister, committed grave breaches of article 147 of Geneva Convention IV, contrary to section 1 of the Geneva Convention Act 1957.

Judge Pratt considered whether General Mofaz had state immunity in his capacity as Israeli defence minister. The applicants argued that the question of immunity should not be raised until the first hearing after the warrant had been executed. Judge Pratt did not accept that, and he took the view that immunity was one of the issues he had to consider. Judge Pratt accepted, following Pinochet (No. 3), that the issue was one for customary international law, and that the Arrest Warrant case did not preclude state immunity extending to office holders other than the head of state, head of government and minister

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<sup>148</sup> 128 ILR 709.

for foreign affairs. As the Arrest Warrant case said that the basis for a foreign minister's entitlement to State immunity was to enable him to effectively fulfil his function Judge Pratt went on to consider whether such immunity could extend to a defence minister. He said in his reasons

*"The function of various Ministers will vary enormously depending upon their sphere of responsibility. I would think it very unlikely that ministerial appointments such as Home Secretary, Employment Minister, Environment Minister, Culture Media and Sports Minister would automatically acquire a label of state immunity. However, I do believe that the Defence Minister may be a different matter.*

*Although travel will not be on the same level as that of a Foreign Minister, it is a fact that many states maintain troops overseas and there are many United Nations missions to visit in which military issues do play a prominent role between certain States. It strikes me that the roles of defence and foreign policy are very much intertwined, in particular in the Middle East."*

Judge Pratt described his decision as being in "somewhat uncharted waters" and he concluded that a defence minister would "automatically acquire state immunity in the same way as that pertaining to a Foreign Minister". He declined to issue the warrant for the arrest of Shaul Mofaz. Judge Pratt found that defence ministers are entitled to immunity *ratione personae*. The comment about the roles of defence and foreign policy being particularly entwined in the Middle East cannot mean that it is only defence ministers from areas of conflict which are entitled to state immunity. Rather, that areas, such as the Middle East, where armed conflict is a day to day part of international relations, highlight the role played by a defence minister, and illuminates what is required for a defence minister to perform his role. If the defence minister of one country is entitled to immunity *ratione personae*, then the defence minister of every state is entitled to such immunity. Judge Pratt did not consider whether Shaul Mofaz was entitled to immunity *ratione materiae*, and this is an area which will be considered in a later chapter of this thesis. The applicants accepted the decision and did not appeal, and



therefore this decision is binding upon them. But as this is a decision of a Magistrates' Court it is not a binding precedent in English law.

The Senior District Judge considered a similar question on 8<sup>th</sup> November 2005 at Bow Street Magistrates' Court, when an application was made for a warrant for the arrest of Bo Xilai,<sup>149</sup> the minister for commerce including international trade for the People's Republic of China. The allegations were of conspiracy to torture in Liao Ning Province since July 1999. When the application was made Mr Bo had been in the UK for a number of days, performing official duties as minister for international trade. From the date of the application he formed part of the official delegation for the State Visit of the President of the People's Republic of China. Judge Workman decided that Mr Bo was entitled to immunity as part of a special mission and this part of his decision is discussed later in this chapter, but he also considered the position of Mr Bo as Minister for International Trade, and said:

*"I have concluded his functions are equivalent to those exercised by a Minister for Foreign Affairs and adopting the reasoning of the International Court of Justice in the case of The Democratic Republic of Congo v Belgium, I reach the conclusion that under the Customary International Law Rules Mr Bo has immunity from prosecution as he would not be able to perform his functions unless he is able to travel freely."*

The refusal of this warrant was not appealed, and the decision is not binding on other courts. Any future applications will have to be decided upon their own merits.<sup>150</sup> This is

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<sup>149</sup> 128 ILR 713.

<sup>150</sup> For example Court of Appeal, *Paris v Durbar* 7 November 2008 City of Westminster Magistrates Court (unreported) Saifee Durbar was appointed by the President of the Central African Republic as Minister Resident in London whilst extradition proceedings against him were being heard. Mr Durbar argued that his appointment entitled him to state immunity. Judge Evans said that he did not think anything turned on the title, and that he had to look at what Mr Durbar actually did. Judge Evans heard evidence from Mr Durbar and the CAR Ambassador. Mr Durbar did not assert that he had any diplomatic or business contacts, or other dealings with the Government of the UK, rather his role was to assist the CAR in other countries. The evidence was that Mr Durbar went to China with the Minister for Energy and Mines of the CAR and met the Trade Minister of China, when some pre-agreement documents may have been signed. Judge Evans was satisfied on the evidence he heard that Mr Durbar did not come within the category of persons entitled to immunity.

an area of international law which is uncertain, and there is little state practice. District Judges, and justices of the peace, sitting in Magistrates' Courts, considering whether to issue a warrant would be influenced by the decisions, particularly by that of the Senior District Judge, but they would not be bound by the decision.

In commenting upon this case and that of Mugabe Professor Colin Warbrick wrote  
*"There remains much room for argument about the limits of the Arrest warrant case. ...The two judgements give little comfort to those who would maintain that international law immunities should be reconsidered in the face of allegations of international criminal conduct."*<sup>151</sup>

The field of international relations is growing, and the numbers of ministers of state and other state officials who are responsible for some aspect of international relations are increasing. But ministers, other than foreign ministers, do not play a role which is primarily concerned with foreign affairs. Although some aspects of their responsibility may have an element of international relations, it is not their first concern. They do not represent their state at all times in the international arena. They do not need to travel freely in the way that a foreign minister does, as any delegations will be planned in advance with the agreement of the territory visited. A foreign minister has to be able to react to international incidents as, and when, they develop, but this is not the case with other ministers. It is respectfully submitted that the decisions of Bow Street Court in these cases are not, at this time, settled international law. This has been demonstrated by two cases in the ICJ.

In the Case Concerning Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v France),<sup>152</sup> the ICJ was asked to declare that the Djibouti procureur general and the Djibouti Head of National Security were immune from the criminal jurisdiction of France. Both officials were summonsed to give

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<sup>151</sup> 'Immunity and International Crimes in English law' ICLQ 53 (2004) 769.

<sup>152</sup> Case Concerning Certain Questions of Mutual Assistance in Criminal matters (Djibouti v France) <http://www.icj-cji.org/docket/files/136/14550.pdf>.

evidence in France as persons implicated in an offence, accused of having pressurised witnesses in Djibouti to change or discredit evidence. The French court was informed that the two were not authorised to give evidence. At paragraph 185 of the judgment Djibouti abandoned its claim for immunity *ratione personae* on behalf its officials. At paragraph 194 of its judgement the ICJ said *“there are no grounds in international law upon which it could be said that the officials concerned were entitled to personal immunities, not being diplomats within the meaning of the Vienna Convention on Diplomatic Relations of 1961, and the Convention on Special Missions of 1969 not being applicable in this case.”*

On 17 June 2003 The ICJ refused a request for provisional measures by the Congo in the Case Concerning Criminal Proceedings in France (Republic of the Congo v France).<sup>153</sup>

On 5 December 2001 Congolese nationals filed a complaint in the Paris Tribunal de Grande Instance alleging crimes against humanity and torture allegedly committed in the Congo against Congolese nationals by the President of the Congo Denis Sassou Nguesso, the Minister of the Interior General Pierre Oba, Inspector General of the Congolese Armed Forces General Norbert Dabira, and Commander of the Presidential Guard General Blaise Adoua.

General Dabira had a house in France, and was in France on 23 May 2002, when he was arrested and his evidence was taken by judicial police officers. On 8 July 2002 an investigating judge took his evidence as a legally assisted witness. General Dabira was a suspect and he was released without charge. General Dabira returned to the Congo, and on 16 September 2002 the investigating judge issued a warrant for the immediate appearance of General Dabira which would be executed should he return to France. The investigating Judge sought to obtain evidence from President Nguesso through diplomatic channels. The Congo said that the assertion of universal jurisdiction was

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<sup>153</sup> Case Concerning Certain Criminal Proceedings in France (Republic of the Congo v France). ICJ Reports, 2003. p. 102.

against international law, and that the proceedings failed to respect the immunities conferred by international law.

Provisional measures are to preserve the rights of a party; the ICJ said in this case provisional measures could only be granted if the French proceedings entailed a risk of irreparable prejudice to the right of the Congo. The court found that there was no such risk as regards President Nguesso, as Head of State, or General Oba. As regards General Dabira, the courts said that the practical effect of a provisional measure would be to enable General Dabira to enter France without fear of any legal consequences. The courts view was that the Congo had not demonstrated the likelihood or even the possibility of any irreparable prejudice to the rights it claims resulting from the procedural measures taken in relation to General Dabira. The Court said there was no need for provisional measures.

The ICJ in this case is saying that General Dabira did not need to travel freely to be able to perform his functions whilst the case was pending. Indications are that membership of the small group of persons who have blanket immunity *ratione personae* is not being extended. Ministers and other officials visiting other states may be granted temporary immunity as members of a special mission. Such immunity is granted with the knowledge of the sending state and the consent of the receiving state, and is time limited and certain. The next part of this chapter will look at special missions and the immunity granted to members of such missions.

## **Special Missions**

A special mission is temporary mission sent by one state to another state. At the request of the UN General Assembly<sup>154</sup> the ILC worked upon the codification and progressive development of international law relating to special missions. The Convention on

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<sup>154</sup> See GAR 1504 (XV) of 12 December 1960, GAR 1687 (XVI) of 18 December 1961, GAR 1902 (XVIII) of 18 November 1963 and GAR 2045 (XX) of 8 December 1965.

Special Missions was adopted by the General Assembly on 8 December 1969,<sup>155</sup> and it entered into force on 21 June 1985. The legal status of the immunity of special missions was discussed in the draft articles on Special Missions with commentaries 1967,<sup>156</sup> whether special missions had immunity under customary international law, or whether they were accorded merely as a matter of courtesy. The commentary asserts:

*“Since the War, the view that there is a legal basis has prevailed. It is now generally recognised that States are under an obligation to accord the facilities, privileges and immunities in question to special missions and their members.”*

The underlying principle adopted by the ILC was that *‘every special mission should be granted everything that is essential for the regular performance of its functions, having regard to the nature of its task’*.

The convention is now considered to be declaratory of customary international law having been quoted with approval both in the Pinochet case, and in the Arrest Warrant case as providing, *“useful guidance on certain aspects of the question of immunities.”*<sup>157</sup>

The preamble to the Special Missions Convention recalls that special treatment has always been accorded to special missions, and says that the convention complements the Vienna Convention on Diplomatic Relations 1961, and the Vienna Convention on Consular Relations 1963, and contributes to the development of friendly relations among nations, whatever their constitutional and social systems. It goes on to say that the purpose of privileges and immunities relating to special missions is not to benefit individuals, but to ensure the efficient performance of the functions of special missions as missions representing the state.

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<sup>155</sup> GA Res 2530 (XXIV).

<sup>156</sup> YBILC 1967, vol. II. p. 347 at p 358.

<sup>157</sup> 128 ILR 1 at para. 52.

A special mission is defined by article 1 as a temporary mission, which must represent the state. It is sent by one state with consent to another state for the purpose of dealing with the second state on specific questions, or of performing, in relation to that second state, a specific task. The draft articles say that the term special mission cannot be considered to include missions sent by political movements to establish contact with a particular state, or missions sent by states to establish contact with a political movement. A mission sent by the opposition party to establish contact with the government of another state, or missions sent by a local politician, such as the Mayor of London, would not come within the definition as they are not sent by a state.

A special mission must have a specific task, and must not have the character of a mission responsible for maintaining general diplomatic relations between states. The mission must be of a temporary nature, it cannot be a permanent specialised mission, such as a trade mission.

The prior consent of the receiving state is required regarding all aspects of a special mission. The functions of the mission are determined by mutual consent, the receiving state has to be informed of the size and composition of the special mission, and in particular the names and designations of the persons the sending state intends to appoint. The foreign ministry of the receiving state has to be informed of all arrangements made for the mission. The receiving state may decline to accept a special mission of an unreasonable size and may, without giving reasons, decline to accept any person as a member of the mission, or may notify the sending state that a representative of the mission is *persona non grata*.

The members of a special mission are present on the territory of the receiving state, with the consent of that state, for the purpose of the mission. Whilst they are there, article 29 of the convention provides they are inviolable, and are not liable to any form of arrest or detention, and article 31 provides that they are immune from the jurisdiction of the receiving state.

Between 1983 and 1986 the West German Courts considered the question of the immunity to be accorded to a member of a special mission in the case of Tabatabai.<sup>158</sup> In 1983 Dr Tabatabai was a member of the political leadership in Iran. He had previously been the Iranian deputy prime minister, and had served as a special envoy for Iran on various special missions to foreign states including West Germany.

Dr Tabatabai carried a diplomatic passport, and on 3 January 1983 he obtained a visa from the West German Embassy in Tehran, for the purpose of making a business visit to the Federal Republic. On 5 January 1983 Dr Tabatabai had a meeting in Iran with the West German ambassador to Iran. Dr Tabatabai informed the ambassador that he was to undertake an important confidential mission to several Western European countries, including West Germany. Dr Tabatabai asked the ambassador to assist him in contacting the French authorities. The ambassador was also planning to return to West Germany, and they agreed to meet there. The ambassador agreed to defer informing the West German Foreign Office of the mission to ensure that the important mission was kept absolutely confidential. The ambassador informed the West German Foreign Office of his discussions on 14 January 1983.

When Dr Tabatabai arrived in West Germany on 8 January 1983, the customs authorities checked his luggage, and found 1716.6 grams of opium. Dr Tabatabai was arrested and the opium confiscated. For a person to be brought before a court in criminal proceedings in West Germany at this time, an arrest warrant had to be issued. On 9 January 1983, the District Court of Dusseldorf issued an arrest warrant and suspended enforcement against payment of a security of DM 200,000. The security was paid, and Dr Tabatabai was released from detention on 10 January 1983. On 17 January 1983 the Provincial Court of Dusseldorf ordered the enforcement of the arrest warrant, and Dr Tabatabai was taken back into custody.

The Iranian Government made representations concerning the detention. On 31 January 1983 a letter was sent to the West German Foreign Minister by the Iranian Foreign

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<sup>158</sup> 80 ILR 389.

Minister. This letter received on 1 February 1983, stated that Dr Tabatabai had been sent as a special envoy to conduct negotiations, on important political questions, with high-ranking representatives, in several Western European countries, and prior notification of the mission had not been given because of the confidential nature of those negotiations. Iran requested that Dr Tabatabai should be granted those privileges and exemptions granted to special envoys pursuant to the rules of international law. The Iranian Foreign Minister also said in the letter, that he would not make the request, if he were not convinced that Dr Tabatabai had not taken part in any criminal activity, and that he was the victim of persons whose intention was to thwart the success of the mission.

The West German Foreign Office accepted the clarifications contained in the letter and agreed that Dr Tabatabai had been sent to the Federal Republic for the performance of a special task within the meaning of the Special Missions Convention, and that he was therefore exempt from German jurisdiction. The West German foreign office informed the Iranian Ambassador of this decision on 3 February 1983. The foreign office then notified the Provincial Court of Dusseldorf, before which the trial proceedings were in progress, of its response to the letter from the Iranian foreign minister, and its view that Dr Tabatabai was exempt from municipal jurisdiction as a special envoy.

Dr Tabatabai applied to the Provincial Court for the warrant for his arrest to be annulled, on the basis that he was exempt from West German municipal jurisdiction, as a special envoy. The West German courts proceeded to struggle with the question whether Dr Tabatabai was entitled to immunity. The history of the proceedings is complicated as the first warrant was quashed by the Superior Court, and a second warrant was issued. Dr Tabatabai left Germany when released, but he continued to defend the proceedings.

On 9 February 1983 the Provincial Court rejected Dr Tabatabai's application, and he appealed to the Superior Provincial Court. On 22 February 1983 that court held that under customary international law he was exempt from the jurisdiction of West Germany and annulled the arrest warrant. On 24 February 1983, the Provincial Court continued with the proceedings and issued a new arrest warrant. The Provincial Court



held that Dr Tabatabai had not been in West Germany to perform a specific task, and therefore he could not be a member of a special mission. The court accepted that under customary international law, a special mission could be established if the agent was already in the receiving state, but the court found that the planned mission, a meeting in Bonn with the West German Ambassador to Iran, was no longer possible on 31 January 1983. This was the date when the West Government agreed, at the request of the Iranian Government, to grant Dr Tabatabai the privileges and immunities of a special envoy. By that date Dr Tabatabai had been arrested, and the ambassador had returned to Iran. The Provincial Court said the request for recognition of the special mission was made to protect the accused as an individual, and was granted in order to prevent the deterioration of relations between the two countries.

Dr Tabatabai was arrested on the new warrant and kept in custody. He appealed against the issue of the second warrant to the Superior Provincial Court and on 7 March 1983 that court allowed the appeal and annulled the warrant. That court decided he obtained the status of a special envoy at the very latest by 3 February 1983, when the West German foreign office granted the Iranian request that the accused be treated as a special envoy, and therefore he ought not to have been taken into custody on 24 February. The court said that there was no requirement that the agreement between the two states, concerning the special mission, should include a detailed description of the specific task to be performed. The fact that Iran had failed to disclose more than a broad outline of Dr Tabatabai's task did not mean that no special task had been agreed upon. It was sufficient that the receiving state was satisfied with the vague detail given. The court also said that the motives and consideration of the foreign office, in granting the request made by Iran, were beyond the scope of the judicial review of the courts. The government's power to conduct foreign relations included the authority to enter into commitments under international law towards other states, as it deemed appropriate and necessary, and this was not subject to review by the courts.

On 7 March 1983, immediately after this decision was given, Dr Tabatabai was released from custody. On 8 March 1983 the West German foreign office withdrew the

recognition of Dr Tabatabai as a special envoy, and told the Provincial Court that if the proceedings against Dr Tabatabai were stayed by reason of immunity, he would be declared persona non grata and asked to leave immediately. Dr Tabatabai did not wait for the decision of the Provincial Court, nor did he wait to be declared persona non grata, he left the next day.

The quashing of the warrant did not quash the proceedings, and the Provincial Court continued with the trial. On the 10 March 1983 that court held that Dr Tabatabai was not entitled to immunity because an agreement by the West German foreign office to the establishment of a special mission would only bind the court if it was in conformity of international law, and the agreement in this case was not in conformity with international law, as the arrival of the accused in West Germany had not been notified. The consent of the West German Ambassador to Iran to meet the accused, during his stay in Bonn, could not establish his immunity, in the absence of an official agreement between the two countries, concerning his status, task and immunity. Although a special mission with corresponding immunity could be established after the representative had entered the receiving state, the request by the Iranian Government, and its acceptance by the Federal Government, could not constitute the establishment of such a mission in the absence of an agreement on the function of that special mission. Neither the parties to, nor the location or subject of, prospective negotiations had been indicated in the exchange of notes between the two governments initiated by Iran on 31 January. The court said that what the two states in fact sought was to grant immunity to the accused in order to prevent him being prosecuted. Dr Tabatabai was convicted and sentenced in his absence, to three years imprisonment.

Dr Tabatabai appealed to the Federal Supreme Court. That court allowed the appeal on 27 February 1984 on the grounds that the proceedings were barred because the Dr Tabatabai was entitled to immunity. That court found that the two governments concerned had concluded an agreement concerning a special mission adequately specifying the task to be carried out. Although the Iranian Government had outlined the tasks in its note of 31 January 1983 in only a very indeterminate manner, the foreign

office knew that part of the mission consisted in seeking support for intended contacts with the French authorities. This task was specific enough to constitute an agreement with regard to the establishment of a special mission. The court used the functional theory to justify the grant of immunity to a special envoy, the grant of immunity was not protect the envoy as a person, rather the mission which was to be carried out by him and, therefore his sending state.

This was not the end of the matter. On 1 April 1985, a new enquiry was instituted on the same facts, and a new warrant issued. Dr Tabatabai appealed unsuccessfully against the issue of the warrant to the Provincial Court and then he appealed to the Superior Provincial Court. On the 20 March 1986 that court also dismissed the appeal saying that the new criminal proceedings were admissible because the immunity to which the accused had been entitled as a special envoy did not constitute a personal exemption from prosecution, but merely a procedural bar. As such the immunity could only extend to acts which had been performed in the exercise of his functions. The court said:

*“Once his official activity has come to an end there is no longer any reason for him to enjoy the protection of immunity for those acts which were not performed in the exercise of his official functions. ... It is manifestly clear ... that the importation of narcotic substances ... is not to be classified as one of the official functions of a special envoy.”*

This case illustrates the difficulties that domestic courts encounter in deciding the facts upon which to decide questions of international law, when those facts are dependent upon diplomatic negotiations and agreements. Whether a person is a member of a special mission is a fact, and if the proceedings were in England, such facts come within the category that is within the knowledge of the Foreign and Commonwealth Office (FCO), and a certificate<sup>159</sup> could be issued.

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<sup>159</sup> The FCO may issue conclusive certificates or statements of fact which are conclusive evidence in English courts. This practice is accepted at common law. Section 4 of the Diplomatic Privileges Act 1964 provides that such a certificate is conclusive evidence of any fact relating to whether a person is entitled to any diplomatic privilege or immunity. Section 21 State Immunity Act 1978 provides that such a certificate is conclusive evidence of whether a country is a state, whether any territory is a constituent territory of a federal state, and as to the person or persons to be regarded as head or government of a state.

A case in which such a certificate was used is *R v Governor of Pentonville Prison, ex parte Teja*.<sup>160</sup> In this case the Divisional Court concluded that, as a representative of the Costa Rican Ministry of Industry and Commerce, Mr Teja was not entitled to privileges and immunities under the Vienna Convention on Diplomatic Relations, but that he was possibly on a special mission. This case was shortly after the implementation of the Diplomatic Privileges Act 1964.

Mr Teja was an Indian national, who had been a company director buying ships from Japan. In 1966 the company was taken over by the Indian Government. Mr Teja left India and went to the USA. India alleged that Mr Teja, as chairman of the company, had been guilty of dishonesty. Extradition proceedings were commenced by India in the USA and Mr Teja fled to Costa Rica which had no extradition treaty with India. Mr Teja was engaged by the Costa Rican government, and in June 1970 he was issued with a diplomatic passport and a letter of credence describing him as an economic adviser to the Costa Rican government studying the possibility of developing a steel mill in Costa Rica. Mr Teja visited a number of European countries, and during a visit to England he was arrested and detained in custody pending his extradition to India.

An application for a writ of habeas corpus was made on Mr Teja's behalf contending that he was entitled to diplomatic immunity, despite a certificate from the FCO stating that he was not an accredited diplomat,. The Divisional Court dismissed the application holding that a foreign state's unilateral action in appointing a diplomatic agent did not confer diplomatic immunity on that representative and, until the UK had accepted and received the intended representative as a *persona grata*, the diplomatic agent was not immune from the proceedings in the English courts.

Lord Parker CJ considered that Mr Teja, whilst not a diplomatic agent, could be on a special mission. The reasoning and conclusion of the judgment on this point is not very clear, he appears to be saying that any agent for whom immunity is claimed cannot be

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<sup>160</sup> [1971] 2 QB 274.

sent unilaterally to a foreign country. It is only with consent that immunity can be accorded and claimed.

As explained earlier in this chapter on 8 December 2005 the Senior District Judge considered whether he could issue a warrant for the arrest of Minister for Commerce including International Trade for the People's Republic of China, Mr Bo Xilai for offences of conspiracy to torture in Liao Ning province in China. Judge Workman first considered whether Mr Bo was entitled to immunity *ratione personae* by virtue of being the Minister for Commerce including International Trade and decided that Mr Bo was entitled to such immunity. Judge Workman then went on to consider whether Mr Bo was entitled to immunity as a member of a special mission. Although Judge Workman does not specifically refer to it in his reasons, the FCO was contacted at Judge Workman's request and provided information about Mr Bo's visit. Judge Workman decided that Mr Bo was entitled to immunity as a member of a special mission, and said;

*"Although Mr Bo has been here for a number of days performing official duties as Minister for International Trade, he today forms part of the official delegation for the state visit of the President of the People's Republic of China. As such, I am satisfied that he is a member of a Special Mission and as such has immunity under Customary International Law. That immunity has been embodied in the Convention on Special Missions of the 8<sup>th</sup> December 1969 which by virtue of article 31 declares that the representatives of the sending state in the Special Mission and the members of all its diplomatic staff shall enjoy immunity from the criminal jurisdiction of the receiving state. This Convention was adopted by Resolution 2430 of the General Assembly of the United Nations in 1969. Mr Hardy has referred me to the House of Lords judgment in Pinochet but I am satisfied that the essence of that decision depended upon the fact that Senator Pinochet was no longer a head of state and the decision was based upon the fact that he was a former head of state. I am therefore satisfied that particularly by virtue of being a member of a Special Mission Mr Bo has immunity of prosecution and I am declining to issue a warrant."*<sup>161</sup>

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<sup>161</sup> 128 ILR 713.

This is an example of how the question of immunity can be decided simply, if immunity *ratione personae* were restricted to heads of state, heads of government, foreign ministers and members of a special mission. To ascertain whether a person was entitled to such immunity, an enquiry could be made of the FCO, who would provide a factual statement as to whether a person was a head of state, head of government, foreign minister or member of a special mission. This would prevent political embarrassment, and all concerned would know, before any travelling arrangements were made, who is entitled to claim immunity.

A recent case where immunity has been claimed as a member of a special mission, and a certificate was provided by the FCO is in extradition proceedings, in the Court of Appeal, *Paris v Durbar* before the City of Westminster Magistrates' Court. Mr Durbar was accused of embezzlement in France in 1995. On 16 May 2006 at the Tribunal de Grande Instance, Paris he was convicted in his absence and sentenced to three years imprisonment. He appealed to the Court of Appeal in Paris, and on 26 April 2007 that appeal failed, and the sentence was confirmed. The judicial authority in France was asking for his extradition to France. Mr Saiffee asserted that he was entitled to immunity as a member of a special mission sent by the CAR. Mr Durbar claimed he was appointed advisor to the then President of the CAR in 1999, and that on 6 October 2000 he was re-appointed as advisor to the succeeding President of CAR by decree No. 06.313 and issued with a diplomatic passport. On 27<sup>th</sup> October 2006 he was issued with a Schengen visa by the French embassy in CAR. This was a non-diplomatic visa for a business journey. Mr Durbar claimed that he entered France on 30 October 2006, and that he accompanied the President of the CAR on a special mission to Paris for meetings with the French President and other members of the French government to discuss general bilateral relations. This was not accepted by the requesting French judicial authority. On 9 August 2007 Mr Durbar was issued with another Schengen visa by the French Embassy in the CAR. This was a non-diplomatic visa for a business journey. On 21 September 2007 Mr Durbar was arrested in London on the French European arrest

warrant. On 4 October 2007 the FCO certified that Mr Durbar *'has not been notified to or received by the FCO as a member of a diplomatic mission in the UK.'*<sup>162</sup>

It was submitted that Mr Durbar was a member of a special mission and entitled to procedural immunity in respect of the proceedings. On 26 June 2008 Judge Nicholas Evans gave little credence to the defendant's assertions, saying that he found the immunity claim *"completely bogus and devoid of any merit"*. The defendant did not submit any evidence in support of the contention that he was on a special mission. A letter dated 6 February 2008 from the CAR Ministry of Foreign Affairs was given to the court. It stated that the defendant made an official journey to France arriving in Le Bourget airport at 0915 hours on 30 October 2006 on a Hawker 800X aircraft. The letter was totally silent as to the purpose of the journey, it did not suggest the President of the CAR was on the plane, it made no mention of any planned meetings, and it did not suggest there was any special mission. The Ministry of Justice in Paris sent a letter to the Crown Prosecution Service (CPS) which provided no support for the defendant's claim that he was on a special mission. The immunity claim does not appear to have featured in any of the proceedings in France, a feature which Judge N. Evans described as *"rather odd"*.

Judge N. Evans said in his judgment;

*"There is insufficient evidence before this court to conclude that the defendant has ever been on a special mission. Mere assertion is not enough. Even if, which I do not accept, the defendant was entitled to some form of immunity whilst he visited France in October 2006 I do not accept that provides him with continuing immunity such as to interfere with these extradition proceedings. He does not assert that he enjoyed his claimed immunity at the time of his offending or at his first instance trial."*

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<sup>162</sup> Court of Appeal Paris v Durbar (City of Westminster Magistrates' Court 16 June 2008) unreported. Quoted in the judgment of Judge Evans.

Judge N. Evans found that Mr Durbar was not entitled to immunity as a member of a special mission, as he was not part of such a mission. Mr Durbar was not entitled to immunity *ratione personae*. Judge Evans also found that Mr Durbar was not entitled to immunity *ratione materiae* as even if Mr Durbar had ever been entitled to any form of immunity it did not continue, as the membership of the mission, which had come to an end, had nothing to do with the offending, which occurred before he became an adviser to the President of the CAR. If Mr Durbar had been entitled to immunity *ratione personae* then the fact that the offending was before he was appointed would have been irrelevant.

**Must be a High Official of a State.**

A person claiming immunity *ratione personae* must represent a sovereign state. This may seem self evident, as the immunity being claimed is state immunity, but the courts have not always found this concept easy to apply. The immunity to which individuals are entitled, and the immunity which a state may claim, are derived from the sovereignty of the state, but the entitlements are not identical. One case where this distinction between a state, and a state official, and the entitlement to state immunity caused confusion is *The Queen on the application of Diepreye Solomon Peter Alamiyeseigha and the CPS*.<sup>163</sup>

Mr Alamiyeseigha was the governor and chief executive of Bayelsa State, a constituent part of the Federal Republic of Nigeria. He was arrested in England and charged with three offences of receiving corrupt payments and money laundering. He was alleged to have abused his position as governor of Bayelsa State to benefit personally from the award of contracts with Bayelsa State. On 7 October 2005 he was released on bail with conditions, one of which was that he was not to go within three miles of any airport or port.

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<sup>163</sup> [2005] EWHC 2704 (Admin).



Mr Alamieyeseigha asked the Administrative Court to quash the decision to prosecute him on the grounds that he was entitled to sovereign immunity in his capacity as Governor and Chief Executive of Bayelsa State, a constituent part of the Federal Republic of Nigeria. He contended that Bayelsa State had sufficient autonomy under the Nigerian Constitution, and a sufficient range of governmental functions so as to be entitled to state immunity, and therefore he should be afforded immunity as the head of Bayelsa State. The CPS said that Bayelsa was merely a constituent part of the Federal State, and not entitled to state immunity, and that as Mr Alamieyeseigha could have no better claim to state immunity than Bayelsa State, he was therefore also not entitled to immunity.

The FCO issued a certificate under section 21 of the State Immunity Act 1978, which recorded, among other matters that:

*“The Federal Republic of Nigeria is a State for the purposes of Part 1 of the Act. Bayelsa State is a constituent territory of the Federal Republic of Nigeria, a federal state for the purposes of part 1 of the Act. Diepreye Solomon Peter Alamieyeseigha is the Governor and Chief Executive of Bayelsa State and is not to be regarded for the purposes of Part 1 of the Act as Head of State of the Federal Republic of Nigeria ...”*

This certificate would have been conclusive in civil proceedings, and the Administrative Court acknowledged that the certificate had to be of decisive importance, quoting Lord Atkin in the case of *Spain v. SS “Arantzazu Mendi”*<sup>164</sup> *“One State cannot speak with two voices on such a matter, the judiciary saying one thing, the executive another.”* Despite this the Administrative court went on to consider whether Bayelsa State was to be regarded as a state whose governor was entitled to state immunity. The court was influenced by the case of *Mellenger v New Brunswick Development Corporation*,<sup>165</sup> where it was held that New Brunswick, a federal state of Canada had retained its independence and autonomy directly under the Crown, and therefore the New

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<sup>164</sup> [1939] AC 256 at p. 264.

<sup>165</sup> 2 All ER 593 (1971).

Brunswick Development Corporation which was an arm or alter ego of the government of New Brunswick was entitled to claim sovereign immunity. The court was also influenced by Lord Browne-Wilkinson in the Pinochet case when he said at page 201H, “*a head of state is entitled to the same immunity as the state itself.*” It was common ground between the parties that if a state is entitled to immunity, then the head of state is also therefore entitled to immunity, and the court said that this was the effect of section 20 of the State Immunity Act 1978. The Administrative Court said “*the issue on this application is therefore whether Bayelsa State is entitled to state immunity.*” The court went on to decide that Bayelsa State was not entitled to claim state immunity because it had very limited powers, and that even those powers it had were subject to the overriding powers of the Federal Republic of Nigeria, and therefore Mr Alamaseigha was not entitled to claim immunity.

It is submitted that the Administrative Court came to the correct conclusion, Mr Alamaseigha was not entitled to immunity, but the court came to the conclusions for the wrong reasons. The submission by the CPS that Mr Alamaseigha could have no better claim to immunity than Bayelsa State was confusing. The immunity of a sovereign state, and the immunity afforded to a state’s high state officials are not the same. A state cannot be arrested or imprisoned. A state may be liable in civil proceedings whereas a high state official is completely immune throughout the time the official is in office. The question the Administrative Court should have asked was not whether Bayelsa State was entitled to claim state immunity, but rather whether it was recognised as a sovereign state under international law. If a state is a sovereign state, then its high state officials are entitled to state immunity *ratione personae*.

This case confuses the fact that actions performed on behalf of a state may be immune, with the fact that an entity representing the state may be entitled to immunity. It is only individuals who represent the state who can have immunity *ratione personae*. Asking whether a state has immunity is to ask the wrong question. The FCO issued a certificate stating that Bayelsa State was not a sovereign state for the purposes of civil proceedings. The Administrative Court said that the certificate was additional and decisive evidence

that Bayelsa State was not entitled to state immunity, and therefore Mr Alamieyeseigha was not so entitled. The certificate should have been conclusive in this matter from the beginning. Whether a state is sovereign or not, is a matter of fact, but is not the kind of fact which it is appropriate for a municipal court to decide.

The head of a constituent state of a federation travels at his own peril if there are those who wish to prosecute him. This was demonstrated in an application on 20 August 2003 for a warrant for the arrest of the Chief Minister of Gujarat for an offence of torture.<sup>166</sup> In February 2002 Narendra Modi was the Chief Minister of the State of Gujarat, in India. In that capacity he formulated state government policies and made policy decisions. He was in charge of the police and government officials of the state of Gujarat. On 27 February 2002 fifty eight Hindus died in the “Godhra train incident,” when a train was set on fire in an attack attributed to Muslims. Mass violence followed and at least two thousand people died, and between one hundred and two hundred thousand people were displaced. The Gujarat government said it was a spontaneous reaction. The applicant alleged it was deliberately organised and orchestrated. It was alleged that the Gujarat state government ordered a number of surveys by the police to obtain detailed information on Christians and Muslims in Gujarat, and that the lists were used to pinpoint Muslim targets. It was also said that on the evening of 27 February 2002 two meetings were held, one by senior ministers from Mr. Modi’s cabinet at which a plan was drawn up and disseminated detailing methods and strategies for revenge killings, the second later that evening convened by Modi with the Commissioner of Police of Ahmedabad, other police officers, the Home Secretary and the Secretary for the Home Department. At this meeting Chief Minister Modi was alleged to have said there would be justice for Godra in the next few days, and he ordered the police not to come in the way of “the Hindu backlash”. Once the violence started the state government refused to deploy the army for twenty-four hours.

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<sup>166</sup> Application for arrest warrant for Narendra Modi (Bow Street Magistrates’ Court. 20 August 2003) (unreported).

The application for a warrant for the arrest of Mr Modi was made because he was in England. His visit was reported in the Times of India on 19 August 2003, as “*Narendra Modi began on Sunday a whistle-stop tour through Europe to re-brand Gujarat internationally.*” Bow Street Court contacted the FCO who confirmed that Mr Modi had been granted a visa, and that he was in England to promote an event called Vibrant Gujarat, a global investment project to promote Gujarat abroad. The event was jointly organised by the UN Industrial Development Organisation, the Federation of Indian Chamber of Commerce and Industry and the Indian Government.

The Senior District Judge considered the question of immunity although it was not raised before him. He was not of the view that Mr Modi was entitled to any immunity and refused the application on the basis that there was no evidence before him. He said that another application could be made, if evidence was forthcoming. No such application was made.

## **Conclusion**

Heads of state, heads of government, foreign ministers, diplomats and members of special missions have immunity from prosecution before the criminal courts of other states. They are immune because of the position they occupy. Members of special missions are immune if accepted in advance by the receiving state. Such immunities are granted to enable the officials to perform their role on behalf of their state. These officials who are entitled to immunity *ratione personae* are easily identifiable, and there is a coherent reason for their immunity.

There are indications that state immunity *ratione personae* may extend to other ministers or other state officials if they are representative of their state, and if their functions are such that being involved in foreign affairs is an intrinsic part of their role.

State immunity *ratione personae* is the immunity of the state, in that it can be waived by the state, but it is a separate entitlement to immunity from that of the state, and it is not

dependent upon whether the state itself is immune. Immunity *ratione personae* is a wide immunity in that covers all conduct before or after an official took office. Those entitled to it are completely immune and inviolable. What happens after they leave office, do they continue to be immune? This continuing immunity is known as immunity *ratione materiae*. Immunity which attaches to conduct and which therefore continues after a person leaves office. It is only applicable to conduct for which the state is entitled to claim immunity. This is the subject of the next chapter in this thesis.

