United Nations A/CN.4/596

General Assembly

Distr.: General
31 March 2008

Original: English

International Law Commission
Sixtieth session
Geneva, 5 May-6 June and 7 July-8 August 2008

Immunity of State officials from foreign criminal jurisdiction

Memorandum by the Secretariat

08-29075 (E) 141108

Summary

The present study, prepared by the Secretariat at the request of the International Law Commission, is intended to provide a background to the Commission's consideration of the topic "Immunity of State officials from foreign criminal jurisdiction". The study examines the main legal issues that arise in connection with this topic, both from classical and contemporary perspectives, also taking into account developments in the field of international criminal law that might have produced an impact on the immunities of State officials from foreign criminal jurisdiction.

Three limitations to the scope of the study need to be emphasized. *First*, the study only deals with immunities of those individuals that are *State officials*, as opposed to other individuals — for example, agents of international organizations — who may also enjoy immunities under international law. Furthermore, the study does not cover certain categories of State officials such as diplomats and consular agents, since the rules governing their privileges and immunities have already been a subject of codification. However, reference is made, as appropriate, to such rules where they might provide useful elements in addressing certain issues on which practice regarding the individuals covered by the present study appears to be scant. *Secondly*, the study is limited to immunities from *criminal* jurisdiction, as opposed to other types of jurisdiction such as civil. Nevertheless, elements of State practice, including domestic judicial decisions, in the field of civil jurisdiction have been taken into account to the extent that they might be relevant in addressing certain aspects relating to the legal regime of immunities from criminal jurisdiction as well. *Thirdly*, the study is concerned with immunities from *foreign* criminal jurisdiction, namely immunities enjoyed by State officials before the authorities of a foreign State, as opposed to immunities enjoyed by them in their own State, or immunities before international courts or tribunals. In this respect, the treatment of immunities before international courts or tribunals has been addressed from the perspective of its historical development and potential impact on the legal regime of immunities before foreign domestic jurisdictions.

The present study is divided into two parts. Part One provides, largely from a historical perspective, a general background overview and context in which immunity of State officials has arisen and has been invoked. This part comprises four sections. Section A seeks to provide the definitional range by which the term "State officials" would be employed, while section B provides an overview of the notion of jurisdiction — including criminal jurisdiction — which is closely linked to that of immunity. Section C is devoted to addressing the concept of immunity in its diverse manifestations. Diplomatic immunities and the doctrines of State immunity are in particular distinguished to delineate the scope of the present study, and an overview is given of the way in which the Commission dealt with "sovereign and head of State immunity" when elaborating the draft articles on jurisdictional immunities of States and their property. This section also deals with concepts such as non-justiciability and the act of State doctrine, which appear to be related to immunity — at least to some extent, as they may prevent the exercise of adjudicatory jurisdiction over a dispute involving a foreign State or an official thereof. Finally, section D considers developments whereby immunity issues have been addressed in relation to efforts relating to the establishment of international criminal jurisdiction.

Part Two is the substantive part and consists of three sections. It describes the scope and implementation of the immunity of State officials from foreign criminal jurisdiction in light of international treaties, relevant elements of State practice (including domestic legislation and judicial decisions), international jurisprudence and the legal literature. This part proceeds on the basis of the distinction, which appears to be widely recognized, between immunity *ratione personae* and immunity *ratione materiae*.

Section A addresses questions relating to immunity *ratione personae*. Such immunity, which appears to cover acts performed in an official capacity as well as private acts, including conduct preceding the term of office, only accrues to incumbent officials holding high-ranking positions within the structure of a State — primarily heads of State or Government, but possibly also other officials such as ministers for foreign affairs, as recognized by the International Court of Justice in its judgment in the *Arrest Warrant* case. Thus, this section addresses the question of the individuals covered by such immunity, including the determination of the status of the individuals possibly entitled thereto; the potential role of recognition, or lack thereof, of State or Governments in the granting of immunity *ratione personae*; the situations in which immunity *ratione personae* operates (in particular, the question whether such immunity also applies when the individual finds himself in the territory of a foreign State on a private visit); the specific situation of heads of State in exile; as well as the possible granting of immunity *ratione personae* to the family members or the entourage of the individual concerned. This section also discusses the question whether immunity *ratione personae* might be subject to an exception when the alleged criminal conduct constitutes a crime under international law. While the International Court of Justice has denied, in the *Arrest Warrant* case, the existence of such an exception as regards the immunity from foreign criminal jurisdiction of an incumbent minister for foreign affairs, and while certain elements of State practice — including national judicial decisions — would seem to support the Court's finding, some scholars have suggested possible exceptions, in particular in situations where the granting of immunity *ratione personae* would entail a serious risk of impunity.

Section B considers immunity *ratione materiae*, namely immunity that attaches to acts performed by State officials in the discharge of their functions, as opposed to private acts. Several questions are addressed in this section, including: the criteria for distinguishing between official and private acts; the treatment of *ultra vires* acts; the question of the relevance of the distinction between *acta jure imperii* and *acta jure gestionis*; whether such immunity also covers acts performed by a State official in the territory of a foreign State; and the individuals possibly enjoying immunity *ratione materiae*, including the situation of former officials, officials of unrecognized States or Governments, as well as officials of a State that has disappeared. This section then addresses the question whether an exception to immunity *ratione materiae* has emerged in respect of crimes under international law. In this context, attention is drawn to recent developments in the field of international criminal law (in particular, the principle according to which the official status of the perpetrator of an international crime does not exempt him or her from criminal responsibility), to the findings of international and domestic courts, and to the doctrinal debate on the rationale, the nature and the possible extent of such an exception. Finally, the study addresses the question of possible exceptions to immunity *ratione materiae* in respect of crimes of international concern that would not yet have acquired the status of crimes under international law.

The final section C focuses on the procedural aspects relating to the implementation of the immunity of State officials from foreign criminal jurisdiction. This section addresses several questions such as the invocation and the determination of immunity; the legal effects of the operation of immunity (including the relationship between immunity from jurisdiction and immunity from execution and inviolability; the question of the immunity of State officials who are not themselves accused of a criminal act; and the identification of the acts precluded by the operation of immunity). This section also discusses issues relating to the waiver of immunity such as the form of waiver, whether express or implied, the authority competent to waive immunity and the legal effects of a waiver. Given the relative paucity of State practice on these questions, reference is frequently made to the solutions that have been applied in the field of diplomatic immunities as well as State immunity.

Contents

I. Introduction*

1. In today's interdependent world, as millions of individuals traverse national borders into other States, the criminal jurisdiction model which emerged from the Westphalian system of territorial nation-state strives to cope with the incidence of criminality and provides the framework for efforts of the international community to prosecute those who commit crimes. Such a system was based on principles of independence, sovereign equality and dignity of States. Under classical international law, a State possessed jurisdiction within certain limits, by virtue of its territorial sovereignty, over the person and property of foreigners found upon its land and waters[1] and this remains true today. Furthermore, it possessed jurisdiction, also within certain limits, over acts done within its borders affecting foreign States or their subjects. At the same time, there were special rules and practices by which the general right to exercise jurisdiction over foreign nationals and their property was excepted.[2] Seen differently, circumstances existed which were recognized as according a State of nationality the competence to operate beyond the limits of its territorial jurisdiction, in particular in matters concerning its nationals or property.

2. An exegesis of the title of the Commission's topic "Immunity of State officials from foreign criminal jurisdiction" partly reveals the scope of the study. For purposes of analysis, three essential elements bare themselves to prominence: (a) *ratione personae*, the study is limited to those individuals who are State officials; (b) *ratione materiae*, the subject matter dwells on their immunity in respect of criminal jurisdiction; (c) and spatially, *ratione loci*, the immunity is in respect of foreign jurisdiction. In recent years, the *Pinochet* cases, the *Arrest Warrant* case and the *Djibouti v. France* case have drawn particular interest to this area of the law,[3] as well as to the need to address any uncertainty relating to the immunity rules applicable particularly in respect of those in leadership positions who may be responsible for serious crimes.[4]

---

* At its fifty-eighth session (2006), the International Law Commission included, inter alia, the topic "Immunity of State officials from foreign criminal jurisdiction" in its long-term programme of work; *Official Records of the General Assembly, Sixty-first Session, Supplement No. 10* (A/61/10), para. 257. At its fifty-ninth session (2007), the Commission decided to include the topic in its work programme and appointed Mr. Roman A. Kolodkin as Special Rapporteur; ibid., *Sixty-second Session, Supplement No. 10* (A/62/10), para. 376. The Commission also requested that the Secretariat prepare a background study on the topic; ibid., para. 386.

1 William Edward Hall, *A Treatise on International Law*, edited by A. Pearce Higgins, 8th edition (Clarendon, Oxford University Press, Humphrey Milford Publisher to the University, 1924), at § 48.

2 Ibid., at § 48. Art. 2 of the Draft Declaration on Rights and Duties of States, 1949, affirms this by providing:

> "Every State has the right to exercise jurisdiction over its territory and over all persons and things therein, subject to the immunities recognized by international law."

Yearbook of the International Law Commission, 1949. See also General Assembly resolution 375 (IV) of 6 December 1949. *Yearbooks* of the Commission are available at http://www.un.org/law/ilc/index.htm).

3 House of Lords, *Regina v. Bartle and the Commissioner of Police for the Metropolis and Others Ex Parte Pinochet*, 24 March 1999, reproduced in *International Legal Materials*, vol. 38, 1999, pp. 581-663 (hereinafter "*Pinochet* (No. 3)"). *Case concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, *Judgment, I.C.J. Reports 2002*, p. 3. *Case concerning Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France), Judgment of 4 June 2008,* available at: www.icj-cij.org.

4 See, for example, the resolution on Immunities from Jurisdiction and Execution of Heads of State and of Government in International Law, adopted by the Institut de droit international at its Vancouver session in 2001; Institut, *Annuaire*, vol. 69 (2000-2001), pp. 742-755.

3. The present study is divided into two parts. Part One provides a general background overview and context in which immunity of State officials has arisen and has been invoked. It seeks to draw certain parameters surrounding the scope of the study, by highlighting the treatment of issues relating to immunity largely from a historical perspective. This part comprises four sections. The first two sections are preliminary in nature. An attempt is made in section A to provide the range within which the term "State officials" would be employed, while section B, in view of the close link with immunity, gives an overview of the notion of jurisdiction, including criminal jurisdiction. Section C is devoted to addressing the concept of immunity in its diverse manifestations, as well as related concepts. In particular, diplomatic immunities and the doctrines of State immunity are distinguished from the subject matter of the present study. This section also gives an overview of how the Commission dealt with "sovereign and head of State immunity" when elaborating the draft articles on jurisdictional immunities of States and their property. Section C also explores other techniques than jurisdictional immunities by which the adjudication of a dispute that relates to another State or an official of a foreign State may be avoided, including non-justiciability and the act of State doctrine. Finally, section D considers developments whereby immunity issues have been addressed in relation to efforts relating to the establishment of international criminal jurisdiction.

4. Part Two is the substantive part and is divided in three sections. It describes the scope and implementation of the immunity of State officials from foreign criminal jurisdiction in light of international treaties, relevant elements of State practice (including domestic legislation and judicial decisions), international jurisprudence and the legal literature. This part proceeds on the basis of the distinction that is given between immunity *ratione personae* and immunity *ratione materiae*. Section A addresses questions relating to immunity *ratione personae*, examining the individuals and acts possibly covered by such immunity, as well as possible exceptions thereto. Section B considers immunity *ratione materiae*, describing the material scope of such immunity (particularly, in light of the distinction between official and private acts), the individuals covered by such immunity as well as possible exceptions thereto. Section C focuses on the procedural aspects of the immunity of State officials from foreign criminal jurisdiction, examining the invocation and the determination of immunity, the legal effects of the operation of immunity from foreign criminal jurisdiction, as well as the issues relating to the waiver of immunity.

II. Part One. Background and context: Definitional issues concerning the scope of the study and related developments surrounding the subject

A. State officials

5. Customary international law does not as such define a "State official". As will be explored in greater detail in Part Two, in the context of immunity a distinction is drawn between immunity *ratione materiae* and immunity *ratione personae*. Whereas the former continues to subsist and may be invoked even after the expiration of one's term of office, the latter survives up to the end of such term and

attaches to the official concerned.[5] While the group of State officials enjoying immunity *ratione materiae* is theoretically broad as to encompass a wider range of officials, and indeed there are commentators who contend that it embraces all State officials,[6] the beneficiaries of immunity *ratione personae* seem to be more limited in scope. How limited in scope this category is will be explored further in Part Two, section A. However, a working definition for Part One that encompasses within an inner core those that were covered by "Sovereign and head of State immunities", as understood in classical international law, will be employed for purposes of contrast with other types of immunities such as diplomatic and consular immunities and State immunities. From a criminal law enforcement viewpoint, there are a number of instruments that epitomize this narrow approach. First, article 7 of the Charter of the International Military Tribunal stated that the official position of defendants, whether as Heads of State or responsible officials in Government Departments, did not relieve them of any responsibility. When the Commission was elaborating the Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal, it aligned the text of Principle III with the language of article 7 of the Nürnberg Charter, it being understood that the preferred phrase "responsible officials" meant those in high rank, and having "real responsibility", while those referred to in Principle IV, concerning superior orders, had lesser responsibility.[7] Moreover, the term "public official" referred to a responsible official attached to the government of his country. Accordingly, Principle III reads "responsible government official". For its part, article IV of the Convention on the Prevention and Punishment of the Crime of Genocide includes within persons that may be criminally responsible "… constitutionally responsible rulers, public officials …".[8] Moreover, article 1 of the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents defines an internationally protected person to include a head of State, a head of Government or a minister for foreign affairs, and any representative or official of a State who is entitled pursuant to international law to special protection from any attack on his person, freedom or dignity.[9]

6. At a broader level, the law of responsibility of States for internationally wrongful acts captures a wider range of officials for purposes of attribution. The conduct of any State organ is considered to be an act of that State under

---

[5] See infra, Part Two.

[6] See infra, Part Two, sect. B.2 (a).

[7] Summary record of the 46th meeting, 14 June 1950, paras. 93-102, *Yearbook … 1950*, vol. I. Principles III and IV of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal:

> "*Principle III*
>
> "The fact that a person who committed an act which constitutes a crime under international law acted as Head of State or responsible Government official does not relieve him from responsibility under international law.
>
> "*Principle IV*
>
> "The fact that a person acted pursuant to order of his Government or of a superior does not relieve him from responsibility under international law, provided a moral choice was in fact possible to him."

[8] Article IV of the Convention on the Prevention and Punishment of the Crime of Genocide, United Nations, *Treaty Series*, vol. 78, p. 277: "Persons committing genocide or any of the other acts enumerated in article III shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals."

[9] United Nations, *Treaty Series*, vol. 1035, p. 167.

international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State.[10] The International Court of Justice, in its advisory opinion in *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, affirmed a well-established rule of customary character that the conduct of any organ of a State must be regarded as an act of that State.[11] Since an organ includes any person or entity which has that status in accordance with the internal law of the State, a term "State official", for purposes of State responsibility, would effectively embrace not only those that constitute a formal organ of the State but also those persons or entities that exercise elements of governmental authority. The term may also cover persons or groups of persons who in fact act on the instructions of a State or under its direction or control or those persons or groups of persons exercising elements of governmental authority in the absence or default of official authority.[12] Part Two, section B, of the study explores issues surrounding this broader category in greater detail.

B. Concept of jurisdiction

7. For immunity from foreign criminal jurisdiction to be invoked in respect of a State official, he would prima facie have to be amenable to the jurisdiction of another State. In the *Arrest Warrant* case, the International Court of Justice acknowledged that, as a matter of logic, immunity should be addressed once there has been a determination in respect of jurisdiction,[13] even though the Court itself addressed the immunity issues without making any determination on jurisdiction, in deference to the submission of the parties. In a legal system, whether national or international, the exercise by a State of jurisdiction is a manifestation of its sovereign power; it is the means by which the law is made functional[14] and

---

[10] See art. 4 (1) of the articles on responsibility of States for internationally wrongful acts, *Yearbook … 2001*, vol. II (Part Two), para. 76.

[11] *I.C.J. Reports 1999*, p. 62, at para. 62.

[12] See, generally, arts. 4-11 of the Articles on responsibility of States for internationally wrongful acts, op. cit., para. 76.

[13] *Arrest Warrant*, para. 46. In separate opinions, Judge Guillaume noted that "… a court's jurisdiction is a question which it must decide before considering the immunity of those before it. In other words, there can only be immunity from jurisdiction where there is jurisdiction" (para. 1); Judge Rezek said that if the Court had first considered the question of jurisdiction, it would have been relieved of any need to rule on the question of immunity (para. 10); and Judges Higgins, Kooijmans and Buergenthal noted, in a joint separate opinion, that "[i]mmunity" was the common shorthand phrase for "immunity from jurisdiction". "If there is no jurisdiction *en principe*, then the question of an immunity from a jurisdiction which would otherwise exist simply does not arise … While the notion of 'immunity' depends, conceptually, upon a pre-existing jurisdiction, there is a distinct corpus of law that applies to each." (paras. 3 and 4).

[14] Covey T. Oliver, Edwin B. Firmage, Christopher L. Blakesley, Richard F. Scott and Sharon A. Williams, *The International Legal System: Cases and Materials* (Westbury, New York, Foundation Press, 1995), p. 133. There are numerous sources on jurisdiction; for earlier sources see for example: Michael Akehurst, "Jurisdiction in International Law", *British Year Book of International Law*, vol. 46 (1972-1973), p. 145; Frederik Alexander Mann, "The Doctrine of Jurisdiction in International Law", *Recueil des cours de l'Académie de droit international de la Haye*, vol. 111 (1964-I), p. 1; and Frederik Alexander Mann, "The Doctrine of Jurisdiction in International Law Revisited after twenty years", *Recueil des cours …*, vol. 186 (1984-III), p. 9.

operationalized. Analytically, such authority involves three types of jurisdiction, namely: (a) prescriptive jurisdiction; (b) enforcement jurisdiction; and (c) adjudicatory jurisdiction.[15] The demarcation among the three types of jurisdiction is a fine one.[16]

8. The distinctions nevertheless have practical and legal significance. For purposes of immunity, the determination of an issue may sometimes rest on whether the jurisdiction in question is prescriptive, adjudicatory or enforcement.[17] The procedural aspects of implementation are further examined in Part Two, section C.

1. Criminal jurisdiction

9. The label "criminal" or "civil" may not accurately depict the real distinction in the degree to which a prescribing State may be exercising its prerogative to control particular conduct.[18] This may be true in situations where crimes under international law have given rise to civil claims at the domestic level. In civil law systems, private parties may apply for civil law compensation in criminal proceedings. In other instances, legislation that is "civil" as is the case with anti-trust legislation may be penal and coercive in its impact.[19] The present study is concerned with "foreign criminal jurisdiction". However, the formalistic delineation may not fully

---

[15] (a) Prescriptive jurisdiction perforce implies rule-making: The authority of a State to make its substantive laws applicable to particular persons, activities or circumstances. (b) Enforcement jurisdiction involves the ability of the State to enforce law against particular persons, in particular circumstances, or in respect of things and to deploy its resources to induce or compel compliance of its law or to provide redress for non-compliance. (c) Adjudicatory jurisdiction encompasses the authority to subject certain persons, events or things to the process of its judicial proceedings. Adjudication entails a declaration of rights and a vindication of private interests. The three types of jurisdiction are often described as legislative, curial and executive. See generally, American Law Institute, *Restatement of the Law: the Foreign Relations Law of the United States* (1987) (3rd edition), Introductory note and chaps. 1-3.

[16] See, generally, Vaughan Lowe, "Jurisdiction", in Malcolm D. Evans (ed.), *International Law* (2nd edition) (Oxford, Oxford University Press, 2006), pp. 335-360, who divides analysis between prescriptive and enforcement jurisdiction. Adjudicatory jurisdiction is perceived to be a refinement of enforcement jurisdiction. A State enforces its laws by taking action through judicial proceedings and otherwise. However, adjudicatory jurisdiction is not always employed in situations, and for purposes, that are strictly enforcement, Oliver, Firmage, and others, op. cit., p. 134. Ordinarily, matters that are the subject of adjudicatory jurisdiction within a State emanate from what has been prescribed. A person is tried for a particular crime because there would be a law proscribing such conduct. A State would not have jurisdiction to enforce within its territory if it does not prima facie have jurisdiction to prescribe. It is worth stressing that enforcement jurisdiction is in principle limited to the State's own territory. While a State may not be able to effectively assert its adjudicatory jurisdiction over an individual who is beyond its territory, is it not encumbered from requesting enforcement through other means, including by seeking cooperation with any other State that may be concerned or has jurisdiction to prescribe, ibid.

[17] The 2004 Convention on Jurisdictional Immunities of States and their property, see infra Part One, sect. C.2, draws a distinction between immunity from adjudication and immunity for enforcement (measures of enforcement).

[18] D. W. Bowett, "Jurisdiction: changing patterns of authority over activities and resources", in Charlotte Ku and Paul F. Diehl (eds.), *International Law: Classic and Contemporary Readings* (Colorado and London, Lynne Rienner Publishers Inc, 1998), p. 208.

[19] See, for example, the United States Alien Tort Claims Act, enacted in 1789 and codified as 28 U.S.C.§ 1350. Under the Act, "the District Courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States".

provide a clear reflection of the issues involved. Indeed, case law arising from civil proceedings may broach issues that may be analogously relevant in respect of criminal proceedings and such case law, as appropriate, has been resorted to in the present study. The present study is nevertheless essentially concerned with situations in which an individual may be prosecuted in a foreign jurisdiction for having committed a criminal offence.[20]

10. Whereas international law considers criminal jurisdiction to be ordinarily territorial, this has not prevented almost all domestic systems of law from extending its application to extraterritorial offences.[21] International law discloses five principles that provide bases for criminal jurisdiction: (a) The *territorial* principle;[22] (b) the *nationality* ("active personality") principle;[23] (c) the *passive personality* principle;[24] (d) the *protective* principle;[25] and (e) the *universal* principle.[26] Although these bases have found varying levels of acceptance in the

---

[20] In *Bouzari et al. v. Islamic Republic of Iran* (2004) the appellant, relied, inter alia, on the exception in the State Immunity Act of Canada that it does not apply to criminal proceedings or proceedings in the nature of criminal proceedings, and argued that the proceeding seeking damages from Iran for kidnapping, false imprisonment, assault, torture and death threats was in the nature of a criminal proceeding because he was seeking punitive damages which were in the nature of a fine. The motion judge and the Court of Appeal for Ontario rejected the argument, concluding that the relief sought was available only in a civil proceeding after a finding of civil liability and an award of compensatory damages. While the purpose of punitive damages was to deter, they remained a remedy in a civil proceeding; reproduced in *International Law Reports*, vol. 128 (November 2006), p. 586, para. [44].

[21] The attitude of international law towards the exercise of extraterritorial jurisdiction is informed by the dictum in the *S.S.* "*Lotus*" case that: "The territoriality of criminal law, …, is not an absolute principle of international law and by no means coincides with territorial sovereignty." *The Case of the S.S.* "*Lotus*" *(France v. Turkey)*, *P.C.I.J. 1927 (Series. A)*, No. 10, p. 19.

[22] (a) Territorial jurisdiction determines jurisdiction by reference to the place where the crime is committed. This jurisdiction may be *subjective* or *objective*; the former covers an incident which is initiated within a State's territory but is consummated outside it; while the latter refers to an incident that originates outside the territory of a State but is completed within it. For earlier works on the subject, see generally, Harvard Research in International Law, "Study on Jurisdiction with respect to crime, Draft convention with respect to crime", *American Journal of International Law*, vol. 29 (Supplement) (1935), pp. 435-651.

[23] The nationality principle founds jurisdiction on an existing personal *nexus* between the national and the prosecuting State, although the crime by the national may have been committed abroad.

[24] The *passive personality* principle determines jurisdiction by reference to the nationality of the injured person: This principle, "for so long regarded as controversial … today meets with relatively little opposition, at least so far as a particular category of offences concerned", *Arrest Warrant*, Joint separate opinion of Judges Higgins, Kooijmans and Buergenthal, para. 47. It has found its niche in particular in recently adopted counter-terrorism instruments.

[25] The *protective* principle predicates jurisdiction on the national interest injured by the offence committed abroad. The reliance upon the economic repercussions within its territory rather than some element of intra-territorial conduct distinguishes the protective ("effects") principle in its pure form from objective territorial jurisdiction. Lowe, op. cit., p. 345.

[26] The *universal* principle determines jurisdiction by reference to the nature of the offence recognized as of universal concern, regardless of the *locus delicti* and the nationalities of the offender and of the victim. Piracy is the quintessential example. Henry Wheaton, *Elements of International Law* (the Literal reproduction of the edition of 1866 by Richard Henry Dana, Jr., edited with Notes by George Grafton Wilson) (Oxford, The Clarendon Press, London, London: Humphrey Milford, 1936) suggests that "the reason a pirate *jure gentium* can be seized and tried by any nation, irrespective of his national character, or of that of the vessel on board which, against which, or from which, the act was done is that the act is one over which all nations have equal jurisdiction". § 124, footnote.

There were also other senses in which universal jurisdiction appears to be used. Classical commentators, such as Grotius, Heineccius, Burlamaqui, Vattel, Rutherforth, Schmelzing and Kent, but opposed by Puffendorf, Voet, Martens, Klüiber, Leyser, Kluit, Saalfeld, Schmaltz, Mittermeyer, and Heffter, pointed to the possible prosecution of perpetrators of certain particularly serious crimes not only in the State on whose territory the crime was committed but also in the country where they sought refuge. On the basis of this view, a State was under an obligation to arrest, followed by extradition or prosecution, in accordance with the maxim *aut dedere aut judicare*. See Wheaton, ibid., § 115, fn. See also separate opinion of Judge Guillaume in the *Arrest Warrant* case, paras. 3-12. A contemporary manifestation of this approach is found in a number of multilateral instruments, in particular those concerning international terrorism. The Hague Convention for the Suppression of Unlawful Seizure of Aircraft, United Nations, *Treaty Series*, vol. 860, p. 105. Art. 4 (2) of the Convention provides: "Each Contracting State shall ... take such measures as may be necessary to establish its jurisdiction over the offence in the case where the alleged offender is present in its territory and it does not extradite him pursuant to article 8 of any of the States mentioned in paragraph 1 of this article", i.e., those that may establish jurisdiction in accordance with the Convention. Similar articles or variations thereof exist in the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, Montreal, 1971 (art. 5(2)), United Nations, *Treaty Series*, vol. 974, p.177; the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, New York, 1973 (art. 7), ibid., vol. 1035, p. 167; the International Convention against the Taking of Hostages, New York, 1979 (art. 10), ibid., vol. 1316, p. 205; the Convention on the Physical Protection of Nuclear Material, Vienna, 1980 (art. 8), ibid., vol. 1456, p. 127; the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (art. 7(1)), ibid., vol. 1465, p. 85; the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, Rome, 1988 (art. 10(1)), ibid., vol. 1678, p. 221; the Convention on the Safety of United Nations and Associated Personnel, New York, 1973 (art. 14), ibid., vol. 2051, p. 363; the International Convention for the Suppression of Terrorist Bombings (art. 8(1)), ibid., vol. 2149, p. 256; the Convention for the Suppression of the Financing of Terrorism (art. 10(1)), General Assembly resolution 54/109; and the Convention for the Suppression of the Acts of Nuclear Terrorism (art. 11), General Assembly resolution 59/290. See also the Draft Code of Offences adopted by the International Law Commission (1996) (art. 9) and the Draft comprehensive convention on terrorism being negotiated by the Ad Hoc Committee on terrorism established pursuant to General Assembly resolution 51/210 (art. 11). These provisions at one level impose an obligation on a State party to establish jurisdiction on the basis of one or a combination of specified jurisdictional bases and, at another level, closes the potential for any gaps by placing an obligation on the State in whose territory the perpetrator of the crime takes refuge to extradite or prosecute him. This form has been called quasi universal jurisdiction, see Malcolm N. Shaw, *International Law*, 5th edition (Cambridge, Cambridge University Press, 2003), p. 598.

There were also suggestions regarding the existence of universal jurisdiction in absentia. Whether a State may establish jurisdiction over offences committed abroad by foreigners against foreigners when the perpetrator is not present in the territory of the State in question was espoused but not pursued by Belgium in the *Arrest Warrant* case. In his separate opinion in the *Arrest Warrant* case, Judge Guillaume stated that international law knows only one true case of universal jurisdiction: piracy. Universal jurisdiction in absentia as applied in a court of a State where the author of the offence is not present on its territory was unknown to international law, paras. 12-13. In their joint separate opinion, Judges Higgins, Kooijmans and Buergenthal (para. 52), agreed with the authors in Robert Jennings and Arthur Watts (eds.), *Oppenheim's International Law*, 9th edition (London and New York, Longman, 1992), vol. 1, at p. 998, that:

> "While no general rule of positive international law can as yet be asserted which gives to States the right to punish foreign nationals for crimes against humanity in the same way as they are, for instance, entitled to punish acts of piracy, there are clear indications pointing to the gradual evolution of a significant principle of international law to that effect."

There have been recent scientific efforts that have been made to clarify the scope and meaning

practice of States, a State may found its jurisdiction on the basis of any of these principles or a combination thereof. For example, the various anti-terrorism conventions provide several bases on which a State could take measures to establish its jurisdiction.[27] In the *Eichmann* case, Israel assumed jurisdiction on the basis of the passive personality principle, as well as the protective and the universality principles.[28] Amending the substantive criminal law to conform with an international obligation assumed may not be sufficient to seize a domestic court with jurisdiction, if there is no corresponding change, if required by the internal constitutional order, to the criminal law recognizing the establishment of jurisdiction on any of the bases.[29]

11. Of the five principles, the universality principle has given rise to issues of implementation in relation to immunity; the view being sometimes advanced that the recognition of such jurisdiction would effectively render immunity irrelevant for particular crimes.[30] The extent to which the establishment of universal jurisdiction

---

of universal jurisdiction. See, for example, International Law Association, *Report of the 69th Conference held in London 25-29 July 2000* (London 2000), pp. 403-431. See also the resolution on Universal Criminal Jurisdiction with respect to the Crime of Genocide, Crimes against Humanity and War Crimes adopted by the Institut de droit international at its Krakow session in 2005; Institut, *Annuaire*, vol. 71, Parts I and II, as well as the Princeton Principles of Universal Jurisdiction, 2001 (available at http://www1.umn.edu/humanrts/instree/princeton. html). See also Amnesty International, "Universal jurisdiction: the duty of States to enact and implement legislation", September 2001 (AI Index IOR53/002/2001).

[27] See for example, art. 6 of the International Convention for the Suppression of Terrorist Bombings, art. 7 of the International Convention for the Suppression of the Financing of Terrorism, and art. 9 of the International Convention for the Suppression of Acts of Nuclear Terrorism. See also art. 5(1)(c) of the Convention against Torture, and other Cruel, Inhuman or Degrading Treatment or Punishment, United Nations, *Treaty Series*, vol. 1465, p. 85. Under the Omnibus Diplomatic Security and Antiterrorism Act of 1986, 18 U.S.C., it is a crime to kill, or attempt or conspire to kill, or to cause serious bodily injury, to a national of the United States outside the territory of the United States. Prosecution under this section, however, may be undertaken only on certification by the Attorney General or his delegate that in his judgment the offence was intended to coerce, intimidate, or retaliate against a government or a civilian population.

[28] *Attorney-General of the Government of Israel v. Adolf Eichmann*, District Court of Jerusalem, 12 December 1961, reproduced in *International Law Reports*, vol. 36, pp. 5-276 and *Attorney-General of the Government of Israel v. Adolf Eichmann*, Supreme Court (sitting as a Court of Criminal Appeal), 29 May 1962, reproduced in *International Law Reports*, vol. 36, pp. 277-344.

[29] *Hissène Habré* case in the Court of Appeal of Dakar (Chambre d'accusation), 4 July 2000 and Court of Cassation, 20 March 2001, reproduced in *International Law Reports*, vol. 125, pp. 569-580.

[30] See, for example, article 5 of the Princeton Principles of Universal Jurisdiction, 2001, op. cit.:

> "Immunities
>
> "With respect to serious crimes under international law as specified in Principle 2(1) ((1) piracy; (2) slavery; (3) war crimes; (4) crimes against peace; (5) crimes against humanity; (6) genocide; and (7) torture), 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."

For examples of legislation providing for universal jurisdiction, see section 8 of the Crimes Against Humanity and War Crimes Act of Canada (2000, c. 24):

> "Jurisdiction
>
> "8. A person who is alleged to have committed an offence under section 6 or 7 may be prosecuted for that offence if
>
> "(a) at the time the offence is alleged to have been committed,
>
> "(i) the person was a Canadian citizen or was employed by Canada in a civilian or military capacity,

by a State bears on immunity in respect particularly of crimes under international law will be addressed in Part Two.

12. The present study uses the term "crimes under international law" and "international crimes" synonymously to denote crimes of a particularly serious nature such as genocide, crimes against humanity, war crimes and torture. Of the three main components of international criminal law, namely (a) international aspects of national criminal law;[31] (b) criminal aspects of international law;[32] and (c) international criminal law stricto sensu, it has been suggested that "crimes under international law" fall within the last category. These are crimes for which rules of international law impose criminal responsibility directly upon individuals.[33] The term "international crime", in its historical context, has been employed by some authors to broadly embrace "a crime against international law" and a crime which brings an offender into conflict with the law of more than one State.[34] It has been suggested that a "crime against international law" would cover "crimes under international law" as well as "offences of international concern".[35] For its part, the Commission, in its elaboration of the Statute of an International Criminal Court, seems to have used the distinction between crimes under general international law ("core crimes") and crimes under or pursuant to certain treaties ("treaty" crimes).[36] For the purposes of the present study, the terms "crime under international law" or "international crime" as forming a possible exception to immunity are used to

---

"(ii) the person was a citizen of a state that was engaged in an armed conflict against Canada, or was employed in a civilian or military capacity by such a state,

"(iii) the victim of the alleged offence was a Canadian citizen, or

"(iv) the victim of the alleged offence was a citizen of a state that was allied with Canada in an armed conflict; or

"(b) after the time the offence is alleged to have been committed, the person is present in Canada."

See also, concerning the United Nations Transitional Administration in East Timor (UNTAET), Regulation No. 2000/15 of 6 June 2000, on the establishment of Panels with the exclusive jurisdiction over serious criminal offences, providing:

"Section 2

"Jurisdiction

"2.2 For the purposes of the present regulation, 'universal jurisdiction' means jurisdiction irrespective of whether:

"(a) the serious criminal offence at issue was committed within the territory of East Timor;

"(b) the serious criminal offence was committed by an East Timorese citizen; or

"(c) the victim of the serious criminal offence was an East Timorese citizen."

[31] Addressing issues involving a foreign criminal component, i.e., the transnational application of domestic criminal law, such as the extent to which national courts are permitted to assume jurisdiction over extraterritorial crimes, the choice of applicable law or recognition of foreign penal judgments, see Edward M. Wise and Ellen S. Podgor, *International Criminal Law: Cases and Materials* (New York, Matthew Bender & Co., 2000), p. 1.

[32] Concerned about international standards of criminal justice, imposing obligations on States in relation to the content of their domestic criminal law such as principles and rules of international law requiring States to respect the rights of individuals accused or suspected of crimes or to prosecute and punish or "offences of international concern", including hijacking and hostage taking; ibid., p. 3.

[33] Concerned with the law applicable imposing international criminal responsibility, including crimes directly proscribed by international law, ibid., pp. 4-5.

[34] Ibid., p. 496, quoting John Fischer Williams, *Chapters on Current International Law and the League of Nations* (New York, Longmans, Green & Co., 1929), p. 243.

[35] Ibid., p. 5.

[36] Draft Statute for an International Criminal Court with commentaries, *Yearbook … 1994*, vol. II (Part Two).

denote crimes under general international law, as well as treaty crimes.[37] These matters will be discussed further in Part Two, alongside the question whether other crimes of international concern — such as embezzlement, corruption or misappropriation of national assets — would fall within such a possible exception.

2. International cooperation for the exercise of criminal jurisdiction

13. It may not be enough to establish jurisdiction over particular conduct. In a globalized world of a United Nations membership of 192 States, international cooperation is crucial in ensuring that the exercise of jurisdiction is effective and efficacious in another foreign jurisdiction. Extradition and mutual assistance in judicial matters constitute mechanisms by which States cooperate with each other in seeking to bring offenders or fugitives to justice. The United Nations has been consistent in drawing attention to the relevance of international cooperation in the detection, arrest, extradition and punishment of persons alleged to have committed crimes, particularly serious crimes such as genocide, war crimes and crimes against humanity, although problems regarding securing and exchanging of information and evidence, as well as extradition cannot be overstated.[38]

C. Concept of immunity and related issues

14. If jurisdiction is concerned with the exercise by a State of its competence to prescribe, adjudicate or enforce laws, the concept of immunity seems to seek to achieve a reverse outcome, namely the avoidance of the exercise of jurisdiction and a refusal to satisfy an otherwise legally sound and enforceable claim in a proper

---

[37] The notion "international crime" was used in the draft "Treaty of Mutual Assistance" prepared by the League of Nations in 1923 to characterize "a war of aggression", see generally Report by Ricardo J. Alfaro, Special Rapporteur (A/CN.4/15 and Corr.1), *Yearbook … 1950*, vol. II. For an analysis of the notion of "international crimes" in the context of State responsibility, see Fifth report on State responsibility by Roberto Ago, Special Rapporteur (A/CN.4/291 and Add.1 and 2), *Yearbook ... 1976*, vol. II (Part One). The Commission adopted on first reading an art. 19 on "international crimes" of States drawing a distinction with "international delicts". This "penalization" of international law proved controversial and was set aside by reference to the notion of "serious breaches of obligations to the international community as a whole", see generally, James Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (Cambridge, Cambridge University Press, 2002), pp. 1-60.

[38] See General Assembly resolution 3074 (XXVIII) of 3 December 1973. See also General Assembly resolution 95 (I) of 11 December 1946 which affirmed the Principles of International Law recognized by the Charter of International Military Tribunal of Nürnberg and the Judgment; resolution 3 (I) of 13 February 1946 on extradition and punishment of war criminals and resolution 170 (II) of 31 October 1947 concerning the Surrender of war criminals. See also the study prepared by the Secretary-General entitled, "Study as regards ensuring the arrest, extradition and punishment of persons responsible for war crimes and crimes against humanity and exchange of documentation" (E/CN.4/983 and Add.1 and 2, A/8345). See also *Analytical Survey prepared in accordance with resolution 1691 (LII) of ECOSOC on Principles of international cooperation in the detection, arrest, extradition and punishment of persons guilty of war crimes and crimes against humanity* (A/8823). The Declaration of the Moscow Conference of October 1943 provided that members of the German forces and members of the Nazi party responsible for war crimes or crimes against humanity "will be sent to the countries in which their abominable deeds were done in order to be judged and punished according to the laws of these liberated countries and of the free governments which will be created therein". The Declaration contained a proviso concerning major German war criminals "whose offences have no particular geographical localization and who will be punished by the joint decision of the government of the Allies".

jurisdiction. The rules governing the jurisdiction of national courts ought to be distinguished from those governing immunity from jurisdiction. These are two distinct norms of international law in play, although immunity arises only if jurisdiction exists.[39] Once jurisdiction is established, it does not necessarily mean that immunity is absent. Conversely, the absence of immunity does not imply jurisdiction. In the *Arrest Warrant* case, the International Court of Justice stated that although various international conventions on the prevention and punishment of certain serious crimes impose 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; they remain opposable before the courts of a foreign State, even where those courts exercise such a jurisdiction under such conventions.[40]

15. Immunity acts as a barrier or an impediment to the exercise by a State of its jurisdiction, particularly in respect of adjudicatory and enforcement jurisdiction. Although interrelated, these rules, technically, have to be distinguished from those rules that provide protection from trespass, which involve questions of inviolability.[41]

16. Although international law does not provide any rule that requires a structure of a State to follow any particular pattern,[42] over the course of time, most States have instituted a structure which includes the following organs whose status is particularly relevant as regards immunities: (a) a head of State; (b) a Government; (c) a diplomatic service; (d) a consular service; and (e) armed forces of the State.[43] As a legal abstraction, the State operates through acts of individuals.[44] The circumstances that were extant as exceptions to the exercise of jurisdiction under classical international law, in addition to the exception to the State itself, coalesced around these structures, and consequently, the individuals entrusted to perform functions on behalf of the State.[45]

---

[39] Joint separate opinion of Judges Higgins, Kooijmans and Buergenthal in the *Arrest Warrant* case, para. 5.

[40] *Arrest Warrant*, para. 59. See also art. 11 of the Harvard Research in International Law Draft Convention on Jurisdiction with Respect to Crime, op. cit., p. 592:

> "In exercising jurisdiction under this Convention, a State shall respect such immunities as are accorded by international law or international convention to others States or institutions created by international convention."

The 2005 Institut de droit international resolution on Universal Criminal Jurisdiction with respect to the Crime of Genocide, Crimes against Humanity and War Crimes, op. cit., states that the provisions of the resolution are without prejudice to the immunities established by international law.

[41] Inviolability and immunity overlap (art. 22 (1) and (3) and arts. 29-31, Vienna Convention on Diplomatic Relations). However, the former is more concerned about questions of trespass while the latter is applied to jurisdictional matters, including immunity from the courts processes and immunity from taxes, D. J. Harris, *Cases and Materials on International Law*, 5th edition (London, Sweet and Maxwell 1998), p. 347.

[42] *Western Sahara*, *Advisory Opinion*, *I.C.J. Reports 1975*, p. 12, para. 94.

[43] N. A. Maryan Green, *International Law* (Bath Press, Avon, Pitman Publishing, 1987), p. 126.

[44] See art. 4 (2) of the articles on responsibility of States for internationally wrongful acts, op. cit., para. 76.

[45] Wheaton, op. cit. §§ 95-111, identifies among such exceptions the person of a foreign sovereign, a foreign minister, an ambassador or other public minister, and foreign army or fleet. The term "foreign minister" or "public minister" seems to be used synonymously and interchangeably with that of ambassador. Oppenheim, *International Law* (London, Longmans, Green & Co.,

1. Immunities distinguished

17. There are various kinds of immunities that arise under international law and cover a range of aspects. These include broadly: (a) diplomatic immunities; (b) consular immunities; (c) "Sovereign and head of State immunities"; (d) State immunities; and (e) immunities of international organizations, and of officials related thereto. All these immunities bear on the activities of the State and its organs and form part of rules of "diplomatic law".[46] However, the various immunities have all followed a varied albeit interconnected historical trajectory, immunities of international organizations being of the latest origin. To the extent that immunities of international organizations attach to international officials and not to State officials, they fall outside the scope of this study. Although the law of consular immunities has a long usage and provenance, its specialized nature allowed the law on diplomatic immunities to have a greater influence on "sovereign and head of State" immunities and on State immunity.[47]

18. In its efforts towards the codification and progressive development of international law, the Commission has already elaborated the rules concerning diplomatic and consular immunities and privileges, thus in essence addressing international law rules applicable in respect of diplomatic and consular services. In its treatment of the topic "Jurisdictional immunities of States and their property", it has also dealt with aspects concerning the immunity of a head of State, a Government and armed forces of a State.[48]

(a) Diplomatic immunity versus "Sovereign and head of State" immunity

19. The synergy between diplomatic immunity and sovereign and head of State immunity is prominent in the works of classical writers, including Grotius,

---

1905), vol. 1 Peace, pp. 414-15 describes the Foreign [Secretary] [Minister] as head of the Foreign [Office] [Ministry], "an office which, since the Westphalian Peace [1648] has been in existence in every civilized State". "He is the chief over all the ambassadors of the State, over its consuls, and over its other agents in matters international ..."

[46] Chanaka Wickeremesinghe, "Immunities enjoyed by officials of States and International Organizations" in Evans, (ed.), *International Law*, op. cit., p. 396.

[47] For example, sect. 20 of the State Immunity Act of the United Kingdom of 1978 provides that the Diplomatic Immunities Act 1964 shall apply with the necessary modifications to a sovereign and other head of State as it applies to the head of a diplomatic mission. In the *Djibouti v. France* case (para. 174), the International Court of Justice recalled that the rule of customary international law reflected in art. 29 of the Vienna Convention on Diplomatic Relations, while addressed to diplomatic agents, was necessarily applicable to heads of State. Article 29 reads as follows:

> "The person of a diplomatic agent shall be inviolable. He shall not be liable to any form of arrest or detention. The receiving State shall treat him with due respect and shall take all appropriate steps to prevent any attack on his person, freedom or dignity."

[48] Diplomatic intercourse and immunities; Consular intercourse and immunities and Jurisdictional immunities of States were on the provisional list of topics selected by the Commission, see document A/CN.4/13 and Corr.1-3 and in *Yearbook … 1949*, vol. I. The Commission has already elaborated the law relating (a) diplomatic missions under the Vienna Convention on Diplomatic Relations, 1961; (b) consular missions under the Vienna Convention on Consular Relations, 1963; (c) special missions under the Convention on Special Missions, 1969; (d) internationally protected persons under the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, 1973; and (e) representation of States under the Vienna Convention on the Representation of States in Their Relations with International Organizations of a Universal Character, 1975.

Burlamaqui, Bynkershoek and Vattel. Grotius notes that the character, which ambassadors sustain, is not that of ordinary individuals, but they represent the majesty of the sovereigns, by whom they are sent, whose power is limited to no local jurisdiction.[49] Burlamaqui asserts that the foundation of the privileges that the law of nations grants to the ambassadors, is that, as an ambassador represents the person of his master, he ought of course to enjoy all the privileges and rights, which his master himself, as a sovereign, would have were he to come into the states of another prince in order to transact his own affairs.[50] Vattel claimed that the "sovereign was bound to protect every persons within his dominions", whether native or foreigner, and shelter him from violence: but this attention was due to a foreign minister to an even greater degree. "An act of violence … if done to a public minister, … is a crime of State, an offence against the law of nations".[51] In asserting that the sovereign enjoys the same if not more immunity than an ambassador, Bynkershoek appeals to reason, noting that if ambassadors, who represent the prince, are not subject either in the matter of contracts or of crimes to the jurisdiction of the country in which they are serving as ambassadors, an opposite conclusion could not be reached in the case of the sovereign. Just like ambassadors (and indeed for still stronger reasons), kings and princes are immune from arrest, and in this respect differ from all private individuals.[52]

(b) Basic theories for immunities

20. Three basic theories have been advanced for the grant of immunities. Under the "exterritoriality theory" the legal fiction was created whereby the premises of a mission or the temporary premises of a sovereign in a foreign jurisdiction were perceived to be an extension of the territory of the sending State. In the vocabulary of Westlake, "there came [a] desire to find a juridical ground for privileges already enjoyed which led to the fiction that the precincts of a legation are part of the State which sends it, and consequently to the term 'exterritoriality' indicative of absence or exclusion from the geographical territory".[53]

21. For diplomatic envoys, extraterritoriality was rationalized on the necessity that envoys must, for purposes of fulfilling their duties, be independent of the jurisdiction and control of the receiving State, while in the case of the sovereigns it

---

[49] Grotius, *De jure belli ac pacis*. Book II, chap. XVIII, sect. 4.

[50] Jean-Jacques Burlamaqui, *The Principles of natural and politic law* (in two volumes (1747, 1752)), translated into English by Thomas Nugent (Electronic edition, Lonang Institute, copyright 2003, 2005), vol. II, Part IV-XI.

[51] Emmerich de Vattel, *Droit des Gens* (in four books, 1758), translated into English by Joseph Chitty (1833) (Electronic edition, Lonang Institute, copyright 2003, 2005), Book 4, chap. 7, § 82. See also: § 92 "It is impossible to conceive that a prince who sends an ambassador, or any other minister, can have any intention of subjecting him to the authority of a foreign power; and this consideration furnishes an additional argument, which completely establishes the independence of a public minister. If it cannot be reasonably presumed that his sovereign means to subject him to the authority of the prince to whom he is sent, the latter, in receiving the minister, consents to admit him on the footing of independence; and thus there exists between the two princes a tacit convention, which gives a new force to the natural obligation."

[52] Cornelius van Bynkershoek, *De Foro Legatorum Liber Singularis*, edited by James Brown Scott (containing an introduction by Jan de Louter, a photographic reproduction of the text of 1744, with a translation by Gordon J. Laing, a list of errata, and indexes) (London, Oxford University Press), pp. 20-21.

[53] John Westlake, *International Law* (Cambridge, Cambridge University Press, 1904), Part I, p. 263.

was premised on the principle *par in parem non habet imperium*[54] or *par in parem non habet jurisdictionem*. As a consequence of State equality, no State can claim jurisdiction over another.[55] Immunity has also been deduced from the principles of independence and of dignity of States[56] and of non-interference.[57]

22. The "representative theory" bases immunities on the presupposition that the mission personifies the sending State. In relation to the sovereign or head of State, he represented in his person the collective power of the State[58] and was considered to be its chief organ and representative in the totality of its international relations; all his legally relevant acts were considered acts of his State; and his competence to perform such acts was *jus repraesentationis omnimodae*.[59] The immunities and privileges belonged to the head of State in his representative character. With time, situations in which a head of State would negotiate directly and in person with a foreign power became occasional and the foreign minister began to direct foreign affairs of the State in the name of the head of State and with his consent; he was a middleman, through whose "hands … all transactions concerning foreign affairs must pass".[60]

23. The "functional necessity theory" justifies immunities as being necessary for the mission to perform its functions. In the elaboration of the Vienna Convention on Diplomatic Relations, the Commission was guided by the functional theory "in solving problems on which practice gave no clear pointers, while also bearing in mind the representative character of the head of the mission and of the mission itself".[61] The functional necessity theory seems to represent a more contemporary rationalization of immunities.[62] In the *Arrest Warrant* case, it was recognized that the immunities of ministers for foreign affairs were accorded to ensure the effective performance of their functions on behalf of their respective States.[63]

(c) Immunities at the domestic level

24. It may be mentioned at this stage that arising from such functional expediency, it is not unusual for immunities to be granted through national legislation at the domestic level in respect of the head of State, head of Government or other members in the executive branch such as members of the Cabinet, or to members of the legislative branch, including the Speaker and members of legislative assemblies, in particular with respect to utterances made in the performance of their official functions. The rationale behind such immunities is embedded in the constitutional order, in particular the principle of separation of powers.[64] It is essential for the functioning of

---

[54] Oppenheim, op. cit., p. 441.

[55] Robert Jennings and Arthur Watts (eds.), *Oppenheim's International Law*, 9th edition (London and New York: Longman, 1992), vol. 1, p. 341.

[56] Ibid., p. 342.

[57] *Pinochet* case (No. 3), Lord Saville of Newdigate, p. 642; Lord Millet, p. 645; and Lord Phillips of Worth Matravers, p. 658.

[58] Robert Phillimore, *Commentaries upon International Law*, 2nd edition (1871), vol. II, pp. 127-128. See also Arthur Watts, "The Legal Position in International Law of Heads of States, of Governments and Foreign Ministers", *Recueil des cours …*, vol. 247 (1994-III), pp. 9-136.

[59] Oppenheim, op. cit., pp. 341 and 343.

[60] Ibid., pp. 414-415.

[61] *Yearbook ... 1958*, vol. II, General comments on sect. II, paras. (1)-(3).

[62] Ibid. The Commission noted that this theory seems to be "gaining ground in modern times".

[63] *Arrest Warrant*, para. 53.

[64] Antonio Cassese, *International Criminal Law* (Oxford: Oxford University Press, 2003), p. 264.

the various branches of Government that its officials are able to execute their respective functions or to express honest opinions without fear of prosecution or favour.

25. Customary international law does not seem to contain any rule imposing a general obligation on a State to disregard national legislation that may provide immunity with respect to its own officials.[65] However, any such national legislation may be in conflict with a treaty rule imposing an obligation to try and punish individuals of crimes under international law.[66] France amended its constitutional provisions relating to immunity to ensure compatibility with its obligations assumed under the Rome Statute of the International Criminal Court.[67]

26. The present study is not as such concerned with immunities under national legislation accruing to State officials to fulfil functions under the internal order. However, the impact of such immunities on the effective prosecution of crimes cannot be underestimated. Other obstacles at the national level that may impede the timely and effective prosecution or jeopardize cooperation in criminal matters include national laws granting a general amnesty; national statutes of limitation; and the application of the *ne bis in idem* rule.[68]

(d) "Sovereign and head of State" immunity versus State immunity

27. Although diplomatic immunities bear on sovereign and head of State immunities, the relationship between the latter category and State immunity is even closer. The Commission's Survey of International Law pointed to the convenience of including the immunities of the head of the State, as well as those of men-of-war and of the armed forces of the State, in the effort to codify jurisdictional immunities of States and their property.[69]

---

[65] Ibid., p. 273.

[66] Ibid., pp. 273-274. In its Decree Number 2764 of 2002 promulgating the Rome Statute of the International Criminal Court, *Diario Oficial Year CXXXVIII*, No. 45015, 30 November 2002, Colombia made the following declaration upon ratifying the Rome Statute:

> "1. None of the provisions of the Rome Statute regarding the exercise of jurisdiction by the International Criminal Court preclude the concession of amnesties, or executive or judicial pardons by the Colombian State with regard to political crimes, provided such a concession is in accordance with the Constitution and with the principles and norms of international law as accepted by Colombia."

[67] In its decision on the Treaty laying down the Statute of the International Criminal Court, the Constitutional Council found that art. 27 of the Rome Statute was contrary to the specific regime of criminal responsibility laid down in art. 68 (1) of the French Constitution (that members of the Government can only be tried for crimes and offences in the exercise of their official functions by the Court of Justice of the Republic); art. 68 (that the President of the Republic enjoys immunity for acts performed in the exercise of his functions, with the exception of the case of high treason); art. 26(1) (that members of Parliament enjoy immunity in relation to their opinions or votes expressed in the exercise of their functions; art. 26(2) that they cannot be subject to criminal or summary proceedings, except in the case of flagrant offence, nor can they be arrested or deprived of or restricted in the exercise of their liberty except with the authorization of the bureau of the parliamentary assembly of which they are member), Decision 98-408 DC-22 January 1999, available at http://www.conseil-constitutionnel.fr/langues/anglais/a98408dc.pdf. (accessed on 21 February 2008).

[68] See generally, Cassese, *International Criminal Law*, op. cit., chap. 17.

[69] *Survey of International Law in Relation to the Work of Codification of the International Law Commission, memorandum submitted by the Secretary-General* (A/CN.4/1/Rev.1) (United Nations publication, Sales No. 1948.V.1(1)).