## Immunity Ratione Materiae.

*“State officials are mere instrumentalities in the hands of sovereign States”*<sup>167</sup>

Immunity ratione materiae is that aspect of state immunity which attaches to conduct undertaken on behalf of the state. It is also known as subject matter immunity, or immunity for official acts. Immunity ratione materiae prevents the immunity of a state being circumvented by taking action against the state’s agents or officials. This principle has been articulated and developed in civil cases. This is an established principle of law first articulated by Sir George Jessel MR in *Twycross v Dreyfuss*<sup>168</sup> in 1877 when he said *“You cannot sue the agent in the absence of the principal. The principal is the Peruvian Government. You cannot sue the Peruvian Government at all, and therefore you cannot sue its agents.”* This sounds a perfectly reasonable statement; it has been quoted with approval and followed in subsequent cases; but when the facts of this case are examined they generate sympathy for the claimants, and the principle does not seem so self-evident.

In 1870 the Peruvian Government issued bonds for the construction of railways. Dreyfuss Brothers were agents for the Peruvian Government. Mr Twycross bought several bonds from the agents for which he paid over £3265. On each of the bonds was printed a statement that, as a guarantee for the fulfilment of the obligations contracted in the bond, the government of Peru *“under the national faith”* pledged the general revenue of the Republic, and especially the profit from the sale of guano in Europe and America. No interest was paid after 1875, despite guano being sent to the agents, and being sold by them. Mr Twycross thought that the agents had defrauded him. He gave notice of the proceedings to the Peruvian Republic, and offered to make the Peruvian Republic a defendant in the action if it wished. The Peruvian Republic made no claim to

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<sup>167</sup> Prosecutor v Tihomir Blaskic. 29 October 1997. Appeals Chamber. ICTY. Judgment on the request of the Republic of Croatia for review of the decision of the Trial Chamber II of 18 July 1997. <http://www.un.org/icty/blaskic/appeal/decision-e/71029JT3.html>. para. 38.

<sup>168</sup> 18 April 1877. Court of Appeal. *Twycross and others v Dreyfus Brothers and others*. [1874-80] All ER Rep 133.

the guano or the sale moneys, or to any interest in them, and otherwise took no part in the action.

Sir George Jessel explained that “*the municipal law of this country does not enable our tribunals to exercise any jurisdiction over foreign governments as such, The result is these so called bonds amount to nothing more than engagements of honour binding the government which issues them, but they are not contracts enforceable before the ordinary tribunals of any foreign country, or even by the ordinary tribunals of the country which issued them without the consent of the government of that country. The bond in question confers no right of action on the plaintiffs.*” The Court of Appeal decided that to sue the agents would, as James LJ said “*be a monstrous usurpation of jurisdiction to endeavour to sue a foreign government indirectly by making its agents in this country defendants*” and expressed the view that it would be “*indirectly endeavouring to make the foreign government responsible to the jurisdiction of the court.*” The court said that the agents may have a legitimate charge or lien on the guano, but that this was not something the court could investigate. The fact the agents relied upon state immunity leaves the impression that they did not wish their conduct to be scrutinised by a court. The Peruvian Republic took no part in the proceedings at all, except to say that it made no claim as regards the guano and the proceeds of the sale. Peru neither claimed nor waived immunity, and this was not discussed by the court. The proceedings appear to be very unfair to Mr Twycross. He had entered into what he believed to be a contract with agents based in London, and those agents on the face of it were behaving dishonestly, by holding onto money due to him under the contract, and refusing to pay him. Mr Twycross was left with no legal recourse. The fact that the agents were entitled to claim state immunity was accepted unequivocally at that time, as demonstrated by the fact that the representatives for the agents were not called upon to argue by the court. The court listened to counsel for Mr Twycross and the others who had bought bonds, and then dismissed their claim without requiring argument from the respondents. The Court of Appeal accepted without argument that this conduct by agents was covered by state immunity.

One reason why this case seems unfair to today's reader is that the subject matter is a contract, and the conduct would not now be protected by state immunity. If Mr Twycross were to sue today he would have a hearing, and he would be told the facts about the guano and any money from the sale. This is because states accept that not all state conduct is covered by state immunity. This is the restrictive doctrine of state immunity.

### **The Doctrine of Restrictive Immunity. Acta Jure Imperii and Acta Jure Gestionis**

Until the twentieth century it was customary international law that a state could not be sued in the domestic courts of a foreign state. Gradually during the twentieth century customary international law developed to the point where a state could be sued in contract for acts which a private individual could perform; that is for *acta jure gestionis*, acts of a private nature. Whereas *acta jure imperii*, acts which are of a governmental or sovereign nature were immune. The changes in international society were responsible for this limitation on immunity, which is called the restrictive doctrine. States became involved in trade, and entered into contracts. The analogy used is of a sovereign prince becoming a trader and sully his hands, or descending into the market place. In modern society government departments enter into contracts. An embassy requires food, stationery, and other provisions and services, such as water and power. An official visit involves people whose needs have to be catered for. Consequently states enter into contracts for the provision of goods and services such as the hire of vehicles and renting or purchase of accommodation. The contracts for such goods and services are *acta jure gestionis*, and the state can be sued on those contracts. A second restriction on the doctrine of immunity also developed during the latter part of the twentieth century, in tort, largely due to the use of motor vehicles. States are liable in tort for accidents and the like, such as those involving motor vehicles. These restrictions upon immunity for commercial matters, and for some torts, are now part of conventional<sup>169</sup> and customary

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<sup>169</sup> European Convention on State Immunity (1972) The State Immunity Convention.



international law and have been incorporated into the law of the UK<sup>170</sup> and other states.<sup>171</sup> These are expressed in the form that states are immune, except as provided.

A parallel development in customary international law is the personal liability of individuals once they leave office. Those individuals who have immunity *ratione personae* that is immunity conferred because of personal status, such as serving heads of state or government are personally liable for acts of a private nature, *acta jure gestionis*, when they have left office, and their immunity *ratione personae* ceases. An ex head of state is personally liable for debts he incurred whilst head of state if they are such as could be incurred by a private citizen. This was first stated in the case of *Ex-King Farouk of Egypt v Christian Dior*.<sup>172</sup> In Spring 1952 King Farouk of Egypt ordered some expensive clothes for his wife from the couturier Christian Dior. The clothes were delivered in Spring 1952 to the King's private office. On 26 July 1952 King Farouk abdicated and all his property in Egypt was seized and confiscated. The King was left with no money and he could not pay for the clothes. Christian Dior sued him for the amount he owed. It was argued on King Farouk's behalf that he was not liable to pay the debt because it was incurred when he was head of state and therefore immune. The Court of Appeal in Paris held that from the date of his abdication he was no longer entitled to claim the immunity from the jurisdiction of the French courts to which heads of state are entitled.<sup>173</sup>

When he entered into the contract King Farouk had immunity *ratione personae* because he was head of state and he could not be sued. When he was no longer head of state he lost the immunity that accompanied his status, and could be sued for acts of a private

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<sup>170</sup> State Immunity Act 1978.

<sup>171</sup> USA Foreign States Immunity Act 1976 ILM 15 (1976) 1388, Canada State Immunity Act 1982 ILM 21 (1982) 798, Australia Foreign States Immunities Act 1985 ILM 25 (1986) 715.

<sup>172</sup> France, Court of Appeal of Paris. 11 April 1957. 24 ILR 228.

<sup>173</sup> This decision was followed by France in the Tribunal de Grande Instance of the Seine on 12 June 1963 in a further case against the former King and Queen of Egypt. They were sued by Societe Jean Desses for non payment of 2,478,500 old francs plus interest for women's clothing purchased for Queen Narriman between 17 May 1952 and 1 July 1952. The court held that the immunity from jurisdiction which the former King of Egypt enjoyed had disappeared. 65 ILR 37.

nature. If the contract had been an official matter he would have immunity *ratione materiae*, in which case the state would have been responsible for the debt.

A state is responsible for the actions of its officials, and a state may still be liable even if the state official went beyond his authorisation, or acted outside his responsibility.<sup>174</sup> In civil proceedings a state is liable for the actions of its officials which are *acta jure gestionis*, acts such as a private person could perform, whether or not the state expressly authorised such actions. A state has immunity in respect of conduct performed by state officials if the conduct is an exercise of sovereign or governmental authority, *acta jure imperii*, unless there is a specific exception such as torts involving the presence of motor vehicles on the road. State officials have immunity *ratione materiae*, immunity because they are acting on behalf of the state.

The justification for this immunity is that the conduct itself carries the immunity, and the officials are not individually responsible for what they do. They are the agents or servants of the state and do what the state requires of them. They do their duty, and are therefore not responsible. The state is responsible, and to make the official responsible, when the state is immune, would be to circumvent that immunity. Conversely it is the duty of the state to protect its officials who are acting in the interests of the state. This model of the responsibility of state officials portrays the state as an entity which is bigger than the individuals who make it up. On the international plane the state is responsible, but individuals are not. This justification does not fit easily in relation to criminal proceedings, as criminal conduct is committed by individuals, and criminal responsibility is that of the individual who committed the criminal conduct. To say that the conduct was committed in the exercise of duty would be mitigation, not a defence in criminal courts.

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<sup>174</sup> Oppenheim's International Law. Footnote 17 at p. 545. ILC Draft Articles on Responsibilities of States for Internationally Wrongful Acts 2001 articles 4 and 7 with commentaries annexed to GAR 56/83 12 December 2001. YBILC 2001, vol. II (Part two).

### **Immunity for *acta jure imperii* applies to individuals.**

The principle articulated in *Twycross v Dreyfuss* that state agents cannot be sued if the state itself cannot be sued, continues to apply to *acta jure imperii*. It is perceived to be unfair, and there have been a number of attempts to overturn this principle, but it has been consistently upheld in a number of jurisdictions in recent years, even for the most serious of allegations. These cases will now be considered to see the rationale for the decisions and to identify what actions are considered official and carry with them immunity in civil jurisdictions.

In the Church of Scientology case<sup>175</sup> the West German Federal Supreme Court decided on 26 September 1978 that the Commissioner of the Metropolitan police was immune from proceedings in West Germany. New Scotland Yard made a report to the West German police alleging offences of dishonesty by the Church of Scientology against its members. The Church sought an injunction to restrain the head of New Scotland Yard from making the allegations. The Supreme Court considered the Agreement on Mutual Assistance in Criminal Matters 1961 made between the Federal Republic of Germany and the UK and said that Scotland Yard, and consequently its head, was acting as the expressly appointed agent of the British state for the performance of obligations under the treaty, and that the acts of such agents are state conduct and cannot be attributed as private activities to the person authorised to perform them. The court said: *“Any attempt to subject state conduct to German jurisdiction by targeting the foreign agent performing the act would undermine the absolute immunity of sovereign states in respect of sovereign activity.”*

On 20 September 1990 the US District Court of Columbia considered this question in the case of *Herbage v Meese and others*.<sup>176</sup> Mr. Alex Herbage, a British Citizen, was extradited from the UK to the USA in December 1986, charged with offences of fraud and deception. In August 1987 he pleaded guilty to three charges of fraud and was

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<sup>175</sup> 65 ILR 193

<sup>176</sup> [1990] ILR 101

sentenced in total to fifteen years imprisonment. He preserved the right to challenge the court's jurisdiction and appealed. His appeal was refused. He sued alleging that US and UK officials conspired to deprive him of due process under the constitution. He alleged the original request for his extradition was false, that perjured evidence was given at the extradition hearing, and that his specialty protection was breached. He wanted to sue Douglas Hurd, the Home Secretary, Sir Thomas Hetherington, the Director of Public Prosecutions(DPP), Detective Superintendent Roger Hoddinott of Hampshire Constabulary, and Christopher Wilson-Smith and John Spokes both barristers who appeared for the DPP in the English court proceedings.

The British defendants argued that they were entitled to immunity as officials of a foreign state. The US District Court decided that the FSIA was enacted to codify sovereign immunity in the United States, and that that Act is the “*sole basis for obtaining jurisdiction*”.<sup>177</sup> The FSIA does not discuss the liability or role of natural persons, whether governmental officials or private citizens. Mr. Herbage asserted that he was not suing a foreign sovereign, but suing the British defendants, solely, in their individual capacity. The court found that the actions complained of were ones that the British officials could have taken only in their official capacities, they were acting as law enforcement officers, and that the logical approach was to find that immunity under the FSIA covered officials “*for a government does not act but through its agents.*” The court went on to say that the standard for determining whether immunity is warranted does not depend on the identity of the person or entity, so much as the nature of the act for which the person or entity is claiming immunity.

Mr Herbage also argued that the British defendants could not have immunity because they were acting illegally. The court found that no matter how serious the allegations, as the British defendants were government officials, and their actions were sovereign or governmental in nature, the court had no jurisdiction. The case against the American defendants was dismissed for lack of evidence. The United States court would not

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<sup>177</sup> Argentine Republic v Amerada Hess Shipping Corp., 488 U.S. 428, 109 S. Ct. 683, 688, 102 L.Ed.2d 818 (1989).

inquire into the actions of the defendants once the court decided they were UK officials carrying out governmental activities.

A similar submission was considered in Canada in the Ontario Court of Appeals in *Jaffe v Miller and Others*.<sup>178</sup> On 17 June 1993 that court held that functionaries of a sovereign state were entitled to immunity to the extent that the state itself was granted immunity. Mr. Jaffe was involved in litigation in Florida regarding mortgages. He alleged that there was a conspiracy in Florida to extort a settlement in that case. Mr Jaffe said that false charges were laid in Florida, and that he was induced to return to Florida from Toronto in order to respond to a subpoena in the civil matter, and that he was then arrested on the criminal charge, about which he did not know.

Mr. Jaffe was released on a bail bond and returned to Toronto. There were then two unsuccessful applications made to extradite Mr. Jaffe to Florida. The judicial authorities in Florida instructed two bail bondsmen to abduct Mr Jaffe in Toronto. This was done and he was returned to Florida and was imprisoned on 24 September 1981. He was convicted on 11 February 1982 of the criminal charge and sentenced to 135 years imprisonment. On 2 September 1983 he successfully appealed, and on 11 October 1983 he was released from prison and allowed to return to Toronto. Mr Jaffe sued for damages in tort for malicious prosecution and conspiracy to kidnap, and false imprisonment. The defendants who claimed state immunity were the Attorney General of the State of Florida, the Florida State Attorney, an Assistant State Attorney, an investigator for the office of the State Attorney, and a Florida State lawyer. The defendants, who claimed state immunity, all occupied offices created under the Florida State constitution or by statute.

The Ontario Court of Appeal considered the Canadian State Immunity Act 1982, which was passed to implement the restrictive doctrine of immunity as it had evolved in international customary law into Canadian domestic law. The court considered the purpose of the immunity, and said that immunity must apply to state officials otherwise

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<sup>178</sup> [1994] ILR 446.

it could be avoided by suing the functionaries of a state, and this would render the State Immunity Act ineffective. The court found that the defendants were functionaries of the State of Florida, and that, when acting within the scope of their duties, they were entitled to state immunity. It is the United States of America which is entitled to state immunity, and therefore employees, and functionaries of the United States who are entitled to immunity when acting within the scope of their duties. Officials of an internal division of a state can only have immunity if their conduct is official, in that it is of a sovereign nature. The Ontario Court of Appeal did not analyse the relationship between central and state government, and accepted that as functionaries, the officials who were sued were entitled to immunity. The officials were all involved in law enforcement which is a sovereign activity.

The English courts and the European Court of Human Rights considered whether individuals could be sued for official conduct in the case of *Al-Adsani v Government of Kuwait and Others*. Mr. Al-Adsani had dual nationality, being both a British national and a Kuwaiti citizen. At the time of the Gulf war he was a member of the Kuwait airforce, and after Kuwait was invaded by Iraq he remained in Kuwait as a member of the resistance movement. He came into possession of embarrassing sexual videotapes belonging to Sheikh Al-Sabah, a man of influence in Kuwait, who was related to the Emir of Kuwait. The contents of the tapes became common knowledge causing great offence to the Sheikh, and the Sheikh blamed Mr. Al-Adsani for stealing the tapes and other valuables from his house.

Mr. Al-Adsani alleged that on 2 May 1991, after the Iraqis were expelled from Kuwait, he was kidnapped by the Sheikh and two others, taken to the Kuwait State Security prison where he was falsely imprisoned and beaten by security guards, to make him sign a false confession, and when he signed on 5 May 1991 he was released. He asserted that the security guards were acting as the servants or agents of the State of Kuwait, and that their treatment of him amounted to torture. Mr Al-Adsani said that he was again abducted at gunpoint by the Sheikh and the two others on 7 May 1991. He said he was taken in a government car to the Emir of Kuwait's brother's palace, where he was

tortured and seriously burned. He was taken to hospital in Kuwait, and then on 17 May 1991 he was flown to England, and spent six weeks in hospital being treated for burns covering twenty five percent of his body. He alleged that he was threatened after his return to England and that this aggravated his post-traumatic stress disorder.

He tried to sue the State of Kuwait, the Sheikh, and the two others, in the English courts, for damages. The proceedings have a complicated history, and although he tried to issue proceedings against the Government of Kuwait for a decade, he was not allowed to do so. The facts as narrated are as asserted by Mr. Al-Adsani, and were disputed by Kuwait.

Mr. Al-Adsani appealed to the Court of Appeal<sup>179</sup>, contending that a state was entitled to immunity only in respect of acts which were not contrary to international law, and that since torture was a violation of a rule of jus cogens, the Government of Kuwait was not entitled to immunity. The Government of Kuwait did not accept that the alleged conduct by the security guards, if it occurred, was committed by them as its servants or agents, and it asserted that it was entitled to immunity. The Court of Appeal found that the State Immunity Act 1978 bestowed immunity upon sovereign states for acts committed outside the jurisdiction, and that as Mr. Al-Adsani had not established on the balance of probabilities that the Kuwaiti Government was responsible for the threats made in England, there was no case to answer on that point. On 27 November 1976 Mr. Al-Adsani was refused leave to appeal to the House of Lords, and he also failed to obtain compensation from the Government of Kuwait by diplomatic channels. He took his case to the European Court of Human Rights<sup>180</sup> claiming that, by according Kuwait immunity the UK had violated his rights under the European Convention on Human Rights (ECHR).

The European Court of Human Rights found that there was no breach of article 3 of the ECHR as the alleged torture did not take place in the UK, and as the UK authorities did

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<sup>179</sup> 107 ILR 536.

<sup>180</sup> (2001) 34 EHRR 273.

not have any causal connection with what was alleged, the UK was not under a duty to provide a civil remedy to Mr Al-Adsani in respect of torture allegedly carried out by the Kuwaiti authorities.

The European court found that the grant of sovereign immunity to a state in civil proceedings pursued the legitimate aim of complying with international law to promote comity and good relations between states; that the passing of the State Immunity Act 1978 was to incorporate in English law the rules of international law relating to state immunity; and that the application of the provisions of that Act to uphold Kuwait's claim to immunity was a justified restriction on the applicant's access to the court.

Another English case is *Propend Finance Pty and Others v Sing and Others*.<sup>181</sup> This litigation related to conduct in England, the forum state, and the actions of law enforcement officers. Allegations of contempt of court were made against Australian officials in the UK. Contempt proceedings are quasi-criminal as the possible penalties are fines and imprisonment which are imposed on individuals; but as the proceedings were heard in the civil court the State Immunity Act 1978 applies.

On the 27 August 1993 the Australian Attorney-General requested assistance from the UK government in a criminal investigation into alleged tax evasion in Australia by a group of companies including Propend Finance Property Ltd. The Australian authorities requested the search of the offices of solicitors and accountants to recover documents it was believed would be of assistance in the investigation.

On 26 October 1993 Detective Constable Fryer made a successful application at the Central Criminal Court for search warrants. Detective Constable Fryer was accompanied by Superintendent Sing of the Australian Federal Police Force, who was an accredited diplomat at the Australian High Commission, his title being First Secretary (Police Liaison). The role of liaison officer was stated to be "*to represent the interests of the Australian Federal Police on matters of law enforcement, in particular, to receive and*

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<sup>181</sup> Court of Appeal (Civil Division) 17 April 1997. The Times 2 May 1997. (Transcript: Smith Bernal).



*distribute crime intelligence at post and to facilitate provision of crime intelligence to Australian police forces.”*

The warrants were executed on 27 October 1993 and documents were seized. On 29 October 1993 the Secretary of State authorised the Australian High Commission to transmit the evidence directly to the authorities in Australia, and Superintendent Sing took possession of the documents, and took them to the Australian High Commission.

The solicitors and those being investigated in Australia took judicial review proceedings, requesting that the warrants be quashed. On 29 October 1993 they made an application for an injunction to prevent the removal of the seized documents from England, and to prevent their use in the criminal investigation in Australia, until the legality of the issuance of the warrants and the consequent seizure of the documents had been decided. Superintendent Sing attended the application represented by counsel and he gave an undertaking to the Divisional Court that until 5pm on 5 November 1993 the documents seized on 27 October 1993 or copies thereof would not be removed from the jurisdiction of the court or from the Australian High Commission in London, and in particular, Superintendent Sing agreed that copies of the documents would not be faxed anywhere, and that there would be compliance with the tenor and spirit of the undertaking. On 1 November 1993, which was the first working day after he gave the undertaking, the Superintendent faxed extracts from the seized documents to Australia, but this did not come to the attention of the parties until later.

On 13 December 1993 a consent order was made in the Divisional Court that the documents should be sealed, removed from the High Commission, and not used in any way until the final determination of the proceedings. On the 17 March 1994 the decision to issue the warrants, and the decision to authorise the direct transmission of the documents, were quashed by the Divisional Court,<sup>182</sup> and the government of Australia agreed that the documents should not be disclosed, and should be destroyed.

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<sup>182</sup> R v CCC, ex parte Propend Finance Property Ltd and Another. [1996] 2 Cr App R 26.

It was not until the end of 1994 that it came to the attention of those who were the subject of investigation that the documents had been faxed to Australia, copied and distributed there. In a letter dated 31 October 1994 the Attorney General of Australia admitted that the fax had been sent on 1 November 1993. Propend and others took proceedings against Superintendent Sing and the Commissioner of the Australian Federal Police Force for contempt of court. They alleged that Superintendent Sing was in breach of the undertaking made on 29 October 1993 and that the Commissioner was vicariously liable for the actions of the Superintendent.

The Divisional Court found that the Superintendent was immune as he was an accredited diplomat and had been acting in that capacity, but found that the Commissioner was not immune. The Divisional Court had heard evidence about the status of the Australian Federal Police in Australia, and concluded that the police occupied a similar position to the police in the UK, being holders of an independent office under the Crown, fulfilling public duties of maintenance and enforcement of the law. The court found that the references to the government in section 14(1) were to the executive branch of the government, and rejected as “*apparently bizarre*” the conclusion accepted by Professor Crawford, the expert for the Commissioner, that every member of the Australian Federal Police was part of the executive government of Australia. The court said this would lead to the result that “*every bailiff, every tipstaff, many local authority officials, and other who enjoy or are burdened with public power under Act of Parliament are, likewise, members of the executive government*” which result the court considered to be absurd.

Both parties appealed, and on the 17 April 1997 the Court of Appeal<sup>183</sup> found that both the Superintendent and the Commissioner were immune, the Superintendent having both diplomatic and state immunity, whilst the Commissioner had state immunity, and the proceedings against him were misconceived.

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<sup>183</sup> Propend Finance Pty and Others v Sing and Others. The Times 2 May 1997, (Transcript: Smith Bernal).

Propend and the others submitted that once Superintendent Sing left office he was no longer entitled to diplomatic immunity, because he had not performed the relevant acts in the exercise of his functions as a member of the mission. They said that when he gave the undertaking on 29 October 1993 and broke it a few days later he was acting as an officer of the Australian Federal Police, and in no other capacity. They said he had two roles, that of a diplomat responsible for liaison between the governments of Australia and the UK police forces in relation to criminal investigations and matters of mutual concern, and secondly as an officer of the Australian Federal Police discharging police duties, and that in giving the undertaking and breaking it a few days later the Superintendent was acting as a police officer.

The Court of Appeal found that the actions of the Superintendent were performed in the exercise of his functions as a member of the mission. The Australian government had an interest in the satisfactory operation of the Commonwealth scheme for mutual assistance, the stated purpose of which is “*to increase the level and scope of assistance rendered between Commonwealth governments in criminal matters*”. In co-operating as he did in the application made by DC Fryer the Superintendent was exercising his functions as the High Commission’s Police Liaison Officer.

The court did not directly consider what it was the Superintendent did, the assisting in the application for the search warrants is not the action complained of here, rather the giving of the undertaking, and then breaking that undertaking. Although the court does not say so in as many words, the decision means that those actions must also be part of the functions of a diplomat, who is a Police Liaison Officer. Is it really in the interests of mutual assistance for an official to give an undertaking to a foreign court knowing that he is going to break it, and then for him to send evidence to his own state for use in that state, knowing that it is alleged to have been obtained illegally.

The Court of Appeal then went on to consider the case against the Commissioner, which was put on the basis that the person holding that office was vicariously liable for the actions of the Superintendent. The court said that if it were necessary it would have

dismissed the proceedings against the Commissioner on the ground that they palpably lacked any conceivable merit the Commissioner not being a party to the making of the undertaking, but that as state immunity applied that was unnecessary. The court found that both the Commissioner and Superintendent Sing were entitled to state immunity within section 14(1) of the State Immunity Act 1978.

The Court of Appeal thought the Divisional Court had become confused by the concept of the separation of powers within a state, and who is a state official for the purposes of state immunity. The Court of Appeal said that although there is an understandable reluctance to characterise the activities of either police or judges as governmental, both police and judicial functions are sovereign activities for the purposes of state immunity.

These cases are a continuous line of authority that state immunity cannot be circumvented by suing individual officials instead of the state. The question is a troublesome one, particularly when state immunity prevents the responsibility of individuals for torture from being litigated. There is a perception that state immunity protects individuals from liability, and the victims of torture continue to try to use the courts to obtain redress for ill treatment. In 2006 in *Jones v Ministry of the Interior*<sup>184</sup> the House of Lords unanimously confirmed that if a state is immune in civil proceedings then the officials of the state are also immune, even when the allegation is torture, and *jus cogens*.

In this case two actions which raised the same point were joined together. Mr Jones was injured in a bomb blast outside a Riyadh book store on 15 March 2001, and hospitalised for a day. He was arrested, and held in solitary confinement, for sixty seven days. He alleged that he was systematically tortured during that time. He wanted to sue for damages for assault and battery, trespass to the person, torture and unlawful imprisonment. Mr Jones said that following his release and return to England he suffered post traumatic stress disorder, and depression, necessitating treatment, and was unable to work. Mr Jones issued High Court proceedings against the Kingdom of Saudi

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<sup>184</sup> [2005] QB 699.

Arabia and Lieutenant Colonel Abdul Aziz, who was described as a servant or agent of the Kingdom.

The second claim was made by Sandy Mitchell and Leslie Walker, both British citizens and William Sampson, a Canadian citizen, against four Saudi Arabian individuals, Ibrahim Al-Dali, a Major in the Saudi Arabian police force, Khalid Al-Saleh, a lieutenant in the Saudi Arabian police force, Mohamed al Said, a Colonel in the Minister of Interior and Deputy Governor of the Al Ha'ir prison, and Prince Naif, head of the Ministry of the Interior with responsibility for the matters of domestic security and domestic and foreign intelligence including the police service and the prison service. The claim was for assault and negligence as regards the Colonel al Said and Prince Naif as they were said to be responsible for detainees within the criminal justice system in the Kingdom.

All of the claimants alleged severe, systematic and injurious torture, and exhibited medical reports substantiating their claims. Saudi Arabia denied the allegations. In the Court of Appeal, the claimants contended that state immunity was incompatible with article 6(1) of the European Convention on Human Rights. The Court of Appeal found that Saudi Arabia was immune, but allowed the appeal against refusal to serve the individual defendants on the basis that *“it can no longer be appropriate to give blanket effect to a foreign state’s claim to state immunity ratione materiae in respect of a state official alleged to have committed acts of systematic torture.”*<sup>185</sup> Saudi Arabia and the claimants both appealed to the House of Lords.

The House of Lords were unanimous in their decision that state immunity applied. Lord Bingham gave a judgment with which all the judges agreed. Lord Bingham noted that neither the State Immunity Act 1978 nor the 1972 European Convention expressly provide for the case where proceedings are brought against the servants or agents, officials or functionaries of a foreign state in respect of acts done by them as such in the foreign state. He then cited a number of cases including those referred to earlier in this

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<sup>185</sup> Jones v The Ministry of the Interior. [2005] Q.B. 699. Lord Justice Mance at para. 92.

part of this chapter, saying that the authorities showed that the foreign state is entitled to claim immunity for its servants and he considered article 2(1)(b)(iv) of the State Immunity Convention in which 'State' is defined to mean '*representatives of the State acting in that capacity*,' and also article 6(2)(b) of the Convention which provides '*A proceeding before a court of a State shall be considered to have been instituted against another State if that other state ... (b) is not named as a party to the proceeding but the proceeding in effect seeks to affect the property, rights, interests or activities of that other state.*' He said at paragraph 12 of the judgment that a state may claim immunity for any act for which it is, in international law, responsible, save where an established exception applies.

Lord Bingham at paragraph 13 of his judgment said that taking the pleadings at face value certain conclusions were inescapable.

1. That all the individual defendants were at the material times acting or purporting to act as servants or agents of the Kingdom of Saudi Arabia.
2. That their acts were accordingly attributable to Saudi Arabia.
3. That no distinction is to be made between the claim against Saudi Arabia and the claim against the personal defendants; and
4. That none of these claims falls within any of the exceptions specified in the 1978 Act.

and that on a straightforward application of the 1978 Act, it would follow that the Saudi Arabia's claim to immunity for itself and its servants or agents should succeed, as this allegations were not a specified exception, and therefore the general rule of immunity prevailed.

Lord Bingham considered the case of *Al-Adsani* in which the European Court of Human Rights held that the grant of sovereign immunity to a state in civil proceedings pursued the legitimate aim of complying with international law to promote comity and good relations between states through the respect of another state's sovereignty.

Lord Bingham said four arguments were compelling, first, in the light of the Arrest Warrant decision; state immunity does override a prohibition on crimes against humanity, another international crime having the status of jus cogens. Secondly the Torture Convention does not provide for universal civil jurisdiction. Thirdly the State Immunity Convention provides no exception from immunity where civil claims are made for torture, and fourthly there was no evidence that states have recognised or given effect to an international law obligation to exercise universal jurisdiction over claims arising from alleged breaches of peremptory norms of international law. He said that as the rule on immunity was well-understood and established, and no relevant exception was generally accepted, the rule prevailed. It followed that part 1 of the 1978 Act was not shown to be disproportionate as inconsistent with a peremptory norm of international law, and its application did not infringe the claimants' convention rights.

In the Court of Appeal Mance LJ had ignored the description of Colonel Abdul Aziz as a *'servant or agent'* and the Master of the Rolls considered this description *'irrelevant and arguably embarrassing'*. Lord Bingham said there was no principled reason for this departure as *"A state can only act through servants and agents; their official acts are acts of the State; and the state's immunity in respect of them is fundamental to the principle of immunity"*. Lord Hoffman was also of the opinion that both the Kingdom and the state officials were protected by state immunity. At paragraph 68 of the judgment he said quoting Leggatt LJ in *Propend* *"state immunity affords individual employees or officers of a foreign state 'protection under the same cloak as protects the state itself'."*

This approach means that the official is immune only if the state is immune, and this rationale means that the immunity continues to apply to officials after they have left office. The fact that the official's actions are attributable to the state for the purposes of state responsibility is linked to the question of whether the conduct is official for the purposes of the law of state immunity. A state may claim immunity for any act for

which it is in international law responsible unless an established exception to immunity applies.

These cases demonstrate that neither a state, nor state officials can be held civilly liable before the courts of foreign states even for very serious criminal offences such as kidnapping and perverting the course of justice, or for breaches of peremptory norms such as torture, if such conduct is *acta jure imperii*. The state is immune, and that immunity cannot be circumvented by pursuing the state officials. The courts in the US, Canada and the UK all agree that it is the state that is responsible for official actions, and an individual cannot be held to be individually responsible in civil proceedings.

The case of *Jones v. the Ministry of the Interior* highlighted the difference between civil and criminal cases. In civil cases there can be only one liability, and one entitlement for compensation, and therefore if the state is immune, the responsible officials must also be immune. The same is not true of criminal proceedings. The fact that a state is civilly responsible does not relieve an individual of criminal responsibility which had been recognised in international law since the affirmation of the Nuremberg principles by the UN General assembly in 1946.<sup>186</sup>

Some officials who have immunity *ratione personae* will continue to have immunity *ratione materiae* after they leave office in respect of official conduct. That is, they will have continuing immunity attaching to conduct they performed whilst they held office and were entitled to immunity *ratione personae*. The next part of this chapter will look at who has continuing immunity after leaving office.

### **Continuing Immunity.**

As shown in the previous chapter there are a limited number of state officials who have immunity *ratione personae*, that is immunity whilst they hold the position which carries with it immunity. These officials who enjoy immunity because of their position within a

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<sup>186</sup> GAR 95(I)



society retire from office sooner or later, and what is their position then. When these officials have left office, do they have continuing immunity from prosecution for offences in foreign states? Do ex-diplomats and ex-state officials have continuing immunity from prosecution for criminal offences before the domestic courts of foreign states, in respect of crimes committed whilst they were in office? Can they travel freely safe from the threat of prosecution?

Article 39.2 of the Vienna Convention on Diplomatic Relations 1961 says that diplomatic privileges and immunity normally cease at the moment the diplomat leaves the country, but that with respect to acts performed in the exercise of his functions as a member of the mission immunity continues to subsist.

Consular officials and employees are a group of officials who have immunity only for their official conduct, by article 43 of the Vienna Convention on Consular Relations they are not amenable to the jurisdiction of the receiving state in respect of acts performed in the exercise of consular functions. They are state officials with limited immunity *ratione personae*. They have immunity because they are consular officials but only in respect of their official actions. Their status as consular officials does not carry with it immunity for all of their actions, but because they are recognised consular officials their official conduct carries with it immunity. If a person who was not a consular official performed the actions of a consular official his actions would not carry immunity. By article 43.2 of the Convention on Special Missions the immunity of members of special missions continues for acts performed in the exercise of the members functions.

What about ex-sovereigns, ex-heads of state and other ex-foreign ministers, do they have continuing immunity? The position of a foreign minister, and by analogy that of the head of government and that of the head of state was considered by the ICJ, in the Arrest Warrant Case.<sup>187</sup> In considering the question of immunity from jurisdiction, the ICJ emphasised that that immunity did not mean impunity in respect of any crimes,

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<sup>187</sup> 128 ILR 1.

which such a minister may have committed, no matter how serious. The court said in paragraph 60 of the judgement that immunity from criminal jurisdiction and individual criminal responsibility are separate concepts. Jurisdictional immunity is procedural in nature, whereas criminal responsibility is a question of substantive law. Jurisdictional immunity may bar prosecution for a certain period or for certain offences but it does not exonerate the person to whom it applies from all criminal responsibility.

In paragraph 61 the ICJ outlined four situations in which an incumbent or former foreign minister would not enjoy immunity, and the third exception was once the person ceased to hold office a court of a foreign state could prosecute him for acts committed before or after he took office, and for acts committed during his time in office in a private capacity.<sup>188</sup> This is defining the immunity by what it does not include, as opposed to what it does cover. This exclusionary description must mean that the continuing immunity is for actions performed during the time that office is held, for actions that are part of his official functions in whatever office is held. That a person entitled to immunity *ratione personae* can only be prosecuted for illegal private actions performed when in office, after they have left office.

What the ICJ did not consider was the position of Mr Yerodia at the time the court gave judgment, when he was no longer in office. The warrant was cancelled because the issuance of it was a breach of the immunity owed to Belgium, because Mr Yerodia was foreign minister when it was issued. If a second warrant had been issued after Mr Yerodia had left office would Mr Yerodia have been able to claim state immunity? The answer is no, unless he could show that the offence was committed during his period of office, and was not in a private capacity. The allegation was of grave breaches of the Geneva Conventions. Immunity and international crimes are considered in a later chapter in this thesis.

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<sup>188</sup> The other exceptions are that there is no immunity in the minister's own country; there is no immunity if the state which they represent decides to waive that immunity; and here is no immunity before certain international tribunals.

As explained in an earlier chapter, section 20(1) of the State Immunity Act 1978 is confusing as it says that the Diplomatic Privileges Act applies to a sovereign or other head of state as it applies to the head of a diplomatic mission “*subject to any necessary modifications.*” The position of a head of state is different from that of a head of a diplomatic mission. In particular the head of a diplomatic mission is accepted by the receiving state. He may be recalled or refused, and he does not represent his state at all times. The House of Lords considered the section in Pinochet (No 3) and decided that, as a former head of state, Pinochet enjoyed immunity *ratione materiae* in relation to acts done by him as head of state as part of his official functions as head of state. The House of Lords found by six to one that Pinochet was not entitled to continuing immunity as a former head of state for offences of torture, but by five to two that he was entitled to continuing immunity for offences of murder and conspiracy to murder committed on the territory of Spain. The allegations the House of Lords had to consider when deciding Pinochet’s immunity will be looked at further later in this chapter. In summary the following persons are said to have continuing immunity for official acts:

1. Diplomats have continuing immunity with respect to acts performed in the exercise of functions as a member of the diplomatic mission.
2. Consular officials have continuing immunity in respect of acts performed in the exercise of consular functions.
3. Members of special missions have continuing immunity in respect of acts performed in the exercise of his functions as a member of the mission.
4. An ex-head of state has continuing immunity in respect of acts performed by him in the exercise of his functions as head of state
5. An ex-head of government, or other minister entitled to immunity *ratione personae*, such as a minister for foreign affairs, has continuing immunity in respect of acts performed in the exercise of his functions as head of government or minister.

## What Conduct is “Official” and carries with it Immunity?

In civil cases continuing immunity *ratione materiae* is granted to former high state officials, who originally had immunity *ratione personae*. It is granted for conduct performed in the exercise of their functions, in other words for *acta jure imperii*. What kind of conduct does this encompass? One of the earliest cases is *Hatch v Baez*, a case heard in the United States in 1876.<sup>189</sup> Buenaventura Baez, the defendant-respondent, was President of the Dominican Republic four times, between 1849 and 1874. He was opposed to the Dominican Republic being ruled by Spain, and in 1870 he attempted to have the country annexed by the United States, but the United States senate refused to ratify a treaty of annexation. Baez lost the Presidency. He went to the United States of America where he was granted asylum. He was living in New York when he was arrested, in an action against him by the plaintiff-appellant, for injuries sustained at the hands of the defendant in Santo Domingo. The facts of the allegation against Baez are not very clear from the judgement, which says:

*“The wrongs and injuries of which the plaintiff complains were inflicted upon him by the government of St. Domingo, while he was residing in that country, and was in all respects subject to its laws. They consist of acts done by the defendant in his official capacity of president of that republic.”*

The question for the court was whether Baez was subject to the jurisdiction of the court for those acts. The counsel for the plaintiff argued that as a matter of general principle, all persons, of whatever rank or condition, whether in or out of office, are liable to be sued for acts done by them in violation of the law. Gilbert, J. whilst accepting the truth and universality of that principle, said that it did not establish the jurisdiction of the court to take cognisance of the official acts of foreign governments, as it was an established rule of international law, that the courts of one country cannot judge the acts of another country, done within its own territory.

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<sup>189</sup> 7 Hun 596 (1876)

It was also argued on behalf of the plaintiff that Baez no longer had immunity because he was no longer president of the Dominican Republic. This argument was rejected on the basis that the immunity continued as:

*The acts of the defendant for which he is sued were done by him in the exercise of that part of the sovereignty of St Domingo which belongs to the executive department of that government..... “The fact that the defendant has ceased to be president of St Domingo does not destroy his immunity. That springs from the capacity in which the acts were done, and protects the individual who did them, because they emanated from a foreign and friendly government.”*

This is a case involving actions done by a head of state, in his own state, who is sued in a foreign state after he has left office. He is present during the proceedings, and the courts of the foreign state decided that, as a former head of state, he had continuing immunity *ratione materiae* because the actions of which he was accused were an exercise of sovereignty. His immunity is the immunity of the state.

Is the law the same for criminal prosecutions? Not all official acts carry immunity for individuals against criminal prosecution. International tribunals such as the ICTY, the ICTR and the ICC have jurisdiction to prosecute offences of war crimes, crimes against humanity and torture. In Pinochet (No 3) the House of Lords said that there is no continuing immunity for conduct which amounts to official torture. The extent – if any – of continuing immunity for international crimes will be considered later in this thesis. The next part of this chapter will look at the ordinary crimes that Pinochet was accused of having committed, and what the courts decided in respect of his immunity for those offences.

## **Pinochet, An Ex-Head of State, Had Continuing Immunity for What Conduct?**

Pinochet was alleged to be the instigator and primary player in a conspiracy to commit widespread and systematic torture and murder in order to obtain and maintain control of the government of Chile. If Chile, where the conspiracy was based, had been requesting his extradition then there would have been no difficulty about his being extradited. The conduct alleged would have been extradition offences, as the conduct occurred mainly in Chile, and he would not have been entitled to immunity as Chile, the state entitled to assert immunity would have been requesting his extradition. But Chile was not asking for his extradition, Spain was. Therefore there were two questions:

1. Was the alleged conduct an extradition offence?
2. Was Pinochet entitled to state immunity?

The House of Lords in Pinochet (No.3) decided to answer the question, what if any of alleged conduct was an extradition crime, first, for if none of the conduct was an extradition crime, then the question of immunity would not arise.

The original charge in the first provisional warrant dated 16 October 1998 was that “between the 11<sup>th</sup> September 1973 and the 31<sup>st</sup> December 1983 within the jurisdiction of the Fifth Central Magistrates Court of the National Court of Madrid did murder Spanish Citizens in Chile within the jurisdiction of the Government of Spain.” This warrant was quashed by the Divisional Court as the murder of Spanish citizens in Chile was not an extradition offence. The second provisional warrant issued on 22 October 1998 alleged offences of:

- Torture between 1 January 1988 and December 1992
- Conspiracy to torture between 1 January 1988 and 31 December 1992
- Hostage-taking and conspiracy to take hostages between 1 January 1982 and 31 January 1992 and
- Conspiracy to murder between January 1976 and December 1992.

Before the question whether Pinochet could be extradited was considered for a second time by the House of Lords, the formal request for extradition signed in Madrid on 3 November 1988 was received by the British Government. The request was considered by the Secretary of State who issued an authority to proceed, under section 7(4) Extradition Act 1989, on 9 December 1998. If the Secretary of State had decided not to issue his authority to proceed, then the extradition proceedings could not have continued. The authority to proceed specified which offences the defendant could be extradited for, and did not specify the offence of genocide. If it had the conduct alleged would not have been an extradition crime as at that time genocide in England was not an extraterritorial offence.

On 10 December 1998 the Spanish indictment was preferred in Madrid, and on 24 December 1998 further particulars were drafted and sent to the Secretary of State in accordance with Article 13 of the European Convention on Extradition. The House of Lords was considering whether to quash the second provisional warrant, but events had moved on with the provision of the request and further information from Spain and the issuance of the authority to proceed. The House of Lords decided that the Spanish judicial authorities were entitled to supplement the information which was originally provided in order to define more clearly the charges which were the subject of the request, and that the House could have regard to all of the material which was then available. There were complex and difficult legal questions regarding whether the conduct alleged amounted to extradition crimes, as double criminality was required, and extra-territoriality and retrospectivity had to be considered. Most of the alleged conduct took place in Chile in or about 1973. Section 134 of the Criminal Justice Act which made official torture an extraterritorial crime under English law came into force on 29 September 1989, and section 4(1) of the Suppression of Terrorism Act 1978 which gave extraterritorial jurisdiction for the offence of murder in a convention country came into force on 21 August 1978.<sup>190</sup>

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<sup>190</sup> S.I. 1978 No. 1063 giving force to the European Convention on the Suppression of Terrorism of 27 January 1977.

The information from Spain alleged that Pinochet was party to a conspiracy to commit the crimes of murder, torture and hostage-taking, and that this conspiracy was formed before the coup. He was said to have agreed with other members of the military that they would take over the government and subdue all opposition by kidnap and torture. The purpose of the campaign of torture was not just to inflict pain; it was to terrify potential opposition. Some of those who were tortured were to be released to warn others and some of them were to be killed. The plan was to be executed in Chile and several other countries outside Chile.

The information said the conspiracy was put into effect, and victims were abducted, tortured and murdered in Chile, and then in other countries in South America, in the United States and in Europe. Many of the acts evidencing the conspiracy were said to have been committed in Chile before 11 September 1973, the date of the coup. Some people were tortured at a naval base in August 1973. Large numbers of persons were abducted, tortured and murdered on 11 September 1973 in the course of the coup, before the junta took control and Pinochet was appointed its President. These acts continued during a period of repression following the coup. The conspiracy was said to have continued for several years thereafter, but to have declined in intensity during the decade before Pinochet retired as head of state on 11 March 1990. The acts committed in other countries outside Chile were said to be evidence both of the primary conspiracies and a variety of sub-conspiracies within those states.

Draft charges were prepared in order to translate the broad accusations into terms of English law and were summarised by Lord Hope as:

- Charges 1, 2 and 5. Conspiracy to torture between 1 January 1972 and 10 September 1973 and between 1 August 1973 and 1 January 1990.
- Charge 3. Conspiracy to take hostages between 1 August 1973 and 1 January 1990



- Charge 4. Conspiracy to torture in furtherance of which murder was committed in various countries including Italy, France, Spain and Portugal between 1 January 1972 and 1 January 1990.
- Charges 6 and 8 (there is no charge 7). Torture between 1 August 1973 and 8 August 1973 and on 11 September 1973.
- Charges 9 and 12. Conspiracy to murder in Spain between 1 January 1975 and 31 December 1976 and in Italy on 6 October 1975.
- Charges 10 and 11. Attempted murder in Italy on 6 October 1975.
- Charges 13 to 29 and 31 to 32. Torture on various occasions between 11 September 1973 and May 1977.
- Charge 30. Torture on 24 June 1989.

Lord Hope, at page 231H to page 232B of the judgment, analysed the allegations and he said that charge 4 alleged that in furtherance of the agreement about four thousand persons of many nationalities were murdered in Chile and in various other countries outside Chile. Two other charges, charges 9 and 12, alleged conspiracy to murder, in one case of a man in Spain, and in the other of two people in Italy. Charge 9 stated that Pinochet agreed in Spain with others who were in Spain, Chile and France that the proposed victim would be murdered in Spain. Charge 12 did not say that anything was done in Spain in furtherance of the alleged conspiracy to murder in Italy. There was no suggestion in charges 9 and 12 that the proposed victims were to be tortured. Two further charges, charges 10 and 11 alleged the conspiracy to murder and attempted murder of the two people in Italy, and again there was no suggestion that they were to be tortured before they were murdered.

Lord Hope examined the conduct, he considered double criminality and extra territoriality, and he said that the conduct must have been punishable in the UK when it took place. Upon his analysis:

1. The offences of hostage taking were not made out on the facts alleged.
2. The only offences of murder and conspiracy to murder which could be extradition crimes were those which took place on the territory of the requesting state, as the alleged conduct did not constitute extraterritorial offences.
3. Official torture could not be an extraterritorial extradition offence until 29 September 1988 when section 134 of the Criminal Justice Act 1988 came into force.

Charge 9 alleged a conspiracy between 1 January 1975 and 31 December 1976 in Spain to murder someone in Spain. As the conduct was alleged to have occurred on the territory of the requesting state, Lord Hope said it was an offence for which Pinochet could, unless protected by immunity, be extradited to Spain. In charge 4 the alleged conduct was that Pinochet was a party to a conspiracy to murder, in furtherance of which about four thousand people were murdered in Chile, and in various countries outside Chile, including Spain. The only conduct alleged in charge 4 for which Pinochet could be extradited, was that part of it which alleged that he was a party to a conspiracy in Spain, to commit murder in Spain.

The conclusion of Lord Hope's analysis at page 240C to E was that, the only charges which allege extradition crimes for which Pinochet could be extradited to Spain, if he had no immunity, were:

1. those charges of conspiracy to torture in charge 2, of torture and conspiracy to torture in charge 4, and of torture in charge 30 which, irrespective of where the conduct occurred, became extra-territorial offences as from 29 September 1988 under section 134 of the Criminal Justice Act 1998 and under the common law as to extra territorial conspiracies
2. the conspiracy in Spain to murder in Spain which is alleged in charge 9;
3. Such conspiracies in Spain to commit murder in Spain, and such conspiracies in Spain prior to 29 September 1988 to commit acts of torture in Spain as can be shown to form part of the allegations in charge 4.

In short the only extradition crimes the conduct disclosed were offences of official torture after section 134 of the Criminal Justice Act 1988 came into force, and other offences which actually took place on the territory of Spain, the requesting State. The other Judges all agreed with Lord Hope's analysis of what alleged conduct constituted extradition crimes, and the immunity due to Pinochet was considered in relation to this alleged conduct.

Here there are two very different questions to be answered regarding immunity. First is there immunity for an ex-head of state for alleged official torture and conspiracy to torture? The Torture Convention was intended to prevent and punish torture wherever it occurred. Torture is an international crime, a crime of international concern and the question of state immunity and international crimes is considered later in this thesis. But the question of continuing immunity for the ordinary crimes in Spain of murder and conspiracy to murder is different. This is an allegation on the forum state, the jurisdiction that is being asserted is territorial, and as Lord Millett observed during argument on 4 February 1999, quoted at the beginning of this thesis, "*the most important exercise of sovereignty must be the maintenance of law and order in your own state. That must override anything except *ratione personae* must it not?*"

As regards the ordinary crimes of murder and conspiracy to murder, the Law Lords in Pinochet (No 3) decided that Pinochet was immune. In their analysis of the law relating to immunity six of the seven judges started from the premise that, as an ex-head of state, Pinochet was immune for all actions which were governmental, no matter where they occurred, and then considered whether there was an exception to this rule for an accusation of official torture.

Lord Browne-Wilkinson dealt with the question of the immunity relating to murder and conspiracy to murder in Spain very shortly saying that a former head of state enjoys immunity *ratione materiae* in relation to acts done by him as head of state as part of his official functions as head of state. Even though it is not part of the functions of the head

of state to commit crime, actions which are criminal under the local law can still have been done officially and therefore give rise to immunity *ratione materiae*. As to the charges of murder and conspiracy to murder, he said at page 205 H “*no-one has advanced any reason why the ordinary rules of immunity should not apply and Senator Pinochet is entitled to such immunity.*”

Lord Hutton and Lord Saville both agreed with Lord Browne-Wilkinson. Lord Saville at page 265G to 266A added that in general, under customary international law, a former head of state enjoys immunity from criminal proceedings in other countries in respect of what he did in his official capacity as head of state, and as the relevant allegations against Pinochet concerned not his private activities, but what he was said to have done in his official capacity, when he was head of state in Chile, Pinochet was immune. The only possible exception in the circumstances of the case related to torture, which he then went onto consider.

Lord Goff at page 224F said that Pinochet was entitled to immunity *ratione materiae* for all the alleged offences, as they were all performed in the exercise of his functions as head of state. At page 210 he quoted Sir Arthur Watts’ Hague Lectures at page 56 with approval and said the critical question was “*whether the conduct was engaged in under colour of or in ostensible exercise of the head of state’s authority.*” He said the distinction was between governmental acts, which are functions of the head of state, and private acts, which are not, and the mere fact that the conduct is criminal does not of itself exclude the immunity, otherwise there would be little point in the immunity from criminal process; and this is so even where the crime is of a serious character.

Lord Hope at page 241G-H also quoted the same passage from Watts with approval, but drew a different conclusion holding at page 248G that Pinochet had immunity *ratione materiae* from prosecution for all conspiracies in Spain to murder in Spain. He agreed that the test was whether they were private acts on the one hand, or governmental acts done in the exercise of his authority as head of state on the other. Lord Hope was also concerned about the criminality of what was alleged, as it is not one of the functions of a

head of state to commit crimes, but he said the fact that acts done for the state involve conduct which is criminal does not remove immunity, as the whole purpose of the residual immunity *ratione materiae* is to protect a former head of state against allegations of such conduct after he has left office, and to protect his governmental actions from any further analysis. At page 242D-E Lord Hope said there were only two exceptions recognised by customary international law:

1. Criminal acts which the head of state did under the colour of his authority as head of state but which were in reality for his own pleasure or benefit. He agreed with the two examples of such conduct given by Lord Steyn in the Divisional Court, the head of state who kills his gardener in a fit of rage, or who orders victims to be tortured so that he may observe them in agony, and said they were plainly in this category and outside the scope of immunity.
2. Acts the prohibition of which has acquired the status under international law of *jus cogens*, and he went on to consider whether Pinochet had immunity for matters involving torture.

Lord Phillips said although immunity *ratione materiae* was claimed on the ground that the alleged offences were in fact conduct by Pinochet as part his official functions when he was head of state, Pinochet was not entitled to such immunity because Pinochet was accused, not merely of having abused his powers as head of state by committing torture, but of subduing political opposition by a campaign of abduction, torture and murder that extended beyond the boundaries of Chile. Lord Phillips said at page 290C:

*“When considering what is alleged, I do not believe that it is correct to attempt to analyse individual elements of this campaign and to identify some as being criminal under international law and others as not constituting international crimes. If Senator Pinochet behaved as Spain alleged, then the entirety of his conduct was a violation of the norms of international law. He can have no immunity against prosecution for any crime that formed part of that campaign.”*

Therefore Lord Phillips found that Pinochet was not immune in relation to any of the alleged conduct, including the murder in Spain and the conspiracy in Spain to murder in Spain as it was all part of a widespread campaign which was a violation of the norms of international law. If the allegations of murder and conspiracy to murder had been isolated incidents, then presumably Pinochet would have had immunity. Lord Phillips like the other Judges did not consider the effect of crimes committed on the forum state.

The only dissenting voice was Lord Millett at page 277C who said:

*“I finally turn to the pleas of immunity ratione materiae in relation to the remaining allegations of torture, conspiracy to torture and conspiracy to murder. I can deal with the charges of conspiracy to murder quite shortly. The offences are alleged to have taken place in the requesting state. The plea of immunity ratione materiae is not available in respect of an offence committed in the forum state, whether this be England or Spain.”*

He does not explain why he says that immunity ratione materiae is not available in respect of an offence committed in the forum state. It would be usual in a case where immunity is raised that the alleged offence occurred in the forum state, rather than a third state. One of the complexities in the Pinochet case was the element of extraterritoriality. Earlier in his judgment Lord Millett discusses immunity ratione materiae and he implies that such immunity is only available for conduct in the home state. He says at page 269H *“Given its scope and rationale, it is closely similar to and may be indistinguishable from aspects of the Anglo-American Act of State doctrine.”* This doctrine is a rule of domestic law which holds the national courts are not competent to adjudicate upon the lawfulness of the sovereign acts of a foreign state in its own territory. Later at page 270G he says *“The immunity is available whether the acts in question are illegal or unconstitutional or otherwise unauthorised under the internal law of the state, since the whole purpose of state immunity is to prevent the legality of such acts from being adjudicated upon in the municipal courts of a foreign state. A*

*sovereign state has the exclusive right to determine what is and is not illegal or unconstitutional under its own domestic law.”* Although it may be inferred that Lord Millet considers that immunity *ratione materiae* only applies to conduct in the home state, it is not made clear.

Therefore all of the Judges in Pinochet (No 3), apart from Lord Millett are agreed that Pinochet, as an ex-head of state would have immunity from prosecution in Spain for offences of murder in Spain and conspiracy to murder in Spain, even though the offences were committed on Spanish territory, if those offences were committed as part of his public authority as head of state. This was accepted without argument or analysis. This is understandable as all parties were focussing on the question of torture allegedly committed in Chile. Later in this chapter this thesis will consider whether this is correct, but first there is another matter in the Pinochet (No 3) judgment relating to all state officials to consider.

### **Are Other Officials Entitled to Immunity *Ratione Materiae*? Does “Conduct” Carry Immunity?**

As this chapter has explained officials who had immunity *ratione personae*, may continue to have immunity *ratione materiae* for conduct which can be described as official. This continuing immunity is not time limited. Does immunity *ratione materiae* also apply to officials of the state who are not entitled to immunity *ratione personae*? Is an ordinary official immune from prosecution if they commit a crime on official business? If the purpose of immunity *ratione materiae* is to protect the state, then logically it should apply to all state officials carrying out state affairs.

All seven judges in Pinochet (No 3) were agreed that all state officials, even minor officials, have continuing immunity from prosecution, immunity *ratione materiae*, for acts performed in the exercise of their official functions; that is for *acta jure imperii*. They were agreed that such immunity is enjoyed by state officials for all official conduct, except for Lord Phillips who thought that there was an exception in the case of

criminal jurisdiction in relation to international crimes, and presumably Lord Millett in relations to crimes on the forum state, although he did not say so.

Lord Browne-Wilkinson at 202E said that an ambassador, like any other official of the state enjoys immunity in relation to his official acts done while he was an official. Lord Goff at 220D said that state immunity *ratione materiae* operates to protect even minor officials from arrest and prosecution in foreign countries in respect of acts done in the exercise of their functions. Lord Millet at 269D-E said that it was common ground that the protection afforded by immunity *ratione materiae* applies whatever the rank of the office holder and protects even subordinate public officials from the jurisdiction of foreign national courts in respect of governmental or official acts. Lord Hutton and Lord Saville agreed with Lord Browne-Wilkinson, Lord Hope said that the sovereign or governmental acts of one state are not matters upon which the courts of other states will adjudicate; and Lord Phillips at 280E-F agreed with the submission of Pinochet and Chile that no distinction could be made between a head of state, a former head of state, a state official or a former state official in respect of official acts performed under colour of their office, and immunity attached to all official acts imputable or attributable to the state.

The House of Lords is saying that all state officials regardless of their status cannot be prosecuted in a foreign state for their actions if those actions are attributable to the state. There was no examination of state practice before coming to this conclusion. The House of Lords accepted that all officials and former officials enjoy immunity in respect of their official acts, and rejected the argument put forward by Professor Greenwood on 4 February 1999 which is quoted in the introduction to this thesis without analysis. This statement bears further consideration.

This is not the only case where the assertion that all officials are immune for official conduct been accepted. Another example where this assertion was accepted without a



full analysis was in the case of Blaskic<sup>191</sup> before the Appeal Chamber of the ICTY where that court considered the individual liability of individuals, in the context of whether the Tribunal had the power to issue binding orders to state officials.

On 15 January 1997 the ICTY issued a subpoena duces tecum to the Republic of Croatia and its defence minister, Mr Susak in the case of the Prosecutor v Tihomir Blaskic. A subpoena duces tecum, or witness summons, is an enforceable order to attend the court to give evidence, and to produce evidential documents.<sup>192</sup> The court was ordering Mr Susak personally to attend the court, and produce documents. Croatia challenged the legal power and authority of the ICTY to issue such a compulsory order to a state, and a high government official of that state. On 18 July 1997 Trial Chamber II of the ICTY upheld the issuance of the order. Croatia appealed and on 29 October 1997 the Appeals Chamber gave its judgment.

The judgment does not say what documents Mr Susak was asked to produce, or what evidence he was asked to give to the tribunal. The part of the judgment which is of particular relevance to this thesis is the analysis the tribunal undertakes in giving its decision regarding issuing binding orders to individuals. The Appeals Chamber considered the questions whether the ICTY is empowered to issue binding orders to state officials, whether the tribunal can subpoena state officials, and whether it can direct binding orders to state officials. This thesis will look at the analysis undertaken by the ICTY, and will then look at the cited cases in more depth.

At paragraph 38 of the judgment the Appeals Chamber dismissed the possibility of the ICTY addressing subpoenas to state officials acting in their official capacity, saying that such officials are mere instruments of a state, and their official position can only be

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<sup>191</sup> Prosecutor v Tihomir Blaskic. 29 October 1997. Appeals Chamber. ICTY. Judgment on the request of the Republic of Croatia for review of the decision of the Trial Chamber II of 18 July 1997. <http://www.un.org/icty/blaskic/appeal/decision-e/71029JT3.html>.

<sup>192</sup> This is to be distinguished from a summons not associated with measures of constraint. An invitation which a head of state can freely accept or decline respects immunity. ICJ in the Case Concerning Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v France) 4 June 2008 see footnote 54. para. 171.

attributed to the state. They cannot be the subject of sanctions, or penalties, for conduct that is not private, but undertaken on behalf of a state. State officials cannot suffer the consequences of wrongful acts which are not attributable to them personally, but to the state on whose behalf they act, the court said such officials enjoy what is called *'functional immunity'*. The Appeals Chamber said *"This is a well-established rule of customary international law going back to the eighteen and nineteenth centuries restated many times since."*

At this point in the judgment there is a footnote which refers to two examples, the Governor Collot case in 1797 and the McLeod case in 1837. The footnote says the Governor Collot case was a civil case brought against Mr Collot, the Governor of the French island of Guadeloupe. The US Attorney-General wrote: *"I am inclined to think, if the seizure of the vessel is admitted to have been an official act, done by the defendant by virtue, or under colour, of the powers vested in him as governor, that it will of itself be a sufficient answer to the plaintiff's action; that the defendant ought not to answer in our courts for any mere irregularity in the exercise of his powers; and the extent of his authority can with propriety or convenience, be determined only by the constituted authorities of his own nation."*<sup>193</sup>

The ICTY then says *"The famous McLeod case should also be mentioned."* The facts are stated, in the footnote, as being on the occasion of the Canadian rebellion of 1837 against the British authorities, Canada being at the time under British sovereignty, rebels were assisted by American citizens who several times crossed the Niagara, the border between Canada and the United States, on the ship Caroline, to provide the insurgents with men and ammunitions. A party of British troops headed by Captain McLeod were then sent to attack the ship. They boarded it in the United States port of Fort Sclosser, killed a number of men and set the ship on fire. A few years later, in 1840, Captain McLeod was arrested in Lewiston, which is New York territory, on charges of murder and arson. An exchange of diplomatic notes between the two governments ensued. The official position of the USA, which had already been set out in similar terms by Great

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<sup>193</sup> J.B.Mooore, A Digest of International Law, 1906, vol II, p. 23.

Britain in 1838, with regard to the possible trial of another member of the British team that attacked the *Caroline*, was clearly enunciated by the US Secretary of State Webster who wrote:

*“That an individual forming part of a public force, and acting under the authority of his government, is not to be held answerable, as a private trespasser or malefactor, is a principle of public law sanctioned by the usages of all civilised nations, and which the Government of the US has no inclination to dispute...[W]hether the process be criminal or civil, the fact of having acted under public authority, and in obedience of the orders of lawful superiors must be regarded as a valid defence; otherwise individuals would be holden responsible for injuries resulting from the acts of Government, and even from the operations of public war.”<sup>194</sup>*

The Appeals Chamber then continued saying that more recently France adopted a position based on that rule in the *Rainbow Warrior* case. Again there is a footnote which states that when the two French agents who had sunk the *Rainbow warrior* in New Zealand were arrested by local police, France stated that their imprisonment in New Zealand was not justified *“taking into account in particular the fact that they acted under military orders and that France [was] ready to give an apology and to pay compensation to New Zealand for the damage suffered.”* The Appeals Chamber said that the rule is also clearly set out by the Supreme Court of Israel in the *Eichmann* case. Again there is a footnote which says that the court in the *Eichmann Case* stated among other things that *“The theory of ‘Act of State’ means that the act performed by a person as an organ of the State – whether he was head of State or a responsible official acting on the Government’s orders – must be regarded as an act of the State alone. It follows that only the latter bears responsibility therefore, and it also follows that another State has no right to punish the person who committed the act, save with the consent of the State whose mission he performed. Were it not so, the first State would be interfering in the internal affairs of the second, which is contrary to the conception of the equality of*

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<sup>194</sup> British and Foreign State Papers, vol. 29, p. 1139.

*States based on their sovereignty.*”<sup>195</sup> The footnote then states that it should be noted that after this passage the Court expressed reservations about this Act of State doctrine, but that arguably, these reservations were set out for the main purpose of further justifying the proposition that the doctrine did not apply to war crimes and crimes against humanity.

At paragraph 39 of its judgment the Appeals Chamber considered what it said was a distinct but connected question; that is whether the ICTY can direct binding orders to state officials? That is could the tribunal direct an order which was binding upon a state to a particular individual within the state. This is said to be the corollary of the right of a state to demand functional immunity from foreign jurisdiction for its officials. The Appeals Chamber decided that a state cannot prevent the prosecutor from seeking the assistance of a particular state official, but this does not mean that the particular state official has an international obligation to provide assistance. This obligation is only upon the state.

The Appeals Chamber explained that any international body, such as the ICTY, must take into account the basic structure of the international community which “*primarily consists of sovereign States; each jealous of its own sovereign attributes and prerogatives, each insisting on its right to equality and demanding full respect, by all other States for its domestic jurisdiction.*” The Appeal Chamber continued at paragraph 41 that a well established rule of customary international law, based on the sovereign equality of states, is that “*each State is entitled to claim that acts or transactions performed by one of its organs in its official capacity be attributed to the State, so that the individual organ may not be held accountable for these acts or transactions,*” with two exceptions.

1. Those responsible for war crimes, crimes against humanity and genocide cannot invoke immunity from national or international jurisdiction, even if they perpetrated such crimes while acting in their official capacity.

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<sup>195</sup> 36 ILR 5 at 308-309.

2. Other classes of persons although acting as state organs, may be held personally accountable for their wrongdoing. The Appeal Chamber does not explain what it means by other classes of person but gives the example of spies, as defined as defined in article 29 of the Regulations Respecting the Laws and Customs of War on Land, annexed to the Hague Convention IV of 1907.

It is respectfully submitted that the ICTY was too sweeping in its generalisation. The analysis earlier in this chapter demonstrates that as regards civil jurisdiction, if a state is immune then an official is also immune. As regards prosecutions for extraterritorial international crimes against peremptory norms the position is not as simple as expressed by the Tribunal. The ICTY decided that, as a well established rule of customary international law, officials have functional immunity, and that as such they cannot be penalised for conduct undertaken on behalf of their state even if the state itself is not immune. The cases referred to in the judgment bear looking at in more depth to see whether the conclusion is merited.

The Collot is a civil case from 1797, over 200 years ago. Civil liability is different to that in criminal cases. In civil cases the immunity is that of the state, whereas criminal liability is individual. Is issuing a witness summons is a criminal court exercising its criminal jurisdiction, or is it a civil matter? This was not considered by the ICTY. It is submitted that the tribunal is a criminal court, exercising a criminal jurisdiction, if a person refuses to attend a warrant may be issued for his arrest, and the penalties for refusing to attend are criminal penalties, and therefore this is a criminal jurisdiction.

The McLeod<sup>196</sup> case as an example of state practice is confusing. The United States Department of State said one thing, the New York State officials did another, and the national government had no control over the federal officials. It is an old case from 1837, over one hundred and seventy years ago, and international law has developed since that time. The restrictive doctrine has been accepted, statutes and conventions have

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<sup>196</sup> The facts and the quotes regarding this case are taken from the excellent article "The Caroline and McLeod Cases" by R.Y. Jennings. (1938) 32 AJIL 82.

been agreed, and the law relating to international crimes and individual responsibility has been formulated. The facts of this case were oversimplified in the Blaskic Subpeona Duces Tecum judgment in the ICTY.

In 1837, when Canada was a British Colony, there was a rebellion, which was defeated. The rebels had support in the USA and some of them sought refuge there. The rebels raised a force of about one thousand armed men, who were mainly U S citizens, and other sympathetic Americans provided them with supplies, including arms and ammunition.

On 13 December 1837 an armed group of rebels invaded and took possession of Navy Island, which was British territory. From there they attacked both British territory in Canada, and British boats passing the island. There was constant communication between American territory and Navy Island, and regular reinforcements of both men and supplies. On 29 December 1837 a boat, the 'Caroline,' came down the river from Buffalo in the United States, and delivered men and packages containing "*Stores of War*" at Navy Island and then she made two trips between Fort Schlosse and Navy island transporting a "*Six-pounder*," which was a kind of cannon, and other "*war like stores*."

Colonel McNab, commanding the British forces assembled across the river at Chippewa, decided that the destruction of the Caroline would prevent further reinforcements and supplies from reaching the island, and would deprive the rebels of their means of access to the mainland of Canada. An expedition, led by Captain Drew, was sent on the night of the 29 December 1837 to carry out the plan.

According to the master of the Caroline there were ten crew and officers, and twenty-three US citizens spending the night on board the boat. At about midnight seventy or eighty armed men attacked "*Immediately after the Caroline fell into the hands of the armed force who boarded her, she was set on fire, cut loose from the dock, was towed into the current of the river, there abandoned, and soon after descended the Niagara*

*falls.*” At first twelve people were thought to be missing feared dead, but later it was established that two people lost their lives; Amos Durfee, whose body was found on the quay had been shot in the head, and a cabin boy known as, little Billy, who was shot while attempting to leave the boat. No one was killed by the boat going over the falls.

The correspondence, which followed between the American and British authorities regarding responsibility for the loss of the *Caroline*, led to the much-quoted Webster doctrine of self-defence.

The destruction of the *Caroline* led to very strong feeling in America, and at first there was fear that there may be an armed retaliation. On 23 August 1838 a man called Mr. Christie was arrested and “*judicially examined*,” or questioned, on a charge of having been concerned, with other British Subjects, in the attack upon the *Caroline*. There is a report,<sup>197</sup> i.e. an advice on the law, of Mr. Dodson, the Queen’s Advocate<sup>198</sup> dated 31 October 1838 ‘*relative to the persecution to which British Subjects, suspected of being concerned in the destruction of the Steam Boat ‘Caroline’ are exposed, if they venture to land on American Territory,*’ referring particularly to the case of Mr. Christie. Mr. Dodson drafted a despatch of 6 November 1838 saying:

*“the attack upon the “Caroline” was a publick act of persons in Her Majesty’s Service, obeying the order of their superior authorities, and according to the usages of nations,<sup>199</sup> that proceeding can only be the subject of discussion between the Two Governments, but cannot be made the ground of proceedings in the United States against the individuals who, upon that occasion, were acting in obedience to the authorities appointed by their Government.”*<sup>200</sup>

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<sup>197</sup> The functions of Law Officers to the Crown included that of acting as legal advisers to the Government departments. Requests for advice were made in the form of “drafts” prepared by the secretary of the Minister at the head of the department concerned. The replies of the Law Officers are called “reports”.

<sup>198</sup> See the Law Offices’ Reports, Vols. F.O. 83. 2207-2209.

<sup>199</sup> ‘Usages of Nations’ is an archaic term for customary international law.

<sup>200</sup> Public Record Office, F.O.5. 321.

This despatch was sent by the Foreign Secretary, Lord Palmerston to Mr. Fox the British Minister in Washington.

Alexander McLeod, a Canadian Deputy Sheriff from Niagara, while in the state of New York, boasted of taking part in the destruction of the Caroline. He was arrested on 12 November 1840 at Lewiston, on charges of murder and arson. On 18 November 1840 he was committed in custody for trial. On the 19 November 1840 Alexander MacLeod wrote to the Canadian authorities, stating that he had not taken part in the attack on the Caroline, and asking for their intervention on his behalf. On 13 December 1840 Mr. Fox wrote to Mr. Forsyth, the American Secretary of State about the MacLeod case asserting that the United States national courts did not have jurisdiction to try individuals for involvement in the Caroline incident. Mr Forsyth replied that:

*“The jurisdiction of the several states which constitute the Union, is, within its appropriate sphere, perfectly independent of the Federal Government. The offence with which Mr. McLeod is charged was committed within the territory and against the laws and citizens of the State of New York, and is one that comes clearly within the competency of her tribunals. It does not, therefore, present an occasion where, under the constitution and laws of the Union, the interposition called for would be proper, or for which a warrant can be found in the powers with which the Federal Executive is invested; nor would the circumstances to which you have referred, or the reasons you have urged, justify the exertion of such a power if it existed.”*<sup>201</sup>

In March 1841, there was a change of administration at Washington, and Mr. Fox immediately wrote to Mr. Webster, who had replaced Mr. Forsyth, demanding the release of Alexander McLeod, arguing that:

*“With the particulars of the internal compact which may exist between the several states that compose the Union, foreign powers have nothing to do; the relations of foreign*

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<sup>201</sup> Report on the Commission of Claims, under the Convention of 1853, compiled by Edmund Hornby, the British Commissioner (London, 1856), at p. 430.



*Powers are with the aggregate Union; that Union is to them represented by the Federal Government; and of that Union the Federal Government is to them the only organ. Therefore, when a foreign Power has redress to demand for a wrong done to it by any State of the Union, it is to the Federal Government, and not to the separate State, that such power must look for redress of that wrong. And such foreign Power cannot admit the plea that the separate State is an independent body over which the Federal Government has no control. It is obvious that such a doctrine, if admitted, would at once go to a dissolution of the Union as far as its relations with foreign Powers are concerned; and that foreign Powers, in such case, instead of accrediting diplomatic agents to the Federal Government, would send such agents not to that government, but to the government of each separate state.”<sup>202</sup>*

Mr. Webster wrote to the US Attorney-General, sending a copy to Mr. Fox, stating:

*“That an individual forming part of a public force, and acting under the authority of his Government, is not to be held answerable, as a private trespasser or malefactor, is a principle of public law sanctioned by the usages of all civilized nations, and which the Government of the United States has no inclination to dispute. But whether the process be criminal or civil, the fact of having acted under public authority, and in obedience to the orders of lawful superiors must be regarded as a valid defence; otherwise, individuals would be holden responsible for injuries resulting from the acts of Government, and even from the operations of public war.”<sup>203</sup>*

The British and American governments were not agreed about what should happen, and had different views on the process. The British position was that McLeod should not be tried, not that he should be acquitted. Whereas the position of the American government was that he should be released by judicial process.

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<sup>202</sup> Note of March 12, 1841, British & Foreign State papers, Vol. 29, p. 1126.

<sup>203</sup> British and Foreign State Papers vol 29, p 1139.

The Supreme Court of New York refused leave to enter the *nolle prosequi*, and rejected an application for a writ of habeas corpus. It was proposed that there should be an appeal to the Federal Court, but Alexander McLeod demanded a trial, as he wanted no further delay. At the trial there was no evidence to show that he had been present at the destruction of the *Caroline*, and he was acquitted in October 1841, having been held in custody for almost a year.

The attack, which involved British forces entering the territory of the United States, and attacking the ship without concern for civilians or property, would now be described as an armed attack, and part of an international armed conflict. The death of little Billy, the cabin boy who was trying to leave the boat, would be wilful killing, as would probably be that of Amos Durfee, and therefore grave breaches of the Geneva Conventions. The destruction of the ship would probably also be a grave breach, as it was extensive destruction, and difficult therefore to justify as military necessity. It is not here being argued that the British soldiers involved in the expedition to destroy the *Caroline* should have been prosecuted. What is being suggested is that the facts of this case and the law applicable thereto are time specific. Customary international law changes to reflect the needs of the international community. It is only if state practice and *opinio juris* show that states continue to hold to the same tenets, that the law in the mid nineteenth century can be quoted as the law now. The international community, and the consensus regarding international law, has changed so fundamentally since those events, that the agreement of the British and American governments as to the state of the law at that time, indicates what the law was understood to be at that time, but further investigation is required before it can be stated to be the law now.