28. Such a linkage was not coincidental. Historically, the principle of State immunity, a nineteenth century development, traces its origins to the personal immunity of the sovereigns or head of State.[70] The plea was absolute. For the seventeenth and eighteenth century sovereign State, the monarch in its absolute form personified the State, as exemplified by the fabled refrain attributed to Louis XIV: "*L'État, c'est moi*".[71] The king could do no wrong; monarchs were not subject to be impleaded before their own courts. It was considered beneath regal dignity for them to appear in their own courts. Naturally, this posture translated into relations with other monarchs. If he entered the territory of another with the knowledge and licence of its monarch, that licence, although containing no express stipulation exempting his person from arrest, was universally understood to imply such stipulation. A foreign sovereign was not understood as intending to subject himself to a jurisdiction incompatible with his dignity and the dignity of his nation.[72] The recognition of such immunities was prompted by considerations partly of courtesy and partly of convenience so great as to be almost equivalent to necessity.[73] It was generally assumed that the exercise of jurisdiction over foreign States or sovereigns was contrary to their dignity and as such inconsistent with international courtesy and the amity of international relations.[74]

29. In the United States of America, State immunity was urged to accord deference to the dignity of the "states of the Union".[75] It was considered to be a degradation of sovereignty in the states to submit to the "supreme judiciary of the United States".[76] In *The Schooner Exchange v. McFaddon*, the absolute immunity was elucidated as follows:

> "One sovereign being in no respect amenable to another; and not 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 status, though not expressly stipulated, are reserved by implication and will be extended to him."[77]

30. In the Court of Appeal of England in the *Parlement Belge* case, "dignity", "independence" or "independence and dignity" or "equality and independence" were variously used to deduce that the exercise of jurisdiction would be incompatible with the regal dignity of the sovereign — that is to say his absolute independence of every superior authority:[78]

> "The principle to be deduced from all … cases is that, as a consequence of the absolute independence of every sovereign authority, and of the international community which induces every State to respect the independence and dignity

---

[70] Ian Sinclair, "The Law of Sovereign Immunity: Recent Developments", *Recueil des cours …*, vol. 167 (1980-II), p. 121.

[71] Ibid.

[72] Wheaton, op. cit., § 97.

[73] William Edward Hall, op. cit., § 48.

[74] Hersch Lauterpacht, "The Problem of jurisdictional immunities of foreign States", *British Year Book of International Law*, vol. 28 (1951), p. 230.

[75] Ibid.

[76] *Chisholm v. Georgia*, 2 Dall 412, at 425 (U.S.) 1793, quoted in Lauterpacht, ibid.

[77] (1812) 7 Cranch 116, pp. 136-137.

[78] (1880) LR 5 PD 197.

> of every other sovereign State, each and everyone declines to exercise by means of its courts any of its territorial jurisdiction over the person of any sovereign …, and, therefore but for the common agreement, subject to its jurisdiction".[79]

31. Towards the end of the nineteenth century, Italian and Belgian courts took the lead in drawing a distinction between *acta jure imperii*, that is, acts attributable to the sovereign or public acts of a State and *acta jure gestionis*, that is, acts pertaining to commercial activities.[80] Thus, following the end of the First World War, the theory of absolute State immunity began to increasingly tilt towards a more restrictive form of immunity influenced by an increase in commercial activities where the State was also a major player.

32. The justifications for State immunity were not always considered satisfactory and have been criticized. It has been said that there is no obvious impairment of rights of equality or independence or dignity of a State where it has subjected itself to an ordinary judicial process.[81] Lauterpacht asserted that:

> "the entire concept of state immunity — whether of the foreign state from suit in its own courts or of the territorial state — is a survival of the period when the sovereign, if he did justice to the subject, did so as a matter of duty but of grace … It is one of the manifestations not so much of the Austinian as of the Hobbesian conception of a State — a conception to which justice Holmes gave expression in a frequently cited and often criticized passage in *Kawananakoa v. Polyblank* in which he based the immunity of the State 'on the logical and practical ground that there can be no legal right as against the authority that makes the law on which the rights depends'."[82]

He called for the abolition, subject to specified safeguards and exceptions, of the rule of immunity of foreign States through international agreement or unilateral legislative action.[83]

33. In its modern manifestation, the plea of State immunity is available where proceedings are brought against a foreign State. It is considered a preliminary plea that is taken at the commencement of the proceedings.[84] The purpose of the plea is to debar the court of the forum State from exercising jurisdiction and inquiring further into the claim, essentially halting the proceedings in the forum State.[85]

---

[79] Ibid., Brett. L. J., pp. 207 and 214-215.

[80] Harvard Research in International Law, "Competence of Courts in regard to Foreign States", *American Journal of International Law*, vol. 26 (Supplement) (1932), pp. 451-649.

[81] Jennings and Watts, op. cit., p. 342.

[82] Lauterpacht, op. cit., p. 236.

[83] Ibid., p. 237. He noted that immunity would remain (a) for legislative acts of a foreign State or measures taken in relation thereto; (b) for executive and administrative acts of a foreign State within its territory; (c) with respect to contracts made with or by a foreign State except where the lex fori is the law of the contract; and (d) actions or execution against a foreign State contrary to the accepted principles of international law in the matter of diplomatic relations, ibid., p. 237-240.

[84] Hazel Fox, "International Law and Restraints on the Exercise of Jurisdiction by National Courts of States", in Evans, *International Law*, op. cit., p. 384.

[85] Ibid. For a recent critique of the formalism involved, see Lorna McGregor, "Torture and State Immunity: Deflecting impunity, Distorting sovereignty", *European Journal of International Law*, vol. 18 (2007), pp. 903-919.

2. United Nations Convention on Jurisdictional Immunities of States and their Property

34. A more recent shift towards restrictive immunity is best exemplified by the United Nations Convention on Jurisdictional Immunities of States and their Property,[86] adopted by the General Assembly on the basis of work done by the Commission.[87] It covers the question of immunities of a State from adjudication and from enforcement.[88] For purposes of immunity, the definition of a State under article 2 of the Convention has a particular meaning. It broadly comprehends immunity for all types or categories of entities and individuals: (a) the State and its various organs of government; (b) constituent units of a federal State or political subdivisions of the State, which are entitled to perform acts in the exercise of sovereign authority, and are acting in that capacity; (c) agencies or instrumentalities of the State or other entities, to the extent that they are entitled to perform and are actually performing acts in the exercise of sovereign authority of the State; and (d) representatives of the State acting in that capacity. The understanding is that sovereigns and heads of State in their public capacity would be embraced by (a) and (d), while it is contemplated that other heads of Government, heads of ministerial departments, ambassadors, heads of mission, diplomatic agents and consular officers, in their representative capacity, are covered by (d).[89]

35. Article 3 of the Convention makes provision for a safeguard clause.[90] Paragraph 1 expressly provides that the Convention is without prejudice to the

---

[86] Earlier efforts to codify State immunity: resolution of 1891 of the Institut de droit international on the competence of courts in actions brought against foreign States, sovereigns and heads of State, *Annuaire de l'Institut de droit international* (1891), p. 436; 1954 resolution of the Institut on the immunity of foreign States from jurisdiction and measures of execution; the resolution of 1952 of the International Law Association, *Report of the Forty-fifth Conference*, Lucerne 1952, p. viii; the Harvard project on Competence of Courts in regard to Foreign States, op. cit. At the regional level, the Asian-African Legal Consultative Committee established a Committee on Immunity of States in respect of Commercial and Other Transactions of a Private Character, Final Report, 1960, M. M. Whiteman, *Digest of International Law*, vol. 6 (1968), pp. 572-574. Within the Council of Europe, the Third European Ministers of Justice (1964) agreed upon an initiative which culminated in the elaboration of the 1972 European Convention on State immunity and Additional Protocol. See also the Convention for the Unification of Certain Rules concerning the Immunity of State-Owned Ships, Brussels, 1926, art. 13. See also the Bustamante Code of Private International Law, adopted at the VIth International Conference of American States held in Havana, League of Nations, *Treaty Series*, vol. 86, p. 111.

[87] See General Assembly resolution 59/38 of 2 December 2004, annex.

[88] *Yearbook ... 1991*, vol. II (Part Two), para. (2) of commentary to draft art. 1, as adopted by the Commission.

[89] Ibid., para. (17) of commentary to draft article 2, as adopted by the Commission.

[90] Article 3 reads:

"*Privileges and immunities not affected by the present Convention*

"1. The present Convention is without prejudice to the privileges and immunities enjoyed by a State under international law in relation to the exercise of the functions of:

"(*a*) its diplomatic missions, consular posts, special missions, missions to international organizations or delegations to organs of international organizations or to international conferences; and

"(*b*) persons connected with them.

"2. The present Convention is without prejudice to privileges and immunities accorded under international law to heads of State *ratione personae*.

"3. The present Convention is without prejudice to the immunities enjoyed by a State under international law with respect to aircraft or space objects owned or operated by a State."

privileges and immunities enjoyed by a State under international law in relation to the exercise of the functions of (a) its diplomatic missions, consular posts, special missions, missions to international organizations or delegations to organs of international organizations or to international conferences; and (b) persons connected with them.

36. Paragraph 2 does not prejudge the extent of immunities granted by States to foreign sovereigns or other heads of State, their families or household staff which may also, in practice, cover other members of their entourage. Likewise, the extent of immunities granted by States to heads of Government and ministers for foreign affairs is not prejudged. This latter category was not expressly included in paragraph 2 on account that it would be difficult to prepare an exhaustive list. Moreover, any such listing would have raised issues regarding the basis and the extent of the jurisdictional immunity accruing to such persons.[91]

(a) Consideration by the Commission of draft article 25 proposed by Special Rapporteur Sompong Sucharitkul

37. The reserving provisions of paragraph 2 of article 3 emerged from an illuminating debate in the Commission. Initially, the Special Rapporteur on the subject proposed, in his seventh report (1985), a draft article 25, which in his view was necessary to cover the whole field of State immunity,[92] including diplomatic and consular immunities, which were in fact immunities of the State and ultimately belonged to it, as well as immunities in respect of "personal sovereigns and other heads of State".[93]

38. To justify such a provision, the Special Rapporteur pointed to judicial practice which showed a distinction drawn for reigning sovereigns, between acts performed as head of State and acts performed in a private capacity.[94] He attributed the paucity of practice with regard to sovereigns not being prosecuted after the termination of their reign to the longevity of their tenure.[95] Crucially, for purposes of the present

---

[91] *Yearbook ... 1991*, vol. II (Part Two), para. (7) of commentary to draft article 2, as adopted by the Commission.

[92] *Yearbook ... 1985*, vol. II (Part One). For introduction, see S. Sucharitkul, summary record of the 1942nd meeting, 7 May 1986, *Yearbook ... 1986*, vol. I, para. 11. For the debate see ibid., summary records of the 1942nd to 1944th meetings. The draft article read:

"*Article 25. Immunities of personal sovereigns and other heads of State*

"1. A personal sovereign or head of State is immune from the criminal and civil jurisdiction of a court of another State during his office. He need not be accorded immunity from its civil and administrative jurisdiction:

"(*a*) in a proceeding relating to private immovable property situated in the territory of the State of the forum, unless he holds it on behalf of the State for governmental purposes; or

"(*b*) in a proceeding relating to succession to movable or immovable property in which he is involved as executor, administrator, heir or legatee as a private person; or

"(*c*) in a proceeding relating to any professional or commercial activity outside his sovereign or governmental functions.

"2. No measures of attachment or execution may be taken in respect of property of a personal sovereign or head of State if they cannot be taken without infringing the inviolability of his person or of his residence."

[93] Ibid., para. 12.

[94] Ibid., paras. 13 and 14.

[95] Ibid., para. 13. Hall, op. cit., § 50 notes that the comparative shortness and rarity of the visits of the sovereigns to foreign countries, and still more the circumstances in which they usually take

study, Lacleta Muñoz argued that draft article 25 was necessary because it dealt with immunities of the head of State *ratione personae*. Its deletion, for being superfluous in view of the provisions of article 3, paragraph 1 (*a*), (now article 2, paragraph 1 (*a*)), which provided for immunity of the head of State *ratione materiae*, would have meant that there would no longer be any mention anywhere of the principle of the immunity of the sovereign or head of State from criminal jurisdiction; that principle did not follow from any other provision of the draft articles.[96] In reaction, Reuter wondered whether, if national courts had to try crimes against humanity, sovereigns and heads of State would enjoy immunity; he claimed that this aspect of the question should be dealt with, if only in the commentary.[97] On the other hand, Ushakov felt that draft article 25 was unnecessary and dangerous. It ran counter to well-established rules, including works elaborated by the Commission, such as the Nürnberg Principles.[98] Thiam, pursuing a similar line of reasoning, preferred the deletion of the draft article since it appeared impossible to state without reservation that a head of State had immunity from criminal jurisdiction. If retained, the Commission should, he suggested, consider including a reservation on the possibility of such immunity since it was also working on the draft Code of Offences against the Peace and Security of Mankind.[99]

39. With a view to accommodating the different viewpoints, Mahiou suggested inserting a reference in draft article 4 (the present article 3) to the immunities and privileges of personal sovereigns and heads of State recognized under the "diplomatic conventions and other rules of international law in force".[100] Consequently, Sinclair proposed that the problem should be dealt with in draft article 4, thus converting a substantive draft article 25, which raised the controversial question of the treatment to be extended to a head of Government and a minister for foreign affairs, as well as the question of the members of the household and private servants of a sovereign or head of State, into "a procedural or safeguard" clause.[101] Since in draft article 3, paragraph 1 (a) (i) (now article 2), the "State" was defined as including "the sovereign or head of State", meaning the sovereign or head of State acting in a public capacity, a reservation would resolve the problem by safeguarding the situation under the rules of customary law governing acts performed in a private capacity or relating to private property.[102]

40. The Special Rapporteur approved of the Sinclair proposal. He nevertheless cautioned against ignoring a part of international law which the Commission had set out to progressively develop and codify, namely State immunities in general, irrespective of how those immunities were termed. Thus, in addition to the Sinclair proposal, it was necessary to add two further provisions: (a) that in their public

---

place, have caused the law affecting the heads of States to remain a general doctrine, which there has been little, if any, opportunity of applying contentiously.

96 Ibid., summary record of the 1942nd meeting, 7 May 1986, Lacleta Muñoz, para. 53.

97 Ibid., Reuter, para. 56.

98 Ibid., summary record of the 1943rd meeting, 12 May 1986, Ushakov, paras. 29-31.

99 Ibid., summary record of the 1944th meeting, 13 May 1986, Doudou Thiam, paras. 39-40.

100 Ibid., Mahiou, paras. 12-18.

101 Ibid., Sinclair, paras. 23-26

102 Ibid., Sinclair, at para. 26, proposed the following language:

> "The present articles are without prejudice to the extent of immunity, whether immunity from jurisdiction or immunity from measures of constraint against private property, enjoyed by a personal sovereign or head of State under international law in respect of acts performed in his personal capacity."

capacity sovereigns and heads of States enjoyed the immunities prescribed in the draft articles; and (b) that in their private capacity they enjoyed immunity from civil and criminal jurisdiction during their tenure of office, in accordance with, or as customary under, international law. He suggested that the question whether it should also cover heads of Government should be discussed briefly in the commentary, which might thus provide the Commission with a basis for further study. He did not think that the content of draft article 25 could be adequately reflected in draft articles 3 or 4.[103]

41. The Sinclair proposal formed the basis of paragraph 2 of draft article 4, adopted by the Commission on first reading.[104] It was underscored that the draft article 4 was simply a safeguard clause and did not confer any immunities; the existing customary law on the matter was left untouched.[105] Since some elements of draft article 25 were already covered in article 3, paragraph 1 (a) and (d), (the present article 2) the paragraph was couched in general terms without going into details.

(b) Consideration by the Commission of draft article 4 on second reading

42. In his review of Government comments in his preliminary report, the Special Rapporteur, Motoo Ogiso, who had since replaced Sompong Sucharitkul, observed that there was general support for the draft article 4 as adopted on first reading.[106] Of the specific comments made on paragraph 2, Germany stated that the paragraph, with the exception of heads of State immunity, made no reference to certain types of immunity, considering it advisable that a clause be included generally clarifying the fact that types of immunity other than jurisdictional immunity of States remained unaffected. Spain, drawing upon article 21, paragraph 2 of the Convention on Special Missions, 1969, proposed including not only the privileges of heads of State

---

[103] Ibid., Special Rapporteur, paras. 50-52. The Commission had already completed a series of projects dealing with various aspects of State immunities, such as diplomatic and consular relations, special missions, prevention and punishment of crimes against internationally protected persons, and representation of States.

[104] Ibid., summary record of the 1968th meeting, 16 June 1986, Riphagen, Chairman of the Drafting Committee, paras. 24-27. The text of draft article 4 (2) read as follows:

> "The present articles are likewise without prejudice to the privileges and immunities accorded under international law to heads of State *ratione personae*."

[105] Commentary to draft article 4 adopted on first reading:

"(6) Paragraph 2 is designed to introduce an express reference to the immunities extended under existing international law to foreign sovereigns and other heads of State in their private capacities, *ratione personae*. Jurisdictional immunities of States in respect of sovereigns or other heads of State acting as State organs or State representatives are dealt with in article 3. Article 3, paragraph 1 (*a*) and (*d*), cover the various organs of the Government of a State and State representatives, including heads of State, irrespective of the system of government. The reservation in article 4, paragraph 2, therefore refers exclusively to private acts or personal privileges and immunities which are recognized and accorded in the practice of States and whose status is in no way affected by the present articles. The existing customary law is left untouched.

"(7) The present articles do not prejudge the extent of the immunities which are granted by States to foreign sovereigns or other heads of State, their families or household staff, and which may in practice also be extended to other members of their entourage." *Yearbook ... 1986*, vol. II (Part Two).

[106] Preliminary report, by Motoo Ogiso, Special Rapporteur (A/CN.4/415 and Corr.1)*, Yearbook ... 1988*, vol. II (Part One), para. 42.

but also those recognized for heads of Government, ministers for foreign affairs and persons of high rank. The United Kingdom of Great Britain and Northern Ireland also expressed the wish to include certain persons connected with a head of State, namely members of his family forming part of his household and his personal servants. Alluding to the Agreement between the Parties to the North Atlantic Treaty regarding the status of their forces, it also suggested an additional safeguard clause in respect of privileges and immunities enjoyed by the armed forces of one State while present in another State with the latter's consent.[107]

43. The source of the obligation giving rise to immunity was a subject of divergent views in the Commission. For the Special Rapporteur, it was not very clear whether, under customary law, heads of Government and foreign ministers enjoyed the same privileges and immunities as heads of State. The privileges and immunities of members of the family of heads of State, ministers for foreign affairs and persons of high rank were accorded rather on the basis of international comity than of established international law. Likewise, the privileges and immunities of the armed forces of a State, while present in another State, were determined by agreement between the States concerned rather than by customary international law. Accordingly, the Special Rapporteur considered that there was no need to introduce any changes into paragraph 2. Tomuschat,[108] Rao,[109] Koroma,[110] Solari Tudela,[111] Pawlak,[112] Roucounas[113] and Al-Khasawneh[114] preferred broadening the scope of paragraph 2 to expressly include heads of Government and ministers for foreign affairs, as well as high officials. Rao, Koroma, Solari Tudela and Roucounas found untenable the assertion by the Special Rapporteur that such privileges were accorded "rather on the basis of international comity than of established international law".

44. In summing up the debate, the Special Rapporteur indicated that he was prepared to accept a majority view on this point, although he had hesitations regarding "persons of high rank", since there was no generally accepted criteria for determining whether a person is of high or ordinary rank and, as a result, some difficulties might arise in application of the provision. Although, in his Third report, the Special Rapporteur proposed a new paragraph that included heads of

---

[107] Ibid., paras. 46 and 47. For comments and observations of Governments, see document A/CN.4/410 and Add.1-5, in *Yearbook ... 1988*, vol. II (Part One).

[108] Summary record of the 2116th meeting, 9 June 1989, *Yearbook ... 1989*, vol. I. Tomuschat suggested adding "or other government officials" after "heads of State", in order to take account of the applicable rules of international law and thus leave open the possibility that there were other persons to whom certain privileges and immunities extended.

[109] Ibid., summary record of the 2117th meeting, 13 June 1989.

[110] Ibid., summary record of the 2118th meeting, 13 June 1989.

[111] Ibid.

[112] Ibid.

[113] Ibid.

[114] Ibid., summary record of the 2119th meeting, 15 June 1989. Al-Khasawneh suggested to include certain persons connected with the head of State, such as members of his family forming part of his household and servants attached to his personal service, and perhaps also prime ministers and ministers for foreign affairs.

Government and ministers for foreign affairs,[115] a minimalist approach was preferred in the Drafting Committee, which noted that paragraph 2 related to the privileges and immunities accorded to heads of State *ratione personae* and not to those they enjoyed as State organs. In the view of the Drafting Committee, the matter should therefore not be referred to in draft articles on State immunity. However, since no Government had proposed the deletion of the paragraph, it was considered inadvisable to eliminate it at the second-reading stage. To underscore the meaning to be attached to the safeguard clause, the text was made more flexible by deleting the word "the" before the words "privileges and immunities".[116]

(c) Issues left open

45. The Convention's treatment of immunity leaves open certain issues in at least four respects: first, the Convention does not deal with immunity in respect of criminal jurisdiction.[117] Secondly, the Convention only addresses questions of jurisdictional immunity of heads of State and other representatives of the State acting in that capacity *ratione materiae* in the context of State immunity. The Convention, in its general approach, does not apply where there is a special immunity regime, including immunities *ratione personae*. The express reference to heads of State in article 3 does not suggest that immunity *ratione personae* of other State officials is affected by the Convention.[118] Thirdly, there are divergent views as to the extent to which jurisdictional immunities of armed forces of a State are

---

[115] Third report (A/CN.4/431 and Corr.1), by Motoo Ogiso, Special Rapporteur, *Yearbook ... 1990*, vol. II (Part One). The text proposed read as follows:

> "2. The present articles are likewise without prejudice to the privileges and immunities accorded under international law to heads of State, heads of Government and ministers for foreign affairs."

This proposal was made after the draft articles had already been referred to the Drafting Committee.

[116] Draft articles on jurisdictional immunities of States and their property (A/CN.4/L.444). Titles and texts, adopted by the Drafting Committee on second reading: articles 1 to 10 and 12 to 16 — reproduced in summary record of the 2191st meeting, 11 July 1990, paras. 23 et seq, *Yearbook ... 1990*, vol. I.

[117] In para. 2 of its resolution 59/38, the General Assembly agreed with the general understanding reached in the Ad Hoc Committee that the Convention does not cover criminal proceedings. In his statement to the Sixth Committee, the Chairman of the Ad Hoc Committee drew attention to the Ad Hoc Committee's recommendations in paras. 13 and 14 of its report, *Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 22* (A/59/22), that the General Assembly should adopt the draft Convention; and that the General Assembly should include in its resolution adopting the draft Convention, the general understanding that it did not cover criminal proceedings (A/C.6/59/SR.13, para. 32). Initially, the general understanding formed part of the general understandings annexed to the Convention, ibid., *Fifty-eighth Session, Supplement No. 22* (A/58/22), annex II. It was later felt a more appropriate placement for that issue was in a General Assembly resolution (ibid., *Fifty-ninth Session, Supplement No. 22* (A/59/22), para. 11).

[118] Statement to the Sixth Committee, the Chairman of the Ad Hoc Committee on Jurisdictional Immunities of States and their Property (A/C.6/59/SR.13, para. 37). He also noted that generally the Convention would have to be read in conjunction with the commentary prepared by the Commission, at least insofar as the text submitted by the Commission had remained unchanged. The Commission's commentary, the reports of the Ad Hoc Committee and the General Assembly resolution adopting the Convention would form an important part of the travaux préparatoires of the Convention. That common reading of the text of the Convention and the commentary would certainly clarify the text if certain questions of interpretation remained (ibid., para. 35).

covered by the Convention.[119] Fourthly, the Convention does not address questions concerning immunity arising from civil claims in relation to acts of a State in violation of human rights norms having the character of *jus cogens*, particularly the prohibition of torture.

46. When the Commission established a Working Group,[120] to prepare preliminary comments, pursuant to General Assembly resolution 53/98, on the outstanding issues relating to the draft articles on jurisdictional immunities of States and their property, it drew the attention of the General Assembly to the development in State practice and legislation relating to civil claims being pursued in national jurisdictions. Such claims were being made on the strength of the argument that immunity should be denied in the case of death or personal injury resulting from acts of a State in violation of human rights norms having the character of *jus cogens*, particularly the prohibition on torture.[121] Attention was also drawn to the *Pinochet* case which had emphasized the limits of immunity in respect of gross human rights violations by State officials. Although the case distinguished its conclusion on non-immunity from decisions upholding the plea of sovereign immunity in respect

---

[119] In his statement to the Sixth Committee, the Chairman of the Ad Hoc Committee clarified that one of the issues that had been raised was whether military activities were covered by the Convention. The general understanding had always prevailed that they were not. In any case, reference should be made to the Commission's commentary on art. 12, stating that "neither did the article affect the question of diplomatic immunities, as provided in article 3, nor did it apply to situations involving armed conflicts" (A/C.6/59/SR.13, para. 36). It is also understood that art. 26 of the Convention which safeguards existing regimes would necessarily imply that instruments such as European Convention on State Immunity, 1972, would prevail at least as between States parties to both conventions. Art. 31 of that Convention provides: "Nothing in this Convention shall affect any immunities or privileges enjoyed by a Contracting State in respect of anything done or omitted to be done by, or in relation to, its armed forces when on the territory of another Contracting State". At a Seminar on State Immunity and the New United Nations Convention, Chatham House, 5 October 2005, Mr. Hafner, who was Chairman of the Ad Hoc Committee, was less categorical when he said that the Commission's commentary had already identified military activities in a situation of armed conflict as excepted from the Convention. The question was whether all military activities were covered by this exception. He recalled the statement of the Chairman of the Ad Hoc Committee, repeating the wording of the Commission, but added that it was his impression that it covered all military activities but leaving it to individual States to draw their own conclusions on this. Andrew Dickinson at the same seminar observed that concept of "military activities" was broader than "situations involving armed conflicts". The consequences of events in time of war might well require that different principles should govern immunities for States in civil proceedings. Summary of Seminar available at http://www.chathamhouse.org.uk/files/3280_ilpstateimmunity.pdf (accessed on 21 February 2008). In its comments submitted on the subject, Japan considered it appropriate that the issue of jurisdictional immunities of foreign armed forces be dealt with bilaterally and that armed forces of a State stationed in another State should be excluded from the scope of the draft articles (see document A/48/464, annex).

[120] In its resolution 53/98, the General Assembly invited the Commission to present comments on outstanding substantive issues relating to the draft articles on jurisdictional immunities of States and their property taking into account the recent developments of State practice and other factors related to this issue since the adoption of the draft articles.

[121] For example, in the United States, the Foreign Sovereign Immunities Act of 1976 (FSIA), was amended to include a new exception to immunity: Sect. 221 of the Antiterrorism and Effective Death Penalty Act of 1996, provides that immunity will not be available in any case: "in which money damages are sought against a foreign State for personal injury or death that was caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage-taking ...". United States, Public Law 104-132, 110 Stat. 1214 (1996).

of civil claims on the ground that it was concerned with a criminal prosecution, the Commission noted that the case had generated support for the view that State officials should not be entitled to plead immunity for acts of torture committed in their own territories in both civil and criminal actions. The Commission noted that this development was not examined in addressing the outstanding issues but was nevertheless a recent development which should not be ignored.[122] The Convention, however, does not address the issue.

47. To conclude, the following comments may be made:

(a) The term "proceedings" is not defined by the Convention. However, it was clearly indicated that it should be understood that it does not cover criminal proceedings in any organ of a State empowered to exercise judicial functions regardless of the level or the nomenclature used.[123] This has been confirmed in the relevant General Assembly resolution 59/38, to which the Convention is annexed;

(b) An attempt was made during the elaboration of the draft articles on jurisdictional immunities of States and their property to address the question of immunities *ratione personae* at least in respect of the sovereign and head of State. In the final analysis, the matter was left open by the inclusion of a safeguard provision which subsists as article 3 of the Convention. The Commission went from the assumption, in its 1949 Survey, that it would be convenient to include "in the effort to codify jurisdictional immunities of States and their property, the immunities of the Head of the State", to not including a substantive provision on the matter in the draft articles on jurisdictional immunity of States and their property other than a safeguard clause;

(c) The proposal made by Special Rapporteur Sucharitkul to include immunities of State officials *ratione personae* within the scope of the jurisdictional immunities articles drew heavily upon article 31 of the Vienna Convention on Diplomatic Relations, and this seems to be consistent with approaches followed at the domestic level by some countries.[124] Divergent views were expressed as to the source of the obligation regarding immunity, especially as concerns officials other than the sovereign and the head of State;

(d) The fact that a State under the Convention includes sovereigns and heads of State in their public capacity — as well as heads of Government, heads of ministerial departments, ambassadors, heads of mission acting in the capacity as representatives — raises the possibility of overlap between the regime under the Convention and any immunities enjoyed *ratione personae* under customary law, particularly in circumstances where the question of immunity *ratione materiae* in respect to crimes under international law is invoked. These matters are addressed further in Part Two below;

(e) The question of immunity from criminal jurisdiction in respect of crimes under international law, which was of concern to the Commission in its work on the draft code of crimes against the peace and security of mankind, was borne in mind in the debates, and it was recognized that work on such matters should not be

---

[122] Report of the Working Group on jurisdictional immunities of States and their property, (A/CN.4/L.576), *Yearbook ... 1999*, vol. II (Part Two), appendix, paras. 3-13.