The third case which the Appeal chamber of the ICTY referred to in the *Blaskic* *Subpeona Duces Tecum* case, as supporting the proposition that state officials cannot be made individually responsible for their actions which are attributable to the state, is the *Rainbow Warrior* case. The ICTY reported France as saying their imprisonment was not justified. That is correct, but the state practice to be noted from this case is much more complicated than that. New Zealand never accepted that the French agents were

not individually responsible; neither did the UN Secretary General. France did not assert that the French agents should not be prosecuted. France only asserted that they should not be punished in arbitration proceedings before The UN Secretary General, after they had been convicted and sentenced. Taken at its highest France's position was that the French agents should not be punished, not that they were not responsible, and not that they should not be prosecuted.

The Rainbow Warrior case<sup>204</sup> involved French agents committing very serious criminal offences, on New Zealand territory. A boat was blown up, without warning, using explosives, and a person was killed.

For many years before 1985, the French Government organised underground nuclear tests on the atoll of Mururoa, in French Polynesia. France argued that these tests were essential for the modernisation of its defence, and that scientific teams had established that the tests had no real effect on the environment. This was not accepted by many other states and international organisations. In July 1985<sup>205</sup> the French Government intended to stage more tests. Greenpeace, an international organisation concerned with conservation and environmental matters, which advocates direct action announced that it would attempt to disrupt the tests by sailing vessels into the test area. The flagship of Greenpeace, the Rainbow Warrior, arrived in Auckland, New Zealand, on 7 July 1985.

Rainbow Warrior had a crew of thirteen, including its captain, approximately ten of whom slept on board. The ship was open to the public during much of its stay in Auckland. On the evening of the 10 July 1985 a birthday party was held on the boat, and by 11.50 p.m. there were twelve people remaining.

Some time previously French agents had attached two high explosive devices to the hull of the vessel, and the explosives detonated, without warning, shortly before midnight.

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<sup>204</sup> 74 ILR 241.

<sup>205</sup> The facts as here set out are taken from the judgment of the Chief Justice of New Zealand, Davison C.J. 74 ILR 241 at p 245, and the web page of the Auckland City Police Department [www.aucklandcity.police.govt.nz/history/warrior.htm](http://www.aucklandcity.police.govt.nz/history/warrior.htm).

The explosions caused a hole eight feet by six feet to the ship below the waterline and the ship sank quickly. One member of the crew, Fernando Pereira, a national of the Netherlands, was drowned.

The operation was pre-planned and carried out by agents of the Directorate General of External Security (DGSE), part of the French Ministry of Defence. The Government of France subsequently admitted responsibility. The Director-General of the DGSE was dismissed and the Minister of Defence resigned.

On 22 June 1985 two of the DGSE agents involved in the operation, Major Alain Mafart, and Captain Dominique Prieur had arrived in New Zealand by plane. They travelled on forged Swiss passports under false identities.<sup>206</sup> They played an essential role in the conspiracy, providing equipment for those who placed the explosives, and aiding the bombers to escape after the operation. Major Mafart and Captain Prieur were arrested on 15 July and kept in custody. They pleaded guilty to manslaughter and causing wilful damage by explosions. The New Zealand Solicitor-General agreed to accept these pleas and not to proceed with the charges of murder. The DSGE agents did not argue before the New Zealand court that they were entitled to immunity because they were acting on behalf of their state. France did not intervene on their behalf to claim immunity. Both agents were sentenced to substantial periods of imprisonment.<sup>207</sup>

The actions of the French agents were in violation of New Zealand sovereignty and of the UN Charter, which New Zealand said was “*neither accidental or technical,*” as “*International law and New Zealand’s sovereignty were violated deliberately and contemptuously.*”<sup>208</sup> France accepted this, in a letter of the 8 August 1985 from the President of the French Republic to the Prime Minister of New Zealand it was admitted

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<sup>206</sup> The Swiss Government lodged a formal protest with the French Government over the use of forged Swiss passports by the French agents. The Swiss also demanded further explanation and called on the French Government to prevent a repetition. The Times, Thursday, Aug 29, 1985; pg. 4; issue 62229; col G.

<sup>207</sup> R v Mafart and Prieur 74 ILR 241.

<sup>208</sup> Letter dated 8 August 1985 from the President of the French Republic to the Prime Minister of New Zealand.

that the incident was, “*a criminal attack committed on your territory and which cannot for any reason be excused.*”<sup>209</sup>

New Zealand requested restitution from France, but the two states could not reach an agreement. The French said that no settlement was possible without the release of Major Mafart and Captain Prieur who had been acting under orders, whereas the New Zealand government did not consider that this exempted the agents from personal responsibility for their criminal acts. The New Zealand government said Major Mafart and Captain Prieur could only be released to the French if they would be kept in custody to serve the remainder of their sentences.

On 19 June 1986 the two states agreed to refer all outstanding disputes between them regarding the Rainbow Warrior affair to the UN Secretary General, whose ruling they agreed to accept as binding.<sup>210</sup> The Secretary General ordered that the prisoners should be transferred to French military custody, and that they should be incarcerated for three years. France breached the agreement and on 30 April 1990 the arbitration tribunal declared that France had committed a violation of its international obligations towards New Zealand.<sup>211</sup>

The Rainbow warrior case does not support the proposition that state officials have immunity from prosecution for criminal offences. It is state practice which demonstrates that state officials have individual criminal liability for offences which they commit on the territory of another state, at the behest of their state and whilst on duty. This is shown by the fact that:

1. France did not intervene in the trial to assert immunity.

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<sup>209</sup> Communiqué of 22 September 1985 by Prime Minister of France. Annex A to the memorandum of the Government of New Zealand to the Secretary-General of the United Nations.

<sup>210</sup> 74 ILR 256.

<sup>211</sup> 82 ILR 499.

2. New Zealand asserted jurisdiction and prosecuted, sentenced and imprisoned. The fact that they were acting as state agents was considered to be mitigation of sentence.
3. The UN Secretary General rejected the submission that the French officials were not individually responsible.
4. The International Tribunal declared that France was in breach of its obligations towards New Zealand in not keeping the officers in custody as required.

Not only did New Zealand prosecute, it demonstrated *opinio juris* in declaring that it had the right to prosecute. This view was reinforced by the UN Secretary General who accepted that New Zealand had the right to prosecute and punish the French officers. The UN Secretary General is an international person whose actions are of international significance, and in this instance his assertions in this arbitration are evidence of customary international law.

The final case in the footnote in the *Blaskic* case is that of Eichmann who was tried in Israel, accused of crimes against humanity during World War II. Eichmann argued that the crimes were committed within the framework of the anti-Jewish decrees of the Nazi regime, and that he was acting in accordance with law, and that by the Act of State doctrine the court was precluded from looking behind those laws. The Act of State doctrine is that there are certain actions taken by a state, in its own territory, which a foreign court is not capable of adjudicating upon, and this includes foreign legislation. The *Eichmann* case decided that this doctrine was limited when applied to international crimes, as these were acts against the law of nations, for which there is individual responsibility. This has been followed in English courts, and there is a residual power which is to be exercised with “*caution and the greatest circumspection*” to disregard a foreign law provision when to do otherwise would be an affront to basic principles of justice and fairness.<sup>212</sup>

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<sup>212</sup> *Oppenheimer v Cattermole*. HL [1976] AC 249. *Kuwait Airways v Iraqi Airways Co.* [2002] UKHL 19. Lord Nicholls at paragraph 18.

On further reading, these cases cited by the ICTY in the Blaskic case, to support the proposition that functional immunity for all State officials is a well established rule of customary international law, do not support that proposition in criminal prosecutions. This proposition was accepted in the Pinochet case without full argument. To return to the transcript of the argument before the House of Lords in those proceedings records that on Tuesday 4 February 1999, and the passage quoted at the beginning of this thesis;

Professor Greenwood said *“What they (Senator Pinochet and Chile) have invited your Lordships to do is to take as a starting-point in the analysis that all officials and former officials enjoy immunity in respect of their official acts ....My Lords, we submit that that starting-point is wrong.*

In his speech Professor Greenwood refers to a case in Cyprus concerning two Mossad agents. They were arrested at 4.00 a.m. on 7 November 1998 in a small fishing village in the south of the island. The two men posed as teachers on holiday, and they were traveling on Israeli passports under the false names of Udi Hargov and Igal Damary. The authorities in Cyprus believed they were spying on a site where Cyprus was planning to install Russian made S-300 missiles said to be targeted at Turkey. The two men were arrested and remanded in custody after being found with electronic equipment, recording police conversations with a sophisticated scanner.

Turkey and Cyprus are traditional enemies. In 1974 Turkey invaded northern Cyprus dividing the island, and in 1988 Turkey had 35,000 troops stationed there. Cyprus was planning to deploy anti-aircraft missiles aimed at the Turkish sector, and the Turkish government threatened to destroy these the moment they were in place. Israel had an agreement of military co-operation with Turkey, and shared Turkish concerns about the S-300 missiles, as the Israelis were worried that the missiles and their radar would be able to target Israeli jets passing over the eastern part of the Mediterranean.

Cyprus initially said that there was no evidence that the men were working for Israel, but voiced suspicions that they were freelancing for Turkey. The Israeli press tried to

make light of the matter by seizing on comments made by a restaurateur in the fishing village, who suspected the men were spies because they had hidden away, and did not visit his establishment, renowned for its fish. But the case was reported as being viewed seriously by both governments.<sup>213</sup>

On 15 November 1998 The Sunday Times reported that Israel was involved in determined, but unsuccessful, attempts to have the two men freed. Amiram Levine, the deputy head of Mossad, traveled secretly to Cyprus, accompanied by an Israeli lawyer, in an attempt to strike a deal. Amiram Levine was reported as admitting to senior Cypriot security and state officials that the two were Mossad agents. But he insisted they were on a "*routine mission*" in co-operation with other secret services, saying it had nothing to do with Cyprus or Turkey. The Israeli President Ezer Weizman also sent Arie Shomer, the general director of his office, to Cyprus to apologise to Glafcos Clerides, the Cypriot president.<sup>214</sup>

On 25 November 1998 The Times reported that Udi Hargov and Igal Damary had been charged the previous Friday, with illegal possession of wireless equipment for espionage, and conspiracy to commit a crime, and they were remanded in custody to stand trial on 8 December. The Times also stated that the Israeli daily newspaper, Haaretz reported that the Mossad operations chief, known publicly only as "Y" resigned, and "*Before it was determined who was responsible for the foul up, Y took ministerial responsibility upon himself for it.*"

The two agents claimed they were merely innocent tourists, but Cyprus accused them of operating with a "*specific intelligence institute whose headquarters is in Tel Aviv*", that is Mossad. Police on the island also said the two were spying on behalf of Turkey, which had a defence pact with Israel. The Israeli Government did not acknowledge

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<sup>213</sup> 10 November 1998, The Times, p.10.

<sup>214</sup> 15 November 1998, The Sunday Times, News, p.25.



publicly that the two were Mossad agents, saying only that they did not spy on behalf of Turkey and were not trying to hurt Cypriot interests.<sup>215</sup>

The court in Cyprus refused a request by Israel for release on bail, pending trial,<sup>216</sup> and on 1 February 1999 a court in Larnaca Cyprus sentenced the two Israeli intelligence agents to three years imprisonment for approaching a prohibited military zone. Espionage charges were reported as dropped in a plea-bargain deal,<sup>217</sup> in other words the two men pleaded guilty. They were also jailed for six months concurrently for possessing radio scanning equipment without a license. It was reported that the sentence was imposed despite pressure from Israel for their release.

Binyamin Netanyahu, the Israeli Prime Minister, said Israel would do everything to bring them home "*in accordance with the laws of Cyprus*". This is the quotation which Professor Greenwood was referring to in his speech before the House of Lords. The men's lawyers had said they were not spying on Cyprus at the time of their arrest in November, but were on the island as lookouts, during a secret meeting of informants, who had collected intelligence about international terrorists plotting attacks in Israel. It was reported that Israel's President Weizman, as well as Mr Netanyahu, had attempted to convince the Cypriot authorities that the men were not acting against Cyprus on behalf of Turkey.

However, Judge George Aresti in the Larnaca court, said that the defence had not been prepared to offer any evidence to support that explanation, and that although charges of espionage and conspiracy, which carried a maximum ten-year jail term, had been withdrawn, the court could not ignore the fact that the two men had approached a military area "*at a time when a very serious military operation was under way*", and that operation was the unloading of important military equipment under conditions of strictest secrecy. He also referred to the vulnerable political situation on Cyprus, he said

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<sup>215</sup> 25 November 1998, The Times, p.17.

<sup>216</sup> 21 November 1998, The Times, p. 17.

<sup>217</sup> 2 February 1999, the Times, p. 13.

that gathering information linked to the military and security of the state *"endangers the very existence of our country."*

On 12 August 1999, after a recommendation for clemency by the Attorney-General, the two agents were pardoned by President Clerides of Cyprus. They had served only five months of their sentence. A government statement said that Mr. Clerides's decision was *"based on the national interest of Cyprus. The continuing detention of the two men would no longer serve the national interest."* Ehud Barak, the Israeli Prime Minister, quickly issued a brief statement thanking the Cypriot President for pardoning the two men.<sup>218</sup>

The two Israelis were arrested during a period of rising military tension, just before international pressure forced the Greek Cypriots to abandon plans to deploy sophisticated Russian made S-300 anti-aircraft missiles. Turkey had threatened to destroy the missiles, raising fears the missiles could trigger armed conflict between Greece and Turkey. The Israeli Government did not deny the two men were Mossad agents, but insisted they were not acting against Cyprus on behalf of Turkey. Shimon Peres the former prime minister, said on a visit to Cyprus they were attempting to prevent an attack on Israel by Muslim terrorists.<sup>219</sup>

These agents were clearly acting on behalf of their state, and they continued to do so throughout their arrest and trial, by trying to minimize the embarrassment to their government. They refused to co-operate with the Cypriot authorities, they denied any involvement in spying, and then avoided a trial by pleading guilty.

As Professor Greenwood said to the House of Lords at no time did the Israeli government assert that the agents were entitled to immunity. Israel made a number of confusing assertions on behalf of the two men; that they were not guilty of the conduct

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<sup>218</sup> 13 August 1999, The Times, p. 19.

<sup>219</sup> 16 January 1999, The Times, Times Magazine p.12.

alleged against them, that they were not acting against Cyprus, and then made sustained attempts to get them released by diplomatic means.

What is striking is that no-one involved; not the Israeli government, nor the Cypriot government, not the men themselves, or their defence lawyers suggested that they were entitled to immunity; and neither did any of the political commentators. The fact that their conduct was clearly being performed on behalf of a state and therefore could carry with it immunity from prosecution does not seem to have crossed anyone's mind, or if it did it was dismissed as patently incorrect. Israel did not deny that the men were its agents, and accepted that their activities were against Cypriot law.

The Cypriot courts treated the men as ordinary criminals, and did not find the fact that they were acting on behalf of their national state as mitigation. The fact that they were endangering Cyprus was an aggravating feature of their offence. But the Cypriot government did not treat them as ordinary criminals; the men were pardoned and released after serving only five months imprisonment, even though they were sentenced to a much longer term.

The other case referred to by Professor Greenwood in the House of Lords on 4 February 1999 is that of *The Rainbow Warrior* in New Zealand which has been already mentioned.<sup>220</sup> As explained this was one of the cases cited by the Appeals Chamber of the ICTY in the case of *Blaskic* as support for the proposition that functional immunity continues after leaving office, but on reading the case it does not support that proposition. This case is an important example of state practice. The operation was pre-planned and carried out by agents of the DGSE. The government of France initially denied having any involvement in or knowledge of the attack, but it subsequently admitted responsibility. The New Zealand authorities knew that the French were responsible from the time of the explosion,<sup>221</sup> but the French tried to cover this up with

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<sup>220</sup> 74 ILR 241.

<sup>221</sup> On 22 July 1985 David Lange New Zealand's Prime Minister said he knew who bombed the *Rainbow warrior* and why they did it. But he said that his knowledge was different from having the proof to make immediate arrests or bring the matter to court. He said those involved were not New Zealanders. He

an official enquiry by M Bernard Tricot, former Chief of Staff to President de Gaulle. His report was given on 26 August 1985 and it admitted that five members of the French secret service were in New Zealand and that three of these who were highly trained in combat diversion were on the yacht, *Ouvea*, which was chartered after authorisation from an officer “*high up in the presidential administration.*” The report said that French secret service agents were in New Zealand “*to observe and infiltrate the Greenpeace boats and their crews.*” M Tricot said “*There is one thing I am really sure of, that is, there was no government directive, even veiled in someway*”.

New Zealand’s Prime Minister Mr David Lange rejected the report saying, “*It is so transparent it could not be called a whitewash*” and declared “*There is no doubt whatever that it was a very heavily funded operation. The fact is that we had operators of French Government intelligence agencies in New Zealand for some time and spending at a conspicuous level. The French Government is, of course, involved.*”<sup>222</sup>

The New Zealand police wished to interview and arrest the French agents involved, but France did not allow this. The three crew members were made available to M Tricot for his enquiry, but they had not been available for questioning by New Zealand police in Paris, even though they were wanted on murder charges. Mr Lange complained “*That is an incredible state of affairs to exist between two originally friendly countries.*”<sup>223</sup> International arrest warrants, were issued for the arrest of four French nationals suspected of involvement in the bombing, three crew members of the *Ouvea* and for a woman who allegedly infiltrated the Greenpeace environmental group in order to prepare for the attack.<sup>224</sup>

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described the bombings as well, funded, meticulously planned, external in that New Zealand was the venue for the attack, rather than the target. The article in *The Times* on 23 July then refers to links with a ketch chartered by a French crew. *The Times*, Tuesday, Jul 23, 1985; pg.. 9. Issue 62197; col G.

<sup>222</sup> *The Times*, Tuesday, Aug 27, 1985, pg. 1; Issue 622227; col B.

<sup>223</sup> *The Times*, Tuesday, Aug 27, 1985,; pg. 1; Issue 622227; col B.

<sup>224</sup> *The Times*, Friday, Aug 16, pg. 1; Issue 62218; col F.

The Tricot report gave the true identities of the agents arrested in New Zealand, and by 9 September 1985 it was public knowledge that France accepted that they were its agents. A note from the French Foreign Ministry to the New Zealand Embassy in Paris issued the previous weekend called for all the guarantees of international law to be applied to the agents. Commenting on France's demand that its embassy officials be granted visiting rights, Mr David Lange pointed out that since their arrest eight weeks before no-one from the embassy had made any attempt to visit, although visits were allowed. The Deputy Prime Minister and Justice Minister of New Zealand, Mr Geoffrey Palmer said New Zealand's prisons met all the international rules on the treatment of prisoners, and that conditions compared favourably with those anywhere in the world, including France. Mr Lange said *"The suggestion by the French Government that New Zealand is somehow not meeting those standards is preposterous, presumptuous and arrogant."*<sup>225</sup>

On 22 September 1985 Monsieur Laurent Fabius, the French Prime Minister made an announcement that French secret agents acting under orders carried out the attack. He went out of his way to stress that the truth was hidden from M. Tricot. M. Fabius seemed to go back on his promise made in July to the New Zealand government that any French citizen found guilty of criminal acts in the affair could be brought to trial in France, when he suggested that those who carried out that attack should not be prosecuted. The following is an extract from the official translation of M Fabius's announcement:

*"Agents of the DGSE sank this boat. They acted on orders. ...The people who merely carried out the act must, of course, be exempted from blame, as it would be unacceptable to expose members of the military who only obeyed orders."*<sup>226</sup>

The next day Mr Lange was reported as taking strong exception to M. Fabius's statement that as the agents had been acting under orders it would be wrong to blame

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<sup>225</sup> The Times, Monday Sep 09, 1985; pg. 4; Issue 62238; col F.

<sup>226</sup> The Times, Sep 23, 1985; pg. 1; Issue 62250; col B.

them for the attack, he said that such statements were “*provocative and inflammatory*” and not a defence. Mr Lange said it implied that the agents in hiding in France and wanted by the New Zealand police would not be made available. He said the two agents held in New Zealand would go on trial on charges of murder, arson and conspiracy as scheduled on 4 November 1985.<sup>227</sup>

This is a claim by the French Government, not of immunity, but of being morally blameless; France is asserting that its agents should not be held responsible because they were acting under orders. This excuse was accepted in France, *Le Figaro* and *Le Quotidien* were of the view that the agents should not have to face trial because they were officers who had simply acted under orders, and an opinion poll indicated that the majority of the French public agreed with that view.<sup>228</sup> The New Zealand Government did not agree with that the French agents were blameless, and neither did the Australian government which demanded a full apology from France on 23 September 1985. The acting foreign minister, Gareth Evans said “*The Australian Government expects the French government to act within the bounds of international law and civilised conduct and to take account of world and regional opinion.*” Mr Evans continued that Australia remained appalled at the action and he said “*Recalling Prime Minister Fabius’s previous call for the perpetrators of the crime to be brought to justice, Australia looked forward to that occurring without delay or qualification.*”<sup>229</sup>

Charles Hernu the French defence minister resigned on Friday 20 September, and Admiral Pierre Lacoste, the Director-General of the DGSE was also dismissed on that day.

On 4 November 1985 Major Alain Mafart, and Captain Dominique Prieur, pleaded guilty to manslaughter and causing wilful damage by explosions thereby avoiding a trial

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<sup>227</sup> The Times, Tues Sep 24 1985 pg. 6.

<sup>228</sup> The Times, Tues Nov 05, 1985.

<sup>229</sup> The Times, Tues Sep 24 1985 pg. 6.

on charges of murder.<sup>230</sup> They accepted they played an essential role in the conspiracy by aiding those who placed the explosives. The plea of guilty curtailed the trial which had been scheduled to last two weeks, and the expected details of the activities of the French secret services in New Zealand were not forthcoming. The two defendants were remanded in custody for sentence at the New Zealand High Court on 23<sup>rd</sup>. November 1985. There were suggestions in the press that the guilty pleas were as the result of a deal between the French and New Zealand government.<sup>231</sup>

Judge Davidson C.J. in passing sentence was of the opinion that the fact they were acting on behalf of France was an aggravating rather than a mitigating feature. He said that the offences were terrorist acts, and the fact that they were committed by French officers, acting under orders, in what they perceived to be the best interests of the French state, did not alter their terrorist character. It was all the more reprehensible that the operation should have been carried out by the agents of a foreign state on the territory of an ally. The sentences had to serve as a deterrent to anyone contemplating similar terrorist attacks in New Zealand and should reflect the sense of public outrage, and condemnation of the type of offences committed. Both defendants were sentenced to ten years imprisonment for manslaughter, and seven years imprisonment, to be served concurrently, for wilful damage.

No-one argued that the two agents could not be arrested or prosecuted as they were entitled to the benefit of state immunity; this was not suggested by the agents themselves, or by their defence lawyers, or by France. It was also not suggested by any commentators. The two agents pleaded guilty and thereby prevented further embarrassment to France. France thereafter continued to negotiate their release. On the day they were sentenced M. Paul Quiles, the French defence minister said that the French government would seek the early return of the agents, and La Monde was quoting sources close to the defence that the agents would be home in time for

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<sup>230</sup> The Times, Monday, Nov 04, 1985; pg. 1; Issue 62286, col G.

<sup>231</sup> The Times, Tuesday, Nov 05, 1985, pg. 9; issue 62287, col A.

Christmas.<sup>232</sup> Repatriation talks were held between New Zealand and France, but agreement could not be reached<sup>233</sup> and in 1986 the matter was referred to the UN Secretary General for arbitration.

The actions of the French agents were in violation of New Zealand sovereignty and of the UN Charter, which New Zealand said was “*neither accidental or technical*”, as “*international law and New Zealand’s sovereignty were violated deliberately and contemptuously*”.<sup>234</sup> France accepted this, in a letter of the 8 August 1985 from the President of the French Republic to the Prime Minister of New Zealand it was admitted that the incident was “*a criminal attack committed on your territory and which cannot for any reason be excused.*”<sup>235</sup>

New Zealand was seeking restitution for the international wrong in the form of an apology and compensation. There was also concern for the family of the victim of the deceased, this was not strictly a matter for New Zealand as he was not a New Zealand national, and similarly there was concern that Greenpeace should be adequately compensated for the loss of the Rainbow Warrior. There were negotiations between the two states about these matters. The French government accepted that the attack carried out against the Rainbow Warrior was in violation of international law, as the territorial sovereignty of New Zealand had been violated, and that New Zealand had a right to compensation for harm which it had directly suffered in the attack. But the negotiations foundered on the question of the two imprisoned agents. The French position was that no settlement was possible without the release of Major Mafart and Captain Prieur who had been acting under orders, as “*those who simply carried out the deed must obviously be exonerated since it would not be acceptable to expose these military men who merely*

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<sup>232</sup> The Times, Saturday, Nov 23, 1985, pg. 7; Issue 62303 col A.

<sup>233</sup> The Times, Tuesday, Dec 17, 1985, pg. 7; Issue 62323; col A.

<sup>234</sup> Letter dated 8 August 1985 from the President of the French Republic to the Prime Minister of New Zealand.

<sup>235</sup> Communiqué of 22 September 1985 by Prime Minister of France. Annex A to the memorandum of the Government of New Zealand to the Secretary-General of the United Nations.



*obeyed orders.*”<sup>236</sup> Whereas the New Zealand government did not consider that they were exempt from personal responsibility for their criminal acts, and would only release them to the French authorities if they would be kept in custody to serve the remainder of their sentences.

On 19 June 1986 the two states agreed to refer all outstanding disputes between them regarding the Rainbow Warrior affair to the UN Secretary General, whose ruling they agreed to accept as binding.<sup>237</sup>

In his ruling the UN Secretary General summarised the positions of the two states:

*“The French Government seeks the immediate return of the two officers. It underlines that their imprisonment in New Zealand is not justified, taking into account in particular the fact that they acted under military orders and that France is ready to give an apology and to pay compensation to New Zealand for the damage suffered. The New Zealand position is that the sinking of the Rainbow Warrior involved not only a serious breach of international law, but also the commission of a serious crime in New Zealand for which the two officers received a lengthy sentence from a New Zealand court. New Zealand is ready to explore the possibility of the sentences being served outside New Zealand, but the New Zealand position is that there should be no release to freedom, that any transfer should be to custody, and that there should be a means of verifying that.”*

France wished to repatriate its people, whereas New Zealand refused to do so without adequate assurances that they would serve their sentences.

The Secretary General ordered that the government of New Zealand should transfer Major Mafart and Captain Prieur to the French military authorities, and that immediately thereafter they should be transferred to a French military facility on an isolated island

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<sup>236</sup> Communiqué from the French Prime Minister dated 22 September 1985.

<sup>237</sup> 74 ILR 256.

outside Europe for a period of three years, and that they should be prevented from leaving the island for any reason, except with the mutual consent of the two governments. They should be isolated during their assignment on the island from persons other than military or associated personnel, and immediate family and friends, and they should be prohibited from any contact with the press or other media. On 25 July 1986 Major Mafart and Captain Prieur were transferred to the island of Hao in French Polynesia.

France breached the agreement by transferring Major Mafart for medical treatment, and transferring Captain Prieur because she was pregnant, and her father died. On 30 April 1990 there was an international arbitration regarding the breach of the Secretary General's ruling. The tribunal declared that France had committed a violation of its international obligations towards New Zealand.<sup>238</sup>

When they were arrested the agents initially denied the offences, but they subsequently accepted that they were culpable, and pleaded guilty, thereby saving France from further humiliation and embarrassment. At the time of the arrests France denied that they were its agents, but within a few weeks France accepted that the act was committed by its agents. Thereafter France made sustained attempts to get its agents returned, and eventually breached the agreement imposed by Secretary General to return them home. France clearly was, as Professor Greenwood said, "*extremely aggrieved*" at the imprisonment of its agents, and considered that it had a great responsibility towards them. France did all it could to repatriate them, but it never claimed that they were entitled to state immunity. In the negotiations leading up to the arbitration France argued that they should be exonerated as they merely obeyed orders, and that their imprisonment was not justified. This was not accepted by the UN Secretary General.

The two agents and their defence lawyers did not argue before the New Zealand court that because they were acting on behalf of their state they were entitled to immunity, nor

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<sup>238</sup> 82 ILR 499.

was this ever claimed on their behalf by the French state. France apologized and paid compensation.

The argument made by France to the UN Secretary General that the agents should not be punished because they were acting under military orders and France had made reparation by apologizing and paying compensation is quite different to any of the justifications for state immunity applying to individuals. The justification of obeying superior orders is one that is not accepted by modern international law, and was not so accepted at the time of the Nuremberg trials. A person has to be responsible for their own actions, if a plea of "*I was only doing what I was told*" could be an excuse for heinous crimes, then murder, torture, genocide, and war crimes would carry no individual liability unless a person was acting outside their orders. Much of modern international criminal law would become meaningless.

State immunity is justified on two grounds:

1. That all states are equal, and for one state to judge the sovereign actions of another state, would be an unacceptable interference by that state, in the affairs of the other state.
2. That state immunity is necessary to enable a state's officials to perform their functions.

Neither of these justifications can apply here. France is interfering in the internal affairs of New Zealand by blowing up a boat in New Zealand territorial water, France cannot therefore claim that its agents' actions should not be subject to scrutiny. France could claim that the political decisions taken in France are subject to state immunity, but the egregious criminal actions of the French agents on New Zealand territory cannot be said to be an internal matter for France.

The justification that state immunity is necessary to enable the French agents to perform their function does not stand up to scrutiny either. The French agents entered New

Zealand clandestinely with the intention of being part of a conspiracy to cause explosions. Causing explosions on the territory of a friendly ally, an action which has no regard for human life, is a gross breach of the sovereignty of that ally. Causing explosions on the territory of other states is not a legitimate function of state officials.

These two cases are very different. The Cyprus case relates only to collecting information, albeit in a covert way, whereas the Rainbow Warrior case involves bombings and murder; very serious crimes of violence. But the cases have features which are similar, the agents are disguised, their identity and the purpose of their visit are not disclosed to the foreign state. The reason for this is self evident, if they disclosed who they were, and why they were on the territory of the foreign state, they would be excluded. The foreign state would not consent to their presence on its territory.

Both cases evince responses from the states and agents involved which are very similar. At the beginning the agents deny being who they are, and assert that they are they innocent, and their state does not acknowledge their actions. When the evidence is overwhelming, the agents plead guilty thereby protecting their state from further embarrassment, whilst the state accepts responsibility for the actions of the agents. Both the responsible states and the agents try to minimise what has happened, and the state makes sustained and ultimately successful efforts to get their people returned. No-one involved asserts that state immunity applies, and the responsible states do not assert that their agents are entitled to immunity from prosecution as an aspect of state immunity, even though a successful plea of immunity would prevent the potential embarrassment of any trial.

These two cases share common characteristics, most overwhelmingly the fact that no-one involved has considered that immunity from criminal prosecution may apply to people who are quite clearly state actors. In both cases:

1. The state officials were not entitled to immunity *ratione personae*.

2. Their conduct was undertaken on behalf of their state, and was official, in that it was requested of them by other state officials.
3. Their conduct took place on the territory of the forum state.
4. Under the application of the ordinary principles of state responsibility the state would be held responsible for the actions of their officials.

These two cases are instances of state practice where state immunity is not accorded to state officials undertaking official business. As explained earlier in this thesis customary international law is created by state practice which is “*a general practice accepted as law.*”

There are three associated questions regarding state immunity *ratione materiae*:

1. Do state officials other than high state officials, diplomats and consuls have immunity for official conduct?
2. What conduct carries continuing immunity, and does it apply to all former officials?
3. Are officials, other than those entitled to immunity *ratione personae*, entitled to immunity from criminal prosecution for conduct on the forum state?

The next part of this thesis will look at other instances of state practice to endeavour to provide answers to these questions. Diplomats and consuls have continuing immunity for official conduct, and looking at prosecutions involving diplomats and consuls may assist in understanding what conduct carries continuing immunity.

### **Diplomats and Consuls: Performance of Duties.**

There are not many cases where diplomats and consuls are accused of criminal offences. There is a duty upon both diplomats and consuls to abide by the laws of the receiving state, and most consuls and diplomats do so. But there are a small number of cases

involving diplomats and consuls which throw some light on what conduct “*is performed in the exercise of functions.*”

In 1977 in the *Hesse v Prefect of Trieste*<sup>239</sup> the Italian courts had to consider this regarding a consul who had not paid his parking fines. Mr. Hesse was the Honorary Consul of the Republic of Cameroons in Trieste Italy, and he had a number of unpaid fines for parking offences. The Prefect of Trieste wanted to enforce the payment of the fines, and Mr. Hesse appealed against this to the Pretore (Examining Magistrate) claiming that under articles 43 and 58 of the Vienna Convention on Consular Relations 1963 he was immune from the jurisdiction of the administrative and judicial authorities of Italy. The Pretore dismissed the appeal stating that the Prefect’s injunctions were administrative and not judicial acts and that the Consul could not therefore invoke immunity from jurisdiction. Mr. Hesse then appealed to the Court of Cassation. The appeal was dismissed. The Court of Cassation held that consular immunity covered not only consular functions but also activities, which, although not constituting the performance of such functions, were nevertheless closely linked and instrumental to such functions. The court said that it was wrong to state that as a matter of principle, consular immunity could never extend to the driving and parking of a car. Nevertheless in this case the appellant had not proved the instrumental nexus between his parking in a no parking area and the performance of his consular duties. The court said that consular immunity extended to cover actions carried out by in the exercise of consular functions, and also actions which although not in themselves of an official nature were instrumentally connected with the accomplishment of official acts.

In this case the court decided that Mr. Hesse was not entitled to immunity and had to pay the fines. This decision recognises that activities, although not constituting part of the performance of official functions, but which are closely linked and instrumental to such functions may be immune.

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<sup>239</sup> [1977] 77 ILR 610 Italy, Court of Cassation (Joint Session) 10 November 1977.

New Zealand also had to consider what actions could be performed in the exercise of functions in 1977, in a much more serious matter in *L v The Crown*.<sup>240</sup> L. was the Vice-Consul of a Pacific Island country employed at the Consulate-General in Auckland. On 18 April 1977, during business hours, a citizen of his country came to the Consulate-General offices to re-new her passport. L, as Vice-Consul interviewed her, this was within his Consular functions, as one of the functions of a consul is to issue passports, and travel documents.<sup>241</sup> The woman alleged that during the interview L. indecently assaulted her, and L was charged, in New Zealand, with indecent assault.

L. applied to the court for an order seeking his discharge on the ground that he was immune from prosecution as a consular officer, as what he did was performed by him in the exercise of his consular functions within the meaning of article 43(1) Vienna Convention on Consular Relations 1963.

The application was dismissed and L. was ordered to stand trial. The New Zealand Supreme Court found that the basis of consular privileges and immunities is a functional necessity and not for the benefit of individuals. The court noted it is “*to ensure the efficient performance of functions on behalf of respective states,*” and found therefore the immunity of a consular officer from prosecution was not a personal immunity, but an immunity for the benefit of the sending state. Such immunity was limited to acts that properly occurred in the course of the exercise of consular duties. The court found that, an indecent assault, committed by a consular officer on consulate premises, was not an act performed in the exercise of a consular function. The fact that the consular officer’s introduction to the complainant would not have been made had he not held consular office, did not transform his action into one performed in the exercise of a consular function. The court said, “*Such an act is as unconnected with the duty to be performed by the consular officer as an act of murder. It is not one required of him in the exercise of his functions,*” and L was therefore subject to the jurisdiction of the New Zealand courts and stood trial.

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<sup>240</sup> [1977] 68 ILR 175 Supreme Court, Auckland, New Zealand. 12 September 1977.

<sup>241</sup> Article 5(d) of the Vienna Convention on Consular Relations 1963.

The immunity of a consular officer from prosecution, is not a personal immunity, it is an immunity for the benefit of the sending state. It is an immunity which is limited to acts which properly occur in the course of consular duties. The issuing of the passport is a consular duty, the indecent assault is not. The indecent assault was not closely linked to, nor instrumental to the issuing of a passport.

A case which is confusing in its reasoning is that of the Former Syrian Ambassador to the German Democratic Republic.<sup>242</sup> This is a prosecution in Germany, after reunification in 1990, of the former Syrian ambassador to East Germany for failing to prevent a terrorist attack in West Berlin, which at that time was part of West Germany. In 1983 there was a bomb attack at an arts centre in West Berlin. One person was killed and more than twenty seriously injured. The East German Syrian ambassador was implicated. He allegedly failed to prevent the terrorist group which carried out the attack from removing explosives from the Syrian Embassy, where they had been allowed to store them in accordance with specific instructions, from Syria, to its ambassador “*to do everything possible to assist the group*”. It was not known how the explosives reached West Berlin, although a Syrian embassy official had refused, after consultation with the ambassador, a request from the terrorists to transport them there in an embassy bag. The terrorists were allowed to leave the embassy with the explosives, and the attack occurred a few hours later.

In July 1994 a District Court in Berlin issued a warrant for the arrest of the former ambassador, charging him with being an accessory to murder, and with causing of an explosion. The former ambassador challenged the warrant. The warrant was upheld by the Berlin Court of Appeal, on the basis that immunity was not a bar to the proceedings, even though at the relevant time, the accused had been accredited as the ambassador of Syria in East Germany.

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<sup>242</sup> ILR 115 595.



The former ambassador then lodged a constitutional complaint. He argued that the Court of Appeal had been wrong in holding that, at the relevant time, he was only exempted from the criminal jurisdiction of East Germany, but not from that of the Federal Republic, that is reunified Germany. He said the Court of Appeal was wrong to hold that diplomatic immunity did not have erga omnes effect.