[123] Commentary to art. 2 (1)(a).

[124] See, for example, the State Immunity Act of the United Kingdom.

prejudiced. The Commission's consideration of this aspect will be covered in section D of the present Part.

3. Other techniques limiting the exercise of adjudicatory jurisdiction

48. Having considered the various aspects concerning jurisdictional immunities perceived as a procedural bar in section C.1 (d) above, other related techniques exist that offer restraints to courts from exercising jurisdiction over a particular subject matter. The present subsection deals with issues of non-justiciability and the act of State doctrine. Not every matter that is brought before a court of law is amenable to judicial determination. A subject matter is justiciable when it is tried according to law.[125] In some domestic law systems, informed by the constitutional law principle of separation of powers, there are certain matters purportedly falling within the competence of the executive branch of Government that are not justiciable before the courts. Perceived from this high level of generality, State immunity and the act of State doctrine, as adjudicatory avoidance techniques, are both embraced by notions of justiciability.

(a) Non-justiciability

49. A plea of non-justiciability may be raised in proceedings whether or not a foreign State is party,[126] and this may be at the preliminary or substantive stage.[127] Where it is invoked in proceedings concerning foreign executive acts, the court would typically refuse to adjudicate upon an exercise of sovereign power, such as making war, peace, concluding international treaties or ceding territory.[128]

50. In *Buttes Gas and Oil and Company v. Hammer* (No. 3),[129] Lord Wilberforce framed the contours of the doctrine, at least in English law, as follows:

> "So I think that the essential question is whether, …, there exists in English law a more general principle that the courts will not adjudicate upon the transactions of foreign sovereign States. Though I would prefer to avoid argument on terminology, it seems desirable to consider this principle, if existing, not as a variety of 'act of state' but one for judicial restraint or abstention."[130]

51. In the case in question, it was clear to the Court that if the proceedings were allowed to advance further, they would have involved the determination of matters concerning (a) which State had sovereignty over a particular area; (b) the width of the territorial waters of that area; and (c) the boundary of the continental shelf between States. Delving into the questions would have involved the consideration of the meaning and effect of the parallel declarations made; whether they amounted to an inter-State agreement; and their "unlawfulness" under international law. The Court refrained from doing so by countenancing that these were not issues upon which a municipal court could pass. Leaving aside all possibility of embarrassment

---

[125] Malcolm N. Shaw, op. cit. (2003), p. 162.
[126] Fox, "International Law and Restraints …", op. cit., p. 384.
[127] Ibid.
[128] Shaw, op. cit. (2003), p. 384.
[129] [1982] A.C. 888. See also *International Law Report*, vol. 64, p. 331.
[130] Ibid., p. 344.

in foreign relations, "there were no judicial or manageable standards by which to judge these issues. The court would be in a judicial no-man's land".[131]

52. Thus, non-justiciability, at least as understood in the Anglo-American legal traditions, bars a national court from adjudicating certain issues, such as international relations between States by reason of their lacking any judicial or manageable standards by which to determine those issues.[132] The non-justiciability principle does not mean that a court is handicapped in that it would not take cognizance of international law or consider that a violation of that law has occurred. For instance, in appropriate circumstances, it is legitimate for a court to have regard to the content of international law in deciding whether to recognize a foreign law.[133]

(b) Act of State doctrine

53. The act of State doctrine is related to the doctrine of non-justiciability, but its precise contours, as well as its status in international law, are not clear. Some commentators have averred that it is essentially a conflict of law doctrine;[134] while others have asserted that it is not a rule of public international law.[135] One commentator has identified at least seven applications by which the expression "act

---

[131] Ibid., p. 351.

[132] Fox, "International Law and Restraints …", op. cit., p. 364.

[133] See Lord Nicholls in *Kuwait Airways Corp v. Iraqi Airways Co. et al*. (No. 2), 16 May 2002, [2002] UKHL 19, para. 26.
Also available at: http://www.publications.parliament.uk/pa/ld200102/ldjudgmt/jd020516/kuwait-1.htm (last accessed on 5 February 2008). Lord Hope, at para. 140, said:

> "As I see it, the essence of the public policy exception is that it is not so constrained. The golden rule is that care must be taken not to expand its application beyond the true limits of the principle. These limits demand that, where there is any room for doubt, judicial restraint must be exercised. But restraint is what is needed, not abstention. And there is no need for restraint on grounds of public policy where it is plain beyond dispute that a clearly established norm of international law has been violated."

[134] For various viewpoints, see generally, Louis Henkin, "Act of State today: Recollections in Tranquility", *Columbia Journal of Transnational Law*, vol. 6 (1967), p. 175. See also: House of Lords, *Regina v. Bartle and the Commissioner of Police for the Metropolis and Others Ex Parte Pinochet Ugarte*, 25 November 1998, reproduced in *International Legal Materials*, vol. 37, 1998 (cited as "*Pinochet* (No. 1)"), Lord Nicholls, at p. 1331:

> "The act of state doctrine is a common law principle of uncertain application which prevents the English court from examining the legality of certain acts performed in the exercise of sovereign authority within a foreign country or, occasionally, outside it. Nineteenth century dicta (for example, in *Duke of Brunswick v. King of Hanover* (1848) 2 H.L.Cas. 1 and *Underhill v. Hernandez* (1897) 169 U.S. 456) suggested that it reflected a rule of international law. The modern view is that the principle is one of domestic law which reflects a recognition by the courts that certain questions of foreign affairs are not justiciable (*Buttes Gas and Oil Co. v. Hammer* [1982] A.C. 888) and, particularly in the United States, that judicial intervention in foreign relations may trespass upon the province of the other two branches of government (*Banco Nacional de Cuba v. Sabbatino* 376 U.S. 398)".

[135] Ian Brownlie, *Principles of Public International Law,* 6th edition, p. 483 (Oxford and New York, Oxford University Press, 2003). See also *Banco Nacional de Cuba v. Sabbatino*, 307F 2d 845 (1962), p. 855:

> "the Act of State Doctrine briefly stated that American Courts will not pass on the validity of the acts of foreign governments performed in their capacities as sovereigns within their own territories … This doctrine is one of the conflict of laws rules applied by American Courts; it is not itself a rule of international law ... it stems from the concept of the immunity of the sovereign because 'the sovereign can do no wrong'".

of a State" is employed in the legal environment.[136] Two types of "acts of State" may need to be distinguished for the purposes of the present study. Section C.1 (d) above has already addressed "acts of a State" where a foreign government will be accorded immunity from legal proceedings in respect of itself or its property. This has been considered to be State immunity proper. There is however another "act of State" which implies that an act of the Government of one State, such as its laws, will not be the subject of inquiry in legal proceedings in the courts of another State. This type of plea may be raised in proceedings where a private person or a foreign State is a party.[137] According to *Underhill v. Hernandez*, considered to be the *locus classicus*:

> "Every sovereign State is bound to respect the independence of every other sovereign State, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory. Redress of such acts must be obtained through means open to be availed of by sovereign powers as between themselves."[138]

54. While an act of State doctrine is an established doctrine in common law systems, it is rarely used by civil law tribunals.[139] An act of State doctrine is a plea to the substantive law.[140] Unlike an immunity plea, it is not procedural.[141] The doctrine is not absolute. It is subject to exceptions.[142] Since Judge Cardozo in *Loucks v. Standard Oil Co of New York* famously spoke that the court will exclude the foreign decree only when it "would violate some fundamental principle of justice, some prevalent conception of good morals, some deep-rooted tradition of the common weal",[143] an act by a foreign government may not be enforced in the forum State if it is contrary to public policy. In *Oppenheimer v. Cattermole*, which involved the 1941 decree of the National Socialist Government of Germany depriving Jewish émigrés of their German nationality with the attendant consequence leading to the confiscation of their property, Lord Cross of Chelsea said that a racially discriminatory and confiscatory law of this sort was so grave an infringement of human rights that the courts of the United Kingdom ought to refuse to recognize it as a law at all.[144]

55. In *Kuwait Airways Corp v. Iraqi Airways Co.* (No. 2), Lord Nicholls observed thus:

> "When deciding an issue by reference to foreign law, the courts of this country must have a residual power, to be exercised exceptionally and with the greatest

---

[136] Philip Allott, "The Courts and the Executive: Four House of Lords Decisions", *Cambridge Law Journal*, vol. 36 (1977), p. 270.

[137] Fox, "International Law and Restraints …", op. cit., p. 364.

[138] *Underhill v. Hernandez*, 168 U.S. 250, 18 S.Ct. 83, 42 L.Ed. 456 (1897).

[139] Oliver, Firmage, and others, op. cit., p. 624 note that tribunals in civil law systems use the principle against examination of the legitimacy of an otherwise applicable foreign legal rule. A foreign rule that would be violative of the public order of the forum State will not be applied. The term act of State, however, is rarely used.

[140] Fox, "International Law and Restraints …", op. cit., p. 364. See also Brownlie, *Principles …*, op. cit., p. 50.

[141] See, however, the position adopted by some scholars who consider immunity *ratione materiae* to be a substantive defence; *infra*, footnote 213.

[142] See, generally, Fox, "International Law and Restraints …", op. cit., p. 384.

[143] (1918) 120 NE 198 at 202.

[144] [1976] AC 249 at 277-278.

circumspection, to disregard a provision in the foreign law when to do otherwise would affront basic principles of justice and fairness which the courts seek to apply in the administration of justice in this country. Gross infringements of human rights are one instance, and an important instance, of such a provision. But the principle cannot be confined to one particular category of unacceptable laws. That would be neither sensible nor logical. Laws may be fundamentally unacceptable for reasons other than human rights violations."[145]

56. A final point may be made on this matter. An "act of State" defence has also been invoked in criminal proceedings.[146] However, this variation of "act of State", based on the maxim *par in parem non habet imperium*, bears on immunity *ratione materiae*. It posits that a State may not try a person for a criminal act that constitutes an "act of State" of another State, without its consent to that person's trial. According to Kelsen, the State on whose behalf the "organ" (ruler or official) had acted is alone responsible for the violation, through such act, of international law, while the perpetrator himself, with the exceptions of espionage and war treason, is not responsible.[147] It has been held that this general rule is well established in international law.[148] In the *Eichmann* case,[149] it was argued that the crimes against the Jewish people, crimes against humanity and war crimes for which the accused was charged had been committed in the course of duty and constituted "acts of State" for which the German State alone was responsible. The District Court rejected this notion on several grounds. First, it noted that the theory of "act of State" had already been invalidated by the law of nations with respect to international crimes. That theory was repudiated by the International Military Tribunal at Nürnberg[150] and subsequently by the General Assembly of the United Nations when, in its resolution 95 (I) of 11 December 1946, it affirmed the Nürnberg Principles. The Assembly, in resolution 96 (I) of 11 December 1946, also affirmed that genocide was a crime under international law. Principle III of the Nürnberg Principles as formulated by the International Law Commission and article IV of the Genocide Convention were examples of rejection of this plea in respect of odious crimes.

---

[145] Para. 18. In that case, Lord Hope concluded that:

"… I would hold that a legislative act by a foreign state which is in flagrant breach of clearly established rules of international law ought not to be recognised by the courts of this country as forming part of the *lex situs* of that state."

[146] Lord Sylnn of Hadley in the *Pinoche*t case (No. 1) stated that "despite the divergent views expressed as to what is covered by the Act of State doctrine, … once it is established that the former Head of State is entitled to immunity from arrest and extradition on the lines I have indicated, United Kingdom Courts will not adjudicate on the facts relied on to ground the arrest, but in Lord Wilberforce's words [in *Buttes Gas*], they will exercise judicial restraint or abstention".

[147] Hans Kelsen, "Collective and individual responsibility in international law with particular regard to punishment of war criminals", *California Law Review*, vol. 31 (1942-1943), p. 530.

[148] *Prosecutor v. Blaškić*, (IT-95-14), Appeals Chamber, Judgement on the Request of the Republic of Croatia for review of the decision of Trial Chamber II of 18 July 1997 (Subpoena decision), para. 41. Generally, see also Akehurst, op. cit., pp. 240 et seq.

[149] *Attorney-General of the Government of Israel v. Adolf Eichmann*, para. 28, and *Attorney-General of the Government of Israel v. Adolf Eichmann*, Supreme Court (sitting as a Court of Criminal Appeal), para. 14.

[150] Ibid.

57. Secondly, the District Court rejected the Kelsenian theory, noting that the State that planned and implemented a "final solution" cannot be treated as *par in parem*, but only as consisting of a gang of criminals.

58. In the Supreme Court, the plea was also rejected. The Court, agreeing with the District Court, said that whatever was the value of the act of State doctrine in other cases, it could not stand as a defence in respect of international crimes, in the light of article 7 of the Charter of the International Military Tribunal, the Nürnberg Principles and the Genocide Convention. The very essence of the Charter was that individuals had international duties which transcended their national obligations of obedience imposed by the individual State. If one violated the laws of war, immunity could not be obtained while acting in pursuance of the authority of the State if the State in authorizing action moved outside its competence under international law.

59. The Court also observed that by deriving from the concept of "sovereignty", which was not absolute, the doctrine of "act of State" ought to be applied in a like manner; it was itself not absolute. Moreover, there was no basis for the doctrine when the matter pertained to acts prohibited by the law of nations, especially when they are international crimes of the class of "crimes against humanity". Such acts, from the point of view of international law, were completely outside the "sovereign" jurisdiction of the State that ordered or ratified their commission, and therefore, those who participated in such acts must personally account for them and cannot shelter behind the official character of their task or mission, or behind the "Laws" of the State by virtue of which they purported to act. International law postulated that it was impossible for a State to sanction an act which violated severe prohibitions.

60. Similar arguments were advanced at Nürnberg.[151] The defence argued, first, that individuals cannot be criminally responsible under international law, as only States were subjects of the law of nations; and only they could be responsible for an "international legal crime". Secondly, that certain acts attributed to the defendants as crimes against peace were acts of State, which could be imputed only to the State and to individuals who had committed them as organs of the State. To punish individuals for their decisions regarding war and peace would be to destroy the notion of the State. The defence, however, conceded that the usages of war had, exceptionally, in regard to certain war crimes removed "the partition erected by international law, respectful of national sovereignty, between the acting individual and foreign Powers".

61. In turn, the prosecution denied the existence of any principle of international law that only the State and not the individual could be made responsible under international law; cases of piracy, breach of blockade, spying and war crimes pointed to duties that international law imposed directly on individuals.[152] The

---

[151] In *Goering and others*; International Military Tribunal at Nürnberg, 1 October 1946, in *Annual Digest and Reports of Public International Law Cases*, vol. 13, p. 203 at p. 221. See generally, Memorandum submitted by the Secretary-General, *The Charter and Judgment of the Nürnberg Tribunal: History and Analysis*, document A/CN.4/5 (United Nations publication, Sales No. 1949.V.7). See also Study by the Secretariat, *Historical Review of Developments relating to Aggression* (United Nations publication, Sales No. E.03.V.10).

[152] For spying, see arts. 29-31 of the Regulations annexed to the Convention respecting the Laws and Customs of War on Land (The Hague Convention IV), 18 October 1907.
Art. 41 of the Regulations annexed to the Convention with respect to the Laws and Customs of

crimes that the Charter of the Nürnberg Tribunal was concerned about were rather testament to the need to affirm that the rights and duties of States were the rights and duties of men and that unless "they bind individuals they bind no one".

62. Rejecting the act of State doctrine, the prosecution further stated that the confirmation by a series of decisions that one State had no authority over another sovereign State or over its head or representative was based on the precepts of the comity of nations and of peaceful and smooth international intercourse. Such decisions did not constitute authority for the proposition that those who constituted the organs — those who are behind the State — were entitled to rely on the metaphysical entity which they created and controlled when by their directions that State sets out to destroy that very comity on which the rules of international law depended.

63. The Tribunal did not hesitate to affirm the criminal responsibility of individuals under international law; it had been long recognized that international law imposed duties and liabilities upon individuals, as well as upon States. It averred in an oft cited passage:

> "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."[153]

64. On the act of State doctrine, the Tribunal stated:

> "The principle of international law, which under certain circumstances protects the representatives of a State, cannot be applied to acts which are condemned as criminal by international law. The authors of these acts cannot shelter themselves behind their official position in order to be freed from punishment in appropriate proceedings."[154]

65. It also relied upon article 7 of the Charter and claimed that:

> "… the very essence of the Charter is that individuals have international duties which transcend the national obligations of obedience imposed by the individual State. He who violates the laws of war cannot obtain immunity while acting in pursuance of the authority of the State if the State in authorizing action moves outside its competence under international law."[155]

66. The treatment of the "act of State" doctrine in the *Eichmann* case and at Nürnberg bears on questions relating to immunity *ratione materiae*, which will be subject of further inquiry in Part Two below.

War on Land (The Hague Convention II), 29 July 1899, reads:

> "A violation of the terms of the armistice by private individuals acting on their own initiative, only confers the right of demanding the punishment of the offenders, and, if necessary, indemnity for the losses sustained."

[153] Nazi Conspiracy and Aggression, Opinion and Judgment (Washington: United States Government Printing Office, 1947), p. 53, quoted in the Memorandum submitted by the Secretary-General, *The Charter and Judgment of the Nürnberg Tribunal* … op. cit., p. 41.

[154] Ibid., pp. 41-42.

[155] Ibid., p. 2 .

D. Individual criminal responsibility and removal of immunity

67. In order to deduce whether there was any form of exception to the rule according immunity from criminal jurisdiction to an incumbent minister for foreign affairs, the International Court of Justice in the *Arrest Warrant* case examined, inter alia, the rules concerning immunity or criminal responsibility of persons having an official capacity contained in legal instruments creating international criminal tribunals, and found that it was unable to conclude that any exception existed in customary international law in regard to national courts.[156] It also observed that immunity from criminal jurisdiction and individual criminal responsibility were quite separate concepts. In contrasting the two, the Court noted that the former was procedural in nature, while the latter was a question of substantive law.[157]

68. However, the formalism in this dichotomy tends to obscure the nature of the dynamic relationship that seems to exist. This relationship between national criminal jurisdictions on one hand and international jurisdictions on the other[158] remains relevant to issues concerning immunity. As three judges concluded, in their separate opinion in *Arrest Warrant*: "the increasing recognition of the importance of ensuring that the perpetrators of serious international crimes do not go unpunished has had its impact on the immunities which high State dignitaries enjoyed under traditional customary law."[159]

69. There is a close relationship between immunity and individual criminal responsibility. In particular, two developments in international criminal law in the twentieth century seem to have had an impact on the discussions concerning the development of immunities: The establishment of international criminal jurisdiction and the development of the substantive law relating to irrelevance of official position, each of which effectively raising the bar of accountability for egregious offences. In order to properly contextualize the issues of immunity discussed in Part Two of the study, the present section therefore provides a historical background of the growth of international criminal law and a review of provisions in that law concerning the irrelevance of official position for purposes of criminal responsibility.[160]

1. International criminal jurisdiction

70. If, within the domestic structure, the legislative function of a Parliament is complemented by the adjudicatory powers of the Courts, as well as by law enforcement, a similar developmental path was not pursued in the international legal system. Under classical international law, the proscription of offences as *delicta juris gentium* was not accompanied by a corresponding desire or possibility of

---

[156] *Arrest Warrant*, para. 58.

[157] Ibid., para. 60.

[158] See statement by President Shi (former President of the International Court of Justice) on "Immunities in international law, in the jurisprudence of the I.C.J." on the occasion of the visit of the Prime Minister of Madagascar on 23 October 2003 available at: http://www.icj-cij.org/presscom/index.php?p1=6&p2=1&pr=97&search=%22owed%22.

[159] Joint separate opinion Higgins, Kooijmans and Buergenthal, para. 74.

[160] The substance of this interplay between the growth of international criminal law and immunities of State officials before national jurisdictions is then discussed *infra* both in relation to immunity *ratione personae* (*infra*, Part Two, sect. A) and immunity *ratione materiae* (*infra*, Part Two, sect. B).

according jurisdiction over such crimes to an international court or organ. In effect, the qualification of particular acts as international crimes developed distinctly from the question of international criminal jurisdiction, until the latter became a subject of serious inquiry in the aftermath of the First World War (1914-1919).[161] The international system relied on the domestic law for enforcement. There was a general tendency to confer competence over international crimes upon national jurisdictions or to assume that competence will be exercised by such jurisdictions. The War and several impulses propelled discussion to gravitate towards international criminal jurisdiction. Such a system was seen to be best positioned to assure due process than through measures rendered at the domestic level by victorious States.

71. Moreover, and perhaps significantly for the present study, there was a certain obscurity as to the rules governing the responsibility for war crimes of Sovereigns and heads of State and of civilian war leaders.[162] The dominant perception then was that heads of State were not triable at all or that they were not responsible for acts of subordinates. For civilian officials whose criminal activities were confined to the territory of their own State, such was the preponderance of the territorial principle, that they were held accountable to the extent that the law of the territorial State was able to prescribe.[163]

72. In between the two World Wars[164] and thereafter,[165] the prevailing view began

---

[161] See, generally, Memorandum submitted by the Secretary-General, *Historical Survey of the Question of International Criminal Jurisdiction* (A/CN.4/7/Rev.1) (United Nations publication, Sales No. 1949.V.8). See also Report on the Question of International Criminal Jurisdiction by Ricardo J. Alfaro, Special Rapporteur (A/CN.4/15 and Corr.1), *Yearbook … 1950*, vol. II.

[162] Memorandum submitted by the Secretary-General (A/CN.4/7/Rev.1), op cit., p.2.

[163] Ibid.

[164] There were proposals at the Paris Peace Conference in 1919 for the trial by international courts of accused persons of the nationalities of the defeated powers for "grave outrages against the elementary principles of international law" against, inter alia, all authorities civil or military, belonging to enemy countries, however high their position may have been, without distinction of rank, including the heads of State, who ordered, or, with knowledge thereof and with the power to intervene, abstained from preventing or taking measures to prevent, putting an end to or repressing violations of the law or customs of war (it being understood that no such abstention should constitute a defence of the actual perpetrators); "Commission on the Responsibility of the authors of the War and on Enforcement of Penalties, Report presented to the Preliminary Peace Conference", *American Journal of International Law*, vol. 14 (1920), pp. 95-154. However, differences among the victor powers only culminated in art. 227 in the Treaty of Versailles by the terms of which the Allied and Associated Powers publicly arraigned William II of Hohenzollern, formerly German Emperor, "for a supreme offence against international morality and the sanctity of treaties" before a special tribunal; see "Memorandum of reservations presented by the representatives of the United States to the Report of the Commission on Responsibilities", in ibid. The trial never took place. William of Hohenzollern took refuge in the Netherlands and the Government refused to deliver the ex-Emperor to the Allied and Associated Powers, invoking the principle *nullum crimen sine lege*.
For other initiatives, see Draft Statute of the International Penal Court, as amended by the Permanent International Criminal Court Committee of the International Law Association, *34th Report, Vienna* (1927), pp. 113-125; Resolution of the Inter-Parliamentary Union on the Criminality of War of Aggression and of International Repressive Measures (1925), *Union interparlementaire, compte rendu de la XXIIIème Conférence* (Washington, 1925), pp. 46-50, and p. 801. *Vœu* of the International Congress of Penal Law concerning an International Criminal Court (Brussels, 1926), *Premier congrès international de droit pénal, Actes du congrès*, p. 634; Draft Statute for the creation of a criminal chamber of the International Court

to give way to arrangements that bear on the character and architecture of the international criminal legal system today. If relinquishing its domestic penal jurisdiction and being obliged to deliver up its nationals to a foreign jurisdiction was seen by a State as contrary to the classical principle of sovereignty, an international court properly established was arguably an appropriate response by the international community to counter any misapprehensions that there were certain crimes perpetrated by Governments or by individuals as representatives of Governments that could hardly be tried by territorial courts. By creating such a court, States will have consensually acted upon their own sovereign will in concert with other States to serve the supremacy of international law.[166] The Appeals Chamber for the Special Court for Sierra Leone, in its decision on the immunity from jurisdiction in respect of Charles Taylor, noted that the principle of State immunity derives from the equality of sovereign States — whereby one State may not adjudicate on the conduct of another State — and therefore has no relevance to international criminal tribunals, which are not organs of the State but derive their mandate from the international community.[167]

73. The conclusion of the Rome Statute of the International Criminal Court was a result of this challenge to orthodoxy that started at the beginning of the twentieth century. The internationalization of the criminal jurisdiction allowed the international community to overcome the constrictions of sovereignty. At the same time, it allowed States to continue to take measures domestically to implement

---

of Justice adopted by the International Association of Penal Law, Paris, 16 January 1928 and revised in 1946, in *Memorandum of the Secretariat*, appendix 7; Convention for the Creation of an International Criminal Court, opened for signature at Geneva, 16 November 1947, annexed to the Convention on the Prevention and Punishment of Terrorism, ibid., appendix 8; Conclusions adopted by the London International Assembly on 21 June 1943, which provided in paragraph 3 that an International Criminal Court shall be instituted and that it shall have jurisdiction over the following categories of war crimes … (d) crimes committed by Heads of State, ibid., appendix 9; Draft Convention for the Creation of an International Criminal Court, London International Assembly 1943, ibid., appendix 9.B; Draft convention for the establishment of a United Nations War Crimes Court, with explanatory memorandum, which in article 1 established a United Nations War Crimes Commission for the trial and punishment of persons charged with the commission of an offence against the laws and customs of war with jurisdiction to try and punish any person irrespective of rank or position, ibid., appendix 10.

[165] Draft proposal for the establishment of an international criminal court, Memorandum submitted to the Committee on the Progressive Development of International Law and its codification by the representative of France, in *Historical Survey of the Question of International Criminal Jurisdiction*, op. cit., appendix 11; draft convention on the crime of genocide prepared by the Secretary-General (E/447), with two annexes on the establishment of an International Criminal Court for the Punishment of Acts of Genocide. It was envisaged that the State would be obliged to bring acts of genocide before an international criminal court if such acts were committed by individuals as organs of the State or with the support or toleration of the State. The Court would thus have tried rulers of a State or persons who conspired with these rulers; Draft convention on genocide submitted to the Sixth Committee by the French delegation, ibid., appendix. 15. The Nürnberg Tribunal found that Karl Dönitz, as Head of State of Germany from 1 to 9 May 1945, was "active in waging aggressive war", in part based on his order, in that capacity, to the Wehrmacht to continue the war in the East, and he was convicted of Counts Two and Three of the indictment and sentenced to 10 years, see *Historical Review of Developments relating to Aggression* … op. cit., pp. 51-53.

[166] See, generally, Report on the Question of International Criminal Jurisdiction by Ricardo J. Alfaro, Special Rapporteur, op. cit.