On 10 June 1997 in a judgment which has been criticised<sup>243</sup> the Federal Constitutional Court held that courts of the Federal Republic had criminal jurisdiction, because the acts which the complainant was accused of assisting had been committed within West Berlin, and their effects were also felt there, and that the former ambassador was not immune. The court accepted that the former ambassador had acted “*in the exercise of his functions as a member of the mission*” within the meaning of the Vienna Convention on Diplomatic Relations 1961, and that by art 39(2) his diplomatic immunity continued to subsist even after his functions came to an end. But the court found that there was no rule of customary international law whereby that continuing immunity is binding on third states, and that there was no rule of customary international law which required the Federal Republic of Germany to recognise that a diplomat formerly accredited to the German Democratic Republic was entitled to continuing immunity under article 39(2) by operation of the rules of state succession.

It is submitted that the reasoning in this case is incorrect; the Federal Republic of Germany takes over the international obligations of the German Democratic Republic. The ambassador was either entitled to continuing immunity for actions in the exercise of his functions of the mission, or not. If he was entitled to immunity that obligation was binding on the re-unified Germany. The difficult question is why did the court consider that this conduct was within the exercise of his functions as a member of the mission? It may be because he was accused of failing to prevent the attack. To have informed upon his fellow citizens who were undertaking his state’s policy would have undermining his own state. But they were going to bomb a public building. Such activity cannot be a legitimate state activity. In any event the former ambassador was not granted immunity.

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<sup>243</sup> See e.g. Fassenbender 92 AJIL 74 (1998).

A more recent case, regarding a former diplomat and terrorist actions, which points to such conduct not being in the exercise of his functions as a member of the mission, is that of the former Iranian ambassador to Argentina, Hadi Soleimanpour. On 18 July 1994 in Buenos Aires in Argentina, a Renault van full of explosives crashed into a Jewish Community Centre. The bomb destroyed the building, eighty-five people were killed and two hundred injured. Hadi Soleimanpor, who was then Iranian ambassador to Argentina, was accused of planning the attack. It was alleged he provided information to co-conspirators about how the attack should be carried out, and the place and timing of the bomb. The allegation was that the Iranian government were responsible for the bombing, and that Mr. Soleimanpour was acting on the instructions of his government. On 20 March 2003 the New York Times reported that Abdolghassem Mesbahi, a high ranking Iranian intelligence official who defected to Germany in 1996, implicated Mr Soleimanpour in carrying out the bombing, and that it was on the orders of, and financed by the Iranian government. A warrant for Mr Soleimanpour's arrest was issued in Argentina, by Judge Galeano, for offences of conspiracy to murder. Judge Galeano said there was evidence that Mr Soleimanpour harboured the bombers, and gave them logistical support.

Argentina and the UK are parties to a bi-lateral extradition treaty signed in 1894. The treaty provides that a prima facie case has to be made out before a person can be extradited, and for the issue of a provisional warrant in cases of urgency, before the evidence is received.

Mr Soleimanpour came to England to study at Durham University. Argentina requested the UK to arrest Mr Soleimanpour for extradition. On 21 August 2003 District Judge Pratt issued a provisional warrant for the arrest of Mr Soleimanpour. Judge Pratt was aware that Mr. Soleimanpour had been the Iranian ambassador to Argentina at the time of the bombing, but took the view that the allegation was such that it could not be within the exercise of the functions of an ambassador. Mr. Soleimanpour was arrested on the

warrant on 21 August 2003 and brought before Bow Street Magistrates' Court, and refused bail.

Under the terms of the treaty Argentina had two months in which to provide the extradition request. The request was received, and on 12 November 2003 the Secretary of State cancelled the provisional arrest warrant, as he was not satisfied that the prima facie evidential test had been satisfied. He declined to cancel the request on the basis of continuing diplomatic immunity despite being requested to do so by Mr Soleimanpour's lawyers.

This case caused a diplomatic incident. The arrest and failure to grant bail was reported to have angered the Iranian government. Iranian officials were reported as saying that they regarded Mr. Soleimanpour's detention as politically motivated, and President Khatami, the Iranian leader, warned that Britain should expect serious consequences if Mr. Soleimanpour remained in custody.<sup>244</sup> *"I hope the British Government revises its policies on this issue...because of the results it could have on relations between the two countries,"* Abdollah Ramazanzadeh, an Iranian spokesman, said adding that all options, including the expulsion of British diplomats, remained open.<sup>245</sup> On 2 September 2003 Morteza Sarmadi the Iranian Ambassador in London was recalled to Iran.<sup>246</sup> The High Court granted bail to Mr. Soleimanpour on 2 September 2003. This was reported to have averted a potentially explosive diplomatic row between Iran and Britain.<sup>247</sup> When Mr. Soleimanpour was discharged the Iranian foreign ministry said that Tehran was satisfied, and that *"The decision shows that the accusations against Iran were baseless and politically motivated."*<sup>248</sup>

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<sup>244</sup> 03 August 2003, The Times, p. 20.

<sup>245</sup> 08 August 2003, The Times, p. 17.

<sup>246</sup> 03 September 2003, The Times, p. 14.

<sup>247</sup> 3 September 2003. The Times, p. 4.

<sup>248</sup> 14 November 2003, The Times, p. 15.

This case caused serious political repercussions, but at no time did Iran claim that their agent was entitled to state immunity. Iran did not say that Argentina should not have issued a warrant, nor did they claim that the UK should not have arrested Mr. Soleimanpour. The complaint from the Iranian government was that Mr. Soleimanpour should have been released on bail. The Iranian government did not claim that Mr. Soleimanpour was entitled to diplomatic immunity, but his defence lawyers did so. The Secretary of State did not accept this argument and did not cancel the provisional warrant on this ground. The warrant was cancelled because the Secretary of State was not satisfied that the *prima facie* evidential test required for extradition to Argentina had been satisfied.

These cases show that immunity does not apply to criminal conduct committed by a person who had immunity *ratione personae* unless the conduct was performed as part of an official function or was closely linked and instrumental thereto. This is true of the most minor such as non payment of parking tickets, as well as serious criminal offences such as sexual assaults, and also politically motivated terrorist offences. It is not part of the functions of diplomats and consuls to commit crimes, and they do not have continuing immunity for crimes unless committed in the exercise of their legitimate functions. Violence is not a legitimate function for a diplomat. Serving diplomats may not be prosecuted but they can be expelled. When they have left office they can be prosecuted for offences that were not performed as part of a legitimate official function. The prosecuting state does not ask the home state to extradite ex-diplomats, but those accused of serious crimes travel at their peril.

### **The Waiver of Immunity.**

Immunity is for the state to claim or waive, not for an individual. If an official's state chooses to waive his immunity, he cannot then claim immunity himself. The cases where states have waived the immunity of officials throw light on the kind of conduct which states do not consider it appropriate to protect.

The New Zealand Court of Appeal in October 2004 considered waiver in the case of *R v X*.<sup>249</sup> where a diplomat was charged with indecent assault on a nanny living and working in his home. He entered the nanny's bedroom at night and masturbated to ejaculation. The nanny pretended to be asleep, and after X left the room, she discovered that she had semen in her hair. She cut off some of her hair and placed it in a plastic bag. She complained to the police and gave them the sample. The police laid charges against X. X's home government waived immunity from prosecution. In the District Court X argued that the semen sample was inadmissible. X's counsel relied upon art 29 of the Vienna Convention, which states that "*the person of a diplomatic agent shall be inviolable*". X's application was dismissed. The Judge ruled that "*the person of the diplomatic agent*" did not include bodily fluids which have been discarded by that person. X appealed to the Court of Appeal which dismissed his appeal, finding that the semen sample was admissible. There had been no breach of article 29, in that the receiving state had done nothing directly, or through its agents, to detain or arrest or constrain X in order to obtain the sample. Since X's semen had been abandoned or discarded by him, the subsequent actions of the police and courts with regard to the semen sample could not have breached article 29. The court also held that the waiver of immunity by X's home government extended to all steps which were reasonably incidental to the prosecution of X, including leading evidence of the sample. The state employing X did not consider indecent assault in his own home was the kind of conduct it wished to protect from scrutiny.

In January 1997 the President Shevardnadze of the Republic of Georgia waived the immunity of Deputy Ambassador to the United States Gueorgui Makharadze. Mr Makharadze was speeding and driving under the influence of alcohol when he crashed causing the death a sixteen year old girl and injured four others. Mr Makharadze surrendered to the police, he expressed remorse, and pleaded guilty, and was sentenced to seven to twenty-one years imprisonment.<sup>250</sup>

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<sup>249</sup> CA 299/04, [2005] 2 NZLR 121; 2004 NZLR LEXIS 56, 18 October 2004.

<sup>250</sup> New York Times. January 11 1997, February 21 1997, October 9 1997, December 20 1997.

Colombia waived immunity for the trial for murder of Jairo Soto-Mendoza, a special forces soldier and military attache at the Colombian Embassy in London. Senor Soto-Mendoza was accused of the murder of Damian Broom, a petty criminal who had mugged his son Valencia. Senor Soto-Mendoza was entitled to immunity from prosecution, but Colombia decided to waive it after Tony Blair raised the case with Alvaro Uribe, the country's President. Senor Soto-Mendoza was found not guilty at the Central Criminal Court on 22 July 2003.<sup>251</sup>

In each these cases the alleged criminality was very serious, and the diplomat was clearly in breach of his duty to abide by the law of the receiving state. The alleged conduct has nothing to do with state business, and the alleged conduct did not threaten state interests.

### **States Requesting Immunity.**

When a state does not assert the right to immunity after the event, but requests that immunity be granted before an activity is undertaken, it indicates that there is no immunity under international law. Such a situation where a state did not assert immunity was when George Bush, the US President made a state visit to the UK, in November 2003, during a time of heightened security risks. There had been terrorist attacks in New York on 11 September 2001, and Bali in October 2002 and during the visit there was to be an anti-war demonstration at which one hundred thousand people were expected to march on London's streets. The terrorist threat level in Britain was raised to the second-highest level, after intelligence warned of an al-Qaeda plot. It was in this climate, that the United States Security Services were reported to be concerned, that Islamic terrorists might take advantage of the disorder to stage an attack.

The United States secret service insisted that Mr Bush's personal safety was its responsibility, and they made a number of requests which were refused; such as that bullet proof windows be installed in Buckingham Palace, that a helicopter gunship

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<sup>251</sup> 23 July 2003, The Times, p. 7.

should hover above Buckingham Palace at all times, and that there should be a complete exclusion zone for anti-war protests. The American authorities also wanted to bring two hundred and fifty armed officers with Mr Bush, and requested that any agent who used a gun be granted immunity from prosecution. This request for immunity was refused, and Whitehall officials were reported as insisting that “*US agents must follow the law and can use arms only if there is an imminent or direct threat to life*”<sup>252</sup>

Here both the British and American authorities accept that the United States had to ask for immunity, and that the UK is entitled to say no. The press do not question this; rather there was anger in the British press at perceived American arrogance in contemplating the use of guns on British streets, and in asking for immunity. An agent who is a member of a team protecting his President from harm on an official visit to a foreign state must be an official agent acting in his official capacity. If state immunity attaches to all official state acts, then there should be no need for the American to request immunity.

This is an example of state practice where state officials do not have immunity in a second state unless that state has consented, both to the presence of the agents of the foreign state, and to those agents having immunity for their actions. Mere consent to the presence of state officials for state purposes does not confer immunity.

### **Prosecutions for Serious Crimes Committed by State Agents.**

#### **Terrorism.**

In the Lockerbie case state officials were prosecuted as state agents undertaking terrorism on behalf of their state.<sup>253</sup> Two members of the Libyan Intelligence Service were prosecuted for offences of terrorism, which were described in the charges as committed on behalf of the state of Libya. On 21 December 1988 Pan Am Flight 103

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<sup>252</sup> 12 November 2003, The Times, p. 1. 17 November 2003, The Times, p. 4.

<sup>253</sup> The facts of this case are taken from the University of Glasgow trial briefing site at [www.ltb.org.uk](http://www.ltb.org.uk).

was en route from Heathrow airport London to John F Kennedy airport New York, when it exploded in mid-air and falling wreckage destroyed three houses in the village of Lockerbie in Scotland. Two hundred and seventy people were killed; two hundred and forty three passengers, sixteen crew, and eleven residents of Lockerbie. The investigation established that a semtex-type plastic explosive bomb contained in a Toshiba radio-cassette player, amongst clothes in a Samsonite suitcase, had been detonated automatically and caused the explosion in the left side of the forward hold of the plane. The suitcase had been carried by Pan-Am unaccompanied and transferred onto the flight.

On 13 November 1991 warrants were issued by a Scottish Sheriff for the arrest of two Libyans, Abdelbasset al-Megrahi and Ali Fhimah, on charges of conspiracy to murder, murder and breaches of the Aircraft Security Act 1982. The Petition (the document requesting the warrants) outlined charges which were alleged to be committed by Mr al-Megrahi and Mr Fhimah as members of the Libyan Intelligence Services. These charges remained substantially the same in the two indictments in the eventual trial.<sup>254</sup> The charges alleged that the conspiracy to blow up the aircraft, and the actions performed in furtherance of that conspiracy, were Libyan State policy and officially sanctioned. The indictment alleged that the two defendants committed the crimes as members of the Libyan Intelligence Services, and that the conspiracy was to further the purposes of the Libyan Intelligence Services by criminal means. These are official actions performed by state officials in the execution of state policy.

Libya refused to surrender the suspects, but the reason it gave for doing so, was not that the allegations involved state actions, but that that it had no extradition treaty with either the UK, or the USA, and that Libyan law prohibited the extradition of its own nationals. Libya could have claimed that neither the British or American courts had jurisdiction, on the basis that the allegations were regarding actions of state officials, on official state

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<sup>254</sup> In the second indictment only Abdelbaset Ali Mohamed Al Megrahi was alleged to be a member of the Libyan intelligence services, but it was still alleged that they both were acting in furtherance of the purposes of the Libyan Intelligence Services. See [www.ltb.org.uk.chargesindictment2.cfm](http://www.ltb.org.uk.chargesindictment2.cfm).



business, without conceding the truth of the allegations, and without the evidence being considered, but did not do so.

Instead Libya said that it would consider trying the men itself under the provisions of the Montreal Convention. The Libyan authorities arrested the two accused and placed them under house arrest, and appointed a Supreme Court Judge as examining magistrate to consider the evidence and prepare the case against them. When the British and US authorities declined to assist this investigation, Libya filed a case with the ICJ for a declaration that Libya was entitled to try the accused in Libya, and that the UK and the USA were in breach of their obligations under the Montreal Convention in insisting upon trial elsewhere.<sup>255</sup> At no stage in these proceedings before the ICJ did Libya assert that the UK and the USA did not have jurisdiction to try the allegations because of state immunity.

The UN Security Council said it was “*Deeply concerned over the results of investigations, which implicate officials of the Libyan Government*” and “*recalled the statement made on 30 December 1988 by the President of the Security Council on behalf of the members of the Council strongly condemning the destruction of Pan Am flight 103 and calling on all State to assist in the apprehension and prosecution of those responsible for this criminal act.*”<sup>256</sup> The Security Council did not consider that the fact the agents were acting on behalf of their state absolved them from responsibility, on the contrary it urged that the perpetrators be prosecuted.

After the intervention of the Security Council,<sup>257</sup> the imposition of sanctions, and years of negotiations, a Scottish Court was convened in The Netherlands.<sup>258</sup> On 5 April 1999

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<sup>255</sup> Case Concerning Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v United Kingdom) 1992 General List No. 88 filed 3 March 1992. On 10 September 2003 the case was removed from the list at the joint request of the parties.

<sup>256</sup> Security Council Resolution 731 of 21 January 1992.

<sup>257</sup> Security Council Resolution 731 of 21 January 1992 strongly deplored the government of Libya’s lack of co-operation in the matter and urged Libya to respond to British and American requests contained in their statements of 27 November 1991. Security Council Resolution 748 of 31 March 1992 found that failure to comply with the request was a threat to international peace and security, and acting under

Mr al-Megrahi and Mr Fhima surrendered to the Netherlands authorities, and on the 3 May 2000 the trial started in the High Court of Justiciary sitting in the Netherlands. During the trial neither of the defendants raised as a defence that the actions alleged were the actions of the Libyan state, and that they were therefore entitled to be acquitted. Libya did not claim state immunity on behalf of its agents, and the defendants did not raise it for themselves. On 31 January 2001 the court convicted Mr al-Megrahi of murder and sentenced him to life imprisonment. Mr Fhima was found not guilty and released.

The Lockerbie case is a clear example of state agents accused of committing crimes on the orders of their state, and being held liable as individuals for the criminal conduct. This is state practice by the UK which prosecuted, the USA which supported the prosecutions, all the states on the Security Council, and Libya which did not claim immunity.

A second example of a state agent being prosecuted for terrorist offences is Nezar Hindawi. He was convicted on 24 October 1986 at the Central Criminal Court of attempting to destroy an Israeli airliner and sentenced to forty five years imprisonment. On April 17 April 1986 he planted a bomb in the luggage of his pregnant girlfriend, Anne-Marie Murphy. During the trial it was stated that Mr. Hindawi had acted under instructions from the Syrian intelligence service, had traveled to London under a false name on a Syrian diplomatic passport, and had received the active co-operation and encouragement of Syrian embassy staff, including the ambassador. The UK claimed that there was conclusive evidence that the Syrian government was directly involved in planning the incident, and on 24 October 1986 diplomatic relations with Syria were severed.<sup>259</sup> The English authorities prosecuted, and the Syrian authorities did not claim immunity.

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chapter VII of the United Nations Charter required Libya to renounce terrorism, and comply with the requests, that is surrender the suspects for trial within fifteen days or face the imposition of sanctions.

<sup>258</sup> The idea of trial in a neutral venue was proposed initially by Professor Robert Black of Edinburgh University. See From Lockerbie to Zeist. [www.thelockerbietrial.com/from\\_lockerbie\\_to\\_zeist.htm](http://www.thelockerbietrial.com/from_lockerbie_to_zeist.htm).

<sup>259</sup> Keesings. Israel. November 1986.

### **Terrorism by Disguised Members of Armed Forces.**

The Privy Council has held in two cases in 1968 and 1969 that members of armed forces engaged in sabotage who do not abide by the Geneva Conventions are not protected by the conventions as combatants. Both cases are appeals from the Federal Court of Malaysia. In *Osman Bin Haji Mohamed Ali and Others*<sup>260</sup> the appellants appealed against their convictions for murder. On 10 March 1965 there was an explosion at a bank in Singapore which killed three people. The appellants had been dressed in civilian clothes when they placed the explosives and lit them, and when they were arrested. There was confession and identification evidence. The appellants claimed they were members of the Indonesian armed forces and entitled to prisoner of war status, as there was an armed conflict between Indonesia and Malaysia. The court found that if they were members of the Indonesian armed forces, they were not entitled to be treated on capture as prisoners of war under the Convention as they were dressed as civilians and therefore forfeited their combatant status.

In *the Public Prosecutor and Oie Hee Koo and others*<sup>261</sup> the twelve accused were members of an armed force of paratroopers under the command of the Indonesian Air Force, captured in Malaysia. They were arrested carrying firearms, ammunition and military equipment. They had Malay identity cards. The court held that they were not entitled to be treated as combatants because the Geneva Conventions do not extend the protection given to nationals of the detaining power nor to persons who, although not nationals, owed a duty of allegiance to that power.

In both of these cases the allegations were that the appellants were acting as state agents, members of the armed forces, but there was no suggestion by anyone involved in either Malaysia or England that they were entitled to claim state immunity.

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<sup>260</sup> [1969] 1 AC 430.

<sup>261</sup> [1968] AC 829.

## **Assassination.**

There are a number of cases where state agents have carried out assassinations in foreign states. These are serious crimes performed by state agents on behalf of their state.

On 9 July 1978 Colonel al Nayef, a former Iraqi Prime Minister was fatally shot in London. Two Iraqis citizens, Salem Ahmad Hassan and Ammadi Rahman al-Shukri were accused of the murder. On 28 February 1979 at the Central Criminal Court Mr. Hassan, who was accused of firing the shot, pleaded guilty. Mr. al-Shukri pleaded not guilty. Mr. al-Shukri was alleged to be a senior officer of the Iraqi intelligence service, and the prosecution said that he accompanied Mr. Hassan to London from Baghdad, and had identified Colonel al Nayef to Mr. Hassan by shaking hands with him in the foyer of the Hotel Continental, immediately before the assassination. Mr. Hassan was sentenced to life imprisonment. Mr. al-Shukri was acquitted.<sup>262</sup> Here the UK asserted the right to prosecute, and neither the defendants nor Iraq claimed they were entitled to immunity because the allegation was that they were acting on behalf of their state.

On 25 September 1997 Mr Meshaal, a Hamas leader, was attacked outside his office in Amman, Jordan by men who were later identified as Mossad agents. They sprayed poison in his ear. Two of the men were detained, after a struggle, and taken to the police station. They were traveling on Canadian passports using false names. They declined the help of the Canadian Embassy and were soon identified as Israeli agents employed by Mossad. Other agents took refuge in the Israeli embassy. The attempted assassination was ordered by Binyamin Netanyahu. King Hussain of Jordan was said to be infuriated.<sup>263</sup> On 1 October 1997 Israel released Sheikh Yassin, who was described as

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<sup>262</sup> Keesings. February 1980. Iraq. Two British business men, Mr. Frank French, an engineer working for an American oil company in Iraq, and Mr. Christopher Sparkes, a senior representative of the George Wimpey construction company were arrested in Iraq in 1978 following the expulsion from Britain of 11 Iraqis in connection with the killing of Colonel al Nayef, and other violent attacks on Arabs in London. They were tried in April and May 1979. Mr. French was sentenced to six months imprisonment for leading a bible study group to "cover up for subversive activities." M. Sparkes was sentenced to life imprisonment for economic espionage.

<sup>263</sup> 05 October 1997, The Sunday Times, News p. 20.

Israel's most prominent Palestinian prisoner and the spiritual founder of Hamas. He was pardoned and flown to Amman in a helicopter sent by King Hussein of Jordan. He was greeted by the Monarch on his arrival. His release was reported as being part of a deal to try to secure the freedom of the two Mossad agents.<sup>264</sup> On 4 October 1997 Binyamin Netanyahu admitted that there had been an *"operational failure,"* but said the attack had been essential. The attack led to the withdrawal of Canada's ambassador from Tel Aviv.<sup>265</sup> Politicians in Ottawa called for sanctions against Israel. On 6 October 1997, Israel's parliament was recalled for an emergency debate on the *"assassination attempt ordered by Binyamin Netanyahu"* and opposition politicians called for his resignation.<sup>266</sup>

On 7 October 1997 the two Israeli agents were returned to Israel as part of a swap negotiated with King Hussain of Jordan. Twenty more Palestinian and Jordanian prisoners were released, and Sheikh Ahmed Yassin was allowed to return to Gaza. It was reported that Israel would free fifty more Arab prisoners within a fortnight. Binyamin Netanyahu announced that the undercover fight against terrorism would continue in every country where anti-Israeli terrorists sought sanctuary. *"This is a battle without compromise. It is not a battle of words. It is a battle of deeds,"* he said *"this bloody war cannot possibly be fought with only successes ... there are bound to be failures."*<sup>267</sup> On 11 October 1997 King Hussain ordered the expulsion of the entire intelligence mission from the Israeli Embassy in Amman.<sup>268</sup>

On 10 October 1997 the Canadian foreign minister, announced to the Canadian parliament in Ottawa that he had received a full apology from the Israeli foreign minister regarding the use of forged Canadian passports by Mossad in Jordan. The

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<sup>264</sup> 02 October 1997, The Times, p. 17.

<sup>265</sup> 05 October 1997, The Sunday Times, News p. 20.

<sup>266</sup> 06 October 1997, The Times, p. 15.

<sup>267</sup> 07 October 1997, The Times, p. 13.

<sup>268</sup> 11 October 1997, The Times, p. 17.

Israeli foreign minister promised *"that the use of forged Canadian passports by Israel would never happen again"*.<sup>269</sup>

This is an example of an attempted assassination by state agents on foreign territory, where the foreign state prosecuted. Jordan prosecuted the Israeli agents, the Israeli authorities made strenuous efforts to ensure the return of their agents, but they never claimed immunity.

Georgi Markov was assassinated in London in September 1978. Mr. Markov was a celebrated writer in Bulgaria who defected to the West. He lived in England and worked for the BBC World Service, and his broadcasts apparently angered Bulgaria's President Todor Zhikov. On 7 September 1978 he was stabbed in the thigh by a man with an umbrella on Waterloo Bridge. He died three days later, and an autopsy discovered a tiny pellet in his thigh filled with the poison ricin. At that time the Bulgarian government said the allegation that Bulgaria was responsible for the murder was groundless and it protested at *"slanders and fabrications."* The Bulgarian news agency said the allegations were *"ill intended propaganda against our country"* and that they *"strongly smell of a campaign schemed in advance by interested circles against the People's Republic of Bulgaria so as to discredit and denigrate her."*<sup>270</sup>

The metropolitan police reviewed the case regularly. In 1991 Oleg Kalugin, a former Soviet Intelligence Service (KGB) general, said that Todor Zhikov ordered the killing, and that the Bulgarians asked the Soviet Union for assistance. The KGB defector Oleg Gordievsky said the KGB provided the poisoned umbrella, and Bulgaria the assassin. In 1991 after Todor Zhikov was removed from power, the metropolitan police provided information to Bulgarian police.<sup>271</sup> In June 2008 it was reported that English and Bulgarian police were working together on the case, reviewing documents and questioning witnesses, including two former top-secret police officers. *"We are fully*

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<sup>269</sup> 11 October 1997, The Times, p. 17.

<sup>270</sup> The Times, Thursday, Oct 05, 1978; pg. 2; Issue 60424; col E.

<sup>271</sup> 09 June 1991, The Sunday Times.

*cooperating with our colleagues and are having a 100 per cent exchange of information on both sides - something we lacked in the past,"* Mr Tsvetanov the Bulgarian investigator told Dnevnik.<sup>272</sup>

The British authorities investigated, and continue to investigate this matter. The Bulgarians have never said that the agent who murdered Georgi Markov is entitled to immunity because he was acting on the order of the state; rather in 1978 the Bulgarian government denied responsibility for this crime, although Bulgaria now accepts that it was responsible.

On 23 November 2006 Alexander Litvinenko, died in a London hospital of acute radiation poisoning.<sup>273</sup> On 1 November 2006 Mr Litvinenko met Andrey Lugovoy at the Millennium Hotel in Mayfair; he was poisoned by tea laced with the radioactive isotope polonium-210. Mr Litvinenko was shown on British television dying a result of radiation sickness. Mr Litvinenko directly accused Vladimir Putin of being responsible for his being poisoned.

Mr Litvinenko was a British citizen, having been granted asylum. He had formerly been a Russian KGB and FSB officer, and he was an outspoken critic of Russia. He alleged that the al-Qaeda number two, Ayman al-Zawahiri, was trained by the FSB in Dagestan in the years before the 9/11 attacks, and he denounced the war in Chechnya as a crime, calling for Russian troops to be withdrawn. He was poisoned days after meeting Mario Scaramella, an Italian academic, in Piccadilly where it is said that he received documents claiming to name the killers of Anna Politkovskaya, an outspoken Russian journalist and critic of the Putin regime.

On 22 May 2007 the DPP announced that he had decided to prosecute Andrei Lugovoy, a former KGB officer with the murder of Alexander Litvinenko. He said *"I have today concluded that the evidence sent to us by the police is sufficient to charge Andrey*

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<sup>272</sup> The Times June 20, 2008.

<sup>273</sup> The following facts and statements are taken from the report in The Times Online, May 22, 2007.

*Lugovoy with the murder of Mr Litvinenko by deliberate poisoning. I have further concluded that a prosecution of this case would clearly be in the public interest. In those circumstances, I have instructed CPS lawyers to take immediate steps to seek the early extradition of Andrey Lugovoy from Russia to the United Kingdom, so that he may be charged with murder - and be brought swiftly before a court in London to be prosecuted for this extraordinarily grave crime."* A warrant was issued for the arrest of Mr Lugovoy, and the Russian ambassador was summoned to the FCO to be told that the UK expected his Government's full co-operation in the extradition. Marina Gridneva, a spokeswoman for the Russian prosecutor's office, said: *"In accordance with Russian law, citizens of Russia cannot be turned over to foreign states."*

The official spokesman for the UK Prime Minister, said the legal process should take its course, and added: *"Nobody should be under any doubt as to the seriousness with which we are taking this case. Murder is murder and therefore it is very serious and the nature of this murder also is very serious."* Russia refused to extradite Mr Lugovoy, and on 16 July 2007 the British Foreign Secretary David Miliband made a statement to the House of Commons<sup>274</sup> explaining that Britain was to expel four diplomats from the Russian Embassy in London. He told MPs Russia was an important ally, and the situation was one that Britain had *"not sought and does not welcome"*. But he said it was necessary to send a *"clear and proportionate signal"* to Russia, about the seriousness with which Britain regarded the matter.<sup>275</sup> He went on to add that if Mr Lugovoy were to travel then he could be arrested and extradited to Britain. He also said that the crime was against a British citizen in London, and that therefore the appropriate venue for the trial is London.

The Russia Foreign Ministry chief spokesman Mikhail Kamynin said: *"London's position is immoral. Moreover, in London they should clearly realise that such*

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<sup>274</sup> BBC News Online 16 July 2007.

<sup>275</sup> <http://www.fco.gov.uk/servlet/Front?pagename=OpenMarket/Xcelerate/ShowPage&c=Page&cid=1007029391629&a=KArticle&aid=1183544695364>.



*provocative actions masterminded by the British authorities will not be left without an answer and cannot but entail the most serious consequences.”*

After the four Russian diplomats were expelled by Britain, four British diplomats were expelled from Russia,<sup>276</sup> and the granting of visas was suspended by both countries. On 22 July 2007 it was reported that the murder of Alexander Litvinenko was “*undeniably state-sponsored terrorism on Moscow’s part. That is the view of the highest levels of British government*”.<sup>277</sup>

The matter was viewed very seriously by both governments, there were tit for tat expulsions of diplomats, and high level diplomatic exchanges, but no-one suggested that Mr Lugovoy could claim state immunity as an agent of the Russian state. A warrant was issued for his arrest in England, and his extradition requested. The DPP and the Foreign Secretary were both involved in the decision making, and neither thought state immunity could apply. Russia was very aggrieved by the request, and refused extradition, but only on the grounds that Russia does not extradite its own citizens. Russia never asserted that Mr Lugovoy was entitled to state immunity. The British government stated that one of its concerns was the maintenance of law and order on its own territory, and maintained that a trial for the murder of a British citizen on British territory should take place in London. State immunity was never considered to be a possible bar to prosecution by any of the government officials concerned.

### **Kidnapping.**

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<sup>276</sup> Times Online July 19, 2007.

<sup>277</sup> Times Online. July 22, 2007.

Kidnapping by foreign agents, on the territory of foreign states, is another crime for which state immunity is not claimed. One such case is that of Mohammed Yusufu.<sup>278</sup> On 5 July 1984 anti-terrorist police officers rescued Umaru Dikko from a crate in the hold of a Nigeria Airways Boeing 707 at Stansted Airport. Mr Dikko, a former Nigerian Transport Minister, was accused of stealing millions of dollars from the Nigerian State. He had been kidnapped in West London and drugged. The crate was accompanied by several Nigerian diplomats, and was labelled “*To the Ministry of External Affairs, Federal Republic of Nigeria, Lagos.*” Mr Yusufu was arrested trying to leave the country, and was one of four men charged with the kidnapping. The Nigerian High Commissioner left the UK, and other Nigerian diplomatic staff were asked to leave England including a Nigerian attaché, who acted as courier for the crates.<sup>279</sup> Mr Yusufu was committed for trial on 23 August 1984 by Lambeth Magistrates’ Court, his argument that he was entitled to diplomatic immunity having failed. He applied for habeas corpus to the Divisional Court. Mr Dikko said that he was a diplomat at the Nigerian High Commission, but that the High Commissioner had not formally presented his credentials. There was no notification to the FCO of Mr Yusufu’s presence in the UK, and there was no approval by the British government of him as a diplomat. Mr Yusufu explained the circumstances in which he entered the country and claimed to be a diplomat. The court did not believe him as his account differed from that given on his application for a UK entry certificate.

The court found that Mr Yusufu was not entitled to diplomatic immunity, as it is necessary for there to have been notification, before someone can be approved as diplomat. A sufficient period of time must be allowed for proper consideration to be given to the question as to whether or not the receiving state will accept a person as a diplomat. In his judgment Watkins LJ approved quoted with approval Parker LJ in the case of *R v The Governor of Pentonville Prison, ex parte Teja*<sup>280</sup> where he said

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<sup>278</sup> *R v Lambeth Justices, ex parte Yusufu*. [1985] Crim LR 510, The Times 20 February 1985, C0/168/85, (Transcript:Marten Walsh Cherer).

<sup>279</sup> Friday, Jul 13, 1984; pg. 1; Issue 61882; col F.

<sup>280</sup> [1971] 2 QB 274 at 282.

*“As I see it, it is fundamental to the claiming of immunity by reason of being a diplomatic agent that that diplomatic agent should have been in some form accepted or received by this country.”*

On 12 February 1985 at the Central Criminal Court Mr Yusufu pleaded guilty to kidnapping, and administering a noxious substance, and he was sentenced to twelve years imprisonment.<sup>281</sup> That court was told that the kidnapping was instigated and paid for by the Nigerian High Commissioner.<sup>282</sup>

Nigeria was implicated in this offence. Mr Yusufu was travelling on a Nigerian diplomatic passport. On 10 May 1984 the Nigerian Minister for External Affairs applied for a diplomatic entry certificate for Mr Yusufu to travel to the UK, and on 27 June 1984 the Nigerian High Commissioner applied for a diplomatic visa to the USA to enable him to leave the UK. Nigeria did not claim that Mr Yusufu was entitled to state immunity. The accredited Nigerian diplomats implicated in the matter were allowed to leave the UK, or they were expelled. The UK accepted that the diplomats were entitled to diplomatic immunity, but did not accord Mr Yusufu state immunity.

A recent allegation of kidnapping by state agents occurred in Italy. On 6 February 2005 The Times reported that Italian police were investigating allegations that American intelligence agents kidnapped an Islamic militant in Milan and transported him to Egypt, where he was tortured. Abu Omar, an Egyptian dissident with alleged links to Al-Qaeda, disappeared in Milan on 16 February 2003. The Italian police said Abu Omar was flown via US airbases to Egypt. When he was kidnapped Abu Omar was being investigated by the Italian authorities as a terrorist suspect. Italy said his abduction was “*a serious violation of Italian sovereignty*” and that investigations in Italy into his involvement in terrorism had been disrupted. Abu Omar was released in February 2007.

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<sup>281</sup> The Times, Wednesday, Feb 13, 1985; pg. 3; Issue 62061; col A.

<sup>282</sup> The Times, Tuesday, Feb 12, 1985; pg. 3; Issue 62060; col A.

In June 2005 prosecutors in Milan issued warrants for the arrest of nineteen agents allegedly involved in the kidnap, and on 1 October 2005 The Times reported that three further arrest warrants were issued for CIA agents accused of the illegal abduction. The prosecutor said the three further CIA agents sought included a female US diplomat who had been in charge of the operation and participated in it personally. Italian newspapers named her as Betnie Medero, who arrived in Italy in August 2001 as a second secretary at the US Embassy. The reports said she was working in Mexico in 2005. All twenty-two agents were said to have left Italy, and the prosecutor said that he was seeking their extradition. In October 2005 The Times reported that the US Embassy in Rome would not comment about the case.

On Tuesday 29 November 2005 an Italian Judge ruled that Robert Lady, who was described as a former agent and United States diplomatic consul was not entitled to immunity. The judge said that although Robert Lady relinquished all immunity when he left post in August 2004, the protection given to consular officials is “*always within the limits of international law*”. Furthermore, “*within these limits, naturally, is the principle of the sovereignty of the host state that cannot allow on its territory the use of force by a foreign State that outside every control of the political and judicial authorities.*”<sup>283</sup> The report does not say who made the application for immunity for Mr Lady. Later reports say that lawyers appointed by the state for the accused were without instructions.

On 23 December 2005 European arrest warrants were issued for the arrest of the twenty-two agents alleged to be working for the CIA.<sup>284</sup> This was said to be a reaction to the fact the Justice Minister was stalling on asking for the extradition of the agents. Both Silvio Berlusconi, when Prime Minister and his successor Romano Prodi both refused to make extradition requests to the USA.<sup>285</sup>

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<sup>283</sup> Jurist. Tuesday, November 29, 2005. Italian judge denies immunity claim of CIA agent accused in kidnapping plot.

<sup>284</sup> The Daily Telegraph. December 24, 2005.

<sup>285</sup> Jurist. Friday March 16, 2007. Italy government urges cancellation of indictments against intelligence officers .

On 16 February 2007<sup>286</sup> Judge Caterina Interlandi issued an indictment against 25 Americans including one US Air Force Colonel and five Italians, and on 17 February they were ordered to stand trial for the kidnapping and torture of Abu Omar. Sean McCormack, of the US State Department spokesman, said: “*It’s a judicial matter in Italy.*” Any view about possible prosecutions or extraditions would remain a matter for “*internal dialogue,*” he added. But on the 28 February 2007 John Bellinger, Legal Adviser to the US Secretary of state, Condoleeza Rice, said in Brussels “*We have not gotten that extradition request from Italy. If we got an extradition request from Italy, we would not extradite US officials to Italy.*”<sup>287</sup>

The Italian authorities are implicated in the kidnapping as the Italian defendants include Nicolo Pollari, the head of Sismi, Italy’s military intelligence service. The Times reported on 17 February 2007 that at the preliminary hearings Mr. Pollari denied that Italian intelligence played any role in the kidnapping. But on 16 March 2007 lawyers for Italy asked the Italian Constitutional Court to cancel all the indictments, on the grounds that prosecutors exceeded their authority by using evidence that was protected by state secrets privilege.<sup>288</sup> On 19 April 2007 the Italian Constitutional Court ruled that the Italian government could seek to quash the indictments. On 18 June 2007 the trial was suspended pending the decision of the Constitutional Court. On March 19 2008 Judge Oscar Magi ordered that the trial resume even though there is no ruling from the Constitutional Court saying that the continuation of the trial would not harm the defence in any way.<sup>289</sup>

The reports of this trial are confusing and it is difficult as yet to draw any clear conclusions as to state practice. All the reports are agreed that Abu Omar was the victim of what is known as extraordinary rendition, and that United States agents were involved. But whether this was with or without the knowledge of some Italian

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<sup>286</sup> The Times. February 17, 2007.

<sup>287</sup> Financial Times February 28 2007, and March 1, 2007.

<sup>288</sup> Jurist, Friday March 16, 2007. Italy government urges cancellation of indictments against intelligence officers.

<sup>289</sup> Jurist. Wednesday, March 19 2008. Italy judge orders CIA rendition trial to resume.

authorities is not clear. The reluctance of the Italian Prime Ministers to request extradition could be explained by political pressures, rather than by legalities. The very strong assertion by John Bellinger that extradition would not be granted by the United States implies that the United States believes that its agents were acting legally, but it could also just be political pressure, an indication that there is no point in asking for extradition. The Italian judges are asserting a right to prosecute those who are agents of the United States, but the Italian state is trying to quash the indictments. An application was made on behalf of Robert Lady that he was immune from the proceedings, but this seems to have been on the basis of consular immunity, and it is unclear who made the application. It is difficult to see how kidnapping could be a function of a consul, but the report also refers to Mr Lady being an agent of the United States, so it maybe the application was made on the basis of state immunity. In any event the Italian court refused the application, on the basis that the concept of sovereignty means that a state, cannot allow a foreign state, to use force on its territory, without its consent. This principle is in line with the state practice of other states.

### **Prosecution for Passport Offences.**

In March 2004 two Israeli citizens Urie Zoshe Kelman and Eli Cara were arrested in New Zealand when they went to collect a false New Zealand passport. The passport had been applied for in the name of a cerebral palsy sufferer who had never applied for a passport. The two were charged with offences including participating in an organised crime group. They initially denied the allegations, but in July 2004 both men pleaded guilty to one charged of attempting to obtain a New Zealand passport by fraud, and on 15 July 2004 they were each sentenced to six months imprisonment. The men both denied working for Mossad, but this was not accepted by the New Zealand government. Helen Clark, the New Zealand Prime Minister, said that the action of the men and those of the Israeli Government had *"seriously strained relations"* with New Zealand and that *"The New Zealand Government views the act carried out by the Israeli intelligence agents as not only utterly unacceptable but also a breach of New Zealand sovereignty"*

*and international law.*"<sup>290</sup> As a result of the case New Zealand imposed diplomatic sanctions against Israel; high-level government visits to Israel were suspended and Israeli officials wishing to travel to New Zealand were required to apply for visas. The approval for a new Israeli ambassador to New Zealand was delayed, and it was indicated that any request by President Katsav of Israel to visit New Zealand later in 2004 would be refused.<sup>291</sup> The question of state immunity was never raised.

### **Prosecutions for Trespassing.**

Another area of activity where state officials are arrested and prosecuted is for entering the territory of another state illegally. Such allegations are often associated with allegations of spying.

On 21 June 2004 eight British marines were detained by Iran for illegally straying into its waters. The eight were part of a training team of twenty-eight Royal Navy personnel, who had been instructing Iraqi police in river patrol and coastal defence procedures. British authorities denied they had strayed into Iranian territory, the defence secretary, Geoff Hoon, said that the crews were "*forcibly escorted*" into Iranian waters.<sup>292</sup>

Ali Reza Afshar, a senior member of the Iranian armed forces, told Iran's ISNA student news agency that the eight marines were being interrogated separately. The men were held for three days during which they were paraded on Iranian TV before being released.

A second case involving the same waters was on 23 March 2007 when fifteen British sailors and Royal Marines, including one woman, were seized at gunpoint by Iranian military off Iraq. The Ministry of Defence said the military personnel were in Iraqi territorial waters conducting a routine inspection of a cargo ship when they were

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<sup>290</sup> Times Online. July 15, 2004.

<sup>291</sup> Times Online July 16, 2004.

<sup>292</sup> Times Online. June 22, 2007.

surrounded by Iranian vessels and escorted to waters controlled by Iran.<sup>293</sup> Margaret Beckett, the Foreign Secretary, summoned Iran's ambassador in London. In a statement Mrs Beckett said: *"We have sought a full explanation of what happened and we are leaving them in no doubt that we want the immediate and safe return of our personnel and their equipment."* In the United States Sean McCormack, State Department spokesman, said that Washington backed the demand.

On 25 March 2007 the Prime Minister Tony Blair warned the Iranian government about the seriousness of seizing British sailors in Iraqi waters saying *"This is a very serious situation. There is no doubt at all that these people were taken from a boat in Iraqi waters. It is simply not true that they went into Iranian territorial waters, and I hope the Iranian government understands how fundamental an issue this is for us. We have certainly sent the message back to them very clearly indeed. They should not be under any doubt at all about how seriously we regard this act, which is unjustified and wrong."*<sup>294</sup>

On 4 February 2007 April Jala Sharafi, an Iranian diplomat, was kidnapped in Baghdad and was reported to be held by Iraqi intelligence services. He was released on 3 April 2007 and British, USA and Iraqi officials would not say if his release was linked to the possible release of the Britons.<sup>295</sup>

On 4 April 2007 the Iranian President, Mr Ahmadinejad pardoned and released all fifteen British military personnel. He was prepared to forgive Britain for trespassing into Iranian territorial waters. He said *"This pardon is a gift to the British people, on the occasion of the birthday of the great prophet and for the occasion of the passing of Christ, I say the Islamic Republic government and the Iranian people — with all powers and legal right to put the soldiers on trial — forgave those fifteen."* Mr Ahmadinejad also gave bravery awards to three members of the Iranian coast guard that captured the

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<sup>293</sup> Times Online. March 23, 2007.

<sup>294</sup> Times Online, March 25, 2007.

<sup>295</sup> Times Online, April 3, 2007.



British personnel. The sailors and marines were shown on Iranian television shaking hands with the President in a release “ceremony”. Mr Ahmadinejad said: *"Iran has defended its land and will always defend its land. We are sorry that British troops remain in Iraq and their sailors are being held in Iran."*<sup>296</sup>

These two incidents were in an area where there is some uncertainty as to the delineation of territorial waters, and are against the background of strained diplomatic relations with Iran, about its suspected nuclear weapons programme, the occupation of holy Shia Muslim sites in Iraq and the detention of Iranians in Iraq. Both incidents caused high level diplomatic activity, and strenuous efforts by the British government to get its people returned. The facts leading up to the arrests were strongly disputed, with allegations of entering Iranian territorial waters being denied, but in neither case was there any suggestion that the military personnel were entitled to be released because they were immune from arrest and prosecution.

### **Prosecutions for Collecting Information.**

An activity fraught with danger for individuals, who are not diplomats, is to collect information, and to record images in foreign states. Collecting information is viewed very seriously by states. It is seen as a hostile act. There have been arrests and prosecutions for the collection and transmission of information by the agents of foreign states, in times of peace, for centuries. Those who collect such information are designated as spies. One of the functions of an embassy is to collect information,<sup>297</sup> but it has to be collected by lawful means, and there is a line to be drawn between the proper collection of information for legitimate purposes, and the illegitimate, or illegal collection of information, to undermine another state and its policies.

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<sup>296</sup> Times Online, April 4, 2007.

<sup>297</sup> Article 3 1(d) Vienna Convention on Diplomatic Relations 1961. The functions of a diplomatic mission consist inter alia in ... ascertaining by all lawful means conditioned and developments in the receiving State, and developing their economic, cultural and scientific relations.

The creation of images has long been a cause for arrests. On 9 September 1886 The Times reported that a German national, posing as a tourist, was arrested drawing plans and sketches of a fort at Belfont in France. The German was released after a day or two after no sketches or plans were found. General Boulanger instituted a fresh enquiry after intelligence suggested that the tourist was a Prussian General.<sup>298</sup>

In August 1893 two French officers Delgony and Daguet were arrested as spies at Kiel in Germany. At their trial on 15 December 1893 prosecution counsel asked for heavy sentences. He said that the prisoners were not ordinary spies, and that there was a regular spy system countenanced by the French Ministry and carried into execution by officers.<sup>299</sup> The names are given slightly differently in a second report of the conclusion of the trial on 16 December 1893 when Degony was sentenced to six years and Delguey-Malvas to four years imprisonment. The court accepted that an extenuating circumstance was that the accused had only wished to serve their country. During his examination Degony stated that he had submitted their plans to the chief of the French General Staff, who, after expressing his approval of the scheme, advised them not to attempt to bribe German subjects, not to make any notes on the spot and to be cautious. Counsel for the prosecution laid special stress on the fact that the spies were active officers of the French navy.<sup>300</sup>

After the invention of the camera taking photographs became a dangerous activity for state agents. For example in China on 26 September 1967 Mr. George Watt, a British engineer was arrested on charges of espionage in Lanchow, the capital of Kansu province, north-west China, where he had been working on the construction of a polypropylene chemical plant for the manufacture of synthetic fibres<sup>301</sup>. In a statement made on 12 March 1968 the New China News Agency alleged that Mr. Watt, who had entered China on 14 December 1966, had during his stay in the country stolen "by

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<sup>298</sup> The Times, Thursday, Se 09, 1886, pg. 9; Issue 31860; col E.

<sup>299</sup> The Times. Saturday, Dec 16, 1893; pg. 5; Issue 34136; col B.

<sup>300</sup> The Times, Dec 18. 1893; pg. 5; Issue 34137; col C.

<sup>301</sup> Keesings China April 1968.

*means of spying important intelligence about China's military, political, and economic affairs and the great proletarian cultural revolution, and stealthily took large numbers of photographs of prohibited areas, and committed grave crimes."* On 15 March 1968 Mr Watt was sentenced to three years' imprisonment for espionage. He was released on 2 August 1970 as part of his sentence was remitted in view of his "*good behaviour in acknowledging and repenting his crimes*" while serving his prison term.<sup>302</sup>

In another case in China Mr. David Johnston, the British manager of the Shanghai branch of the Chartered Bank was detained by the Chinese authorities in August 1968, and signed a confession in January 1969 stating that he had offended against Chinese laws. He admitted he had taken photographs. He was released from a Shanghai prison on 23 December 1970.<sup>303</sup>

On 25 April 1981, two Argentinian officers, Major Raul Pablo Barilleau and Lieutenant Oscar Santos were arrested for espionage in Chile. Chile asserted that the activities of the two men in photographing strategic zones and important military institutions had threatened Chilean Security.<sup>304</sup> They were tried and found guilty by a military court within ten days, and their imprisonment ordered. Argentina closed its border with Chile and sent an irate protest note, which termed the arrests "illogical and irrational." The Chilean foreign ministry responded that the two men were indeed spies. Major Barilleau had entered Chile on twelve occasions, Lieutenant Santos on fourteen occasions. During these visits both men had got in touch with Chileans and photographed objectives important to national security, such as bridges, roads, high tensions towers and military installations. The ministry said that both the officers and their wives, who had been detained at the same time, had been afforded treatment in accordance with their rank, and that this was in contrast to the abusive treatment given to two Chileans arrested in 1980 in Argentina. They had been kept in a jail and presented to the public in prison

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<sup>302</sup> Keesings China August 1970.

<sup>303</sup> Keesings. January 1971. China.

<sup>304</sup> Keesings. August 1981 Chile.

dress and in handcuffs. The foreign ministry said that Chile had treated those arrested on spy charges better than Argentina.<sup>305</sup>

One case, which generated much interest in the British press, involved photographs in Greece. On 8 November 2001 twelve British subjects and two Dutch men were arrested in Greece, on suspicion of spying at the Megara military airbase. Their cameras were confiscated, and they were charged with photographing sensitive military installations. The fourteen people arrested insisted they were plane-spotters on holiday, but the Greek authorities thought they were spies because they had note books and diaries containing details of military movements, including details of military flight take-off and landing times at the airbase, to which civilian access was strictly prohibited. Paul Coppin, the organiser of the tour arranged by his company, was reported to have been the guest of the Turkish military earlier in 1998.<sup>306</sup> Mr Coppin's wife, Lesley, was arrested, as was Michael Bursell, a British Telecom manager who had written a number of aviation pamphlets and a book about crashed aircraft in Europe. He was a former employee of BAE, the aeronautics company that manufactured Hawk aircraft. Peter Norris was reported as handing over a diary containing "*voluminous notes of military movements.*" Garry Fagan had a frequency scanner in his possession, which was of particular concern to Greek intelligence officials.<sup>307</sup>

The group appeared in court on 12 November 2001 and were held in custody. On 21 November further charges were preferred relating to the taking of the notes and the aircraft numbers. On 27 November 2001 the case was referred to a higher court, the Council of Judges. On 12 December the Council of Judges reduced the charges from espionage to the collection of illegal information, and released each of the group on bail of £9,000 to return to Greece for trial.<sup>308</sup> The Greek foreign ministry said that the group had been warned three times before their arrest not to photograph military bases, and

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<sup>305</sup> The Times, May 07, 1981; pg. 9; Issue 60921; col C.

<sup>306</sup> 11 December 2001, The Times, p.8.

<sup>307</sup> 28 November 2001, The Times, p.17.

<sup>308</sup> 03 December 2001, The Times, p.8.

that they were arrested on November 5 for taking photographs near the Tanagra military base north of Athens, but were released on the same day.<sup>309</sup>

On 6 April 2002 the fourteen defendants were convicted Paul Coppin, the leader of the group, and seven others were each sentenced to three years imprisonment. The other six were each given a year's suspended sentence. They were all released on bail pending appeal. The evening Jack Straw, the UK foreign secretary, condemned the Greek response to the plane spotters' behaviour as disproportionate.<sup>310</sup>

On 6 November 2002 it was reported that they were all cleared except for Michael Keene, who suffered from ill-health and had not appealed; "*Tears flow as Greeks clear planespotters of spying*" was the headline in The Times, but Judge Efstathiou said that the plane spotters' action could have endangered Greek security, adding: "*However, I recognise that this is a new hobby in Europe and you didn't intend to cause harm.*" He accepted that they were not guilty.<sup>311</sup>

The question whether, if the allegations were true, the plane spotters would be entitled to claim state immunity was never considered, not by the Greek court or government, not by the British Government or press, and not by the defence lawyers. The furore was about the fact that tourists, on a plane spotting holiday, had been arrested for taking photographs.

In all these cases the persons were believed to be state agents, they were prosecuted and no-one claimed that they were entitled to immunity.

The collecting of information by foreign agents is prosecuted by all states. Not just the politically powerful and sensitive, although these states do prosecute the most. During the cold war East Germany prosecuted a large number of spies and imposed heavy

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<sup>309</sup> 28 November 2001, The Times, p.17.

<sup>310</sup> 02 April 2002, The Times, p.16.

<sup>311</sup> 07 November 2002, The Times, p. 9.

sentences.<sup>312</sup> West Germany also prosecuted but imposed much less harsh sentences. For example In 1977 Herr Heinrich Burger, an East German citizen was sentenced in West Germany to seven years' imprisonment for espionage activity on behalf of the East German ministry of state security. He was released on 19 July 1979 in return for the repatriation of four West Berlin citizens who had been convicted by East German courts of espionage.<sup>313</sup> On 4 April 1979, Herr Peter Lehmann, an East German who was resident in West Berlin, was arrested while attempting to recruit East German agents in West Berlin, and was sentenced to 15 months' imprisonment on 13 July 1979.<sup>314</sup>

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<sup>312</sup> Keesings. January 1986. West Germany-East Germany On 17 February 1982 Herr Karl Rechenberg, a West Berliner, was sentenced to 15 years imprisonment for acting as an agent for a West German intelligence service investigating East German border security.

On 24 March 1982 Herr Rudiger Noll, who had worked in the Hamburg city government and for the West German Intelligence services (MAD), was sentenced to life imprisonment by the East Berlin military court for spying on East German military locations since 1974. On 7 February 1983 Herr Heinz Jonsek and his wife Frau Lore Jonsek, both West German citizens, received a life sentence and six years imprisonment respectively for espionage on behalf of the United States of America. On 29 April 1983 Herr Georg Strama, a sergeant in the West German Armed Forces, was sentenced to 11 years imprisonment, for espionage on behalf of West Germany. On 4 August 1983 an unnamed West Berliner was sentenced to life imprisonment for spying on military installations on behalf of the United States of America. On 12 August 1983 Herr Hans Sieberer, a West German citizen charged in the name of Herr Kurt Klepp, was sentenced to 15 years imprisonment for espionage activities carried out on behalf of the United States of America. On 14 April 1984 The Times reported that Herr Maximilian Leibrecht, a West German, was imprisoned for 12 years for spying on airports and troop movements. On 14 December 1984 Herr Gunther Schulz, a West German, was sentenced to 12 years imprisonment for espionage on behalf of the West German Intelligence Services (BND). On 7 February 1985 Herr Niels Jelden, a West German, was sentenced to 5 years imprisonment for espionage on behalf of the West German Intelligence Services (BND). . On 27 July 1985 Herr Eberhard Prohl and his wife Frau Rita Prohl were given sentences of 13 and seven years for espionage for West Germany involving 'at least 24 conspiratorial meetings' with contacts in East Germany. On 16 August 1985, an unnamed West German citizen, was sentenced by the East Berlin military court, to 13 years imprisonment for military espionage. On 13 September 1985 Herr Peter Flath, a West German, on Sept. 13, 1985, was sentenced to eight years imprisonment, for using visits to East Germany since July 1984 for espionage activities for a West German intelligence service. On 23 May 1986 Herr Fred Altenkruger, a West Berliner, was sentenced to life imprisonment for several years' systematic military espionage against East Germany and the Soviet Union on behalf of "a US secret service". On 11 August 1986 The Times reported that Herr Werner Kruger, a West German, was sentenced, to 15 years in prison for spying against the East German and Polish armed forces. On 15 August 1986 Herr Rolf Briefer, a West German citizen, was sentenced by an East Berlin military court to 10 years in prison for several years' military espionage on behalf of the West German Federal Intelligence Service. On 12 November 1987 Herr Bernard Manthey, from West Berlin, sentenced by the East Berlin supreme military court to eight years' imprisonment for espionage on behalf of the West German Federal Intelligence Service since September 1986.

<sup>313</sup> Keesings. January 1982. West Germany.

<sup>314</sup> Keesings West Germany January 1982.

The USA, Russia, China and the UK all have numerous examples of prosecutions of foreign agents for collecting information. Small states such as Norway<sup>315</sup> and Slovakia<sup>316</sup> also prosecute, as do states which are involved in conflict such as Israel,<sup>317</sup> as do neutral States such as Switzerland.<sup>318</sup>

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<sup>315</sup> In April 1954 a Soviet citizen with the Norwegian name of Hansen was sentenced to one year's imprisonment for attempted espionage. His arrest followed the M.V.D. officer Gregori Pavlov seeking political asylum and making disclosures, seven Norwegians were also later convicted and sentenced to up to four years imprisonment for offences of espionage. They collected military information and reported on iron-ore output, visits of tourists and prominent local personalities. *The Times*, Tuesday, June 01, 1954; pg. 5; Issue 52946; col C. On the night of 21<sup>st</sup> to 22<sup>nd</sup> July 1973 M. Ahmed Bouchiki, a Moroccan alleged to have been a member of the Black September Arab terrorist organization, who had been shot dead after leaving a cinema with his Norwegian wife in the town of Lillehammer. On 1 February 1974, at the trial in Oslo, Abraham Gehmer, alias Leslie Orbaure, who had worked as second secretary, then first secretary, at the Israeli Embassy in Paris between 1965 and 1969, and Sylvia Rafael, alias Patricia Roxburgh, a half-Jewish South African posing as a Canadian, each received a prison term of 5 and a half years imprisonment for conspiracy to murder, illegal intelligence activities on behalf of Israel and illegal entry into Norway. Dan Aerbel, a Danish-born Israeli, was sentenced to five years' imprisonment for conspiracy to murder and espionage on behalf of Israel; Marianne Gladnikoff, a Swedish-born Israeli, was sent to prison for 2 and a half years for espionage and negligent manslaughter; and Zwi Steinberg, of Brazilian and Israeli nationality, received a prison sentence of one year for espionage. Michael Doff (27), formerly a chauffeur at the Israel Embassy in Paris, was acquitted. *Keesings*. March 1974. Norway-Middle East.

<sup>316</sup> In 1941 Cy L. Sulzberger, foreign correspondent and columnist of the *New York Times*, who was born in New York on 27 October 1912 was arrested and accused of being a British spy. He was released without trial. 22 September 1993, *The Times*, p.19.

<sup>317</sup> On 19 April 1989 Israel radio reported that the Supreme Court had ruled that an espionage case involving a Soviet spy should be made public. The spy, Gregori Londin, had been sentenced to 13 years in prison in 1988 having been found guilty of spying for the former Soviet Union. *Keesings*. October 1989. Iraq.

<sup>318</sup> On 17 April 1962 three Czechoslovak citizens, Vlastimil Glaser, Otto Schwarzenberger and his wife, were sentenced by a military court at Aargau on charges of espionage. Evidence was given at the trial that Vlastimil Glaser, together with another Czechoslovak agent named Pavlik, had smuggled a wireless transmitter and receiver into Switzerland by using diplomatic passports; and that Otto Schwarzenberger and his wife, who posed as Swiss nationals returning from abroad by using assumed names and false papers obtained through the Czechoslovak authorities gave Glaser material for the Czechoslovak secret service from Schwarzenberger and his wife, and that Glaser handed it to a member of the Czechoslovak Legation in Berne, Mr. Jaroslav Jelinek. Mr. Jelinek's recall was demanded by the Swiss. On 1 May 1962 the Swiss Department of Justice and Police announced that another case had come to light in which an agent of the Czechoslovak secret service had been caught with fraudulently-obtained Swiss papers, and said that the man concerned, who had obtained a post with a firm in Basle, would be prosecuted for political and military espionage. *Keesings*. June 1962. Switzerland Israeli-Swiss relations were upset in 1963 when two Mossad agents were arrested in Berne for intimidating a female member of the family of a German scientist who had been offered a job in Egypt's missile development programme. 7 February 1998, *The Times*, p.17 On 24 May 1965 Auguste Caesar Atencio, an Argentinian was alleged to have acted as a messenger between Soviet spies in three countries was tried in Lausanne of passing secrets to Russia he was said to have met Soviet secret service agents in Lausanne, Madrid and Cannes, and passed information about Switzerland, Greece and Argentina. Hr Atenacio denied belonging to any Russian espionage organisation. *The Times*, Tuesday, May 25, 1965; pg. 12; Issue 56330; col D. On 10 February 1982 a Swiss citizen, Herr Karl Kruminsch, and an East German citizen, Frau Katarina Nummert, were sentenced to three years and two years six months imprisonment respectively for espionage on behalf of

Israel does not deny spying and committing offences on the territory of others states. It does not claim that its agents are entitled to immunity, but does make great efforts to get its nationals returned. For example on 8 May 1965 an Israeli citizen Eliahu Cohen, was convicted in Syria of spying for Israel, and sentenced to death. The Israeli government offered to exchange ten convicted Syrian spies for Mr. Cohen, but the offer was rejected and he was hanged on 18 May 1965.<sup>319</sup>

The collecting of information is viewed very seriously by states, and reporters are particularly vulnerable to arrest as their job is to collect information. Ian Mather of the Observer has been unfortunate in being arrested twice in Argentina for spying.

On 13 April 1982 Mr Mather was arrested with Simon Winchester of the Sunday Times, and Anthony Prime, a photographer for the Observer at the airport in Rio Grande, Tierra

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the Soviet Union. On 25 January 1983 Mr Mikhail Nikolayev, a Soviet citizen who also held United States passports in two names, was arrested, and he was sentenced in December 1983 to three years imprisonment and 15 years banishment from Switzerland, for using Switzerland as a base to conduct espionage activities to the prejudice of South Africa. His activities had been conducted in collaboration with a close relative, Mrs Ruth Gerhardt, who had confirmed the connexion, and was convicted, together with her husband, by a South African court for spying for the Soviet Union. Keesings. February 1985. Switzerland. The nationality of Mrs. Gerhardt and her husband is not disclosed. On 25 August 1985 Herr Johann Hubner, and Frau Ingeborg Manthey, were arrested in Lucerne. Their real names were Herr Jan Vladislav Karmazin and Frau Rosemarie Muller, on 5 December 1986 they were each sentenced to six years imprisonment and fined SFr 75,000 by the Lucerne criminal court, for carrying out military, economic and political espionage over a period of 23 years, on behalf of East Germany, and for passing on to the Soviet authorities information obtained in West Germany. Keesings. February 1987. Switzerland. In 1998 five Mossad agents were arrested for spying in a residential area of Byrne. The Mossad operations chief, who was publicly known only as "Y" offered his resignation. 25 November 1998, The Times, p.17. "David Bental" whose real name was withheld from the Swiss authorities was caught in the basement of a flat near Byrne trying to bug the home of a Lebanese-born car salesman whom the Israeli's suspected of having links with Hezbollah. Israel radio said on 5 July 2000 that Ephraim Halevy, the head of Mossad, had been told that his agents felt that sending "Mr Bental" for trial was a betrayal of trust. In court described how they caught "Mr Bental" and four colleagues installing listening devices in the home of the car dealer. All were questioned, but only "Mr Bental" was charged because he had a bag containing bugging equipment. A cell phone connected to twenty-four batteries, which was to have been plugged into Abdallah el-Zein's telephone line and would have called a recording centre every time he picked up his handset. 06 July 2000, The Times, p.20. On Friday 7 July 2000 a Mossad agent with the alias "Isaac Bental" was given a twelve month suspended sentence and banned from entering Switzerland for five years. Bental had been caught with four other agents in 1988, installing bugging equipment in the flat of a Swiss-Lebanese living in Berne. The Sunday Times reported that as a result of the trial the espionage activities of Mossad, the Israeli secret service, in Europe and the Arab world ceased. In Israel Mossad's agents angered by the decision of Ephraim Halevy, the agency's boss to let Bental stand trial considered strike action. The paper reported that Halevy called off spying on Arab embassies and counter-terrorist activities. 09 July 2000, The Sunday Times, News p.30.

<sup>319</sup> Keesings. March 1966. Syria.



del Fuego. On 25 April 1982 an Argentine federal judge ruled that the three journalists must stand trial on charges of spying. Judge Carlos Sagastume said he did not think they were habitual spies but, given the situation, it was possible that they had acted from patriotic motives or explicit instructions. Material in their possession could, in the opinion of the military, damage the interests of the state if it were put in the hands of a hostile power.<sup>320</sup>

On 2 April 1992 Mr Mather, another journalist, and a photographer from the Sunday Times, were all arrested in Argentina. They were charged with espionage under section 224 of the Argentinean Penal Code, and held in prison in Tierra del Fuego. This was just after the invasion of the Falklands, a self governing UK territory, by Argentina. After the Argentinean surrender in the Falklands on 14 June 1992 the three journalists were freed on bail with permission to leave the country.<sup>321</sup>

Not all journalists are treated as lightly as Mr Mather. Some states consider the collection of information to be so serious that they impose capital punishment. Farzad Basoft was a freelance journalist who worked for the Observer. He was Iranian by birth. He came to London to study in his teens, and could not return after the revolution. In 1988 he was given British travel documents. On 6 September 1989 he went to Iraq, on a press trip paid for by the Iraqi government, to report on the reconstruction of Iraq after the war against Iran. There was news of a huge explosion a month before in a secret missile plant at Al Iskandria, near Baghdad, and it was said that 700 people had been killed. Once in Iraq some journalists including Farzad Bazoft decided to investigate.

When ITN's Paul Davies attempted to drive to the site of the explosion he was questioned for nearly six hours by Iraqi security officials. Farzad Bazoft asked a friend, Daphne Parish, a British nurse working in Iraq to help him. On 12 September she obtained a four-wheel-drive car, and two white coats from the private Irish Hospital where she worked, and they drove to Al Iskandria. They posed as an Indian doctor and

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<sup>320</sup> The Times, Monday, Apr 26, 1982; pg. 5; Issue 61217; col G.

<sup>321</sup> 11 March 1992, The Times, LT/p.5.

his nurse. That trip went smoothly. The next day Farzad Bazoft returned to the plant alone, still disguised as a Doctor. He made sketches, and he took photographs of buildings. He collected soil samples, and he picked up a loose shoe, and some tatters of clothing. Back at his hotel Mr Bazoft telephoned Salah Mukhtar, Iraq's head of information, to tell him about his visit. He also visited the British embassy, asking for his soil samples to be taken out in a diplomatic bag. This request was refused.

On 15 September 1989 Mr Bazoft was arrested at the airport as he tried to leave Iraq. Both he and Daphne Parish were convicted on 10 March 1990 by a revolutionary court in Baghdad. Farzad Bazoft was sentenced to death and Daphne Parish to fifteen years imprisonment.<sup>322</sup> The British Prime Minister, Margaret Thatcher was reported as being horrified by the death penalty, and authorized messages to be sent to Saddam Hussain asking for the sentence to be lifted. William Waldegrave, a foreign office minister warned that if the sentence was carried out “*there would be profound damage to relationships between the two countries.*” Iraq's ambassador to Britain was summonsed to the Foreign Office where officials expressed “*utter dismay*” at the “*excessive*” sentences.<sup>323</sup> On 12 March 1990 Mr Waldegrave called the sentences “*harsh and disproportionate*” and told the House of Commons “*Iraq has recently show herself to be concerned about what she would call the misrepresentation of her policies abroad. She can be in no doubt about the damage which would be done to her standing in the world, let alone her relations with the UK, if these unacceptable sentences were to be confirmed.*” Mr Iltif Nassif Jassem, the Iraqi Information Minister consulted President Saddam Hussain, who alone had the power to commute the death sentence, and he told the official Iraqi news agency “*We considered the fabricated fuss against us a flagrant interference in our internal affairs, because our measure had fully responded with Iraqi law which sentences any spy to execution. The case was fairly tried and the two were convicted and sentenced in the presence of the British consul and in accordance with the laws applied in Iraq.*”<sup>324</sup>

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<sup>322</sup> 18 March 1990, The Sunday Times.

<sup>323</sup> 11 March 1990, The Sunday Times.

<sup>324</sup> 13 March 1990. The Times.

Farzad Bazoft was hanged on 15 March 1990. Daphne Parish was released on 16 July 1990 after a personal appeal by President Kaunda of Zambia to Saddam Hussain.<sup>325</sup> This case demonstrates how threatened states can be by the collection of information, and how seriously they view the offence of spying. The British government made what were described as desperate efforts to prevent Mr Bazoft from being executed, but at no point was it ever suggested that, if he was in fact spying for another state, then he was entitled to immunity.

### **Efforts to Retrieve Agents.**

States consider their agents who spy on their behalf important, they deny that agents have committed offences, they say that spies do not deserve to be punished, and they make strenuous efforts to get their agents back. One example of this is also a case of trespassing and collecting information. On 1 May 1960 Captain Gary Powers was the American pilot of a U2 plane which was shot down over the USSR. The U2 was a high altitude plane equipped with powerful camera. The Soviet Government said that the plane violated the Soviet frontier and was tracked by units of the Soviet anti-aircraft defence. This surveillance showed that the plane's route lay over large industrial centres and important defensive objectives of the Soviet Union.

Gary Powers was arrested and charged with espionage, the indictment against him said this was “*a deliberate incursion with hostile aims into the air space of the USSR.*” and “*in view of this, the Soviet Government ordered the plane to be shot down*”. Tass reported that the examination of the plane's wreckage, and of the special equipment it carried, established that the plane was designed for flight at great altitudes, and was adapted for intelligence purposes, being equipped for aerial photography and radio reconnaissance from great heights. Films of Soviet airfields and what were described as other important military and industrial objectives in the Soviet Union were found among the wreckage together with a ferromagnetic tape recording of the signals of certain

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<sup>325</sup> 17 July 1990. The Times.

Soviet radar stations.<sup>326</sup> On the 19 August 1960 Gary Powers pleaded guilty and was sentenced to 10 years imprisonment. The prosecution accepted that Mr Powers was acting on orders, this was not considered as mitigation, but his sincere repentance and confession of guilt did mitigate the penalty. In sentencing the chairman of the court said that the detachment to which Gary Powers belonged was a special combination of military and civil intelligence services of the USA, and was designed to carry out espionage against the Soviet Union. He said that Gary Powers knew he was violating the sovereignty of the Soviet Union, and was undertaking a flight with reconnaissance aims, in order to note rocket launching sites.<sup>327</sup>

Gary Powers served eighteen months of his sentence. He was released on 10 February 1962 when he and Mr Frederic Pryor, an American Student detained by the East Germans, were handed over to the American authorities, in exchange for Colonel Rudolf Abel, a Soviet spy who was sentenced to thirty years imprisonment in the United States in 1957.<sup>328</sup>

Exchanges of spies who have been arrested in foreign states are often arranged. States do not accept that their agents have been collecting information for them. Usually the agent has a legitimate business reason for being in the foreign state, and their state denies that they have been spying. Despite this apparent abandonment of their agents, states go to great lengths to get them returned.

On 12 May 1963 Greville Wynne, a British man with an export business in electrical equipment was sentenced to eight years detention; three years in prison followed by five years in labour colonies with a '*severe regime*' by the Soviet Supreme Court in Moscow for espionage.<sup>329</sup> Lieutenant-Colonel Oleg Penkovsky, a Soviet intelligence officer who gave Greville Wynn information about agents of the Soviet-Union, the details of Soviet

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<sup>326</sup> The Times. Wednesday, Aug 10, 1960; pg. 6; Issue 54846; col E.

<sup>327</sup> The Times. Saturday, Aug 20, 1960; pg. 6; Issue 54855; col D.

<sup>328</sup> Keesings. February 1962. Soviet Union-United States.

<sup>329</sup> The Times, Monday, May 13, 1963; pg. 11; Issue 55699; col A.

missile sites; an analysis of military manpower and weapons production and the information that important guidance equipment was sent with rockets which were being installed in Cuba, was tried with him. Oleg Penkovsky was sentenced to death, and on 16 May 1963 Tass announced that he had been shot.<sup>330</sup> This is an example of a state's own national being treated more severely than the foreign spy. A state national who conspires against his own state is described as a traitor. Being an agent for a foreign state does not provide immunity, but it is mitigation.

Diplomats named as being conspirators were not arrested, or charged, but left the country. Mr Rodney W. Carlson, an American diplomat, left the Soviet Union voluntarily on 14 December 1962,<sup>331</sup> Mr Ivor Roswell, transport officer at the British Embassy in Moscow and his wife were sent back to London amid allegations of threats on his life.<sup>332</sup> On 13 May 1963 Russia declared seven British diplomatic staff as *persona non grata* saying they had been engaged in "*activities which grossly violate the standards of behaviour appropriate for staff members of a diplomatic mission.*" Five Americans were said to have aided Greville Wynne and Oleg Penkovsky and were also declared *persona non grata* as their behaviour was said to be "*incompatible with the status of officials of a diplomatic mission*"<sup>333</sup> Greville Wynn was released after eighteen months on 22 April 1964 in Berlin in exchange for Conon Molody, also known as Gordon Lonsdale.<sup>334</sup>

On 22 March 1961 Gordon Lonsdale, Peter Kroger, his wife, Helen Kroger; Henry Houghton, and Ethel Gee, were convicted at the Old Bailey of conspiring to commit breaches of the Official Secrets Act. The allegation was that Miss Gee and Mr. Houghton, both civil servants, were passing information including photographs to the others, who were Russian spies. At the time of the trial the true identity of Gordon

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<sup>330</sup> The Times, Friday, May 17, 1963; pg. 14; Issue 55703; col F.

<sup>331</sup> The Times, Saturday, Dec 15, 1962; pg.7; Issue 55575; col B.

<sup>332</sup> The Times, Friday, Mar 08, 1963; pg. 12; Issue 55644; col D.

<sup>333</sup> The Times, Tuesday, May 14, 1963; pg. 12; Issue 55700; col G.

<sup>334</sup> Keesings. April 1964. Soviet Union-United Kingdom.

Lonsdale, who pretended to be a natural-born Canadian citizen, was unknown, but he was believed to be Russian. Mr and Mrs Kroger, who had New Zealand passports, were identified as Maurice and Lorna Cohen, U.S. citizens who had disappeared from New York after the arrest of the spies Julius and Ethel Rosenberg in 1950. Mr. Lonsdale was sentenced to 25 years imprisonment, Mr and Mrs Kroger were both sentenced to serve 20 years imprisonment, Mr. Houghton and Miss Gee were both sentenced to 5 years imprisonment.<sup>335</sup>

Mr and Mrs Kroger were released in October 1969 in exchange for Gerald Brooke, a British lecturer sentenced to five years imprisonment in the Soviet Union in 1965 for distributing subversive literature. Mr Brooke was released on 24 July 1969.<sup>336</sup>

There are numerous examples of exchanges of East and West German citizens during the cold war,<sup>337</sup> and this sometimes involved other states. On 9 September 1967 Yuri Loginov was arrested in Durban, South Africa in possession of documents and espionage equipment. He had been taking photographs. He had assumed the identity of a Canadian, Edmundas Trinkas. He admitted being born in Moscow in 1933 and that he was on a special mission for the KGB. He was exchanged for West German agents serving long sentences for courier activities in East Germany in August 1969.<sup>338</sup> Mr. Loginov admitted being a state agent. No claim for immunity was made on his behalf, but Russia clearly was concerned to have him returned.