[167] Appeals Chamber, *The Prosecutor v. Charles Ghankay Taylor*, Decision on Immunity from Jurisdiction, Case No. SCSL-2003-01-I, 31 May 2004.

international obligations.[168] All these developments should be seen as supplementing and not supplanting the national criminal jurisdiction; indeed, the Rome Statute is complementary to national jurisdictions.[169]

2. Consideration of the Nürnberg Principles by the Commission

74. In addition to the establishment of international criminal jurisdiction, efforts have also been made to address the very issue that partly prompted the movement towards ensuring individual criminal responsibility, that is to say whether the sovereign, head of State or civilian war leaders would escape individual criminal responsibility by virtue of their official position, thus substantively addressing any lingering question relating to immunity once a person was brought before an international jurisdiction.

---

[168] In resolution 3074 (XXVIII) of 3 December 1973 on Principles of international cooperation in the detection, arrest, extradition and punishment of persons guilty of war crimes and crimes against humanity, the General Assembly, taking into account the special need for international action in order to ensure the prosecution and punishment of persons guilty of war crimes and crimes against humanity, proclaimed the following principles of international cooperation in the detection, arrest, extradition and punishment of persons guilty of war crimes and crimes against humanity:

> "1. War crimes and crimes against humanity, wherever they are committed, shall be subject to investigation and the persons against whom there is evidence that they have committed such crimes shall be subject to tracing, arrest, trial and, if found guilty, to punishment.
>
> "2. Every State has the right to try its own nationals for war crimes or crimes against humanity.
>
> "3. States shall co-operate with each other on a bilateral and multilateral basis with a view to halting and preventing war crimes and crimes against humanity, and shall take the domestic and international measures necessary for that purpose.
>
> "4. States shall assist each other in detecting, arresting and bringing to trial persons suspected of having committed such crimes and, if they are found guilty, in punishing them.
>
> "5. Persons against whom there is evidence that they have committed war crimes and crimes against humanity shall be subject to trial and, if found guilty, to punishment, as a general rule in the countries in which they committed those crimes. In that connection, States shall co-operate on questions of extraditing such persons.
>
> "6. States shall co-operate with each other in the collection of information and evidence which would help to bring to trial the persons indicated in paragraph 5 above and shall exchange such information.
>
> "7. In accordance with article 1 of the Declaration on Territorial Asylum of 14 December 1967, States shall not grant asylum to any person with respect to whom there are serious reasons for considering that he has committed a crime against peace, a war crime or a crime against humanity.
>
> "8. States shall not take any legislative or other measures which may be prejudicial to the international obligations they have assumed in regard to the detection, arrest, extradition and punishment of persons guilty of war crimes and crimes against humanity.
>
> "9. In co-operating with a view to the detection, arrest and extradition of persons against whom there is evidence that they have committed war crimes and crimes against humanity and, if found guilty, their punishment, States shall act in conformity with the provisions of the Charter of the United Nations and of the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations."

[169] Preamble and art. 1 of the Rome Statute of the International Criminal Court.

75. When the Commission was elaborating the Nürnberg Principles, it had a discussion on the scope of its mandate to "formulate the principles of international law recognized in the Charter of the Nürnberg Tribunal and in the judgment of the Tribunal" as reflected in General Assembly resolution 177 (II). The issue was whether or not the Commission should ascertain the extent to which the principles contained in the Charter and judgment constituted principles of international law. The Commission concluded that the Nürnberg Principles had been affirmed by the General Assembly in resolution 95 (I). Accordingly, its task was not to express any appreciation of these principles as principles of international law but merely to formulate them, focusing more on the substantive elements — especially those embodied in articles 6, 7 and 8 — than the procedural ones.[170]

Principle III as adopted was based on article 7 of the Charter of the Nürnberg Tribunal.[171] In accordance with the Charter and the judgment, the fact that an

---

[170] *Yearbook … 1949*, vol. I, summary record of the 17th meeting, 9 May 1949, para. 35. However, Scelle, ibid., summary record of the 28th meeting, 26 May 1949, preferred the formulation of general principles of international law underlying the Charter and judgment. In his view, the Nürnberg Tribunal and the judgment confirmed first that the individual was subject to international law, including international penal law, and was punishable for any violation; and that secondly it rejected the old theory which exempted rulers or officials from individual responsibility for any act performed on behalf of the State. The office of head of the State, ruler or civil servant did not confer any immunity in penal matters nor mitigate responsibility. Scelle proposed the following draft, which the Commission rejected basically on the basis of a narrower construction of the mandate of the General Assembly: "The principles of international law recognized in the Charter of the Nürnberg Tribunal and in the judgment of the Tribunal are as follows, ibid.:

> "1. The individual is subject to international law, including international penal law.
> "2. The office of head of State, ruler or civil servant, does not confer any immunity in penal matters nor mitigate responsibility.
> "3. This subjective criminal responsibility of heads of States, rulers and agents is distinct from the objective responsibility of the State, which may become a subsidiary issue.
> "4. International law, including international penal law, has precedence over municipal law. It follows that rulers and agents of State are directly responsible for their international crimes and offences whether or not these are offences under the domestic penal law of their countries. Consequently, any person who commits a crime against international law, either of commission or of omission, is responsible therefor and liable to punishment.
> "5. Superior orders do not constitute a complete defence, but only a mitigating circumstance when justice so requires.
> "6. A court of international jurisdiction appears particularly suitable to try international crimes and offences, especially those committed by heads of State, rulers or high civil servants.
> "7. In the present state of international law such a court is not necessarily bound by the principle that offences and penalties are not retroactive; this presupposes the preparation and drafting of an international penal code.
> "8. In conformity with the Nurnberg Charter and Judgment the following are already now international crimes:
>
> Crimes against peace;
> War crimes;
> Crimes against humanity.
>
> "9. Crimes against peace are: …".

[171] See also art. II 4 (a) of the Control Council No. 10, promulgated to give effect to the terms of the Moscow Declaration 30 October 1943 and the London Agreement of 8 August 1945, and the Charter issued pursuant thereto and in order to establish a uniform legal basis in Germany for the prosecution of war criminals and other similar offenders, other than those dealt with by the International Military Tribunal:

individual acted as Head of State or responsible government official did not relieve him of international responsibility. "He who violates the laws of war cannot obtain immunity while acting in pursuance of the authority of the State if the State in authorizing action moves outside its competence under international law."[172]

76. The Commission did not retain, in the formulation of Principle III, the last phrase of article 7 of the Charter concerning "mitigating punishment". The Commission was of the view that the question was a matter for the competent Court to decide.[173]

3. Consideration of the Draft Code of Crimes against the Peace and Security of Mankind by the Commission

77. Following its initial consideration between 1949 and 1954,[174] the Commission resumed work in 1982 on the draft Code of Crimes against the Peace and Security of Mankind, pursuant to a request by the General Assembly.[175] At its forty-third session (1991), the Commission adopted on first reading the draft Code of Crimes against the Peace and Security of Mankind, including a draft article 13,[176] which read as follows:

"Article 13 (Official position and responsibility)

"The official position of any person, whether as Head of State or as a responsible official in a Government Department, does not free him from responsibility for a crime or entitle him to mitigation of punishment."

Art. 6 of the Charter of the International Military Tribunal for the Far East was varied although the principle is the same:

"Neither the official position, at any time, of an accused, nor the fact that an accused acted pursuant to order of his government or of a superior shall, of itself, be sufficient to free such accused from responsibility for any crime with which he is charged, but such circumstances may be considered in mitigation of punishment if the Tribunal determines that justice so requires."

The formulation has been replicated in other instruments, see, for example, art. 7 (2) of the Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 (document S/25274, adopted on 25 May 1993, pursuant to Security Council resolution 827 (1993), as amended by subsequent resolutions):

"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."

A similar provision is contained in art. 6 (2) of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens responsible for genocide and other such violations committed in the territory of neighbouring States, between 1 January 1994 and 31 December 1994.

[172] *Yearbook … 1950*, vol. II, document A/136, para. 103.

[173] Ibid., para. 104.

[174] The text that was adopted in 1954 contained the following text:

"*Article 3*

"The fact that a person acted as Head of State or as responsible government official does not relieve him of responsibility for committing any of the offences defined in this Code".

Yearbook ... 1954, vol. II. For commentaries, see ibid., *1951*, vol. II, para. 59 ff.

[175] General Assembly resolution 36/106 of 10 December 1981.

[176] Twelfth report, by Doudou Thiam, Special Rapporteur, document A/CN.4/460 and Corr.1, *Yearbook ... 1994*, vol. II (1).

> The official position of an individual who commits a crime against the peace and security of mankind, and particularly the fact that he acts as head of State or Government, does not relieve him of criminal responsibility."

The draft article was modeled on Principle III of the Nürnberg Principles. However, the text was drafted in the present tense, since it addressed many situations likely to arise in the future. By asserting (a) that there would be "no immunity from the application of the code due to the position of the accused"; and (b) that "a plea by the accused that he had acted in the performance of his official functions would not exonerate him from criminal responsibility, the Code was pierc[ing] the veil of the State and prosecut[ing] those who were materially responsible for crimes committed on behalf of the State as an abstract entity".[177] The initial phrase "the fact that he is a head of State or Government", was changed to "the fact that he acts as head of State or Government", in order to underline that the code focused on the time of commission of a crime.[178]

78. The draft article on first reading did not give rise to any objections by Governments. However, Costa Rica[179] stressed that there was need to take account of the various cases in which such officials can be prosecuted, rather than leaving the draft article as a rule in principle which, as such, could be inapplicable. Along similar lines, the United Kingdom pointed to the need to address the question of possible immunity of such officials from judicial process.[180] On the other hand, the Nordic countries observed that it must be presumed that even heads of State cannot be absolved of international responsibility for their acts if these acts constitute a crime against the peace and security of mankind; the article must apply even if the constitution of a particular State provided otherwise.[181] Poland considered the draft article to be "a serious but logical and reasonable limitation to the full immunity of heads of State. Such immunity cannot be a measure which would allow them to be over and outside criminal responsibility for crimes against the peace and security of mankind".[182]

79. The Special Rapporteur favoured the retention of the draft article as formulated on first reading; it was difficult to provide in detail for the various cases in which heads of State or Government should be prosecuted. The important aspect was to stress the principle that whenever a head of State or Government commits a crime against the peace and security of mankind, he should be prosecuted. Thus, the article was designed to draw attention to the fact that the official position of an individual who committed a crime under the code could not relieve him of criminal

---

[177] Statement of the Chairman of the Drafting Committee, Christian Tomuschat, 2084th meeting (A/CN.4/SR.2084), *Yearbook ... 1988*, vol. I, para. 72.

[178] Ibid., paras. 71 and 72.

[179] Document A/CN.4/448, *Yearbook ... 1993*, vol. II (Part One), Costa Rica, para. 39.

[180] Ibid., United Kingdom, para. 17: "It is obviously important for the effective implementation of the Code that officials, including heads of State or Government, are not relieved of criminal responsibility by virtue of their official position. However, the Commission has failed to address here, and in article 9, the possible immunity of such officials from judicial process. The Commission should consider the immunity from jurisdiction to which officials may be entitled under international law, and to consider the relationship of this draft with existing rules on the subject."

[181] Ibid., Nordic countries, para. 23.

[182] Ibid., Poland, para. 37.

responsibility. Even in cases where the individual had the highest official position, such as head of State or Government, he would remain criminally responsible.[183]

80. This is a view that the Drafting Committee accepted, noting that the issue of the possible immunity of officials, including heads of State or Government, from judicial process was a matter of implementation and should not be dealt with in the part of the Code concerning general principles. Procedural concerns should not affect the principle that, whenever a head of State or Government committed a crime against the peace and security of mankind, he should be prosecuted.[184]

81. Subsequently, the Drafting Committee introduced two changes. The words "and particularly the fact that he acts" were placed by "even if he acted" in order to emphasize that even if, under other circumstances, an individual would be entitled to immunity by virtue of his high position in the Government, that would not absolve him of criminal responsibility under the Code. Secondly, there was a substantive addition of the words "or mitigate punishment" at the end of the article, in order to make the article clearer and to avoid misunderstanding.[185] The placement of draft article 13 was changed to draft article 7, reading as follows:

> "*Article 7. Official position and responsibility*
>
> "The official position of an individual who commits a crime against the peace and security of mankind, even if he acted as head of State or Government, does not relieve him of criminal responsibility or mitigate punishment."

82. The Commission asserted that the absence of any procedural immunity with respect to prosecution or punishment in appropriate judicial proceedings was an essential corollary of the absence of any substantive immunity or defence.[186] It would be paradoxical to prevent an individual from invoking his official position to avoid responsibility for a crime only to permit him to invoke this same consideration to avoid the consequences of this responsibility.[187]

83. However, by not addressing on second reading the concerns raised by some Governments, it would seem that the provision fell short of substantively addressing issues concerning removal of procedural immunity from domestic judicial process.[188]

---

[183] *Yearbook ... 1994*, document A/CN.4/460, vol. II (1), paras. 133-134.

[184] Summary record of the 2408th meeting (A/CN.4/SR.2408) *Yearbook ... 1995*, vol. I, para. 36.

[185] Summary record of the 2439th meeting (A/CN.4/SR.2439) *Yearbook ... 1996*, vol. I, para. 16.

[186] The Commission noted that judicial proceedings before an international criminal court would be the quintessential example of appropriate judicial proceedings in which an individual could not invoke any substantive or procedural immunity based on his official position to avoid prosecution and punishment, *Yearbook ... 1996*, vol. II (Part Two), footnote 69.

[187] Ibid., para. (6) of the commentary to draft art. 7.

[188] In its resolution 51/160 of 16 December 1996, the General Assembly appreciated the completion of the final draft articles on the draft Code of Crimes against the Peace and Security of Mankind, and drew the attention of the States participating in the Preparatory Committee on the Establishment of an International Criminal Court to the relevance of the draft Code to their work.

4. Rome Statute of the International Criminal Court

84. Article 27(2) of the Rome Statute of the International Criminal Court goes some way to addressing procedural immunity from domestic judicial process in the following terms:

> "Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person."[189]

85. The possibility of the Statute containing general principles of criminal law was acknowledged as early as 1995 in the work of the Ad Hoc Committee on the Establishment of an International Criminal Court[190] when it developed guidelines of items to be discussed, including the irrelevance of official position. In particular, the opinion was expressed that further consideration of the question of diplomatic or other immunity from arrest and other procedural measures taken by or on behalf of the Court,[191] would be useful, and subsequently, in the context of the Preparatory Committee on the establishment of an International Criminal Court, a number of proposals were developed to deal with the issue and the final version was a combination of these proposals.[192] Also flagged for discussion at almost the same

---

[189] Art. 27 (1) provides:

> "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 reduction of sentence."

See also Section 15 of the UNTAET Regulation No. 2000/15 of 16 June 2000 on the establishment of Panels with the exclusive jurisdiction over serious criminal offences:

> "15.1 The present regulation 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 the present regulation, nor shall it, in and of itself, constitute a ground for reduction of sentence.
>
> "15.2 Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the panels from exercising its jurisdiction over such a person."

[190] *Official Records of the General Assembly, Fiftieth Session, Supplement No. 22* (A/50/22), annex II, B.1. See also the Draft Statute for an International Criminal Court (Siracusa Draft) prepared by a Committee of Experts, organized by the International Association of Penal Law, the International Institute of Higher Studies in Criminal Sciences and the Max Planck Institute for Foreign and International Criminal Law, Siracusa/Freiburg/Chicago, 31 July 1995.

[191] Ibid., *Fifty-first Session, Supplement No. 22* (A/51/22), vol. I, para. 193.

[192] Summary of the Proceedings of the Preparatory Committee (A/AC.249/1), 7 May 1996, p. 77. There was a proposal by Austria that read as follows:

> "*Immunity*
>
> "In the course of investigations or procedures performed by, or at the request of the court, no person may make a plea of immunity from jurisdiction irrespective of whether on the basis of international or national law."

Subsequently, following discussions in the Preparatory Committee, proposals were made that read as follows:

"*Proposal 1*.

> "[1. This Statute shall be applied to all persons without any discrimination whatsoever.]The official position of a person who commits a crime under this Statute, in particular whether the person acts as Head of State or of Government or as a responsible government official, shall not relieve that person of criminal responsibility nor mitigate punishment.

time, but an issue that was only resolved at the Rome Conference in the form of article 98,[193] was the need to consider the relationship between the obligations of States Parties to the Statute to cooperate with the Court and their other existing obligations, such as those arising from bilateral extradition treaties and the Vienna Convention on Diplomatic Relations.[194] In particular, it was recognized that there was need for a further discussion of paragraph 2 in connection with procedure, as well as international judicial cooperation.[195] Article 98 of the Rome Statute does not

---

"2. *Immunity*

"In the course of investigations or procedures performed by, or at the request of the court, no person may make a plea of immunity from jurisdiction irrespective of whether on the basis of international or national law."

"*Proposal 2*

"1. The official capacity of the accused, either as Head of State or of Government or as a member of government or parliament, or as an elected representative, or as an agent of the State shall in no case exempt him from his criminal responsibility nor shall it constitute a ground for reduction of the sentence.

"2. The special procedural rules, the immunities and the protection attached to the official capacity of the accused and established by internal law or by international conventions or treaties may not be used as a defence before the Court."

A/AC.249/CRP.13 and A/AC.249/CRP.9; see also Report of the Preparatory Committee, vol. II, *Official Records of the General Assembly, Fifty-first Session, Supplement No. 22 A* (A/51/22, vol. II).

Per Saland, who coordinated the part relating to general principles of the Rome Statute, notes that this principle was "uncontested throughout the discussions, and it was relatively easy to agree on its formulation". Mexico had some objections concerning the language in para. 2 of art. 27, but these objections were withdrawn. Spain also had some problems. See Per Saland, "International Criminal law Principles", in Roy S. Lee (ed.), *The International Criminal Court: The Making of the Rome Statute, Issues, Negotiations, Results* (The Hague, London, Boston, Kluwer Law International, 1999), p. 202.

[193] Article 98 of the Statute of the International Crimimal Court:

"Cooperation with respect to waiver of immunity and consent to surrender

"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."

[194] Proposal submitted by Singapore, A/AC.249/WP.40. See also Kimberly Prost and Angelika Schlunck, "Article 98", in Otto Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court* (Baden-Baden, Germany, Nomos (1999), pp. 1131-1133.

[195] See A/AC.249/1997/L.5, art. B.e, footnote 14.

"1. This Statute shall be applied to all persons without any discrimination whatsoever: official capacity, either as Head of State or of Government or as a member of Government or parliament, or as an elected representative, or as a Government official, shall in no case exempt a person from his criminal responsibility under this Statute, nor shall it [per se] constitute a ground for reduction of the sentence.

"2. The immunities or special procedural rules attached to the official capacity of a person, whether under national or international law, may not be relied upon to prevent the Court from exercising its jurisdiction in relation to that person."

See also art. 18 [B.e], Report of the Inter-sessional meeting from 19 to 30 January 1998, in Zutphen, The Netherlands, A/AC.249/1998/L.13. At that time only discussion of para. 2 in

accord immunity from prosecution to individuals that the Court may seek to prosecute.[196] It places an obligation on the Court not to put a State in a situation of having to violate an international obligation relating to immunity.[197] While paragraph 1 of article 27 of the Rome Statute would seem to restate customary law on the subject,[198] paragraph 2 primarily establishes a conventional rule.

86. National legislation implementing the Rome Statute on matters concerning immunity has taken a variety of forms, and this may not be conclusive of any particular emerging trend.[199] The first set of legislation stresses consultations between the implementing authority and the International Criminal Court.[200] The

---

connection with judicial cooperation remained. For commentary on art. 27 of the Rome Statute, see Otto Triffterer, "Article 27, Irrelevance of official position", in Otto Triffterer (ed.), *Commentary on the Rome Statute* ..., op. cit., pp. 501-514. See also Paola Gaeta, "Official Capacity and Immunities" in Antonio Cassese, Paola Gaeta and others (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, vol. I (New York and Oxford, Oxford University Press, 2002), pp. 975-1001.

196 Prost and Schlunck, op. cit., p. 1132.

197 Ibid., p. 1131.

198 Gaeta, op. cit. (2002), p. 990.

199 See database established by the International Criminal Court on national legislation at: http://www.icc-cpi.int/legaltools/.

200 See, for example, Section 12 of the International Criminal Court Act 2002, No. 41, 2002 of Australia:

> "… (2) If, after the consultation, the Attorney-General is satisfied that the execution of the request would not conflict with any of those obligations, the Attorney-General must sign a certificate stating that the execution of the request does not conflict with any of those obligations.
>
> "(3) A certificate signed under subsection (2) is conclusive evidence of the matters stated in the certificate.
>
> "(4) If, after the consultation, the Attorney-General is not satisfied as mentioned in subsection (2), the Attorney-General must postpone the execution of the request unless and until the foreign country has made the necessary waiver or given the necessary consent."

Under article 5 of the Law of Georgia on Cooperation between the International Criminal Court and Georgia, the Responsible Agency shall have the authority to consult with the International Court on matters related to the request as prescribed by the Statute and consultation is obligatory if the execution of the request: …

> "d) violates domestic or diplomatic immunity."

And under article 13:

> "If the Court request is related to conduct of the criminal prosecution against persons who are granted immunity under Georgian legislation, the Responsible Agency notifies the appropriate state agency on the existence of the grounds for beginning criminal proceeding in relation to the given persons and facilitates the actions related to the immunity according to the Constitution and other legislative acts of Georgia."

The Swiss Federal Law on Cooperation with the International Criminal Court of 22 June 2001 provides in article 4 that the Central Authority shall conduct consultations as indicated in article 97 of the Statute, in particular when the execution of a request: … (d) could violate State or diplomatic immunity (art. 98 in connection with art. 27 of the Statute). Moreover, article 6 states that on application by the Federal Department of Justice and Police (Department), the Federal Council shall decide on questions of immunity relating to article 98 in conjunction with article 27 of the Statute which arise in the course of the execution of requests and, where this article applies, the Department may order arrest or other preventive measures.

Under Law of 20 October 2004 on Cooperation with the International Criminal Court and other International Tribunals of Liechtenstein, matters arising shall be resolved through consultations with the International Criminal Court, in particular where the execution of a request from the

second excludes the application of immunities in respect of prosecution of crimes referred to in article 5 of the Rome Statute.[201] The third bars prosecution of

---

International Criminal Court would:

"(c) violate the State immunity or diplomatic immunity of a person or property of another State (article 98(1) of the Rome Statute);

"(2) During the consultations, consideration shall be given to executing the request in other ways or under specific conditions.

"(3) If a matter cannot be resolved through consultations, the International Criminal Court shall be requested to amend its request. If such an amendment by the International Criminal Court cannot be considered, the request shall be rejected.

"(4) Any such refusal shall be decided on by the Government. The International Criminal Court shall be informed of any refusal of a request and the grounds." (Art. 10)

Section 23 of the International Criminal Court Act 2001 of the United Kingdom provides:

"(1) 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 under this Part in relation to that person.

"(2) Where —

"(a) state or diplomatic immunity attaches to a person by reason of a connection with a state other than a state party to the ICC Statute, and

"(b) waiver of that immunity is obtained by the ICC in relation to a request for that person's surrender,

"the waiver shall be treated as extending to proceedings under this Part in connection with that request.

"(3) A certificate by the Secretary of State —

"(a) that a state is or is not a party to the ICC Statute, or

"(b) that there has been such a waiver as is mentioned in subsection (2), is conclusive evidence of that fact for the purposes of this Part.

"(4) The Secretary of State may in any particular case, after consultation with the ICC and the state concerned, direct that proceedings (or further proceedings) under this Part which, but for subsection (1) or (2), would be prevented by state or diplomatic immunity attaching to a person shall not be taken against that person.

"…

"(6) In this section 'state or diplomatic immunity' means any privilege or immunity attaching to a person, by reason of the status of that person or another as head of state, or as representative, official or agent of a state, under —

"(a) the Diplomatic Privileges Act 1964 (c. 81), the Consular Relations Act 1968 (c. 18), the International Organisations Act 1968 (c. 48) or the State Immunity Act 1978 (c. 33),

"(b) any other legislative provision made for the purpose of implementing an international obligation, or

"(c) any rule of law derived from customary international law."

[201] Section 4, as read with section 15, of the Diplomatic Immunities and Privileges Act 37 of 2001 of South Africa provides that a head of State is immune from the criminal and civil jurisdiction of the courts of the Republic, and enjoys such privileges as heads of State enjoy in accordance with the rules of customary international law and makes it an offence for any person who willfully or without the exercise of reasonable care issues, obtains or executes any legal process against a person who enjoys immunity under the Act. However, section 4 of Act No. 27 of 2002 on the Implementation of the Rome Statute of the International Criminal Court Act, 2002 of South Africa, which, inter alia, makes provision for the crime of genocide, crimes against humanity and war crimes; for the prosecution in South African courts of persons accused of having committed the said crimes in South Africa and beyond the borders of South Africa in certain circumstances; and provides for the arrest of persons accused of having committed the said crimes and their surrender to the said Court in certain circumstances, states:

"(1) Despite anything to the contrary in any other law of the Republic, any person who commits a crime, is guilty of an offence and is liable on conviction to a fine or imprisonment, including imprisonment for life, or such imprisonment without the option of a fine or both a fine and such imprisonment.

individuals that enjoy immunities so long as they remain in office[202] or bars such prosecution without any temporal limitation unless there is an explicit waiver.[203]

87. Other agreements creating criminal tribunals have addressed questions of immunity. The hybrid nature of such agreements may have a bearing on the way in which immunities may be invoked before those tribunals, although, in the *Taylor* case, the Appeals Chamber resolved the matter by considering the Tribunal to be international in character thereby making the plea of immunity inapplicable. It has also been determined by the Supreme Court of Sierra Leone that, while there would be entitlement to immunity from process before the domestic courts of the State to which an official belongs or before the courts of a third State (except in case of waiver), no a priori entitlement to claim immunity before an international court, particularly from criminal process involving international crimes, would exist.[204]

"(2) Despite any other law to the contrary, including customary and conventional international law, the fact that a person —

"(a) is or was a head of State or government, a member of a government or parliament, an elected representative or a government official: or

"(b) being a member of a security service or armed force, was under a legal obligation to obey a manifestly unlawful order of a government or superior, is neither — (i) a defence to a crime; nor (ii) a ground for any possible reduction of sentence once a person has been convicted of a crime.

Art. 6 (3) of the Law on the Application of the Statute of the International Criminal Court and the Prosecution of Criminal Acts against the International law on war and humanitarian law of Croatia of 4 November 2003 provides:

"The regulations on immunities and privileges foreseen under the law shall not apply in the procedure for criminal acts as per Article 1 of this Law."

[202] Section 16 of the International Crimes Act 270 of 19 June 2003 of the Netherlands containing rules concerning serious violations of international humanitarian law (International Crimes Act) provides:

"Criminal prosecution for one of the crimes referred to in this Act is excluded with respect to:

"(a) foreign heads of state, heads of government and ministers of foreign affairs, as long as they are in office, and other persons in so far as their immunity is recognised under customary international law;

"(b) persons who have immunity under any Convention applicable within the Kingdom of the Netherlands."

[203] The Polish Law relating to the Procedure in criminal cases in international relations (PART XIII) provides, in article 578:

"The jurisdiction of Polish criminal courts shall not extend to:

"(1) the heads of diplomatic missions of foreign states accredited in the Republic of Poland,

"(2) persons on the diplomatic staff of such missions,

"(3) persons on the administrative and technical staff of such missions,

"(4) members of the families of the persons listed in subsections (1) through (3), if they are members of their households, and

"(5) other persons granted diplomatic immunity pursuant to statutes, agreements, or universally acknowledged international custom."

See also the Netherlands legislation, ibid.

[204] In *Issa Hassan Sesay (aka Issa Sesay) and Allieu Kondewa and Moinina Fofana and the President of the Special Court, the Registrar of the Special Court and the Prosecutor of the Special Court and the Attorney General and Minister of Justice*, S. C NO. 1/2003, the Supreme Court of Sierra Leone stressed the importance of the distinction that ought to be made between immunity from suit under domestic law on the one hand, and under international law on the other hand, available at http://news.sl/drwebsite/uploads/specialcourtjudgement_sc1_2003.htm.

III. Part Two. Scope and implementation of immunity of State officials from foreign criminal jurisdiction

88. In considering matters relating the scope of immunity of State officials from foreign criminal jurisdiction, three main questions are to be addressed, namely: (a) which State officials enjoy immunity from foreign criminal jurisdiction; (b) which acts are covered by such immunity; and (c) whether international law recognizes any exceptions or limitations to that immunity (in particular, in the case of international crimes). These questions appear to have received different answers depending on the type of immunity considered. Following a construction that seems to be widely accepted by States,[205] judicial organs[206] and scholars,[207] issues

---

For text of provisions, see, for example, art. 6 of the Statute of the Special Court for Sierra Leone, established by an Agreement between the United Nations and the Government of Sierra Leone pursuant to Security Council resolution 1315 (2000) of 14 August 2000, which provides:

> "… 2. The official position of any accused persons, whether as Head of State or Government or as a responsible government official, shall not relieve such person of criminal responsibility nor mitigate punishment.
>
> "…
>
> "5. Individual criminal responsibility for the crimes referred to in article 5 shall be determined in accordance with the respective laws of Sierra Leone."

Art. 29 of the Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea adopted by the National Assembly on 2 January 2001 in the 5th Session of the 2nd Legislature, approved unreservedly by the Senate on 15 January 2001, in the 4th Session of the 1st Legislature, which seeks to bring to trial senior leaders of Democratic Kampuchea and those who were most responsible for the crimes and serious violations of Cambodian penal law, international humanitarian law and custom, and international conventions recognized by Cambodia, that were committed during the period from 17 April 1975 to 6 January 1979, provides:

> "The position or rank of any Suspect shall not relieve such person of criminal responsibility or mitigate punishment."

Art. 15 (c) of the Statute of the Iraqi Special Tribunal, issued on 10 December 2003, provides:

> "The official position of any accused person, whether as president, prime minister, member of the cabinet, chairman or a member of the Revolutionary Command Council, a member of the Arab Socialist Ba'ath Party Regional Command or Government (or an instrumentality of either) or as a responsible Iraqi Government official or member of the Ba'ath Party or in any other capacity, shall not relieve such person of criminal responsibility nor mitigate punishment. No person is entitled to any immunity with respect to any of the crimes stipulated in Articles 11 to 14 [relating to genocide, crimes against humanity, war crimes and violations of stipulated Iraqi laws.]"

[205] The distinction was recognized by both parties in the oral proceedings of the case concerning *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)* before the International Court of Justice: CR 2008/3, p. 15 (Condorelli, on behalf of Djibouti); CR 2008/5, p. 50 (Pellet, on behalf of France).

[206] The distinction is originally used in the context of diplomatic immunity, and is well established in the context of such immunity (see, e.g, Yoram Dinstein, "Diplomatic Immunity from Jurisdiction *Ratione Materiae*", *International and Comparative Law Quarterly*, vol. 15 (1966), pp. 76-89). See also, e.g., Germany, Federal Constitutional Court, *Former Syrian Ambassador to the German Democratic Republic*, Case No. 2 BvR 1516/96, reproduced in *ILR*, vol. 115, p. 606. For its use in the context of immunity of other State officials, see, for instance: European Court of Human Rights, *Al-Adsani v. United Kingdom*, Application No. 35763/97, Judgment, 21 November 2001, para. 65; Switzerland, Tribunal fédéral, *Ferdinand et Imelda Marcos c. Office fédéral de la police (recours de droit administratif)*, ATF 115 Ib 496, pp. 501-502 (reproduced in Lucius Caflisch, "La pratique suisse en matière de droit international public 1980", *Revue suisse de droit international et droit européen* (1991), pp. 535-536); *Pinochet*

concerning beneficiaries, covered acts and possible exceptions are often examined with reference to two distinct categories of immunity of State officials, namely immunity *ratione personae* and immunity *ratione materiae*.[208] The present Part adopts a structure reflecting this fundamental distinction.[209]

89. It should be clarified from the outset, however, that this distinction is used for purely descriptive purposes and without prejudice of the question of whether there is any difference in the rationale or nature of the immunities concerned. As for the rationale, most contemporary judicial decisions and scholarly studies tend to agree that immunities are not afforded to State officials for their personal benefit, but rather aim at "ensur[ing] the effective performance of their functions on behalf of their respective States".[210] This is the case not only for immunities *ratione materiae*, but also for immunities *ratione personae*.[211] It is apparent, however, that

---

(No. 3), p. 581 (in particular: Lord Browne-Wilkinson, ibid., p. 592; Lord Goff of Chieveley, p. 598; Lord Hope of Craighead, p. 622; Lord Hutton, p. 629; and Lord Saville of Newdigate, p. 641, Lord Milletyt, pp. 644-645)). It should be noted, however, that, in its judgment in the *Arrest Warrant* case, the International Court of Justice examined the issue of immunity of an incumbent minister for foreign affairs and compared it with that of a former minister without referring to this classification (for a criticism of the reasoning of the Court under this aspect, see Antonio Cassese, "When May Senior State Officials be Tried for International Crimes? Some Comments on *The Congo v. Belgium* Case", European Journal of International Law, vol. 13 (2002), pp. 862-864).

207 This distinction was used by the Commission in para. (19) of the commentary to draft art. 2 of the Draft Articles on Jurisdictional Immunities of States and their Property (*Yearbook … 1991*, vol. II (Part Two), pp. 18-19). See also, among others: Cassese, "When May Senior State Officials …", op. cit., pp. 862-864; Vanessa Klingberg, "(Former) Heads of State before international(ized) criminal courts: the case of Charles Taylor before the Special Court for Sierra Leone", *German Yearbook of International Law*, vol. 46 (2003), p. 544; Andrew D. Mitchell, "Leave Your Hat On? Head of State Immunity and Pinochet", *Monash University Law Review*, vol. 25, 1999, pp. 230-231; Geoffrey Robertson, *Crimes against Humanity: The Struggle for Global Justice* (London, Allen Lane, The Penguin Press, 1999), p. 402. In the work of the Institut on immunities from jurisdiction and execution of heads of State and of Government in international law, the distinction was explicitly used by Sucharitkul (Institut, *Annuaire*, vol. 69 (2000-2001), p. 467), Verhoeven, ("Rapport provisoire", ibid., p. 488), Salmon (ibid., p. 563), Fox (ibid., p. 579) and Dinstein (ibid., p. 624); the distinction permeates however most of the debates.

208 Judicial decisions and the legal literature occasionally use a different terminology, immunity *ratione personae* being also referred to as "personal" or "absolute" immunity, and immunity *ratione materiae* being sometimes described as "functional" or "organic". However, the expressions used in the text seem to be the most generally adopted and, as further explained hereinafter, to describe better the criterion by which these two kinds of immunity should be distinguished.

209 The proposed structure seems to be the one that more accurately reflects the state of the debate on immunity of State officials in international law, and it fits therefore the purpose of the present study. It avoids, in particular, repetitions in the description of the acts covered and exceptions for different categories of State officials. Alternative approaches, however, could be envisaged in the work of codification (for instance, describing the scope of immunity for different categories of State officials: heads of State, heads of Government, ministers for foreign affairs, other high-ranking officials, other State officials).

210 *Arrest Warrant*, para. 53.

211 In this sense, it may be said that immunity *ratione personae* is granted to the beneficiary for "functional" purposes, very much in the same way as immunity *ratione materiae* (this militates against using the expression "functional immunity" to describe the latter). On the role that more traditional justifications of the immunity *ratione personae* of the head of State seem to continue to play in international law, see sect. A.1 (a) below.

the need to ensure the effective performance of State functions arises in different ways depending on the nature and importance of the attributions of the official concerned, and on whether the latter is exercising his functions or has left office: These combined factors seem to explain the different scope of the two types of immunity. Indeed, while the State official is in office, criminal proceedings conducted by a foreign jurisdiction may result in the arrest of the official, thus having the effect of directly hampering his ability to continue to perform his duties. The need to preserve this ability is particularly pressing for State officials of a high rank and who are vested with functions (notably of a diplomatic or representative character) which, by their nature, are performed abroad. With regard to the nature of the institution, the majority position seems to be that immunities *ratione personae* and *ratione materiae* share the same procedural nature.[212] The view has nonetheless been expressed that, while immunity *ratione personae* indeed relates to procedural law, immunity *ratione materiae* would rather be "a substantive defence",[213] in that the conduct of a State agent constituting an official act would not be attributable to him, but to the State.[214] It should be observed, however, that the latter principle has

---

[212] In other terms, both immunities *ratione personae* and *ratione materiae* constitute a bar to the exercise of jurisdiction by foreign criminal tribunals, and not a defence on the merits which would exclude the criminal responsibility of the State official concerned. The procedural character of the question of immunity has, for instance, been affirmed by the Appeals Chamber of the Special Court for Sierra Leone, *Prosecutor v. Charles Ghankay Taylor*, para. 27, or by Judges Higgins, Kooijmans and Buergenthal in their Joint separate opinion to the *Arrest Warrant* case, para. 74.

[213] This argument is made, in particular, by Gaetano Morelli, *Nozioni di diritto internazionale*, 7th edition (Padova, CEDAM, 1967), pp. 215-216; Cassese, "When May Senior State Officials …", op. cit., pp. 862-863.

[214] The latter proposition is found in the doctrine. See, e.g., Cassese, "When May Senior State Officials …", op. cit., p. 862 ("[Immunity *ratione materiae*] is grounded on the notion that a state official is not accountable to other states for acts that he accomplishes in his official capacity and that therefore must be attributed to the state."); Hans Kelsen, *Principles of International Law* (New York, Holt, Rinehart and Winston, 1952), pp. 358-359 ("Hence the principle applies not only in case a state as such is sued in a court of another state, but also in case an individual is the defendant or the accused and the civil or criminal delict for which the individual is prosecuted has the character of an act of state. Then the delict is to be imputed to the State not to the individual."); Gaeta, op. cit. (2002), p. 976; and Salvatore Zappalà, "Do Heads of State in Office Enjoy Immunity from Jurisdiction for International Crimes? The Ghaddafi Case Before the French Cour de Cassation", *European Journal of International Law*, vol. 12 (2001), p. 598 (who considers that this type of immunity covers acts performed in the exercise of an official capacity, as they are to be referred to the State itself). The same view was expressed by Lord Lloyd of Berwick, *Pinochet* (No. 1), p. 1328: "The former head of state enjoys continuing immunity in respect of governmental acts which he performed as head of state because in both cases the acts are attributed to the state itself." This approach may notably be based on the following precedents. In his *Droit des gens*, Emer de Vattel noted that "if a nation, or its chief, approves or ratifies the act of the individual, it then becomes a public concern, and the injured party is to consider the nation as the real author of the injury, of which the citizen was only the instrument" (Book II, chap. 6, § 74). This authority, among others, was invoked in the context of the *McLeod* case, where a British subject was arrested in the United States on a charge of murder and arson in connection with the destruction of the vessel *Caroline* by British subjects fighting against the Canadian rebellion of 1837. The British Government requested the liberation of McLeod on the account that the attack was a public act of persons in Her Majesty's Service obeying the order of their superior authorities and could not be made the ground of proceedings in the United States. The principle was accepted by the United States Government, but the question of a *nolle prosequi* was submitted to the Supreme Court of New York which, while considering the argument, decided to remand the accused to take trial in the ordinary

been criticized[215] or interpreted in a different manner.[216] In any event, it is also worth noting that the legal literature, irrespective of the position adopted on the question of the nature of these immunities, generally seems to conceive immunity

---

forms of law (*The People v. McLeod*, 1 Hill (NY) 377 (1841); the accused was later found not guilty). In reply to a note sent after the events (28 July 1842) by which the British Government requested assurances that "the principle which has never been denied in argument, that individuals acting under legitimate authority are not personally responsible for executing the orders of their Government" would be secured in the future, the United States Government acknowledged the said principle (for a description of the case, see R. Y. Jennings, "The *Caroline* and *McLeod* Cases", *American Journal of International Law*, vol. 32 (1938), pp. 82-99, esp. pp. 92-96). See also the statement of the United States Attorney-General in a civil suit against Collot, French Governor of Guadeloupe, in 1797 (reproduced in J. B. Moore, *A Digest of International Law*, vol. II (1906), pp. 23-24). In the context of the *Blaškić* case, the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia (Judge Cassese, Presiding) dismissed the possibility for the Tribunal to address subpoenas to State officials acting in their official capacity noting that "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: they enjoy so-called 'functional immunity'" (*Prosecutor v. Blaškić*, Subpoena decision, para. 38 (footnote omitted)). The Appeals Chamber further referred to the French Government's argument in the *Rainbow Warrior* case and the judgment of the Supreme Court of Israel in the *Eichmann* case (for a further examination of the *Blaškić* Judgment and the latter two cases, see sect. B of the present Part).

[215] See the opinion of Lord Hoffmann in the *Jones* case:

> "I do respectfully think that it is a little artificial to say that the acts of officials are 'not attributable to them personally' and that this usage can lead to confusion, especially in those cases in which some aspect of the immunity of the individual is withdrawn by treaty, as it is for criminal proceedings by the Torture Convention. It would be strange to say, for example, that the torture ordered by General Pinochet was attributable to him personally for the purposes of criminal liability but only to the State of Chile for the purposes of civil liability. It would be clearer to say that the Torture Convention withdrew the immunity against criminal prosecution but did not affect the immunity for civil liability. I would therefore prefer to say, as Leggatt LJ in *Propend Finance Pty Ltd v Sing* (1997) 111 ILR 611, 669, that state immunity affords individual employees or officers of a foreign state 'protection under the same cloak as protects the state itself'. But this is a difference in the form of expression and not the substance of the rule."

United Kingdom, House of Lords, *Jones* v. *Ministry of Interior Al-Mamlaka Al-Arabiya AS Saudiya (the Kingdom of Saudi Arabia), Mitchell and others* v. *Al-Dali and others and Ministry of Interior of Mamlaka Al-Arabiya AS Saudiya (the Kingdom of Saudi Arabia), Jones* v. *Ministry of Interior Al-Mamlaka Al-Arabiya AS Saudiya (the Kingdom of Saudi Arabia)* (hereinafter the *Jones* case), 14 June 2006, [2006] UKHL 26, para. 68.

For a recent critique of the formalistic language, see McGregor, op. cit., pp. 903-919.

[216] See Alain Pellet, on behalf of the French Republic, in the case concerning *Certain Questions of Mutual Assistance* (CR 2008/5, p. 51), quoted in sect. B of the present part.

ratione personae as an autonomous type,[217] while immunity *ratione materiae* is often linked to the doctrine of State immunity.[218]

90. As regards the beneficiaries, the two immunities differ in that immunity *ratione personae* is enjoyed only by a limited number of incumbent high-ranking officials, while immunity *ratione materiae* would seem to cover State officials in general[219] and to extend beyond the period in which the latter were exercising their functions. It follows, in particular, that a high-ranking official, such as the head of State, will be afforded a broad immunity *ratione personae* while in office,[220] but will continue to enjoy a more limited immunity *ratione materiae* once he has left power.[221] However, a number of questions arise. It is debated, for instance, whether

---

[217] In the words of the Commission, "historically speaking, immunities of sovereigns and ambassadors developed even prior to State immunities. They are in State practice regulated by different sets of principles of international law". The Commission however also noted that "the view has been expressed that, in strict theory, all jurisdictional immunities are traceable to the basic norm of State sovereignty" (para. (19) of the commentary to art. 2, in *Yearbook ... 1991*, vol. II (Part Two), p. 14, footnote 47).

[218] The identification of the immunity *ratione materiae* of officials with State immunity seems to be commonly upheld in the context of civil proceedings. See Part One for treatment of this matter in the work of the Commission concerning the 2004 United Nations Convention on Jurisdictional Immunities of States and their Property. As explained in the commentary to article 2: "Actions against such representatives or agents of a foreign Government in respect of their official acts are essentially proceedings against the State they represent. The foreign State, acting through its representatives, is immune *ratione materiae* … the immunity in question not only belongs to the State, but is also based on the sovereign nature or official character of the activities, being immunity *ratione materiae*" (para. (18) of the commentary to art. 2, in ibid., p. 18). In jurisprudence, see, for instance, United Kingdom, Jones, para. 10 (Lord Bingham of Cornhill, with reference to other cases by various jurisdictions), para. 30 (Lord Bingham of Cornhill) and para. 66 (Lord Hoffmann). In the United States, some tribunals have considered individuals as "instrumentalities" of foreign States under the 1976 Foreign Sovereign Immunities Act: *Kline v. Kaneko*, 685 F.Supp. 386 (S.D.N.Y.1988) (holding that the Mexican Secretary of Government can be sued in his official capacity and is entitled to FSIA protection); *Mueller v. Diggelman*, No. 82 Civ. 5513, 1983 WL 25419 (Southern District of New York, 13 May 1983) (considering that a Swiss court is an "organ" of state); *Rios v. Marshall*, 530 F.Supp. 351 (Southern District of New York, 1981) (holding that a foreign labor board is an "instrumentality" under FSIA, thus entitling board officials to protection).
The relationship between immunity *ratione materiae* of State officials and State immunity is also invoked with regard to criminal proceedings (see, for instance: Hazel Fox, "The Pinochet Case No. 3", *International and Comparative Law Quarterly*, vol. 48 (1999), pp. 695-696; Pasquale De Sena, "Immunity of State Organs and Defence of Superior Orders as an Obstacle to the Domestic Enforcement of International Human Rights", in Benedetto Conforti and Francesco Francioni (eds.), *Enforcing International Human Rights in Domestic Courts* (The Hague, Martinus Nijhoff Publishers, 1997), p. 371.

[219] On this issue, see sect. B. of the present part.

[220] As noted by Cassese, a high-ranking official would also be afforded, even while in office, immunity *ratione materiae* for acts performed in the exercise of official functions. In this sense, the two classes of immunity may be said to coexist and somewhat overlap (see Cassese, "When May Senior State Officials …", op. cit., p. 864; see also Dinstein, op. cit., p. 82). This coexistence, however, would not have any implication, except if it were to be considered that the two immunities differ in their nature, in which case immunity *ratione personae* would set a procedural bar on the exercise of jurisdiction by foreign criminal tribunals, while immunity *ratione materiae* would provide a substantive defence (on this theory, see footnotes 213 and 214 above and the corresponding text).

[221] For this reason, the expression "residual immunity" is sometimes used to refer to the immunity *ratione materiae* enjoyed after the term of office (see, e.g., Andrea Bianchi, "Immunity versus

immunity *ratione personae* would only cover heads of State or would extend to other high-ranking officials (the International Court of Justice was of the view that such immunity was enjoyed also by heads of government and ministers for foreign affairs, and other tribunals have extended the scope of that immunity even further to other high-ranking officials).

91. With respect to content, it should be recalled that immunity *ratione personae* has a broader material scope, in that it extends to any conduct of the State official concerned,[222] while immunity *ratione materiae* is limited to those acts performed in the discharge of official functions. In other words, the former immunity is accorded by reference to the status of the person concerned (*ratione personae*), while the latter is granted by reference to the characteristics of the conduct at issue (*ratione materiae*). The main issues arising in this context concern the definition of "official acts" covered by immunity *ratione materiae* and how these acts should be distinguished from conduct performed by the State official in a private capacity.

92. The question of possible exceptions has also received a different treatment depending on the kind of immunity examined. The main controversy in this regard concerns crimes under international law. The argument according to which such crimes would be excluded from immunity *ratione materiae* seems to be predominantly accepted (although the precise motivation and scope of this exception remains subject to different interpretations). On the contrary, the majority view (prominently held by the International Court of Justice in the *Arrest Warrant* case, as well as by national case law, but criticized by a number of scholars) is that the said exception would not apply in the case of immunity *ratione personae*.

93. These issues are examined in more detail below.

A. Immunity *ratione personae*

94. Immunity *ratione personae* is characterized by its broad material scope and is granted under international law to a limited number of officials, most notably the head of State, while in office. Although there exists a fair amount of State practice (including numerous national judicial decisions) on the issue with respect to civil suits, criminal proceedings where the question of immunity has been considered before domestic jurisdictions are infrequent. While judgments in civil proceedings are technically outside from the scope of the present topic, they may be of particular interest and address some issues that are relevant for the purposes of the present study. Accordingly, these cases are occasionally used as reference material. In any event, the question of immunity from criminal jurisdiction has been put on the forefront of the legal debate in recent times, particularly with the increase in the number of criminal charges pressed against incumbent heads of State and other high- ranking officials in relation to crimes under international law.

95. One may observe an upsurge in the number of directly relevant judicial pronouncements and related scholarly articles on the matter.[223] It is noteworthy that

---

Human Rights: The Pinochet Case", *European Journal of International Law*, vol. 10 (1999), p. 254, footnote 73).

[222] This is why immunity *ratione personae* is often qualified as being "absolute" or "total".

[223] It is obvious that the publicity surrounding cases that involved former high-ranking officials (most notably, the *Pinochet* case in Spain and the United Kingdom), which technically speaking

the issue of immunity *ratione personae* is at the core of the judgment rendered by the International Court of Justice in the *Arrest Warrant* case, concerning the dispute on the issue and international circulation by Belgium of an arrest warrant against the incumbent Minister for Foreign Affairs of the Democratic Republic of Congo on the counts of war crimes and crimes against humanity under Belgian law. Although the Court thereby made a clear pronouncement on the scope of the immunity enjoyed by a minister for foreign affairs, the debate surrounding immunity *ratione personae* appears to persist.

1. Individuals covered

96. The determination of the personal scope of immunity *ratione personae* entails essentially an identification of those categories of State officials that are covered by such immunity and justification of the latter. A number of related questions, mainly concerning the circumstances in which this immunity is granted, should also be addressed.

97. In the light of State practice and the legal literature, State officials that are candidates to the enjoyment of immunity *ratione personae* could be classified under three different categories: (a) the head of State; (b) the head of Government and minister for foreign affairs; and (c) other high-ranking officials. There appears to be no instance in which it has been alleged that State officials of a lower rank would enjoy this kind of immunity, except in very specific circumstances. Three cases in which lower officials enjoy such immunity have already been the subject of codification, namely that of diplomatic agents, who are covered by immunity from criminal jurisdiction of the receiving State, under article 31, paragraph 1, of the Vienna Convention on Diplomatic Relations, 1961; that of representatives of the sending State in a special mission and members of its diplomatic staff, who also enjoy immunity from criminal jurisdiction in the receiving State under article 31, paragraph 1, of the Convention on Special Missions, 1969; and that of the head of mission and the members of the diplomatic staff of a mission to an international organization of a universal character, under article 30 of the Vienna Convention on the Representation of States in Their Relations with International Organizations of a Universal Character, 1975.[224]

98. It should be emphasized, from the outset, that this immunity is restricted to the period in which the State official concerned is in office: its broad material scope is justified by the aim of protecting the holder and enabling him to carry out his official duties.[225] Once the individual has ceased to exercise his functions, he will

---

fall under the scope of immunity *ratione materiae*, has also triggered an increased interest on the issue of immunity *ratione personae*, inspiring judicial proceedings against incumbent officials and more careful treatment of immunity *ratione personae* in the legal literature.

[224] There are also bilateral consular agreements which provide that members of the diplomatic staff who are assigned consular functions shall continue to enjoy the rights, privileges and immunities afforded them by virtue of their diplomatic status, and which also provide that consular officers shall enjoy immunity from criminal, civil and administrative jurisdiction in the receiving State except in the case of civil actions; see for example, arts. 23 and 32 of the Consular Agreement between the Union of Soviet Socialist Republics and the People's Republic of China, United Nations, *Treaty Series*, vol. 1477, p. 210.

[225] This type of immunity is similar to the one granted to the head of a diplomatic mission when he is function and which is granted pursuant to the principle *ne impediatur legatio* (see Fox, "The Pinochet Case No. 3", op. cit., pp. 494-496).

only be covered by the more limited immunity *ratione materiae*. The strict temporal scope of immunity *ratione personae* is unanimously accepted in doctrine[226] and is confirmed by national judicial decisions.[227] A good example of this principle is given by the position of the Spanish Audiencia Nacional, which, in respective criminal proceedings for similar charges, denied the immunity of Augusto Pinochet, as a former head of State of Chile, but recognized such immunity in a claim against Fidel Castro, as the sitting head of State of Cuba. [228]

(a) Heads of State

99. The recognition of immunity *ratione personae* to incumbent heads of State in foreign criminal jurisdiction appears to be unchallenged. The United Nations Convention on Jurisdictional Immunities of States and their Property specifies, at article 3, paragraph 2, that it "is without prejudice to privileges and immunities accorded under international law to heads of State *ratione personae*".[229] In the *Arrest Warrant* case, the International Court of Justice stated that "that in

---

[226] See, inter alia: Cassese, "When May Senior State Officials …", op. cit., p. 864; Michel Cosnard, "Quelques observations sur les décisions de la Chambre des Lordes du 25 novembre 1998 et du 24 mars 1999 dans l'affaire Pinochet", *Revue générale de droit international public*, vol. 104 (1999), p. 314; Michael A. Tunks, "Diplomats or Defendants? Defining the Future of Head-of-State Immunity", *Duke Law Journal*, vol. 52 (2002), p. 663; Zappalà, op. cit., p. 600.

[227] See the various judicial instances, particularly in civil proceedings, in which a former head of State was denied immunity for private acts (and therefore was not granted immunity *ratione personae*), e.g.: Cour d'appel de Paris, *Mellerio c. Isabelle de Bourbon, ex-Reine d'Espagne*, 3 June 1872 (on the purchase of jewels for a personal use); Tribunal civil de la Seine, *Seyyid Ali Ben Hammond, Prince Rashid c. Wiercinski*, 25 July 1916 (on the payment of messages by the former Sultan of Zanzibar); Cour d'appel de Paris, *Ex-roi d'Egypte Farouk c. s.a.r.l. Christian Dior*, 11 April 1957, reproduced in *Journal du droit international* (1957), pp. 716-718; Tribunal de Grande Instance de la Seine, *Société Jean Dessès c. Prince Farouk et Dame Sadek*, 12 June 1963, reproduced in *Clunet*, 1964, p. 285; English version in *International Law Reports*, vol. 33, pp. 37-38 (on the purchase of clothes by the former King of Egypt to his wife); *United States of America v. Noriega* (1990) 746 F.Supp. 1506 (on drug trafficking); and *In re Estate of Ferdinand Marcos*, 25 F.3d 1467, 1471 (9th Cir. 1994).

[228] For the *Pinochet* case, see the request for extradition delivered on 3 November 1998 (*Auto de solicitud de extradición de Pinochet*, Madrid, 3 November 1998, fourth para., 5 (d), containing a clear distinction between the immunities granted to serving and former heads of State (reproduced in http://www.ua.es/up/pinochet/documentos/auto-03-11-98/auto24.htm). For the *Castro* case, see Audiencia Nacional *Auto del Pleno de la Sala de lo Penal*, 4 March 1999 (the tribunal considered that the immunity of the foreign head of State is based, not on the Vienna Conventions on Diplomatic Relations and Consular Relations, but on bilateral treaties and international customary law).