In all these cases states do not claim that their agents are entitled to immunity but they make sustained efforts to have their agents released.

### **Conduct not on the Territory of the Forum State.**

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<sup>335</sup> Keesings June 1961 United Kingdom.

<sup>336</sup> Keesings. Soviet Union-United Kingdom, Sept 1969.

<sup>337</sup> See for example Keesings. East Germany, September 1985 and, West Germany June 1982.

<sup>338</sup> Keesings. September 1969.

In the *Djibouti v France Case*<sup>339</sup> the ICJ had to consider whether Djibouti officials, the Procureur de la République, and the Head of National Security had immunity from being required to attend court to give evidence as suspects, warrants having been issued for their arrest. The facts behind this case relate to Judge Bernard Borrel, a French national who had been seconded as Technical Adviser to the Ministry of Justice of Djibouti. On 19 October 1995, his corpse was discovered outside the city of Djibouti. On 28 February 1996 the Procureur de la République of Djibouti opened a judicial investigation into the cause of the death. That investigation concluded that it was suicide. The French authorities were not satisfied and instituted their own proceedings. Letters of request for assistance in the collection of evidence were issued, and evidence was taken in Djibouti for use in France. Allegations of tampering with a witness and subornation of perjury in Djibouti and Brussels were made, and an investigation was instituted in France relating to that allegation. Djama Soulaïman Ali, the Procureur de La République, and Hassan Said Khaïteḥ, the Head of National Security were summonsed as suspected persons to attend court in France. They did not attend. Their lawyer informed the French Judge that they were not authorised to give evidence, and warrants were issued for their arrest. On 27 September 2006, the Versailles Court of Appeal issued European arrest warrants for both. On 27 March 2008, after the close of the oral proceedings before the ICJ, the Versailles Tribunal de Grande Instance found Mr. Ali and Mr. Khaïreḥ guilty, in their absence, and sentenced them to eighteen months, and one year's imprisonment respectively. Mr. Ali and Mr. Khaïreḥ had agreed to be tried without being present, and had appointed their lawyer to represent them. No reference was made to immunity at any time during the hearings, and all the arrest warrants were still in force at the time the ICJ gave judgment.

The ICJ said that the two European arrest warrants were outside its jurisdiction, and the court had received no observations from the parties about the convictions and sentences imposed in absence. Therefore the decisions of the ICJ were limited to the issuance of

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<sup>339</sup> The Case Concerning Certain Questions of Mutual Assistance in Criminal Matters (*Djibouti v France*) ICJ <http://www.icj-cji.org/docket/files/136/14550.pdf>.

the witness summonses and warrants to bring the two defendants before the court to give evidence as suspects.

Djibouti argued that the defendants were entitled to immunity *ratione materiae*, as it is a principle of international law that a person cannot be held as individually criminally liable for acts performed as an organ of the state. At paragraph 188 the ICJ observed that such a claim is, in essence, a claim of immunity for the Djiboutian state, from which the defendants would be said to benefit.

France argued that such a claim would fall to be decided on a case by case basis by national judges. France said that the contrary “*would signify that all an official, regardless of his rank or functions, needs to do is assert that he is acting in the context of his functions to escape any criminal prosecution in a foreign State.*”

At paragraphs 195 and 196 of its judgment the ICJ observed that the various claims regarding immunity were not made known to France by diplomatic exchanges, or before any French court. The Government of Djibouti had not, at any stage, informed the French courts or the ICJ that the acts complained of were its own acts, and that the *procureur de la Republique* and the Head of National Security were its organs, agencies in carrying them out. The ICJ said:

*“The State which seeks to claim immunity for one of its organs is expected to notify the authorities of the other State concerned. This would allow the court of the forum State to ensure that it does not fail to respect any entitlement to immunity and might thereby engage the responsibility of that State. Further, the State notifying a foreign court that judicial process should not proceed, for reasons of immunity, against its State organs, is assuming responsibility for any internationally wrongful act committed by such organs.”*

The court said that given all these elements it did not uphold the submissions of Djibouti, and the summonses and arrest warrants were not declared null and void. The



court did not adjudicate upon whether the alleged conduct, subornation of perjury, can be a state function, but by leaving the summonses and arrest warrants in place implies that the court did not consider the alleged conduct to be a legitimate function of state agents.

The ICJ is saying that the correct procedure to be followed where a state wishes to assert immunity *ratione materiae* on behalf of its agents is for that state to claim that immunity through diplomatic channels, and also before the foreign court. Thereby the state claiming immunity assumes responsibility for the actions of its agents. This is different to state immunity when a state is being sued itself. The State Immunity Convention requires states, and their courts to respect the immunity of other states of their own motion, and the State Immunity Act 1987 requires English civil courts so to do. It is also different to immunity *ratione personae* as the Arrest Warrant case said that under international customary law immunity the issuance of the warrant was a breach of international law, therefore courts issuing warrants have to consider of their own motion whether the wanted person is entitled to immunity *ratione personae*.

## **Conclusion.**

The preceding analysis of the cases shows that state officials do not have immunity *ratione materiae* for criminal charges in respect of acts committed on the territory of the forum state, or the territory of a third state, unless that immunity is accorded by a special regime such as that afforded diplomats and consuls, or by agreement such as that accorded to special missions, or by ad hoc agreement. Only those state agents who have immunity *ratione personae* are entitled to immunity for offences committed on the territory of a foreign state. State practice shows that agents are not only held responsible for what can be considered serious crimes of violence such as murder, planting bombs and kidnapping, but they are also routinely arrested and prosecuted for trespassing and collecting information. State practice shows that states demonstrate *opinio juris* by arresting, charging and prosecuting the agents of other states, and by not objecting to their own agents being prosecuted. States demonstrate a responsibility towards their

agents, and make great efforts to get their agents returned, they make representations and arrange exchanges, but they never assert immunity.

There is continuing immunity for those who have been entitled to immunity *ratione personae* for conduct performed in the exercise of their functions. This extends to conduct which is connected to such functions such a parking offences, but it does not encompass serious crimes of violence such as bombing or kidnapping even if committed on behalf of the sending state. Other officials, not entitled to immunity *ratione personae* do not have immunity from prosecution for any offences on the territory of the receiving state.

Offences committed on the territory of an official's own state are another question. Most crimes committed on the territory of one state are not justiciable on the territory of another state, as there would have to be extra-territorial jurisdiction to prosecute. One area where states have agreed to assert such jurisdiction is in relation to international crimes, such as genocide, war crimes, crimes against humanity and torture. In an effort to prevent the perpetrators of such crimes being able to evade justice states have signed conventions agreeing to prosecute such persons. This has led to a tension in international law between two principles, state immunity and the obligation to prosecute, and this is considered in the next chapter of this thesis.

## **Immunity and Impunity.**

### **Is there a conflict in International Law?**

*“Laws are like spiders webs; they catch the weak and poor but the rich and powerful can rip right through them”<sup>340</sup>*

Is there a conflict in international law between the immunity enjoyed by high state officials for conduct which constitutes international crimes, and the individual responsibility which attaches to those offences? Have the two areas of international law developed separately and without reference to each other to the extent that they are incompatible? The immunity of high state officials has developed to protect individuals performing their state functions in a second state, and also to protect those who perform their functions in their own state from having those decisions called into question in proceedings against them in another state. It is to protect such officials from cultural differences or political interference by the second state. The purpose of this immunity is to enable the individual to perform his or her functions. The purpose of individual responsibility for international crimes is to prevent the creation of safe havens for those committing such crimes, and thus to act as a deterrent to future offenders.

Immunity from prosecution for high state officials does not exist to protect the individual. Its purpose is to enable state officials to conduct their state's business, as it prevents a state from questioning the governmental processes and actions of a second state, before its domestic courts. That immunity, albeit for the protection of the state, also protects the individual concerned from prosecution. If the immunity provides protection from prosecution for an international crime such as genocide or torture, for which there is a duty to prosecute, then there are two conflicting obligations under international law. Does the immunity enjoyed by high state officials for conduct which constitutes international crimes conflict with the concept of individual responsibility,

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<sup>340</sup> Anacharsis 6<sup>th</sup> Century BC.

and the duty to prosecute? Have the two areas of law developed separately to the extent that they are incompatible?

This conflict was at the heart of the Pinochet case. Pinochet was accused of using murder and torture to overthrow and defeat his political opponents, and then to maintain his power in Chile. To do this he used the institutions of his government; the police and the military. Spain asked for his extradition, and the extradition crime was official torture; that is torture as defined in the torture convention, torture “*inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.*” The definition of the crime of torture required that the offence be committed as an action of the state, by a state official, and the governmental nature of the allegations raised the question immunity from prosecution.

Professor Campbell McLachlan, observed the independent development of the two areas of international law relating to immunity and human rights when he wrote:

*“As those involved in the Pinochet litigation discovered, these two bodies of law had developed largely independently. Their potential incompatibility had not been resolved, despite the fact that many international conventions had been concluded during the latter half of the 20<sup>th</sup>. Century, which provided for national court jurisdiction over international crimes.”*<sup>341</sup>

This chapter will look at the development of these two strands of international law, that of individual responsibility for international crimes, and that of immunity, and consider whether they are in fact incompatible. It will look at the development of the concepts of human rights and international crimes; the concept of universal jurisdiction and the duty to prosecute those responsible for gross human rights abuses. It will also look at the developments in immunity in relation to these crimes, particularly the Pinochet case and thereafter.

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<sup>341</sup> After Baghdad: Conflict or Coherence in International Law (2003) 1 NZJPIL.

### **Human Rights, Individual Responsibility and the Duty to Prosecute.**

After the Second World War the international community tried to put mechanisms in place to prevent and regulate future conflicts, and to protect individuals from the actions of their own, and other states. Such protection was seen as a fundamental element of a peaceful international society. The United Nations was created, and under its auspices the ILC prepared and promoted conventions to protect individuals from the excesses of government. The International Committee of the Red Cross (ICRC) developed international law for the protection of the victims of armed conflict. The resultant conventions were designed to be multi-lateral treaties entered into by all states. The conventions all take basically the same approach. A crime is stated to be of international concern, the crime is defined, individual responsibility is confirmed, the jurisdiction to be asserted is described, and the obligation to prosecute asserted. Within this framework the conventions became progressively more sophisticated.

### **Human Rights Conventions.**

On 10 December 1948 the UN General Assembly adopted Resolution 217A (III), the Universal Declaration of Human Rights. It recognised that “*the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world.*” The declaration expressed concern at the barbarous acts which resulted from the disregard and contempt for human rights, and recognised that human rights should be protected by the rule of law, to prevent rebellion against tyranny and oppression. The declaration recognised that a common understanding of human rights, and freedoms, was necessary to promote universal respect for, and observance of, human rights and fundamental freedoms. The declaration was proclaimed as a common standard for achievement. Article 3 declares that everyone

is entitled to life, liberty and security of person, and article 5 that no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.

In 1966 the General Assembly adopted Resolution 2200 (XXI), The International Covenant on Civil and Political Rights, article 6 of which recognises the right to life, and the prohibition on being arbitrarily deprived of life, and article 7 is the prohibition of torture, and cruel, inhuman, or degrading treatment, or punishment.

The European Convention on Human Rights signed on 4 November 1950 also recognises the right to life, and the prohibition on torture, as does the Inter-American Convention on Human Rights signed on 22 November 1969 and in Africa the Banjul Charter, a Charter on Human and Peoples' Rights was adopted in 1981.

### **The Genocide Convention 1948.**

On 11 December 1946 the General Assembly declared that genocide is a denial of the right of existence of entire human groups, and that such denial of the right of existence shocks the conscience of mankind, results in great losses to humanity in the form of cultural and other contributions represented by these human groups, and is contrary to moral law and to the spirit and aims of the United Nations. The resolution declared that the punishment of the crime of genocide is a matter of international concern, and affirmed that genocide is a crime under international law, which the civilised world condemns, and for the commission of which principals and accomplices, whether private individuals, public officials or statesmen, and whether the crime is committed on religious, racial, political or any other grounds, are punishable.

The General Assembly invited member states to enact the necessary legislation for the prevention and punishment of the crime, and recommended that international co-operation be organised between states with a view to facilitating the speedy prevention and punishment of the crime of genocide. The Assembly requested the Economic and Social Council to draft a convention on the crime of genocide, to be submitted to the

next regular session of the General Assembly. The resulting convention, the Genocide Convention 1948, was adopted by the General Assembly in Resolution 260 (III) on 2 December 1948.

The preamble to the Genocide Convention recognises that at all periods of history genocide has inflicted great losses on humanity, and that in order to liberate mankind from such an odious scourge, international co-operation is required.

The convention confirms that genocide is a crime, defines the offence, and provides that anyone committing the offence of genocide shall be punished regardless of their status. The convention specifically refers to constitutionally responsible rulers, public officials and private individuals being punishable. It then goes on to provide for jurisdiction based on territory, or by an international penal tribunal, even though there was no international criminal tribunal at that time. General Assembly Resolution 260 (III) invited the ILC to study the possibility of establishing an international court for the trial of persons charged with genocide, but there was not to be one for over forty years.

The convention does not refer to the immunity of individuals. The specific reference to the punishability of constitutionally responsible rulers, and public officials, implies that they are not entitled to immunity for the crime of genocide, but the treaty does not address immunity directly. The jurisdictional article provides only for trial before the territorial court, where immunity would not be an issue if the alleged perpetrator was a citizen of that state, or before an international criminal tribunal where a state would consent to jurisdiction before surrendering its citizens. Therefore immunity is not an issue.

There was a requirement in the convention to extradite an offender in accordance with the laws and treaties in force, and said that genocide shall not be considered as a political crime for the purposes of extradition, but there was no consideration of immunity in the context of extradition. There was no responsibility to prosecute. Although the prohibition on genocide became *jus cogens*, the prosecution and

punishment of those committing the crime of genocide was wishful thinking, as those in power who commit genocide did not give up their power, and submit to prosecution.

### **The Geneva Conventions 1949.**

After World War II, the ICRC drafted four conventions which are concerned with the protection of the victims of war. The Committee was concerned to clarify international humanitarian law, and to prevent violations of the law in future armed conflicts, by punishing violations. On 12 August 1949 the text of the four Geneva Conventions was agreed. They deal respectively with the wounded and sick in armed forces in the field; the wounded, sick and shipwrecked in armed forces at sea; prisoners of war; and civilians. The four conventions have common principles, and common articles, and created the concept of grave breaches of the provisions of the conventions, such breaches to be punishable by all state parties.

Each of the Conventions defines grave breaches by reference to breaches involving particular acts *“if committed against persons or property protected by the Convention”*. Article 50 of Geneva Convention I which relates to the wounded and sick in armed forces in the field, and article 51 of Geneva Convention II which relates to the wounded, sick and shipwrecked in armed forces at sea defines the acts as *“wilful killing, torture or inhumane treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly.”* Article 130 of Geneva Convention III which relates to prisoners of war defines the acts as *“wilful killing, torture or inhumane treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, compelling a prisoner of war to serve in the forces of the hostile Power, or wilfully depriving a prisoner of war of the rights of fair and regular trial prescribed in the Convention,”* and article 147 of Geneva Convention IV which relates to civilians defines the acts as *“wilful killing, torture or inhumane treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health,*



*unlawful deportation or transfer or unlawful confinement of a protected person, compelling a protected person to serve in the forces of a hostile Power, or wilfully depriving a protected person of the rights of fair and regular trial prescribed in the present Convention, taking hostages and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly.”*

By a common article, article 49 Geneva Convention I, article 50 Geneva Convention II, article 129 Geneva Convention III, and article 146 Geneva Convention IV, state parties undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches. Each state party is under an obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and to bring such persons, regardless of their nationality, before its own courts. Such state party may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another state party, provided there is a prima facie case. There are also safeguards relating to fair trial.

These four conventions created a scheme for the location, prosecution and punishment of war criminals, to ensure that such criminals could not evade justice. There is jurisdiction without a connection with territory or nationality, and there is an obligation to search for and prosecute persons present on a state's territory. The primary obligation is to prosecute, but a person may be extradited instead, if a requesting state can prove a prima facie case. Immunity is not referred to. All the alleged perpetrators would be state officials, in that they would be members of the armed forces and therefore entitled to immunity *ratione materiae* if acting on behalf of the state.

#### **The Torture Convention 1984.**

On 9 December 1975 the General Assembly adopted Resolution 3452, which had annexed to it the Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Following

this the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment was drafted. The preamble to that convention has regard to the prohibition on torture in article 5 the Universal Declaration of Human Rights, and in article 7 of the International Covenant on Civil and Political Rights. The torture convention declares that the states party to the convention desire to make more effective the struggle against torture, and other cruel, inhuman, or degrading treatment, or punishment throughout the world.

Article 1 defines torture as *“any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.”*

Torture is defined as an offence which can only be committed by officials acting in an official capacity, or at the instigation of such an official, or with the consent or acquiescence of such an official. The official character of the torture is a fundamental element of the offence.

The aim of the torture convention is to create a system where no state is complicit in torture, and no torturer can evade justice. All state parties are required to take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under their jurisdiction. No exceptional circumstances whatsoever are allowed; war or the threat of war, internal political instability or any other public emergency, are not to be invoked as a justification of torture, nor can an order from a superior officer or a public authority be invoked as a justification of torture.

No-one is to be extradited, deported or returned by one state to another state where there are substantial grounds for believing that the person would be in danger of being

subjected to torture. Each state party shall ensure that all acts of torture are offences under its criminal law, including attempt, complicity or participation in torture. All states party agree to make these offences punishable by appropriate penalties which take into account their grave nature.

Article 5 of the convention provides for jurisdiction for offences of torture. Each state party shall establish its jurisdiction when the offences are committed in any territory under its jurisdiction, or on board a ship or aircraft registered in that state, and where the alleged offender is a national of that state. If the victim is a national of the state then the state may take jurisdiction.

If an alleged offender is present in any territory under the jurisdiction of a state and the state does not extradite him, then the state must establish its jurisdiction, and submit the case to its competent authorities for the purpose of prosecution. Any decision regarding prosecution is to be taken in the same manner as in the case of any ordinary offence, of a serious nature, under the law of that state. The standards of evidence required for prosecution and conviction are no way less stringent than those for other cases, and there are provisions for taking an alleged offender into custody, and guarantees as to fair trial.

States must take jurisdiction on the basis of territory, and nationality of the offender, and jurisdiction may be taken on the basis of the nationality of the alleged victim. These are the traditional agreed bases of jurisdiction. Jurisdiction also has to be taken on the basis of presence of the offender on state territory, if the offender is not extradited, then he is to be prosecuted if there is sufficient evidence. This gives precedence to the territorial state, or state of nationality, but is designed not to allow a perpetrator to escape because there is a bar to his extradition. The immunity of an alleged offender is not considered at all.

## Individual Responsibility

The concept of individual responsibility for international crimes was articulated in article 7 of the Charter of the International Military Tribunal for the trial of war criminals at Nuremburg, which said “*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.*”<sup>342</sup> The Tribunal emphasised this in its judgement saying that immunity could not apply “*The principle of international law which, under certain circumstances, protects the representatives of a state cannot be applied to acts condemned as criminal by international law. The authors of these acts cannot shelter themselves behind their official position to be freed from punishment.*”<sup>343</sup> The Tribunal also said “*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*”

On 11 December 1946 the General Assembly unanimously adopted Resolution 95(1) and affirmed the principles of international law recognised by the Charter of the Nuremburg Tribunal and the judgment of the Tribunal, and by resolution 177(II) on 21 November 1947 the General Assembly directed the ILC to formulate those principles. On 12 December 1950 by resolution 488(V) the General Assembly accepted the principles as formulated by the ILC. Nuremberg Principle I provides that any person who commits an act which constitutes a crime under international law is responsible therefore and liable to punishment, and Nuremberg Principle III provides that the fact that a person acted as head of state or responsible government official does not relieve him of responsibility under international law.<sup>344</sup>

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<sup>342</sup> London, 8 August 1945, United Nations Treaty Series, vol. 82, 278. Article 7 “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.”

<sup>343</sup> The Trial of German Major War Criminals: Proceedings of the International Military Tribunal Sitting at Nuremberg in Germany, Part 22, HMSO, London 1950.

<sup>344</sup> Principles of International Law Recognised in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal 1950. Yearbook of the ILC, 1950, vol. II, para. 97.

On 3 May 1993 the UN Secretary General reported, as requested by paragraph 2 of Security Council resolution 808 (1993) on the legal basis for the establishment of an International Tribunal for the Former Yugoslavia.<sup>345</sup> In paragraph 29 the report states *“It should be pointed out that, in assigning to the International Tribunal the task of prosecuting persons responsible for serious violations of international humanitarian law, the Security Council would not be creating or purporting to “legislate” the law. Rather, the International Tribunal would have the task of applying existing international humanitarian law,”* and this applies to the concept of individual responsibility for international crimes, as well as to the offences themselves. The report is stating the concept that a person is responsible for their own actions, and may be prosecuted, and punished, even if the conduct was performed on behalf of a state.

The ICTY and ICTR were created by the Security Council under Chapter VII of the UN Charter in 1993 and 1994, with the power to prosecute persons for the most serious violations of international humanitarian law. Article 7 of the ICTY statute and article 6 of the ICTR statute both provide for individual responsibility as follows:

1. A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in articles 2 to 5 of the present Statute, shall be individually responsible for the crime.
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.
3. The fact that any of the acts referred to in articles 2 to 5 of the present Statute was committed by a subordinate does not relieve his superior of criminal responsibility if he knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.

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<sup>345</sup> S/25704.

4. The fact that an accused person acted pursuant to an order of a government or of a superior shall not relieve him of criminal responsibility, but may be considered in mitigation of punishment if the International Tribunal determines that justice so requires.

Article 27 of the ICC Statute provides for individual responsibility and says:

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, 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, nor shall it, in and of itself, constitute a ground for a reduction of sentence.
2. Immunities or special procedure 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.

The setting up of these special international tribunals, and the specific provisions in their statutes that heads of state, and government officials, are not exempt from responsibility and can be tried by the tribunals, rather than demonstrating that there is no state immunity for these acts, implies that there is such immunity. This immunity has been specifically excluded by these statutes, and that this is one of the reasons that the international tribunals and the ICC have been established.

### **The Duty to Prosecute.**

The parties to the Genocide Convention undertake to prevent and to punish the crime of genocide, and by article V they undertake to enact the necessary legislation to give effect to the Convention, and in particular to provide effective penalties for those convicted of genocide, but there is no duty to prosecute under this convention.

States party to the Geneva Conventions undertook to enact legislation to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the conventions. They are also under an obligation 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, or to extradite such persons. This jurisdiction is based on presence of the alleged offender in the territory of a state, and an obligation to prosecute, if extradition is not granted. The common article in each of the four Geneva Conventions provides that *“In all circumstances, the accused persons shall benefit by safeguards of proper trial and defence.”* There is no requirement for any allegations to be submitted to investigating or prosecuting authorities.

This concept of extradite or prosecute was also followed in conventions which were drafted in response to international terrorism, the Hague Convention for the Suppression of Unlawful Seizure of Aircraft 1970, the Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation 1971, the Convention on Crimes against Internationally Protected Persons 1973, the International Convention against the Taking of Hostages 1979, and also in the Torture Convention. All of these conventions require state parties to ensure that the crimes are prohibited under their domestic legislation, and that persons who are present on their territory are prosecuted or extradited. If such persons are not extradited, then the obligation is to submit the case to the state’s prosecuting authorities for investigation.<sup>346</sup> The primary obligation here is to extradite.

Extradite or prosecute, this is a vision of an ideal world. There are differences in municipal criminal justice systems, in the way evidence is collected, and the admissibility of evidence in trials, which make it very difficult to prosecute a person in

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<sup>346</sup> Article 7 Hague Convention 1970 Article 7 Montreal Convention 1971. Article 7 Convention on Crimes Against Internationally Protected Persons. Article 7(1) Convention Against Torture 1984. In the Geneva Conventions the language is different, the Conventions being older, a High Contracting Party is under an obligation to search for persons alleged to have committed grave breaches, and to bring such persons, regardless of their nationality, before its own courts. The obligation is on a State to prosecute, not to allow private prosecutions.

one state when the evidence is in another state. Even if international co-operation in criminal matters was perfect the exercise would be very time consuming and expensive. The first case in which the interaction of the duty to extradite, individual responsibility and immunity was considered was that of Pinochet, and the English courts struggled to reconcile the conflicting principles.

### **The Pinochet Case.**

Pinochet was a former head of the state of Chile and as such, customary international law required that he be granted immunity *ratione materiae* that is immunity for alleged criminal offences committed in his public capacity whilst he was head of state. He was accused of official torture in Chile, his own state, but the Torture Convention makes no mention of state immunity, despite the fact that jurisdiction is given to the national courts of other states.

A warrant was issued in Spain for the arrest of Pinochet, and his extradition was requested. He was arrested in England and he made an application for habeus corpus to the Divisional Court. There were then three hearings in the House of Lords.

It was submitted on behalf of Pinochet that as a former head of state he did not have immunity in respect of personal or private acts, but that he continued to enjoy immunity in respect of public acts performed by him as head of state, that is, in respect of the exercise by him of sovereign power in that capacity, and that the conduct alleged against him related not to his private or personal conduct, but to his conduct when exercising sovereign power as head of state of the Republic of Chile. The allegations were that he used the apparatus of the state to torture and murder.



### **The Decision of the Divisional Court.**

On the 28 October 1998 the Divisional Court<sup>347</sup> comprising three judges unanimously found that Pinochet was entitled to immunity. The court rejected the argument that immunity could not apply to torture as it was an international crime and said that Pinochet was entitled to claim the same immunity as the state of Chile. Mr. Justice Collins added regarding the submission that such crimes could not be a function of a head of state; “*Unfortunately, history shows that it has indeed on occasions been state policy to exterminate or oppress particular groups.*”

The Divisional Court certified that a point of law of general public importance was involved in the court’s decision, namely: “*The proper interpretation and scope of the immunity enjoyed by a former head of state from arrest and extradition proceedings in the United Kingdom in respect of acts committed while he was Head of State.*”

### **The First Decision of the House of Lords.**

On 25 November 1998 the House of Lords<sup>348</sup> gave judgment and found that Pinochet was not immune, but it was a close call with two of the five judges finding that he was entitled to immunity. All of the Law Lords were agreed that the crucial question was whether the acts alleged were done by Pinochet in the exercise of his functions as head of state.

Lord Slynn at page 74 found that Pinochet was entitled to immunity as the acts relied upon were done as part of the carrying out of his functions when head of state, as the government’s plans and instructions enabled the repression to be carried out, and the acts relied on were done by Pinochet as part of the carrying out of his functions when he was head of state. He said if states wished to exclude the long established immunity of

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<sup>347</sup> CO/4074/98 CO/4083/98 [1998] All ER (D) 509.

<sup>348</sup> R v Bow Street Metropolitan Stipendiary Magistrate and others, ex parte Pinochet Ugarte (Amnesty International and others intervening) [2000] 1 AC 61.

former heads of state then they must do so in clear terms, and in the UK that agreement must be incorporated into domestic law by legislation.

Lord Lloyd found that Pinochet was acting in a sovereign capacity, not a personal capacity, and as plan Condor was organised by him as the head of the government in co-operation with other governments, and carried out through the agency of the police and secret service, he was entitled to immunity as the acts of which he was accused were official acts performed by him in the exercise of his functions as head of state. He did not accept that the crimes alleged were so horrific that an exception must be made to the ordinary rule of customary international law. He said that if the word governmental was used rather than official then the distinction between private and official acts is apparent.

Lord Nicholls and Lord Steyn both found that the conduct alleged was not recognised by international law as a function of a head of state, and therefore Pinochet was not immune. Lord Hoffman agreed with them.

Lord Nicholls said that there was only immunity 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 that torture and hostage taking were not regarded by international law as a function of a head of state, and as the two international conventions made it clear these crimes were to be punishable by courts of individual states, Pinochet was not entitled to immunity.

Lord Steyn's view was that there was a line to be drawn between acts performed in the exercise of functions as a head of state and those which were not, otherwise Hitler's final solution could be an official act performed in the exercise of the functions of a head of state. He said that where the line was to be drawn must depend upon the rules of international law, and as international law condemned genocide, torture, hostage taking and crimes against humanity as international crimes deserving punishment, these acts

could not be part of the functions of a head of state such as to grant immunity from criminal prosecution.

Therefore after this judgment of the House of Lords an ex-head of state and therefore analogously any ex-official could not claim continuing immunity from prosecution for international crimes before the national courts of other states, but this decision did not last long.

### **The First Decision of the House of Lords set aside: The Final Decision of the House of Lords.**

On 15 January 1998 the House of Lords<sup>349</sup> set aside the judgment of the 25 November 1998 on the grounds that the court was not properly constituted, and on the 24 March 1999 the House of Lords<sup>350</sup>, comprising seven different Judges, gave a second and final judgment as to whether Pinochet was entitled to immunity from the criminal jurisdiction of the English courts.

During this time the position had changed, the Secretary of State had issued an authority to proceed which did not specify the offence of genocide; and the charges against Senator Pinochet had widened; there were now thirty-one charges alleging offences of torture; conspiracy to torture; conspiracy to take hostages; conspiracy to torture in furtherance of which murder was committed in various countries; conspiracy to murder in Spain and in Italy; and attempted murder in Italy. The time frame for the offences was also extended from between 1 January 1972 and 1 January 1990.

The seven judges in their reasons for their decision refer to each other. Lord Hope analysed what extradition crimes were disclosed by the alleged conduct, and all the other judges agreed with him. The offences relating to hostage taking were found not to

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<sup>349</sup> R v Bow Street Metropolitan Stipendiary Magistrate and others, ex parte Pinochet Ugarte (No 2) [2000] 1 AC 119.

<sup>350</sup> Pinochet (No 3) [2000] 1 AC 147.

be extradition crimes because the conduct alleged did not amount to hostage taking; and the offences of murder, and attempted murder were found not to be extradition crimes because they could not be brought within the extra-territorial provisions of the Extradition Act 1989. The conspiracies to commit offences in Spain were found to be extradition crimes. The question of immunity relating to the offences of conspiracy in Spain to murder in Spain has been considered in a previous chapter. This chapter is concerned with torture and immunity.

Official torture became an offence in the UK on 29 September 1988 when section 134 of the Criminal Justice Act 1988 came into force. As is usual with criminal statutes it was not retrospective in its effect. Usually a court would decide the question of whether immunity applied first, but in this case the court considered the question of whether to be an extradition crime the conduct had to be criminal under UK law at the time of the alleged offence, or at the time of the extradition. The court decided, six judges concurring and only Lord Millett dissenting, that for conduct to be an extradition crime it had to be an offence in both the requesting State and the UK at the time the conduct occurred. Therefore in the case the extra-territorial offences of torture for which Pinochet could potentially be extradited were restricted to those committed after the 29 September 1988.

The court then considered whether Pinochet was entitled to immunity as an ex-head of state performing the conduct in the exercise of his official functions. Any date at which he lost immunity became of great importance as the number of offences for which he could potentially be extradited were different depending upon which date was decided. In this context the dates upon which the countries ratified the Torture Convention became significant; Spain ratified the convention on the 21 October 1987, Chile ratified on the 30 October 1988, and the UK on 8 December 1988. As a consequence the House of Lords concentrated upon the proper construction of the Torture Convention, and was less concerned with the concept of human rights in international law than the first decision of the House of Lords.

All seven of the Judges gave separate reasons for their decision regarding whether Pinochet lost his immunity, and if he did the date at which he lost it. Six of the Judges agreed that he was not immune, but the dates at which the immunity was lost differed. Lord Goff disagreed, and said that Pinochet was entitled to immunity for torture and conspiracy to torture.

Lord Goff said that the central question was whether Pinochet, as a former head of state, was entitled to state immunity *ratione materiae*, and the critical question was “*whether the conduct was engaged in under colour of or in ostensible exercise of the head of state’s public authority*”. He said that the whole purpose of state immunity was to prevent the actions of one state being canvassed before the courts of another, and if immunity *ratione materiae* was excluded, former heads of state and senior public officials would have to think twice about travelling abroad, for fear of being the subject of unfounded allegations emanating from states of a different political persuasion. He thought the fact that no mention was made of state immunity in the convention was decisive. Had it been intended to exclude state immunity then a paragraph in article 7 would have provided for that. He said that the functions of a head of state are governmental functions and the fact that the head of state performs an act, other than a private act, which is criminal, does not deprive it of its governmental character.

He found that Pinochet was immune, rejecting the argument that there is an implied waiver of immunity for torture committed by state officials as part of their functions in the Torture Convention, on the basis that waiver of immunity must be express not implied. He said at 223A “*What a trap would be created for the unwary, if state immunity could be waived in a treaty sub-silentio*”. As there was no mention of immunity in the treaty, it could not be implied that immunity was waived, and therefore immunity was not affected, and still applied. Lord Goff said that to find otherwise was “*contrary to principle, authority and common sense.*”

Lord Browne-Wilkinson at 204H to 206A found that Pinochet lost his immunity on the 8 December 1988, the date when all three states involved had ratified the Torture Convention.

His reasoning was:

1. The torture convention provided worldwide universal jurisdiction for the international crime of torture, and required all states to ban and outlaw torture. Therefore torture became a truly international crime.
2. It cannot be an official function in international law to do something which international law prohibits and criminalizes.
3. An essential feature of the international crime of torture is that it must be committed by or with the acquiescence of a public official or other person acting in an official capacity. Therefore all defendants will be state officials.
4. If the former head of state has immunity, the man most responsible will escape liability while his inferiors, such as the chiefs of police and junior army officers who carried out his orders will be liable, and he found it impossible to accept this was the intention of the convention.
5. If the implementation of a torture regime is a public function giving rise to immunity *ratione materiae* then all state officials who have been involved in carrying out the torture as a state function would be immune, and no case could be brought outside Chile, unless Chile waived its right to its official's immunity.

Lord Hope decided at 247G, 262D and 263E that immunity was lost on 30 October 1988. He said that there was no express waiver, nor an implied term in the Torture Convention, but that the obligations which were recognised by customary international law, in the case of allegations of systematic torture, by the date when Chile ratified the Convention, were so strong as to override any objection by it on the ground of immunity *ratione materiae*.

Lord Hutton said at 251C that the prohibition of torture had acquired the status of *jus cogens*, and having regard to the provisions of the Torture Convention, acts of torture after 29 September 1988 were not a function of a head of state, and therefore Pinochet was not immune after 29 September 1988.

Lord Saville found that Pinochet's immunity ceased at 8 December 1988 as the terms of the Torture Convention expressly state that a former head of state, who allegedly resorts to torture for state purposes, falls within the terms of the convention, and should be dealt with in accordance with them; and at 267F he found that the express and unequivocal terms of the Convention were a clear and unambiguous waiver of immunity.

Lord Millett found that Pinochet was not entitled to immunity for offences of torture, and conspiracy to torture, he said at 277A-278B that the definition of torture is entirely inconsistent with the existence of a plea of immunity *ratione materiae*. The offence can be committed only by, or at the instigation of, or with the consent or acquiescence of, a public official, or other person acting in an official capacity. The official or governmental nature of the act, which forms the basis of the immunity, is an essential ingredient of the offence, and that no rational system of criminal justice can allow an immunity which is co-extensive with the offence.

Lord Phillips said at 290F that Pinochet was not entitled to immunity for the offences of torture, and conspiracy to torture, as the Torture Convention is incompatible with immunity *ratione materiae*. In his view immunity *ratione materiae* cannot co-exist with international crimes, and extra-territorial jurisdiction in relation to them, as 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 the principle cannot prevail where international crime is concerned, and once extra-territorial jurisdiction is established, it makes no sense to exclude from it acts done in an official capacity.

In conclusion the court found by six to one, Lord Millett dissenting, that torture was not an extradition crime until 29 September 1988, when torture became a crime under UK

law; and secondly by six to one, Lord Goff dissenting, that Pinochet was not entitled to immunity for torture and conspiracy to torture. There were different decisions as to the date when immunity was lost. Three of the Judges, Lord Browne-Wilkinson, Lord Hope and Lord Saville, found that it was when all three states involved had ratified the Torture Convention; that is the 8 December 1988. Lord Hutton found it was 19 September 1988 when torture became an offence in the UK, and two judges Lord Phillips and Lord Millett, found that he was not entitled to immunity for the international crime of torture. Therefore the majority decided the date was 8 December 1988, and Pinochet was found to have lost his immunity as of that date.

This meant that Pinochet could only be extradited on a limited number of charges. The Secretary of State had issued his authority to proceed on the basis that all of the allegations in the extradition request would be the subject matter of the extradition proceedings. The House of Lords were of the view that their decision constituted a profound change in circumstances which required the Secretary of State to reconsider his decision to issue an authority to proceed.

A third provisional warrant backed for bail was issued for the arrest of Pinochet, and he was arrested on it and bailed. On 14 April 1999 the Secretary of State issued a second authority to proceed for offences of torture and conspiracy to torture. Between 27 September 1999 and 30 September 1999 Metropolitan Stipendiary Magistrate, Ronald Bartle heard the committal proceedings, and on 8 October 1999 Pinochet was committed to await the decision of the Secretary of State as to his return to Spain. The Secretary of State decided not to return him to Spain on the basis of his ill-health, and Pinochet returned to Chile on 2 March 2000.