[229] In para. (6) of its commentary to the corresponding draft article, the Commission stated the following:

> "Paragraph 2 is designed to include an express reference to the immunities extended under existing international law to foreign sovereigns or other heads of State in their private capacities, *ratione personae*. Jurisdictional immunities of States in respect of sovereigns or other heads of State acting as State organs or State representatives are dealt with under article 2. Article 2, paragraph 1 (b) (i) and (v) covers the various organs of the Government of a State and State representatives, including heads of State, irrespective of the systems of government. The reservation of article 3, paragraph 2, therefore refers exclusively to the private acts or personal immunities and privileges recognized and accorded in the practice of States, without any suggestion that their status should in any way be affected by the present articles. The existing customary law is left untouched." (*Yearbook … 1991*, vol. II (Part Two), p. 22 (footnote omitted)).

international law it is firmly established that ... certain holders of high-ranking office in a State, such as the Head of State ... enjoy immunities from jurisdiction in other States, both civil and criminal".[230] The immunity *ratione personae* of a head of State was recognized by both parties in the *Djibouti v. France* case before the International Court of Justice.[231] In its recent judgment in this case, the Court reaffirmed the "full immunity from criminal jurisdiction and inviolability" of a head of State.[232] Moreover, this immunity is sometimes expressly accorded under national legislation, as for example in Section 20 of the United Kingdom State Immunity Act of 1978, applicable to "a sovereign or other head of State".[233]

100. Several judicial instances in which such immunity was enforced can be found in national jurisprudence.[234] For example, the Federal Supreme Court of the Federal Republic of Germany dismissed in 1984 an application for determination of the competent court in a criminal case against Mr. Honecker, the Head of State of the German Democratic Republic, on the basis of the latter's immunity from foreign criminal jurisdiction under the general rules of international law.[235] The French Court of Cassation reversed, in 2000, a decision by the Court of Appeals of Paris that had denied immunity to Colonel Gaddafi, the Head of State of the Libyan Arab Jamahiriya, with regard to charges relating to an attack against an aircraft in 1989, affirming that:

---

[230] *Arrest Warrant*, pp. 20-21, para. 51.

[231] See, for example: *Memorial of the Republic of Djibouti*, 15 March 2007, para. 133; *Counter-Memorial of the French Republic*, 13 July 2007, para. 4.6; CR 2008/1, pp. 35-37 (van den Biesen, on behalf of Djibouti); CR 2008/5, p. 25 (Pellet, on behalf of France).

[232] *Djibouti v. France*, p. 53, para. 170.

[233] 20 July 1978, reproduced in *International Legal Materials*, vol. 17, 1978, p. 1123. Section 36 of the Australian Foreign States Immunities Act (Act No. 196 of 1985) also extends the national legislation implementing the Vienna Convention on Diplomatic Relations (the Diplomatic Privileges and Immunities Act 1967), "with such modifications as are necessary", to the head of a foreign State. In other countries, the national law on State immunity defines the "foreign State" as including the head of State acting in his public capacity; see: Section 2(a) of the Canadian State Immunity Act (originally of 1980 and subsequently amended); Section 15(1)(a) of the Pakistani State Immunity Ordinance No. VI of 1981; Section 16(1) of the Singaporian State Immunity Act of 1979 (as amended in 1985); Section 2(a) of the South African Foreign States Immunities Act No. 87 of 1981 (all reproduced in Andrew Dickinson, Rae Lindsay and James P. Loonam — Clifford Chance (eds.), *State Immunity. Selected Materials and Commentary* (Oxford, Oxford University Press, 2004), pp. 469-522). In the United States, a controversy exists in the case law as to whether the 1976 Foreign Sovereign Immunities Act supersedes the common law rule of head of State immunity: on this issue, see footnote 249 below.

[234] For a reference to traditional case law granting sovereign immunity, see the Second report by Sompong Sucharitkul, Special Rapporteur, who concluded: "That a foreign sovereign enjoys jurisdictional immunity, including immunity from personal arrest and detention within the territory of another State, has been firmly established in State practice" (*Yearbook … 1980*, vol. II (Part One), document A/CN.4/331, p. 207, para. 36). In addition to the cases described below, reference could be made to the civil proceedings in Switzerland, *Ferdinand et Imelda Marcos c. Office fédéral de la police*, pp. 535-536, where the Federal Tribunal, while considering the question of immunity *ratione materiae* of a former head of State, confirmed the customary character of the immunity *ratione personae* from foreign criminal jurisdiction of the incumbent head of State.

[235] Federal Supreme Court (Second Criminal Chamber), *Re Honecker*, Case No. 2 ARs 252/84, Judgment of 14 December 1984, reproduced in *International Law Reports*, vol. 80, pp. 365-366.

> "international custom precludes Heads of State in office from being the subject of proceedings before the criminal courts of a foreign State, in the absence of specific [international] provisions to the contrary binding on the parties concerned".[236]

101. In 2004, a British Senior District Judge refused to issue a warrant of arrest against Mr. Mugabe on allegations of torture, on the grounds that, as sitting Head of State of Zimbabwe, he was entitled to immunity under Section 20 of the State Immunity Act.[237] In a recent case, in 2008, the Spanish Audiencia Nacional, referring to precedents in Germany and Belgium, as well as to the *Arrest Warrant* case, concluded that the Spanish courts did not have jurisdiction to prosecute Mr. Kagame, the current Head of State of Rwanda, for charges of genocide, crimes against humanity, war crimes and terrorist acts.[238] The immunity *ratione personae* of incumbent heads of State has also been reaffirmed by those tribunals that have examined (and sometimes denied) the immunity of former heads of State: thus, for instance, some Law Lords in the *Pinochet* (No. 3) case, while finding limits to the immunity of General Pinochet with regard to criminal charges of torture, recognized that the situation would have been different if he had still been the Chilean President.[239] The legal literature also confirms the recognition of immunity *ratione personae* of heads of State.[240]

---

[236] Court of Cassation, *Affaire Kadhafi*, Judgment No. 1414 of 13 March 2001, reproduced in *International Law Reports*, vol. 125, pp. 508-510 (the original French version reads as follows: "la coutume internationale s'oppose à ce que les chefs d'Etat en exercice puissent, en l'absence de dispositions internationales contraires s'imposant aux parties concernées, faire l'objet de poursuites pénales d'un Etat étranger" (reproduced in *Revue général de droit international public*, vol. 105 (2001), p. 474)).

[237] Senior District Judge at Bow Street, *Tatchell v. Mugabe*, Judgment of 14 January 2004, reproduced in *International and Comparative Law Quarterly*, vol. 53 (2004), pp. 769-770: "international customary law which is embodied in our Common Law currently provides absolute immunity to any Head of State".

[238] Audiencia Nacional, *Auto del Juzgado Central de Instrucción No. 4*, 6 February 2008, Fourth paragraph, No. 1, pp. 151-157. The tribunal based its finding on art. 21 of the Organic Law of the Judicial Power, which provides that Spanish jurisdiction is limited by the immunity of jurisdiction recognized under international law ("The rules of immunity from jurisdiction and execution established by the norms of public international law shall constitute an exception"). As noted in that decision, the Audiencia Nacional has made similar pronouncement on criminal cases filed against the King of Morocco (*Auto de la Sala Penal de la Audiencia Nacional*, 23 December 1998) and the President of the Republic of Equatorial Guinea.

[239] See *Pinochet* (No. 3), in particular: Lord Hope of Craighead, p. 624; Lord Hutton, pp. 637-638; Lord Saville of Newdigate, p. 642; Lord Millett, p. 651; and implicitly Lord Phillips of Worth Matravers, pp. 660-661. This principle was recognized by the prosecution (ibid., p. 637).

[240] See, e.g., Verhoeven, "Rapport provisoire", op. cit., p. 516 (and the authors cited therein); Christian Dominicé, "Quelques observations sur l'immunité de juridiction pénale de l'ancien chef d'Etat", *Revue générale de droit international public*, vol. 103 (1999), pp. 301-302; Virpi Koivu, "Head-of-State Immunity v. Individual Criminal Responsibility under International Law", *Finnish Yearbook of International Law*, vol. XII (2001), p. 312; Charles Pierson, "Pinochet and the End of Immunity: England's House of Lords Holds that a Former Head of State is Not Immune for Torture", *Temple International and Comparative Law Journal*, vol. 14 (2000), pp. 273-274; Charles Rousseau, *Droit international public, Tome IV: Les relations internationales* (Paris: Sirey, 1980), pp. 125-126; Ernest Mason Satow, *Satow's Guide to Diplomatic Practice*, Lord Gore-Booth (ed.), 5th edition (London: Longmans Green, 1979), pp. 9-10; Xiaodong Yang "State immunity in the European Court of Human Rights: Reaffirmations and misconceptions", *British Year Book of International Law*, vol. 74 (2003), pp. 352-353; and Zappalà, op. cit., pp. 599-600. See, however, Jerrold L. Mallory, "Resolving

102. The special treatment accorded to heads of State, and in particular their immunity *ratione personae*, has received various justifications in international law. Traditionally, it was motivated by reason of the head of State's personal status as a sovereign, a *rationale* explained by the principle *par in parem non habet imperium*.[241] It was also justified by the imperative of respecting the dignity of the head of State, as a personification of the sovereignty of the State.[242] These theories implied that no distinction was clearly made between the immunity of the head of State and the State's sovereign immunity[243] (the latter being, at the time, considered absolute[244]). On some occasions, the doctrine of comity has also been invoked in this context, based on the idea that each State respects immunity so that its own head of State will receive a similar treatment when abroad.[245]

103. Contemporary international law has moved away from justifying the immunity of the head of State on these grounds, rather insisting on the need to ensure the effective performance of his functions on behalf of the State.[246] This is, in particular, the position adopted by the Institut de droit international,[247] but also by

---

the Confusion Over Head of State immunity: The Defined Rights of Kings", *Columbia Law Review*, vol. 86 (1986), pp. 176-179, who observed, in 1986, that "while a survey of the international community's approach to head of state immunity reveals wide agreement that heads of state are entitled to some immunity, there is no consensus on the extent of that immunity" (ibid., p. 177).

241 See, for instance, District Court, Southern District of New York, *Tachiona v. Mugabe*, 169 F.Supp. 2d (S.D.N.Y. 2001), p. 264.

242 Ibid., pp. 268-269. See also United Kingdom, *De Haber v. Queen of Portugal*: "To cite a foreign potentate in a municipal court, for any complaint against him in his public capacity, is contrary to the law of nations, and an insult which he is entitled to resent" (cited by Special Rapporteur Sucharitkul, in *Yearbook … 1980*, vol. II (Part One), p. 207, footnote 28). See also Part One, sect. C.1 above.

243 As noted by Special Rapporteur Sucharitkul, in his second report, "the majority of writers have treated the immunities of foreign sovereigns together with those of foreign States (*Yearbook … 1980*, vol. II (Part One), p. 207, para. 36). See also United States, *Tachiona v. Mugabe*, where the District Court noted that, prior to 1976 (year of the adoption of the Foreign Sovereign Immunities Act in the United States), "no widely accepted international practice established a separately standing principle of head-of-state immunity", op. cit., p. 276; see also J. W. Dellapenna, "Head-of-state immunity — Foreign Sovereign Immunities Act — suggestion by the Department of State", *American Journal of International Law*, vol. 88 (1994), pp. 529-530; S. V. George, "Head of State immunity in the United States courts: still confused after all these years", *Fordham Law Review*, vol. 64 (1995), p. 1055.

244 On the absolute immunity of the foreign sovereign under this classical theory, see the often-cited decision of 1812 by the United States Supreme Court in *The Schooner Exchange v. McFaddon*, notably at pp. 136-137.

245 See, e.g., Supreme Court, *Hilton v. Guyot*, 159 U.S. 113, 163-64, 16 S.Ct.139, 143 L.Ed. 95 (1895): "neither a matter of absolute obligation … nor of mere courtesy and good will … [b]ut it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws" (cited in District Court, Eastern District of New York, *Lafontant v. Aristide*, 844 F.Supp. 128, Judgment of 27 January 1994, p. 132). See also District Court for the District of Columbia, *Flatow v. Islamic Republic of Iran*, 76 F.Supp. 2d 28 (D.D.C. 1999), p. 24: "like foreign sovereign immunity, head of state immunity is a matter of grace and comity, rather than a matter of right".

246 See Verhoeven, "Rapport provisoire", para. 16, reproduced in Institut, *Annuaire*, op. cit., pp. 507-508.

247 The preamble of the resolution adopted by the Institut at its session of Vancouver on this topic affirms "that special treatment is to be given to a Head of State or a Head of Government, as a representative of that State and not in his or her personal interest, because this is necessary for

the Commission in the commentary to its draft on jurisdictional immunities of States and their properties.[248] It follows that the immunity of the head of State is today construed as an autonomous institution under international law, inspired by its own *rationale* and subject to a separate regime.[249] However, it seems that the classical justifications mentioned above have not completely disappeared and are still used by some authors to explain certain aspects of the immunity *ratione personae* of the head of State.[250] In any event, the overall objective of immunity is to preserve the stability of international relations,[251] an imperative which is particularly felt in the

---

the exercise of his or her functions and the fulfilment of his or her responsibilities in an independent and effective manner, in the well-conceived interest of both the State or the Government of which he or she is the Head and the international community as a whole" (resolution of 26 August 2001, third para. of the preamble).

[248] Para. (19) of the commentary by the Commission to draft article 2 of what later became the United Nations Convention on Jurisdictional Immunities of States and their Property indicates that the immunity *ratione personae* of sovereigns and ambassadors "inure … to the benefit of the States they represent, to enable them to fulfil their representative functions or for the effective performance of their official duties" (*Yearbook … 1991*, vol. II (Part Two), pp. 18-19).

[249] The issue of the autonomy of the institution of the immunity of heads of State has often been considered by national courts. In the United States, the question arises in relation to whether the immunity of heads of State (and other officials) falls under the provisions of the 1976 Foreign Sovereign Immunities Act: the case law appears to be divided on this point between those courts that consider that the Act applies to individual foreign officials (see, in particular, Court of Appeals, Ninth Circuit, *Chuidian v. Philippine National Bank*, 912 F. 2d 1095 (9th Cir. 1990) (reproduced in *International Law Reports*, vol. 92, pp. 480-493), followed, for instance, in District Court, Northern District of California, *Doe v. Qi*, 349 F.Supp.2d 1258) and those that conceive head of State immunity as an autonomous doctrine under common law constraining courts to accept as conclusive the State Department's suggestions of immunity (see, e.g., *Lafontant v. Aristide*, or *Tachiona v. Mugabe*). On this question, see, for instance, Tunks, op. cit., pp. 666-675. In the United Kingdom, the State Immunity Act of 1978 distinguishes the immunity from jurisdiction of foreign States (regulated under Part I, which does not apply to criminal proceedings) and the immunity of heads of State (included in Section 20, under Part III): accordingly, the Law Lords in the *Pinochet* (No. 3) case examined a former head of State's immunity based on the latter provisions, which they considered to be in conformity with general international law (see *Pinochet* (No. 3), in particular Lord Browne-Wilkinson, p. 593; Lord Goff of Chieveley, p. 598; and Lord Hope of Craighead, pp. 621-622).

[250] Watts, for instance, notes that the head of State enjoys immunity "in recognition of his very special status as holder of his State's highest office" (Watts, op. cit. (1994), p. 53). He later justifies the special treatment afforded by international law to the head of State (as opposed to heads of Governments and foreign ministers) by virtue of sovereign or majesty attaching to the latter personally (ibid., pp. 102-103; this position is referred to in the joint separate opinion of Judges Higgins, Kooijmans and Buergenthal in the *Arrest Warrant* case, para. 80, and in the dissenting opinion of Judge Al-Khasawneh, ibid., para. 2). Similarly, Lord Millett in the *Pinochet* (No. 3) case (immunity *ratione personae* is enjoyed by the serving head of State "by reason of his special status as the holder of his state's highest office. He is regarded as the personal embodiment of the state itself". (*International Legal Materials*, vol. 38, p. 644)). See also: Robertson, op. cit., p. 402; Rémy Prouvèze, "L'affaire relative au mandat d'arrêt du 11 avril 2000 (*République démocratique du Congo c. Belgique*): quelle contribution de la Cour internationale de Justice au droit international pénal?", *L'Observateur des Nations Unies*, No. 12 (2002), pp. 296-297; and Tunks, op. cit., pp. 654-657.

[251] Zappalà, op. cit., p. 611. In *Re Honecker*, the Federal Supreme Court of the Federal Republic of Germany pointed out that immunity of a head of State under international law is "primarily granted in the mutual interests of States in enjoying undisturbed bilateral relations", which "could be prejudiced" if the Court were to determine the appropriate forum for litigation (*Re Honecker*, op. cit., p. 366).

case of the head of State, given his high-level representative functions[252] and the importance of his role in the internal organization of the State.

104. The granting of immunity *ratione personae* presupposes the determination that the accused is an incumbent head of State, which, in turn, requires findings on two different questions, namely: whether the entity at issue is a sovereign State; and whether the individual concerned holds the position of head of State in the organization of that entity.[253] While these findings are often made autonomously by the judiciary,[254] in some countries (mainly of common law tradition) it is provided that the executive branch should file a certificate or suggestion of immunity with the judiciary, which shall be considered conclusive evidence on these questions.[255]

(i) Determination of whether an entity is a sovereign State

105. In most cases, the first question does not raise any particular difficulties (or any dispute between the parties) and the determination that the entity is a State remains implicit in the reasoning of the judicial decision. One should mention, however, certain instances in which the tribunal concerned has had to devote specific attention to the issue. Thus, for example, the Italian Court of Cassation was called to determine, in 1985, whether Mr. Arafat, against whom a mandate of arrest was issued by Italian authorities, enjoyed immunity in his capacity as the leader and

---

[252] For an emphasis on the representative status of the head of State in relation to the immunity enjoyed by the latter under international law, see India, Supreme Court, *Colonel H. H. Raja Sir Harinder Singh Barar Bans Ahadur v. Commissioner of Income Tax*, Judgment of 15 October 1971, reproduced in *International Law Reports*, vol. 64, p. 528: "In International Law the Head of a State represents the State as such and not as an individual representing his own rights. In that capacity he enjoys certain extra territorial privileges in other States which are friendly and in peace, known as the receiving States, with the State he represents".

[253] Watts points to these two questions in the context of the recognition of heads of State (op. cit. (1994), p. 33).

[254] Even in these cases, however, the judiciary, while retaining its discretion in making this determination, may resort to the advice of the government, particularly the foreign office (see, e.g., the remark by Broms with regard to the Finnish practice in Institut, *Annuaire*, vol. 69 (2000-2001), p. 475).

[255] See, for instance, Section 21(a) of the United Kingdom State Immunity Act of 1978 ("A certificate by or on behalf of the Secretary of State shall be conclusive evidence on any question (a) whether any country is a State for the purposes of Part I of this Act, whether any territory is a constituent territory of a federal State for those purposes or as to the person or persons to be regarded for those purposes as the head or government of a State …"); Section 40(1)(c) of the Australian Foreign States Immunities Act; Section 14(1)(c) of the Canadian State Immunity Act; Section 18(a) of the Pakistani State Immunity Ordinance; Section 18(a) of the Singaporian State Immunity Act; Section 17(c) of the South African Foreign States Immunities Act. It should be emphasized that these provisions are usually intended to be applied in the context of civil proceedings: thus, for instance, under the United Kingdom State Immunity Act, the certificate shall be filed "for the purposes of Part I", which does not apply to criminal proceedings (Section 16(4)). In a recent criminal case, however, a Divisional Court noted that "it would be strange if [such] a certificate … would be conclusive for civil proceedings but that such certificate would be of no value in criminal proceedings" and found that, even in a criminal case, "the certificate of the Secretary of State has to be considered as being of decisive importance in determining the entitlement to State Immunity" (United Kingdom, Queen's Bench Division (Divisional Court), *R* (*on the application of Diepreye Solomon Peter Alamieyeseigha*) *v. The Crown Prosecution Service*, Judgment of 25 November 2005, notably paras. 31-34; as will be subsequently described in the text, the Court, however, also took into account other relevant factors in reaching its conclusion as to immunity in the specific case).

representative of the Palestinian Liberation Organization (PLO).[256] The Court affirmed that customary international law accorded immunity from criminal jurisdiction and inviolability only to the leaders of sovereign organizations that could be equated to the State (which it defined as an entity exercising, in full independence, effective governmental powers over a community established on a territory) and that the PLO did not respond to that qualification, given that it lacked territorial sovereignty.[257] The Court noted that this finding was further confirmed by the position of the Italian Government, as reported by the Foreign Ministry, in its relations with the PLO.[258] It also observed, however, that the recognition de jure or de facto granted to the latter by certain governments did not have a constitutive effect and could not suffice to vest the PLO with the quality of State.[259]

106. More recently, but before Montenegro became an independent State in 2006, the Italian Court of Cassation had denied head of State immunity under customary international law to the President of Montenegro, considering that the said entity could not be qualified as a sovereign State. The Court reached that conclusion by examining the relevant constitutional rules (of Montenegro and the Union of Serbia and Montenegro), the position taken by other States in their relations with that entity, agreements concluded by the latter with other States, its membership in international organizations and the views of the Ministry for Foreign Affairs on the issue.[260] In the United States, the case law shows that the judicial determination whether a head of State enjoys immunity relies on the recognition of the entity concerned as a State by the executive branch.[261] In the United Kingdom, a Divisional Court called to determine whether the Governor and Chief Executive of Bayelsa State enjoyed immunity in a case involving criminal charges of corruption

---

[256] Court of Cassation (Criminal, I), *Arafat e Salah*, Judgment of 28 June 1985 (No. 1981), reproduced in *Rivista di diritto internazionale*, vol. LXIX, pp. 884-889. For another case where similar issues were considered by the Court, see: Court of Cassation, *Bacchelli v. Comune di Bologna*, Judgment of 20 February 1978 (No. 804), reproduced in *Italian Yearbook of International Law*, vol. IV (1978-1979) (note by Luigi Condorelli), pp. 137-145 (denying immunity to the Grand Master of the Order of Santa Maria Gloriosa).

[257] Ibid., p. 885. Customary international law was directly applicable by the Court pursuant to art. 10, para. 1, of the Italian Constitution. The Court did recognize that the PLO was a movement of national liberation, enjoying limited international personality (ibid.), but found that international law did not impose on Italy the obligation to grant immunity to the leader of such a movement and that Italian legislation had not granted such immunity to the leader of the PLO beyond the provisions of international law (ibid., pp. 887-888).

[258] Ibid., pp. 886-887.

[259] Ibid., p. 887.

[260] Court of Cassation (Third Criminal Section), *Public Prosecutor* (*Tribunal of Naples*) *v. Milo Djukanovic*, No. 49666, Judgment of 28 December 2004, notably paras. 16 and 35.

[261] This is what transpires from the reasoning of the Court of Appeals (Second Circuit) in the *Kadic v. Karadzic* case (70 F.3d 232) against the leader of the Republika Srpska. Although Karadzic's main argument in that instance was that "his status as an invitee of the United Nations during his visits to the United States rendered him immune from service of process", either under the Headquarters Agreement or federal common law (an allegation that was rejected; ibid., pp. 246-247), the Court made incidental references to the question of head of State immunity. It observed, for instance, that, while the acquisition of statehood in international law did not require recognition by other States, "recognized states enjoy certain privileges and immunities relevant to judicial proceedings", including head of State immunity (ibid., p. 244). It also found that it would be entirely inappropriate for it to grant head of State immunity to Karadzic based on speculation about a future recognition of the Republika Srpska by the United States Government (ibid., p. 248).

considered that a certificate from the British Secretary of State affirming that "Bayelsa State is a constituent territory of the Federal Republic of Nigeria" and that the individual "is not to be regarded … as Head of State of the Federal Republic of Nigeria" was "decisive evidence" for the purposes of denying such immunity. The Court, however, also took into consideration the lack of legal capacity of Bayelsa State to enter into international relations and "other possible relevant factors", such as the functions entrusted to the member State and the views of the Federal judiciary.[262]

(ii) Determination of whether an individual holds the position of head of State

107. The second question — whether the individual is a head of State — is complicated by the fact that international law neither defines the notion of "head of State" nor determines the modes for the acquisition of this quality or (with a few exceptions) the functions generally attached to it.[263] Reference should therefore be made to each State's internal organization, which may vary considerably.[264] This may imply an examination of both domestic law and practice.[265] The Institut de droit international was of the view that this determination, particularly by tribunals, entailed questions relating to the rules on evidence applicable under domestic law and therefore decided to abstain from examining the issue further.[266] Article 6 of the resolution that was adopted at the Vancouver session simply emphasizes that

---

[262] *R (on the application of Diepneye Solomon Peter Alamieyeseigha) v. The Crown Prosecution Service*, notably paras. 37-48.

[263] See Verhoeven, "Rapport provisoire", op. cit., pp. 497-498. He notes that the notion of head of State "simply refers to the person who, in a State, is at the head of its administration" (ibid., p. 497; see also Alain Fenet, "La responsabilité pénale internationale du chef d'Etat", *Revue générale de droit*, vol. 32 (2002), p. 597). Verhoeven also observes that art. 7 of the Vienna Convention on the Law of Treaties contains a presumption, probably irrebutable, that the head of State (together with the head of Government and the minister for foreign affairs) represents the State for the purpose of performing all acts relating to the conclusion of a treaty. As will further be described below, this provision was also used by the International Court of Justice in its examination of the functions normally exercised by a minister for foreign affairs (see *Arrest Warrant*, para. 53).

[264] Specifically, the head of State may have, in some countries, important institutional functions, as head of the executive power, or its position may be rather symbolic. As noted by Verhoeven ("Rapport provisoire", op. cit., p. 498), taking into consideration the modern tendency to justify immunity *ratione personae* for the purpose of ensuring the effective performance of official functions, one might have expected that such immunity would not be granted to the head of State who performs only limited formal or protocolar functions, but this is not confirmed by practice. This may be seen as an indication of the continued relevance of other considerations in the recognition of immunity to the head of State.

[265] One may draw a parallel, in this regard, with the question of the relevance of internal law in determining the status of a State organ for the purposes of attribution of an internationally wrongful act. As noted by the Commission, in para. (11) of its commentary to art. 4 of the articles on State responsibility: "Where the law of a State characterizes an entity as an organ, no difficulty will arise. On the other hand, it is not sufficient to refer to internal law for the status of State organs. In some systems the status and functions of various entities are determined not only by law but also by practice, and reference exclusively to internal law would be misleading". (*Yearbook … 2001*, vol. II (Part Two), p. 42).

[266] The question was raised under point 2 of the questionnaire distributed by the Rapporteur (see Institut, *Annuaire*, op. cit., p. 452) and the general view in the commission that examined the topic was that it was not appropriate for it to study the issue (ibid., p. 485).

national authorities shall afford immunity from jurisdiction to a foreign head of State "as soon as that status is known to them".[267]

108. An examination of the case law reveals that certain tribunals have determined the status of head of State of the individual before them with reference both to the functions that the latter exercised in the internal structure of the State (in light of both legislation and practice) and in the international relations of that State.[268] In other words, while referring to domestic law, these tribunals considered that the effective exercise of power was conclusive. Thus, for example, in the *Re Honecker* case, the German Federal Supreme Court examined the issue whether the accused, who was Chairman of the Council of State of the German Democratic Republic, could be considered as the head of State of that country by making reference to his functions under the Constitution, as well as to the practice of the Government of the Federal Republic of Germany in its bilateral relations with that country.[269] The French Court of Appeals in the *Gaddafi* case noted that the accused, being the president of the Command Council of the Revolution, was the highest authority in the Libyan Arab Jamahiriya under the constitutional proclamation, and that he also participated in that capacity in international conferences (e.g., meetings of Arab or African Heads of State) and received the representatives of foreign States and the letters of accreditation of their ambassadors.[270] In the United States, on the contrary, certain courts have considered themselves bound by the determination made by the executive power, both through its practice of recognition of foreign Governments and in its suggestions of immunity filed in judicial cases against heads of State: this determination was followed even in those cases where it did not correspond to the effective exercise of official functions at the time of the proceedings. Thus, for instance, the District Court in the *Lafontant v. Aristide* case stated that "immunity extends only to the person the United States government acknowledges as the official head-of-State" and that, since the "determination of who qualifies as a head-of-state is made by the executive branch, it is not a factual issue to be determined by the courts".[271] It noted that the "United States government ha[d] consistently recognized Jean-Bertrand Aristide as the current lawful head-of-state of the Republic of Haiti", even after his exile following a military coup, and found that the suggestion of immunity submitted by the State Department in that case was "controlling with respect to President Aristide", who therefore enjoyed immunity.[272]

---

[267] Article 6 of the Institut's resolution. The preliminary draft proposed by the Rapporteur was different: "The head of a State may avail himself of ... immunity from jurisdiction … as soon as he has informed the court authorities of his status" (ibid., pp. 552-553).