In 2006 the House of Lords again considered the question of state immunity in the case of *Jones v Ministry of Interior*. The House of Lords was again considering whether state immunity applies to civil claims for torture committed by state officials abroad. The House of Lords decided unanimously that state immunity does apply to such claims and that the English courts have no jurisdiction to hear them. In coming to its conclusion the



House of Lords considered what was decided in the Pinochet case regarding immunity from prosecution for official torture. Lord Bingham said at paragraph 19 of the judgment said that the essential ratio in the Pinochet case was that international law could not without absurdity require a state to prosecute and, at the same time, require immunity to be granted to those properly charged. Lord Hoffman said at paragraph 81 that the reason why General Pinochet did not enjoy immunity *ratione materiae* was because “*by necessary implication, international law had removed the immunity.*”

The Judges in all the Pinochet judgments and in the Jones case struggled to make sense of the system of criminal responsibility and accountability introduced by the torture convention, when no mention was specifically made regarding immunity. The only way to implement the torture convention, without allowing those most responsible for the most serious crimes to escape the regime, was to find that the torture convention removed immunity *ratione materiae*. This was reading something into the convention which was not really there, and led to criticism of the extradition proceedings. There was no wholehearted approval of the Pinochet case, and that was because the Torture Convention does not address the issue.

### **After Pinochet.**

Although the House of Lords said that Pinochet could be extradited to Spain, the decision by the Secretary of State not to order his extradition demonstrates the weakness of relying upon national systems to deal with the sensitive matter of international crimes. All participants in the Pinochet proceedings were left feeling that justice had not been done. The decision not to extradite Pinochet was taken on proper medical advice, and after the Divisional Court had considered whether there should be a judicial review of the announcement by the Secretary of State that he was “*minded to conclude that there was no purpose to be served in continuing the extradition proceedings, and that he was minded to take a decision not to extradite Senator Pinochet to Spain.*”<sup>351</sup> But the

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<sup>351</sup> Case No: CO/236/00 and CO/238/00 31 January 2000 R v the Secretary of State for the Home Department ex parte Amnesty International and Others.

impression given was that Pinochet had not been extradited because it was politically convenient. This was reinforced by the behaviour of Pinochet on his return to Chile, when he soon recovered from his illness.

The state of Chile did not waive immunity throughout the proceedings in England, and asserted that the courts of England and Spain had no jurisdiction. When Pinochet returned to Chile there were successful efforts to remove the immunity he had been granted before he relinquished power and charge him with offences before the Chilean courts.<sup>352</sup> Pinochet died on 10 December 2006 before any trial took place.

There have been developments in this area of international law since the Pinochet case. The ICTY and the ICTR have demonstrated that international tribunals are an effective way to deal with alleged war criminals. Internationalised domestic tribunals have since been established in Sierra Leone, East Timor and Cambodia to assist national courts deal with the prosecution of those responsible for atrocities. The ICC has been created by treaty, and the question of the immunity of high state officials has been considered by the ICJ on 14 February 2003 in the Arrest Warrant case.

### **The International Criminal Court**

At its fifty-second session, the UN General Assembly decided to convene a conference, to be held in Rome, Italy, from 15 June to 17 July 1998 “*to finalise and adopt a convention on the establishment of an international criminal court.*”

The ICC Statute<sup>353</sup> was adopted on the 17<sup>th</sup> July 1998 and entered into force on 1 July 2002. In the preamble the state parties recognise that grave crimes threaten the peace, security and well-being of the world, and affirm that the most serious crimes of concern to the international community as a whole must not go unpunished, and that their effective prosecution must be ensured by taking measures at the national level, and by

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<sup>352</sup> Pinochet charged with kidnapping. BBC 1 December 2000.

<sup>353</sup> UN Treaty Series: vol 2187. p. 3.

enhancing international cooperation. They say they are determined to put an end to impunity, and thus contribute to the prevention of such crimes.

The preamble continues that the state parties are determined to establish an independent permanent International Criminal Court in relationship with the United Nations system, with jurisdiction over the most serious crimes of concern to the international community as a whole. The preamble emphasises that the ICC shall be complementary to national criminal jurisdictions. Finally the state parties are resolved to guarantee lasting respect for, and the enforcement of, international justice.

The court has jurisdiction over “*the most serious crimes of concern to the international community as a whole*” that is genocide, crimes against humanity and war crimes. It also has jurisdiction over the crime of aggression, once it is defined. Its jurisdiction is limited to crimes occurring after the statute came into force on the 1 July 2002. A state on becoming a party to the statute accepts the jurisdiction of the court. The primary jurisdiction of the ICC is by consent. State parties may refer a situation to the prosecutor for investigation on the basis of territory or nationality, or the prosecutor may initiate an investigation in those circumstances. A state which is not a party to the statute may, by declaration, accept the exercise of jurisdiction of the court, with respect to a specific crime.

The court also has a non consensual jurisdiction under articles 13 to 15 of the statute, whereby the Security Council acting under Chapter VII of the UN Charter may refer a situation, in which one or more of crimes appear to have been committed, to the prosecutor. This occurred on 31 March 2005 when the Security Council passed Resolution 1593 referring to the situation in Darfur, Sudan since 1 July 2001 to the Prosecutor of the ICC. On 4 March 2009 Pre-Trial Chamber 1 of the ICC issued a warrant of arrest for a serving head of state, the President of Sudan, Omar Al Bashir for war crimes and crimes against humanity.<sup>354</sup>

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<sup>354</sup> ICC Press Release 394.

The complementarity principle is given effect by acknowledging that the domestic jurisdiction of a state takes precedence unless that state is unable or unwilling to prosecute. Article 17 headed “Issues of admissibility”, says the court shall determine that a case is inadmissible where:

- (a) The case is being investigated or prosecuted by a state which has jurisdiction over it, unless the state is unwilling or unable genuinely to carry out the investigation or prosecution;
- (b) The case has been investigated by a state which has jurisdiction over it and the state has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the state genuinely to prosecute;
- (c) The person concerned has already been tried for conduct which is the subject of the complaint, and a trial by the court is not permitted under the principle of *ne bis in idem* dealt with in paragraph 3 of article 20.

In order to determine unwillingness in a particular case, the court shall consider, having regard to the principles of due process recognized by international law, whether one or more of the following exist, as applicable:

- (a) The proceedings were or are being undertaken or the national decision was made for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the court;
- (b) There has been an unjustified delay in the proceedings which in the circumstances is inconsistent with an intent to bring the person concerned to justice;
- (c) The proceedings were not or are not being conducted independently or impartially, and they were or are being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice.

Article 20 paragraph 3 provides that no person who has been tried by another court for conduct shall be tried by the court with respect to the same conduct unless the proceedings in the other court:

- (a) were for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the court; or
- (b) otherwise were not conducted independently or impartially in accordance with the norms of due process recognised by international law and were conducted in a manner which, in the circumstances was inconsistent with an intent to bring the person concerned to justice.

The statute of the ICC has expressly considered immunity, not just in relation to the capacity of the court, but also in relation to national courts. Persons who are wanted by the court, will be arrested, and appear before a national court, before being transferred to the ICC. The provisions relating to immunity are carefully considered.

A person who commits a crime within the jurisdiction of the court is individually responsible and liable for punishment,<sup>355</sup> and official capacity is irrelevant as the statute applies equally to all persons without any distinction based on official capacity. In particular, official capacity as a head of state or government, a member of a government or parliament, an elected representative or a government official does not exempt a person from criminal responsibility under the statute. Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, do not bar the court from exercising its jurisdiction over such a person.<sup>356</sup>

This applies to a person who is before the ICC accused of a crime, but if a person is before a national court, arrested on a warrant issued by the ICC, then:

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<sup>355</sup> Article 25.2.

<sup>356</sup> Article 27.

1. The court may not proceed with a request for surrender or assistance which would require the requested state to act inconsistently with its obligations under international law with respect to the state or diplomatic immunity of a person or property of a third state, unless the court can first obtain the cooperation of that third state for the waiver of the immunity.
2. The court may not proceed with a request for surrender which would require the requested state to act inconsistently with its obligations under international agreements pursuant to which the consent of a sending state is required to surrender a person of that state to the court, unless the court can first obtain the cooperation of the sending state for the giving of consent for the surrender.<sup>357</sup>

This provision acknowledges that states and national courts have an obligation under international law to recognise state and diplomatic immunity. The article says that the ICC may not proceed with a request which would require the requested state to act inconsistently with its obligations under international law. This implies that these obligations are a matter for the ICC to decide. It is submitted that this is too narrow a construction of the article. International law is binding upon both the requested state, and the ICC, both are required to abide by it. The requested state cannot surrender a person who is entitled to immunity, and the ICC cannot proceed with the request.

The English legislation deals with this by providing that such a decision be taken by the Secretary of State not the courts. Section 23 International Criminal Court Act 2001, headed “*Provisions as to State or Diplomatic Immunity*,” provides that any state or diplomatic immunity attaching to a person by reason of a connection with a state party to the ICC statute does not prevent proceedings. This includes immunity under customary international law. Where immunity attaches to any person by reason of a connection with a state which is not a party to the ICC statute, then if the ICC has obtained a waiver of that immunity in relation to a request for that person’s surrender to the ICC that waiver is treated as extending to the proceedings in the UK in connection with that request. A certificate by the Secretary of State that a state is or is not a state

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<sup>357</sup> Article 98

party, or that there has been a waiver is conclusive. The Secretary of State may in any particular case after consultation with the ICC and the state concerned direct that proceedings, which would be prevented by state or diplomatic immunity if the state was not a party to the ICC, or a waiver, shall not be taken.

If the request is for the surrender of a person who has immunity because of a connection with a state not a party to the ICC then the power under section 1 of the United Nations Act 1946 to make orders in council may be used. This power is to give immediate effect by order in council to UN Security Council resolutions not involving the use of armed force. Orders in council made under this section “*shall be laid before Parliament forthwith.*” The procedure has been considered in the case of *A and Others v HM Treasury*<sup>358</sup> in which the Court of Appeal decided that the fact that the order in council must be laid before Parliament even though there is no procedure to enable Parliament to scrutinise or amend it, meant that it was not possible to challenge the lawfulness of the orders on the ground they were ultra vires, as an individual Member could seek to initiate a debate if he or she felt that an order was unsatisfactory. Sir Anthony Clarke MR said “*the likelihood of Parliamentary scrutiny seems more theoretical than real.*”

The International Criminal Court Act 2001 therefore takes any decision regarding the immunity of an individual out of the hands of the national court, but this does not mean that it will not be argued if a person wanted for prosecution by the ICC is arrested in England.

### **The Arrest Warrant Case.**

On 14 February 2003 the ICJ in the Arrest Warrant Case<sup>359</sup> confirmed that serving heads of state, and heads of government are immune from the jurisdiction of the national courts of other states, and found that this immunity extends to foreign ministers. The court then went on to find that such immunity prevents the issue of a warrant and its

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<sup>358</sup> [2008] EWCA Civ 1187.

<sup>359</sup> 128 ILR 1.

international circulation, even when the high state official is not abroad. This means that those high state officials who have immunity *ratione personae* are absolutely immune from the jurisdiction of the courts of other states and this includes immunity from prosecution from international crimes, including official torture.

At paragraph 59 the Court said that the rules governing the jurisdiction of national courts must be carefully distinguished from those governing jurisdictional immunities, as jurisdiction does not imply absence of immunity, while absence of immunity does not imply jurisdiction.

*“Although various international conventions on the prevention and punishment of certain serious crimes imposed on States obligations of prosecution or extradition, thereby requiring them to extend their criminal jurisdiction, such extension of jurisdiction in no way affects immunities under customary international law, including those of Ministers of Foreign Affairs. These remain opposable before the courts of a foreign State, even where those courts exercise such a jurisdiction under these conventions.”*

The court emphasised at paragraphs 60 that immunity does not mean impunity and that immunity from criminal jurisdiction and individual criminal responsibility are quite separate concepts. The court said that jurisdictional immunity is procedural in nature, whereas criminal responsibility is a question of substantive law. Jurisdictional immunity may well bar prosecution for a certain period or for certain offences, but it cannot exonerate the person to whom it applies from all criminal responsibility.

In paragraph 61 the court explained four ways in which a person who has immunity *ratione personae* may be brought to trial:

1. 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.



2. They will cease to enjoy immunity from foreign jurisdiction if the state which they represent or have represented decides to waive that immunity.
3. After a person ceases to hold office, 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 the former official 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.
4. An incumbent or former official may be subject to criminal proceedings before certain international criminal courts, where they have jurisdiction.

The probability of high state officials who commit such serious offences being tried in these circumstances is not high. Their own country is usually the one they are oppressing, and therefore there will be no national prosecution. Such a person will not surrender power; he is likely to grant an amnesty to himself before abdicating. He will not waive immunity, or voluntarily surrender to an international tribunal. Those who are capable of committing genocide, war crimes, crimes against humanity and torture, will not be concerned by the fact that, even though they cannot be tried, they have criminal responsibility.

This exception that a former high state official can be tried for actions committed, whilst in office in a private capacity, returns to the central question in the Pinochet case. Is torture by a state official an official action, is it *acta jure imperii* and therefore immune? Is the act by its nature, and not its purpose, a governmental act. Pinochet instigated torture to preserve his regime, is that not a governmental act? It is not the action of a human rights compliant government, but he was using the apparatus of the state to protect the government. As Lord Millett said at page 268 in Pinochet (3) this exception to immunity is not *acta jure gestionis*, rather it is “*a parallel in some respects opposite development.*”

The explanation of when a former high state official can be prosecuted was not necessary for the ICJ's decision in the Arrest Warrant case, and has been criticised. Hazel Fox in 'State Immunity and the International Crime of Torture'<sup>360</sup> says "*there is some questioning of this ruling which may be described as obiter dicta, since the facts on which the judgment was based concerned a minister while serving in office.*" Steffen Wirth in 'Immunity for Core Crimes? The ICJ's judgment in the Congo v Belgium Case,'<sup>361</sup> argues that the assertion that foreign ministers are immune for official acts, even when they are no longer in office, is obiter dictum, and also that it is not well reasoned, and difficult to reconcile with the existing law of state immunity. He says "*the Court hardly adduces any evidence for the existence of the rule which it asserts, and, what is more, there is a gap in its reasoning: whereas all arguments made by the Court in discussing the merits of the case relate only to incumbent Ministers of Foreign Affairs, the conclusion drawn in paragraph 61 of the decision then includes former Ministers of Foreign Affairs.*" He argues that once a high state official leaves office he should be protected only by immunity *ratione materiae*, which should be interpreted as providing no protection against prosecution for international crimes.

Andrea Bianchi<sup>362</sup> argues that no immunity should be granted with regard to prosecutions for international crimes. He contends that "*the very notion of crimes of international law is inconsistent with the application of jurisdictional immunities ... particularly as regards those crimes which by their very nature either presuppose or require state action. If immunity were granted to state officials ... prosecution of such crimes would be impossible and the overall effectiveness of international criminal law irremediably undermined.*"

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<sup>360</sup> EHRLR 2006, 2, 142-157.

<sup>361</sup> 13 EURJIL 877.

<sup>362</sup> "Denying State Immunity to Violators of Human Rights", 46 Austrian Journal of Public and International Law (1994), pp. 227-228 'Immunity Versus Human Rights: The Pinochet Case.' 10 EJIL (1999) 237 at page 277-278.

At paragraph 85 of their Joint Separate Opinion in the Arrest Warrant Case,<sup>363</sup> Judges Higgins, Kooijmans and Buergenthal quote Andrea Bianchi and note that it is claimed in the literature that serious international crimes cannot be regarded as official acts because they are not normal state functions nor functions that a state alone, in contrast to an individual, can perform, but this has not been followed by state practice. There have not been prosecutions by national courts of ex-high state officials of other states for international crimes. This also has not been followed by the House of Lords in the case of *Jones v The Ministry of the Interior*<sup>364</sup> and it is at odds with the principles of state responsibility. A state will incur responsibility in international law if one of its officials is acting under apparent authority even if the official exceeds his authority or contravenes his instructions, the question is whether he was acting with apparent authority.<sup>365</sup> If so the state will be responsible for his actions, which are therefore official, albeit internationally wrongful, actions. Actions do not cease to be official because they are illegal.

A decision of the ICJ has no binding force except between the parties and in respect of that particular case,<sup>366</sup> but the ICJ is explaining customary international law in the Arrest Warrant case and these are influential pronouncements. The ICJ appears to be saying that the decision of the House of Lords in *Pinochet* (3) is incorrect.<sup>367</sup>

Campbell McLachlan in 'Pinochet Revisited'<sup>368</sup> suggests that "*it would be preferable if international law were to admit of an exception to state immunity for the prosecution of individuals for international crimes, that such an exception develop as an independent head.*" But he says "*Whether such an exception is in truth developing as part of international law's 'living and expanding code' is debateable,*" and; "*Although the ICJ's*

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<sup>363</sup> 128 ILR 119.

<sup>364</sup> [2007] 1 AC 270.

<sup>365</sup> Articles on the Responsibility of States for Internationally Wrongful Acts with commentaries. Yearbook of the ILC 2001. vol. II (Part Two), para. 77, pp.31-143 commentary to article 7 para. (8).

<sup>366</sup> Article 59 Statute of the ICJ 1945.

<sup>367</sup> 128 ILR 1 at paragraph 59.

<sup>368</sup> ICLQ 2002, 51(4), 959-966.

*judgment should properly be limited to the specific issue, as to serving foreign ministers, which it decided, the conservatism at the core of the decision is bound to have a chill effect on national judicial activism on related immunity issues, and thus inhibit the further development of state practice.”*

In the Pinochet case the House of Lords decided that international law has to make sense and be internally consistent. The Torture Convention requires states to extradite or prosecute persons found on their territory accused of crimes of torture, and the definition of the offence of torture requires that the person accused of the offence will have immunity *ratione materiae*, as the offence will have been committed as an official act. The House of Lords decided that the only coherent decision was that Pinochet was not immune, and that states party to the Torture Convention must have meant that immunity did not apply. The House of Lords decided that immunity continues for the offences of murder and conspiracy to murder. It was not the seriousness of the offences, nor the abuses of human rights, which removed the immunity, but the absurdity which would prevail if Pinochet was found to be immune. As Lord Browne-Wilkinson said page 205E *“the whole elaborate structure of universal jurisdiction over torture committed by officials is rendered abortive”*. The complicated reasons given by the Judges for their decision, and the fact that no really sensible ratio can be deduced from the case, shows the difficulty which the judges had in making their decision, and what the judges did was to interpret the torture convention by reading into it a provision which was not there.

The Pinochet case was about a former head of state and immunity *ratione materiae*, whereas the Arrest Warrant case before the ICJ was about the immunity of a serving foreign minister; that is immunity *ratione personae*. The ICJ stated clearly that a treaty provisions regarding jurisdiction cannot change the immunity of an individual under customary international law. This statement was unnecessary for the decision the court came to, but it is a brave national court, particularly one at first instance, which would issue a warrant when the ICJ says that immunity prevails.

The ICJ also said that one way in which a person with immunity can be brought to justice is before an international tribunal. The international tribunals have been successful in arresting and prosecuting individuals, and the International Criminal Court has been created since the Pinochet case. The principle of complementarity in the ICC statute gives precedence to states with traditional bases of jurisdiction, territory and nationality, and only allows for prosecution if those states are unwilling or unable to prosecute.

As Lord Browne-Wilkinson said in Pinochet (N0 3) at 190F

*“It may well be thought that the trial of Senator Pinochet in Spain for offences all of which related to the state of Chile and most of which occurred in Chile is not calculated to achieve the best justice.”*

Criminal offences should be prosecuted in a state with a proper connection to the offence, and if that is not possible because a person is so powerful, then it is submitted that the venue should be an international criminal tribunal, and not the domestic courts of another state.

This is what has occurred in the case of Charles Taylor, the former president of the Republic of Liberia. On 7 March 2009 an indictment and arrest warrant was issued by the Special Court for Sierra Leone for the arrest of Charles Taylor who was at that time President of Liberia and a head of state. Charles Taylor was accused of the commission of crimes against humanity and grave breaches of the Geneva Conventions with intent to obtain access to the mineral wealth of the Republic of Sierra Leone, in particular the diamond wealth of Sierra Leone, and to destabilize the state. The allegation was that he resourced and directed rebel forces, encouraging them in campaigns of torture, terror and mass murder, in order to enrich himself from a share of the diamond mines that were captured by the rebel forces.

On 4 June 2003 when Charles Taylor was visiting Ghana the warrant was transmitted to the Ghanaian authorities, but he was not arrested. On 23 July Charles Taylor requested the Special Court to quash the indictment and declare the warrant null and void. At this time he was still President of Liberia, and the application was originally made by both Charles Taylor and Liberia. Charles Taylor stood down as President in August 2003 and he was allowed to reside in Nigeria. Liberia withdrew from the proceedings and did not support his application.

The Special Court for Sierra Leone had to decide whether it was lawful for the court to issue an indictment and to circulate an arrest warrant in respect of a serving head of state. On 31 May 2004 The Special Court gave its judgment<sup>369</sup> and decided that it was an international court; as it was not a national court, it had been established by an agreement with the UN which was an expression of the will of the international community, and had the characteristics of an international organisation. The court considered following the Nuremberg principle III of individual responsibility subsequently expressed in the statutes of the ICTY, ICTR and ICC that article 6(2) of its Statute providing that the official position of any accused persons, whether as head of state or government or as a responsible government official, shall not relieve such a person from criminal responsibility nor mitigate punishment was lawful. The court considered that Pinochet (No.3) and the Arrest Warrant case supported its conclusion.

At paragraph 53 of its judgment the court held that the official position of Charles Taylor as an incumbent head of state at the time when the criminal proceedings were initiated was not a bar to his prosecution by the Special Court.

The political sensitivities surrounding the prosecution of a former high state official are demonstrated by the subsequent history of this case. On the 29 March 2006 Charles Taylor was arrested in Nigeria. On 3 April 2006 he made his first appearance before the Special Court in Freetown and he pleaded not guilty. By Resolution 1688 of 2006 on 16 June 2006 the Security Council determined that the presence of Charles Taylor in Sierra

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<sup>369</sup> 128 ILR 239.

Leone was an impediment to stability and a threat to the peace of Liberia and of Sierra Leone and to international peace and security in the region, and acting under Chapter VII of the UN Charter the Security Council transferred the trial of Charles Taylor by the Special Court to the building of the ICC in The Hague.

The international community is developing the mechanisms to deal with the political consequences associated with trials of high state officials accused of international crimes, using the international criminal tribunals. It is submitted international tribunals are the appropriate venue for trial of such cases.

## Conclusion

State immunity is a principle of international law based upon the consent of states. The extent to which individuals benefit by immunity from prosecution for criminal offences as an aspect of state immunity is not always clear. This area of law has been developing, particularly during the past two decades, responding to changes in international society.

There are two different immunities which attach to individuals because they are state officials; immunity *ratione personae* and immunity *ratione materiae*. Immunity *ratione personae* is described as being immunity conferred because of the position held by an official in a state, or the immunity granted because of the official's status. Immunity *ratione materiae* is accorded because of the activity undertaken by a state official, the immunity attaching to official acts. Although both of these immunities are accorded to individuals because they are state officials, and the immunity is that of the state inasmuch as it is the state that can waive the immunity, they are not the same. Immunity *ratione materiae* is simply an expression of the immunity of the state, if the state is not immune then neither is the official, whereas immunity *ratione personae* has a separate existence to the immunity of the state. A person is entitled to immunity *ratione personae* whether or not the state would be entitled to claim immunity in civil proceedings for the actions of the state official.

As chapter three of this thesis shows, international law has long recognised that certain high state officials enjoy immunity *ratione personae* which protects them against both civil and criminal proceedings instituted in other states whilst they hold office.

Immunity *ratione personae* protects the person of the most important state officials. It is an immunity afforded only to those officials of the highest status. It protects the dignity of the state by protecting the office held by protecting the official who is inviolable. It means that high state officials can go freely about their state business, enabling such officials to perform their functions without interference, or fear of interference, from other states. This immunity is all encompassing. It applies to all actions of the individual, both before and after taking office, and it includes all civil and criminal



proceedings including those alleging the most serious of international crimes.<sup>370</sup>

Immunity protects the individual and thereby protects the state.

Those who have immunity *ratione personae* have complete immunity from arrest and prosecution for alleged crimes in foreign states. This includes all conduct whether in their own state, the forum state or a third state. This enables these highest state officials to carry out their functions. Not many people are entitled to immunity *ratione personae*, but for those who are its beneficiaries, it is absolute. A foreign state has to accord a person entitled to immunity *ratione personae* immunity of its own motion and not wait for it to be claimed.<sup>371</sup>

What is uncertain about immunity from criminal proceedings *ratione personae* is its extent, in the sense of which officials benefit from it. In 2004 the ICJ in the Arrest Warrant Case confirmed that this immunity extends to high ranking officials “*such as*” heads of state, heads of government and foreign ministers,<sup>372</sup> but the court refrained from saying that this immunity extends no further. The term “*such as*” implies that there may be other high state officials to whom this immunity extends. The role of government ministers is extending as international society becomes more complex. In the UK, for example, the Secretary of State for International Development has taken over some of the responsibility traditionally performed by the foreign minister. In the USA the National Security Adviser plays a role similar to that of a foreign minister. Part of the traditional role of a foreign minister may be performed by civil servants. At this time there has not been enough state practice to ascertain how the law will develop. Two cases before Bow Street Magistrates’ Court, *Re: Shaul Mofaz*<sup>373</sup> and *Re: Bo Xilai*<sup>374</sup> both described in chapter three, have accorded immunity to a defence minister and a minister for commerce including international trade respectively. These cases are of

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<sup>370</sup> Arrest warrant case. ICJ 128 ILR 1 paras 51 and 58.

<sup>371</sup> Arrest warrant case. ICJ 128 ILR 1 at paras 70 and 71.

<sup>372</sup> Arrest warrant Case. ICJ. 128 ILR 1 at para. 51.

<sup>373</sup> 128 ILR 709.

<sup>374</sup> 128 ILR 713.

limited authority in English law, as they are decisions of a court of first instance which have not been considered by the higher courts. As examples of state practice these cases have to be treated cautiously, however they may be indicative of the way international law is developing.

There are also special regimes which give state officials immunity *ratione personae* for limited agreed periods of time. Diplomatic immunity, consular immunity and the immunity accorded to the members of Special Missions are all based upon the consent of states and are well established in international law. These regimes all accord immunity to specific state officials for particular periods of time by agreement between both states involved. The purpose of the immunity conferred under these regimes is to enable state officials perform particular tasks or undertake specific roles on behalf of their state. This immunity *ratione personae* is all encompassing for the time agreed, usually the time the officials are present on the territory of the receiving state. An official who benefits from this immunity has an obligation to abide by the laws of the receiving state, and if he does not do so the sanction available to the receiving state is to expel the official.

It is submitted in this thesis that immunity *ratione personae* accorded to high state officials should be limited to the few state officials whose role requires them to represent their state at all times, and to travel freely on behalf of their state. The people who perform the roles of head of state, head of government and foreign minister are immune. Whatever titles the people performing these roles are given, and whether there is only one person per role or more than one is unimportant, it is the function they perform on behalf of their state that gives the individuals immunity. Otherwise the immunity accorded to members of Special Missions can cover visits by state officials for state business. This regime has the advantage of being agreed in advance so that the sending and receiving state know the purpose of the special mission, and know who has immunity, and for how long.

What is less clear is whether there is continuing immunity *ratione materiae* accorded to those who have had immunity *ratione personae* once that immunity comes to an end. Also whether there is immunity from prosecution for officials who perform official actions. Immunity *ratione materiae* is immunity attaching to conduct undertaken on behalf of a state and it is described as being for *acta jure imperii*, actions of an official nature.

The concept that the immunity of the state also covers the official has been developed in civil proceedings. The rationale for this immunity in civil cases is that if an individual is sued, then the state is sued by proxy, and the immunity of the state is thereby undermined. To allow the individual to be sued when the state is immune would be to circumvent the immunity provided to the state. There is only one entitlement in civil proceedings to compensation, and the responsibility is that of the state. If the conduct of an official is attributable to the state and the state is in international law responsible, then the state may claim immunity unless an established exception to immunity applies, and in these circumstances the state may also claim immunity for the individual state official.<sup>375</sup> In a civil context if a state is entitled to and claims immunity regarding conduct by its officials, then this immunity extends to all officials and ex-officials for this conduct, provided they were acting in an official capacity. Acting in an official capacity means the same here as it does in the context of the law of state responsibility.<sup>376</sup> So if a state claims immunity for its officials that state is accepting responsibility for their actions.<sup>377</sup>

The entitlement of individuals to immunity in civil cases is different to the entitlement to immunity in criminal cases. The responsibility of the individual and the state is not co-terminus when criminality is alleged, as a person who commits a crime is individually responsible for that crime, and can be punished. Individual responsibility for crimes

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<sup>375</sup> *Jones v The Ministry of the Interior*. HL. [2007] 1 AC 270 at para. 12.

<sup>376</sup> ILC Draft Articles on the Responsibility of States for Internationally Wrongful Acts 2001. Articles 4 and 7. *The Case Concerning Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v France)* ICJ <http://www.icj-cji.org/docket/files/136/14550.pdf>. at para. 196.

<sup>377</sup> *Jones v The Ministry of the Interior* [2007] 1 AC 270 at para. 12.

under international law has been a principle of international law since the acceptance of the Nuremburg principles after the Second World War. Individual criminal responsibility is separate from and additional to any responsibility of the state. Associated with the concept of individual responsibility for offences are the ideas of the punishment and prevention of crime. A person who is responsible for a crime should be punished, and the possibility of prosecution and punishment should thereby act as a deterrent to others. There is nothing inconsistent in saying that the state is immune in respect of a particular act, but that an individual official can be prosecuted and punished for it.

The concept of immunity *ratione materiae* covering criminal liability was raised by the arrest of Pinochet, and in Pinochet (3) the judges in the House of Lords were all agreed that all state officials are entitled to continuing immunity *ratione materiae*, but as shown in chapter four this premise was accepted without proper analysis or argument. There have been statements in cases such as *The McLeod*<sup>378</sup> and *Blaskic*,<sup>379</sup> that officials should not be punished for acting on behalf of their state, but as the analysis in chapter four shows the statements are not supported by state practice. The analysis of those cases, and the other cases referred to in the *Blaskic* judgment do not support that conclusion. The analysis of state practice shows that states regularly prosecute state officials for actions performed on behalf of their states.

The place where the criminal conduct occurs has a bearing on whether immunity *ratione materiae* attaches to that conduct. The evidence of state practice set out in chapter four of this thesis demonstrates that states have regularly prosecuted and punished officials of foreign states for acts committed on the territory of the forum state. This includes not only serious offences such as terrorism, assassination and kidnapping, but also less serious matters such as collecting information and trespassing. There is a marked contrast between the treatment of officials who have immunity *ratione personae*, such as

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<sup>378</sup> British and Foreign State Papers, vol. 29, p. 1139.

<sup>379</sup> *Prosecutor v Tihomir Blaskic*, 29 October 1997, Appeals Chamber, ICTY. Judgment on the request of the Republic of Croatia for review of the decision of the Trial Chamber II of 18 July 1997. <http://www.un.org/icty/blaskic/appeal/decision-e/71029JT3.html>.

diplomats, who are expelled, and other officials who are prosecuted, and often severely punished, for the same conduct. The analysis of state practice in chapter four shows that only those state officials who are present on the territory of a foreign state with the consent of the second state and have immunity *ratione personae* are entitled to immunity *ratione materiae* from prosecution after they have left the territory or cease to hold office. They have immunity *ratione personae* for an agreed period, and thereafter they have continuing immunity *ratione materiae*, that is they have immunity from prosecution, for conduct legitimately performed in the exercise of their functions. This immunity extends to conduct which is connected to their functions but does not cover serious crimes of violence, even if committed on behalf of the sending state. In the criminal context acting in an official capacity does not include acts of violence on the territory of a foreign state. An official present on the territory of another state who does not have immunity *ratione personae* does not have immunity from prosecution for any offences committed on that territory.

The analysis of state practice demonstrates that immunity does not attach to conduct alone, for a person to have continuing immunity *ratione materiae* from prosecution for offences committed on the territory of a foreign state they must initially have had immunity *ratione personae*. The forum state must have agreed to the official being present on its territory, and agreed to the purpose of the visit. Those officials present on the territory of a foreign state, with the consent of that state, who have immunity *ratione personae*, have continuing immunity *ratione materiae* only for official conduct, *acta jure imperii*, with the proviso that the conduct must be part of the legitimate functions of the official. This does not extend to acts of violence.

In Pinochet (No 3) all seven judges agreed:

1. An ex-head of state is immune from prosecution for murder and conspiracy to murder alleged to have been committed in the forum state.
2. All state officials no matter how minor are entitled to continuing immunity.

This analysis of state practice in arresting and prosecuting foreign state officials demonstrates that both of these statements are incorrect. State officials are routinely prosecuted in foreign states for offences committed on behalf of their state. A former state official who had immunity *ratione personae* and who committed serious offences on the territory of a foreign state is not entitled to blanket immunity *ratione materiae*. He was on the territory of the foreign state with the consent of that state, but it did not consent to him committing serious offences such as murder and conspiracy to murder. These offences of violence do not carry immunity. A state official who has never had immunity *ratione personae* does not have immunity from prosecution for offences committed on the territory of another state. He is responsible for his own actions and required to abide by the law of the foreign state whilst he is there.

There is the question regarding the extent of immunity for offences committed by an official on the territory of his own state in the exercise of his official functions. For the most part states do not have jurisdiction to prosecute crimes committed on the territory of another state and therefore the question does not arise. As described in chapter six states have signed conventions undertaking to assert extra-territorial jurisdiction in relation to international crimes, and agreeing to extradite or prosecute alleged offenders present on their territory. Most states are party to the four Geneva Conventions 1949 and the Torture Convention 1984. These conventions both require states party to assume jurisdiction over alleged offenders present on their territory. All states party have a duty to extradite a person alleged to have committed any offence as defined in the conventions or to submit the case to its competent authorities for the purpose of prosecution. Grave breaches of the Geneva Conventions are most likely to be committed by soldiers and other state officials and the definition of torture in the Torture Convention requires that the offence is committed by officials acting under the guise of official authority. Therefore these offences are almost certainly to be committed by persons acting in an official capacity. As shown in chapter 6 there is a tension between the principle of immunity and the obligation under international law to prosecute these crimes.

The ICJ at paragraph 61 of its judgment in the Arrest Warrant Case said that after a person ceases to hold office a court of one state may try the former official of another state in respect of acts committed during that period of office in a private capacity. This was the central question in Pinochet, is torture, an offence that has to be committed by a state official, an 'official act' in the sense that it carries immunity *ratione materiae*.

One way to reconcile these two decisions is to say, as the judges did in the Pinochet case, that official torture committed by a state official as defined in the Torture Convention cannot be an act which carries with it immunity *ratione materiae*. This would mean that the terms 'official act' and 'acts committed in a private capacity' have different meanings in different contexts. In civil proceedings an official act means an act for which a state may claim immunity, an act for which it is in international law responsible. In criminal proceedings an official act cannot include conduct prohibited by international law. This is saying that official torture does not carry immunity *ratione materiae* because it is official.

The ICJ also said at paragraph 59 of its judgement that a treaty provision regarding jurisdiction cannot change the immunity of an individual under international law. It said that rules governing the jurisdiction of national courts must be carefully distinguished from those governing jurisdictional immunities, and that jurisdiction does not imply the absence of immunity while the absence of immunity does not imply jurisdiction. This is all very well, but if there is no jurisdiction for official torture, the Torture Convention is rendered meaningless. The ICJ continued that the obligations of prosecution or extradition imposed by conventions for the prevention and punishment of serious crimes require states to extend their criminal jurisdiction, such extension of jurisdiction in no way affects immunities under customary international law, including the immunity of high state officials. The ICJ said those immunities remain opposable before the courts of foreign states even where those court exercise such a jurisdiction under those conventions.

The statements of the ICJ about the immunity of former state officials were not necessary for the decision of the court, and they have been criticised. The Arrest Warrant case was about the immunity *ratione personae* of high state officials, whereas the Pinochet case was about immunity *ratione materiae* to be afforded to former high state officials for offences and therefore the two cases are distinguishable. But the statements of the ICJ in the Arrest Warrant case are powerful and clear declarations of that court's understanding of customary international law. Any national court issuing a warrant for the arrest of a former high state official of a foreign state for torture or grave breaches of the Geneva Conventions engages the responsibility of the state, and must expect the issuance of such a warrant to be challenged in higher courts and on the international plane.

The ICJ said that another exception to the immunity of former high state officials is prosecution before an international criminal tribunal which has jurisdiction. The principle of complementarity in the ICC statute gives precedence to prosecution by states with traditional bases of jurisdiction territory and nationality, and only allows for prosecution before the ICC if those states are unwilling or unable to prosecute.

The ICC has jurisdiction after 1 July 2002 and it has commenced work. It has issued a warrant for a serving head of state, the President of Sudan, Omar Al Bashir and the court is being used for the prosecution of the former President of Liberia, Charles Taylor. The international community is developing the mechanisms to cope with the political consequences associated with the trials of high state officials accused of international crimes using the international tribunals. It is submitted that the statute of the ICC provides a coherent hierarchy and a clear decision making process for deciding where the trials of former high state officials for crimes under international law should be held.



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