[268] Verhoeven notes that the judicial determination of the quality of head of State is most often made by tribunals in civil law countries, which traditionally are under no obligation to request or follow the opinions of the executive power, while tribunals in countries of common law tend to have that obligation and to defer to the position expressed by the minister for foreign affairs or State department ("Rapport provisoire", ibid., pp. 500-501; see also p. 496). On the case law in the United States, see hereinafter in the text.

[269] *Re Honecker*, op. cit., pp. 365-366.

[270] Court of Appeal of Paris (Chambre d'accusation), *Affaire Kadhafi*, Judgment of 20 October 2000 (English version in *International Law Reports*, vol. 125, p. 495). Immunity was therefore granted to Colonel Gaddafi as the de facto Head of State of Libya, based on his exercise of powers proper to a head of State (see Zappalà, op. cit., pp. 596-597).

[271] *Lafontant v. Aristide*, pp. 132-133 (it should be noted that this was a civil suit brought notably under the Alien Tort Claims Act and the Torture Victim Protection Act).

[272] Ibid., pp. 130 and 139 respectively. It should be noted that the tribunal also drew the logical inference from this position in examining the question whether Haiti had waived the immunity

A different District Court applied the same doctrine to deny immunity to the grandson of the ruler of Abu Dhabi and firstborn of the Crown Prince of Abu Dhabi, observing that the Executive had made no determination as to the defendant's status as head of State and had filed no suggestion of immunity.[273]

(iii) Role of recognition of States and Governments

109. All these considerations raise the related question of the role of recognition of States and Governments in the granting of immunity *ratione personae*.[274] As seen in the previous paragraphs, the judicial practice in some States (notably in the United States or the United Kingdom) considers the question of recognition non-justiciable and defers to the determinations made by the executive branch, and therefore recognition plays a decisive role in the granting of immunity.[275] In other countries, tribunals consider this determination to be a factual issue arising in the context of

---

of Aristide, stating that "because the United States does not recognize the *de facto* government [of Haiti], that government does not have the power to waive President Aristide's immunity" (ibid., p. 134).

[273] District Court, District of Columbia, *Jungquist v. Sheikh Sultan Bin Khalifa al Nahyan*, 940 F.Supp. 312 (1996), reproduced in *International Law Reports*, vol. 113, p.531 (on a motion to dismiss a civil action for want of jurisdiction).

[274] On the role of recognition with regard to immunity *ratione materiae*, which raises identical problems, see sect. B.2(c), infra.

[275] As is clear from the description made above, tribunals in the United States generally consider the suggestions of immunity filed by the State Department to be controlling on the matter, but their decisions are unambiguous as to the decisive role played by recognition in the granting of immunity. See, for instance, *Flatow v. Islamic Republic of Iran*, p. 24 ("[o]nly individuals whom the United States recognizes as legitimate heads of state qualify" for head of State immunity) or United States, *Jungquist v. Sheikh Sultan Al Nahyan*, p. 531 ("Head of State immunity … extends only to the person the United States government acknowledges as the official head-of-State. Recognition of a government and its officers is the exclusive function of the Executive Branch, to which the courts must defer" (referring to *Lafontant v. Aristide*, pp. 131-134)). In the United Kingdom, tribunals have clearly affirmed their deference to the determinations of the executive branch (see, for instance, House of Lords, *Government of the Republic of Spain v. SS* "*Arantzazu Mendi*", 1939, AC 256, p. 264: "Our State cannot speak with two voices [on the matter of recognition of a foreign government], the judiciary saying one thing, the executive another … Our Sovereign has to decide whom he will recognize as a fellow sovereign in the family of States; and the relations of the foreign State with ours in the matter of State Immunities must flow from that decision alone"). British courts, however, have also taken into consideration other factors (including the powers exercised by the individual or the internal structure of the foreign State concerned) in making their determination as to immunities (see *R* (*on the application of Diepneye Solomon Peter Alamieyeseigha) v. The Crown Prosecution Service* judgment referred to para. 106 above). In *Pinochet* (No. 1), where no certificate of immunity had been filed by the Secretary of State, Lord Slynn of Hadley found that, although General Pinochet had not been appointed in a way recognized by the Chilean Constitution, he had acted as Head of State, as demonstrated inter alia by the fact that he had signed letters of credential presented to The Queen by the Chilean Ambassador to the United Kingdom (*Pinochet* (No. 1), p. 1305; the other Law Lords in that instance limited themselves to assuming that he was the Head of State of Chile at the relevant period; the Law Lords in *Pinochet* (No. 3) did not consider the issue further). As noted by Michel Cosnard, the position of Lord Slynn of Hadley implied that the effective exercise of power and the de facto recognition of General Pinochet as the Head of State of Chile sufficed to consider him prima facie as the beneficiary of immunity, independently from any consideration regarding the legality of his accession to power (Cosnard, op. cit. (1999), p. 313). It should be emphasized that the United Kingdom is one of those States that has abandoned the practice of recognizing foreign Governments (see the following footnote).

the judicial case, which they solve on the basis of an autonomous study of the relevant domestic rules, and national and international practice: in this context, the recognition of the State or the government concerned (in particular by the Government of the country where the tribunal sits) is only one element (albeit carrying a certain authority) among others that are taken into consideration in making that determination.[276] From the perspective of international law, however, the question remains as to whether the obligation incumbent upon a State to grant immunity to a foreign head of State is dependent upon the recognition of the State or Government concerned.[277] This question was raised at the Vancouver session of the Institut de droit international[278] and it triggered an interesting debate: several members noted the importance of recognition in the granting of immunity and some even considered it to constitute a precondition for the granting of immunity.[279]

---

[276] The recognition which is relevant in the context of such factual determination may be either express or implicit. It is apparent from the cases described above that tribunals often give special weight to the practice of their own Government in its relations with the entity concerned (e.g., the Italian Government with the PLO in the *Arafat* case or with Montenegro before 2006 in the *Djukanovic* case) and/or the individual as head of a foreign State (e.g., the Government of the Federal Republic of Germany with Honnecker as Head of State of the German Democratic Republic). With respect to express recognition, the Italian Court of Cassation has explicitly stated that it considered that recognition (even by the Italian Government) was not a necessary condition for an entity to be considered as a sovereign State for the purposes of immunity, but took into consideration the views of the Italian Ministry for Foreign Affairs on Montenegro's international legal personality (*Public Prosecutor (Tribunal of Naples) v. Milo Djukanovic*, para. 13). It should be noted that a number of States (e.g., France, Belgium, the United Kingdom, etc.) follow the practice of formally recognizing new States, but not new Governments, and therefore the judiciary cannot rely on an express recognition for the purposes of determining the quality of head of State.

[277] Some authors give an affirmative answer to this question, which they try to justify on the basis of the interests protected; see: Watts, op. cit. (1994), p. 34; Zappalà, op. cit., pp. 599-600 ("there exists a sort of presumption according to which other states are supposed to accept [the head of State] as counterpart in foreign relations … Recognition, even in an implicit form, serves the same function of acceptance of credentials for diplomatic agents"); Tunks, op. cit., p. 672 ("When two governments cease to recognize one another, there is no longer a need to foster bilateral diplomacy between them, because diplomatic relations have already broken down completely. And there is similarly no need for a government to take steps to promote the sovereign equality of an entity that it does not even acknowledge as a sovereign state by allowing its leader to escape responsibility for private wrongful acts and international crimes. In the absence of an actual diplomatic relationship between the United States and a foreign leader, the goals of head-of-state immunity cannot be considered strong enough to outweigh the interests of justice"). For the contrary view, according to which the obligation to grant immunity under international law does not depend on recognition, see the position of Rapporteur Verhoeven at the Institut, as described hereinafter.

[278] See point 2 of the questionnaire distributed by the Rapporteur (see Institut, *Annuaire*, op. cit. p. 452).

[279] In the preliminary debate at the 13th Commission, Salmon emphasized that a State may not consider it fit to collaborate with a self-proclaimed president and, in the context of immunity, raised the question of the opposability to the State of a new Government (ibid., p. 456). Fox and Sucharitkul noted that recognition could constitute an important element in determining the applicable law at the domestic level (ibid., pp. 459 and 470, respectively). Tomuschat observed that "many countries make respect for foreign sovereignty dependent on formal recognition of the State or Government concerned. International respect and solidarity is certainly not owed to a government with which diplomatic relations either have never been established or have been severed" and "irregularities violating the coming to power of the person concerned deserve being scrutinized" (ibid., p. 477). For the summary of the debates at the Commission by the Rapporteur, see ibid., pp. 484-485. Subsequently, at the Commission, Salmon indicated that

However, the final resolution adopted by the Institut limits its consideration of this issue to a safeguard clause pursuant to which the resolution "is without prejudice to the effect of recognition or non-recognition of a foreign State or government on the application of its provisions".[280] Commenting on this article, the Rapporteur expressed his serious doubts that the lack of recognition of a foreign State or Government would exempt a State from its obligations under international law.[281] It has also been noted that the provision may have provided an "unintended loophole", since it would seem possible that "a State, by withholding recognition of a person or government as Head or Government respectively of a State could defeat the intention of the Resolution".[282]

(iv) Irrelevance of presence in the forum State

110. Immunity *ratione personae* from foreign criminal jurisdiction has been granted to the incumbent head of State irrespective of his presence on the territory of the forum State[283] or, when present, of the circumstances of his visit (either official,

---

"[t]he recognition of the status of head of State, that of his State and even that of the Government of which he is the de facto head, are clearly preconditions for any granting of privileges and immunities to the person who claims to represent this State or Government " (ibid., p. 555). Fox commented that "recent practice taking account of the legitimacy of a new incumbent and conformity with requirements of 'good government' suggest[s] that recognition plays a larger part than [the Rapporteur] perhaps accord[ed]" (ibid., p. 579).

[280] Art. 12. The provision was included in the final report of the Rapporteur, following the recommendations of Fox and Salmon (see ibid., p. 594).

[281] Ibid., p. 594 ("This includes both the effects that international law would attribute to this (non)-recognition and those that would be assigned to it by a national law. On this occasion, various effects were mentioned. The Commission did not intend to discuss these. However, the Rapporteur seriously doubts that, in terms of substance, such a (non)-recognition could ever exempt a State from compliance with its obligations under international law, in this matter as in others."). In his preliminary report, the Rapporteur had indicated his views on the influence that the irregularities in the acquisition of power could have on the granting of immunity:

> "[i]t does not appear that the status of head of State may be internationally contested solely on the grounds that it has been unlawfully acquired. While it is desirable that violations of law, if they occur, should be duly punished, it is nevertheless difficult to do so by denying authorities that effectively exercise power of all international representation. It may be considered appropriate to deprive them of all immunity when they exercise or have acceded to power under conditions incompatible with the requirements of 'good' government, although international practice does not appear to confirm this. This demonstrates that one of the possible sanctions could be to refuse to grant the head of State some form of privileged status. It does not follow that the head of State could not be held to be the person effectively exercising those functions, unless the two issues are confused. *A fortiori*, the same is true when the 'irregularities' resulting from a lack of knowledge of the constitutional provisions are not accompanied by the violation of a rule of international law or do not amount to such a violation. In such cases, it is not clear what authority third States could rely on to punish the violation of a foreign public law." (Ibid, pp. 499-500).

[282] Hazel Fox, "The Resolution of the Institute of International Law, on the immunities of Heads of State and Goverment", *International and Comparative Law Quarterly*, vol. 51 (2002), pp. 119-125, at p. 123.

[283] Thus, for instance, in the cases described above against Honecker before the Federal German Supreme Court and Colonel Gaddafi before the French Court of Cassation, immunity was granted without any consideration of the question of the presence on the territory of the State (none of the two heads of State concerned was present in the forum State). Watts notes, with respect to the immunity from suit of heads of State, that "there has been little tendency to seek to base differences of treatment" upon inter alia whether the head of State is absent from the

private or incognito).[284] This could be justified under the traditional rationale of immunity (the exercise of jurisdiction, even in absentia, constituting an assertion of imperium vis-à-vis a foreign sovereign), but may also find its justification in the need to ensure the effective performance by the head of State of his functions, often invoked today as inspiring this immunity, since the exercise of jurisdiction over a head of State while he is on an official visit in the forum State constitutes a direct obstacle to the exercise of his official functions in the context of that visit.[285] However, irrespective of where the head of State is or the conditions of his visit, the very risk of being arrested and brought before a court also hampers his ability to perform his representative functions in general and to entertain the international relations of the State, insofar as it limits his possibility of travelling.[286] It is true that the head of State on official visit will enjoy a number of facilities and privileges which are not due to him during a private stay;[287] however, the immunity *ratione personae* from foreign criminal jurisdiction is to be granted in either case.[288]

---

forum State or is present in it, and that for practical purposes the two situations may be treated together (Watts, op. cit. (1994), p. 52).

[284] See: *Ferdinand et Imelda Marcos c. Office fédéral de la police*, op cit., p. 535 (the immunity under customary international law "is also granted to a Head of State who is visiting a foreign State in a private capacity" (English version, op cit., p. 201) — the case concerned however a former head of State); *Tatchell v. Mugabe* (the Senior District Judge granted head of State immunity without giving importance to the circumstances of Mr. Mugabe's presence in the United Kingdom). While noting that the position in international law of the head of State during a private visit abroad is "at best uncertain", Watts does not seem to see any difference with respect to the head of State's immunity (let alone immunity from foreign criminal jurisdiction) between the case in which the head of State is on a private visit and that where he is absent from the forum State (Watts, op cit., pp. 72-74).
The case of an incognito visit poses the specific problem that the authorities of the forum State may not be aware of the head of State's status. This problem is solved by art. 6 of the Institut's resolution, which provides that those authorities are under an obligation to afford the foreign head of State inter alia inviolability and immunity from jurisdiction "as soon as that status is known to them". For an application of that principle, see *Mighell v. The Sultan of Johore* (immunity as a head of State was granted to the Sultan in a suit as soon as he made his true identity known), cited by Watts, op. cit., p. 75.

[285] See, e.g., Watts, op cit., p. 53.

[286] See, for instance, Verhoeven, who affirms that the granting of immunity to the head of State, irrespective of the circumstances of his visit to the territory of the forum State, is in conformity with the functional justification of his status, thereafter explaining that "[a]s long as the exercise of his (international) functions may be jeopardized by the intervention of the court authorities, it is unclear why he should not enjoy the same immunities as in the case of an 'official' visit" ("Rapport provisoire" in Institut, *Annuaire*, op cit., p. 535). He further adds: "There is therefore no reason to restrict the immunities enjoyed by the head of a foreign State when he is not on an 'official' visit, even if it is understood that certain arrangements pertaining strictly to protocol are not applicable in such cases" (ibid., p. 536). See also: Watts, op. cit. (1994), p. 73 ("the generally representative character of a Head of State means that he is at all times to some extent representing his State … even when he is abroad on a private visit, affairs of State may require prompt and free access to him on the part of his home State's authorities"); Zappalà, op. cit., p. 598 (immunity *ratione personae* during an official mission guarantees the scope of the mission and the fulfilment of the particular tasks involved, while during a private visit it is afforded to protect the general interest of the State to be represented).

[287] As noted by Watts, however, even in the case of a private visit, "the State being visited may be expected to grant the visiting Head of State ceremonial courtesies and special measures of protection, and understandings — or even an agreement — to that effect may be reached through diplomatic channels" (Watts, op cit. (1994), p. 73).

[288] On the discussion whether the alleged exception to immunity *ratione personae* in the case of

(v) Head of State on special mission

111. The position of the head of State while leading a special mission is the subject of specific reference in the Convention on Special Missions of 8 December 1969, which, under article 21, paragraph 1, provides:

> "The Head of the sending State, when he leads a special mission, shall enjoy in the receiving State or in a third State the facilities, privileges and immunities accorded by international law to Heads of State on an official visit."

In its commentary to the corresponding draft article, the Commission explained that it had considered the possibility of including special provisions regarding "high-level special missions" in the draft convention, but that, after careful study of the matter, it had come to the conclusion that the rank of the head or members of a special mission did not give the mission any special status.[289] It observed, however, that "in international law … rank may confer on the person holding it exceptional facilities, privileges and immunities which he retains on becoming a member of a special mission".[290] Consequently, the provision was aimed at specifying that, when the head of the sending State leads a special mission, he shall enjoy all the facilities, privileges and immunities accorded to him on an official visit by international law, in addition to those conferred on him by the other articles of the draft (including immunity from criminal jurisdiction).[291] These additional facilities, privileges and immunities, however, are not defined, either in the Convention or the commentary by the Commission. In some instances, the head of State on official visit may also enjoy privileges and immunities under special rules of international law (including conventional rules), such as those applying to the representatives of States who attend international conferences or conduct official business at the headquarters of an international organization: the case law demonstrates that, in such circumstances, national tribunals have taken these privileges and immunities into account, in addition to those conferred on the head of State under general international law and the applicable domestic rules.[292]

---

criminal proceedings for international crimes should be set aside (and immunity retained) when the head of State is on an official visit, see sect. A.3 below.

289 Para. (1) of the commentary to draft art. 21 in *Yearbook ... 1967* , vol. II, p. 359. At its sixteenth session, the Commission had decided to ask its Special Rapporteur to submit articles dealing with the legal status of the so-called "high-level missions". In his second report, the Special Rapporteur, Milan Bartoš, had informed the Commission that he had not succeeded in discovering any special rules applicable to such missions in the practice or in the literature. He proposed a set of rules that comprised specific references to the "full immunity" from jurisdiction of heads of State, heads of Government, Ministers for Foreign Affairs and Cabinet members heading a special mission (see document A/CN.4/179, in *Yearbook … 1965*, vol. II, pp. 143-144). Comments from States were requested and, in the light of those comments, the Special Rapporteur concluded that States had given no encouragement to the inclusion of such provisions in the draft (see Third report, by Milan Bartoš, Special Rapporteur (A/CN.4/189 and Add.1 and 2), in *Yearbook … 1966*, vol. II, paras. 271-286).

290 *Yearbook … 1967*, vol. II, p. 359 (para. (1) of the commentary to draft art. 21).

291 Ibid. (para. (2) of the commentary to draft art. 21). Under the Convention, the representatives of the sending State in the special mission shall enjoy inter alia immunity from the criminal jurisdiction of the receiving State (art. 31, which is based on art. 31 of the Vienna Convention on Diplomatic Relations (see the commentary of the Commission to the corresponding draft article in *Yearbook ... 1967*, vol. II, p. 362).

292 For instance, in *Tachiona v. Mugabe*, the State Department had filed a suggestion of immunity on behalf inter alia of President Mugabe, invoking both head of State immunity and diplomatic

(vi) Head of State in exile

112. State practice shows that heads of State in exile are granted immunity *ratione personae* in the country where they have found refuge. Thus, for instance, British tribunals recognized full immunity, on the basis of common law and customary international law, to foreign heads of State (e.g., the President of Poland or the King of Norway) residing in London during their country's occupation in the course of the Second World War.[293] More recently, as described above, President Aristide was granted immunity in a civil suit brought against him when he was living in the United States following the coup d'état that had deposed him in Haiti.[294] The immunity *ratione personae* of the head of State in exile is also accepted in the legal literature.[295]

113. The determination of this status, however, poses some difficulties. In theoretical terms, the category is well-defined and includes those heads of State that were forced to leave their country, either because of belligerent occupation or internal unrest or upheaval, but continue to be considered as holding that position. The question arises, nevertheless, whether the exile should be appraised as a loss of office, in which case the individual would only benefit from the immunity *ratione materiae* proper to former heads of State.[296] Authors have therefore put emphasis on the temporary character of the exile, which is said to reveal whether the person has ceased to occupy his position as head of State, but even this determination is subject

---

immunity under art. IV, sect. 11, of the Convention on Privileges and Immunities of the United Nations and art. 31 of the Vienna Convention on Diplomatic Relations, given that he was present in the United States as representative of the Government of Zimbabwe to the United Nations Millennium Summit at the time he was served (*Tachiona v. Mugabe*, pp. 267-268). After having examined, and accepted, Mr. Mugabe's entitlement to head of State immunity (finding that the suggestion of immunity was controlling on the issue), the Court turned to the question of Mr. Mugabe's diplomatic immunity, as argued by the State Department, and also accepted his immunity on these grounds (ibid., pp. 297-302). See also United States, *Kadic v. Karadzic*, pp. 246-248 (where the Court, after having rejected Karadzic's claim for immunity given his status as an invitee of the United Nations both under the United Nations Headquarters Agreement and federal common law, also dismissed the possibility of granting him head of State immunity).

293 See, e.g., François de Kerchove d'Exaedre, "Quelques questions en droit international public relatives à la présence et à l'activité du Gouvernement belge en exil à Londres (Octobre 1940-Septembre 1944)", *Revue belge de droit international*, vol. 23 (1990), p. 123. The Diplomatic Privileges (Extension Act) of 6 March 1941 extended diplomatic privileges to the members of the governments in exile, but did not apply to heads of State, who were covered under the common law (for the text of that Act, see ibid., annex I, pp. 144-145).

294 See, *Lafontant v. Aristide*; as noted above in para. 108, the tribunal granted immunity based on a suggestion of immunity filed by the State Department in the case and taking into account the United States Government's recognition of Aristide, even after the coup, as the legitimate Head of State of Haiti.

295 Stefan Talmon, *Recognition of Governments in International Law: With Particular Reference to Governments in Exile* (Oxford Clarendon Press, Oxford, 1998), pp. 259-261; Philippe Cahier, *Le droit diplomatique contemporain* (Paris, Droz, 1962), p. 343; Verhoeven, "Rapport provisoire", op. cit., pp. 542-543; and Watts, op. cit. (1994), pp. 85-86.

296 Verhoeven, "Rapport provisoire", op. cit., p. 542. See also Watts, op. cit. (1994), p. 87. The latter author identifies another category of individuals, that of "pretenders" constituted by the descendents of a former monarch who have never held power themselves, but continue to sustain a claim to the throne: he points out that these individuals are not entitled to any special treatment under international law and are to be considered as private individuals (ibid., p. 87).

to interpretation in light of the circumstances of each case.[297] For this reason, the recognition (either formal or implicit) by the executive branch of the forum State that the individual continues to be considered as the head of a foreign State appears to play a particularly determinant role.[298] It has been noted, however, that such determination, which may be influenced by political motives, would only be binding on the authorities that have made it. According to this view, the granting of immunity by national authorities to a foreign head of State in exile should be construed as "a regime essentially bilateral in nature, similar to a courtesy status, not binding, in principle, upon third States" and, as a consequence, should be distinguished from the treatment given under general international law to the head of State who effectively exercises his power.[299]

(vii) Family members and members of the entourage

114. The granting of immunity *ratione personae* under international law to the family members and members of the entourage of a head of State remains an uncertain matter.[300] This immunity is recognized in those national laws that contain express references to the immunity of the head of State, albeit differing in their determination of the beneficiaries: Section 20(1) of the State Immunity Act of the United Kingdom provides that immunity is granted to "members of [the head of State's] family forming part of his household" and his "private servants"; Section 36(1) of the Australian Foreign States Immunities Act limits such immunity to the "spouse of the head of a foreign State".[301] National case law (mostly in civil proceedings[302]) is limited and remains inconclusive, both because tribunals in

---

[297] See, in particular, Verhoeven, "Rapport provisoire", op cit., pp. 542-543; and Watts, op. cit. (1994), pp. 85-87. At the debate in the 13th Commission of the Institut, Salmon noted that "the nature of this status is not necessarily 'temporary'. When its extension is based on an international illegality (for example, illegal occupation), it is right that it should continue for long as the illegal situation that justifies it persists. If its extension is based on ideological convictions about the legitimacy of the power that has forced the head of State into exile, the status will continue as long as the host State persists in its refusal to recognize the new regime" (Institut, *Annuaire*, op cit., p. 577).

[298] See, in particular, Verhoeven, "Rapport provisoire", op. cit., pp. 542-543, as well as intervention of Salmon, p. 577. See also Watts, op. cit. (1994), pp. 85-87.

[299] Verhoeven, "Rapport provisoire", op. cit., p. 543. [Translated by the Secretariat.]

[300] Both Verhoeven ("Rapport provisoire", op. cit., p. 530) and Watts (op. cit. (1994), p. 76) emphasize this uncertainty in their treatment of the question. Earlier writers, however, recognize immunities from local jurisdiction in respect of sovereigns and their retinue, see Hall, op. cit., § 48; T. J. Lawrence, *The Principles of International Law*, revised by Percy H. Winfield (7th edition) (London, MacMillaw and Co., 1924) § 105: "If any serious and urgent cases arise among his retinue, they must be sent home for trial".

[301] As noted above, both these provisions are based on an extension, with any necessary modifications, of the immunities accorded to the head of a diplomatic mission. It should be recalled, in this respect, that, under art. 37, para. 1, of the Vienna Convention on Diplomatic Relations, the "members of the family of a diplomatic agent forming part of his household shall, if they are not nationals of the receiving State, enjoy the privileges and immunities" granted to the latter, including immunity from criminal jurisdiction under art. 31, para. 1.

[302] The problem of using civil precedents in the context of the present study has already been mentioned in general terms. While decisions rendered in civil cases may assist in understanding the possible scope of the immunity of the family and members of the suite of the head of State (and are, for this reason, referred to below), it should be highlighted that they cannot be considered conclusive with respect to immunity from foreign *criminal* jurisdiction, especially if a functional justification of this immunity is adopted. The fact that, contrary to civil

different forums have taken divergent views on the matter and because the family members concerned have often held an official position of their own. Thus, for instance, the Swiss Federal Tribunal granted immunity to Imelda Marcos, the wife of the former President of the Philippines, in the following terms:

> "customary international law has always granted to Heads of State, as well as to the members of their family and their household visiting a foreign State, the privileges of personal inviolability and immunity from criminal jurisdiction … This jurisdictional immunity is also granted to a Head of State who is visiting a foreign State in a private capacity and also extends, in such circumstances, to the closest accompanying family members as well as to the senior members of his household staff."[303]

115. In 1945, an Indian High Court denied immunity from taxation in British India to the wife of the ruler of Kalsia State, arguing that it could not "extend to the wife of every Ruler of an Indian State recognition of her husband's sovereignty in the full sense of international personality as recognized by public international law", thus implicitly suggesting that its finding would have been different if she had been related to a foreign head of State.[304] In a case concerning a claim for compensation for expropriation, the Civil Court of Brussels found that neither the deceased wife of the President of Zaire nor his children were entitled to immunity, pointing out, as regards the latter, that the children were "of full age" and were thus to be considered "persons distinct from their father".[305] In a case concerning an application of affiliation, the Austrian Supreme Court confirmed the finding of lower courts that the incumbent head of State of Liechtenstein was entitled to immunity, but found that this was not the case for his sister and two brothers, given that they could no longer be considered as being "the closest family members of Head of State forming part of his household" entitled to immunity by virtue of customary international law.[306] In cases regarding family members of heads of State, the United States courts have again followed the views of the executive branch. For instance, a United

---

proceedings, a criminal prosecution may result in the adoption of penalties affecting the personal freedom of family members and may therefore have a serious impact on the head of State's independent performance of his functions could be taken into account in the determination whether this immunity is granted under international law.

[303] *Ferdinand et Imelda Marcos c. Office fédéral de la police*, p. 535 (English version, op. cit., vol. 102, p. 201). It should be noted, however, that Mrs. Marcos had also held an official position in the Government of the Philippines (having been Minister for Social Affairs and Governor of the Metropolitan District of Manila). In its Judgment, the Federal Tribunal occasionally refers to the applicants as the "former leaders of a foreign State" and to Philippines as "the State which they had governed".

[304] High Court of Allahabad, *Rani Amrit Kunwar v. Commissioner of Income Tax*, 21 December 1945, reproduced in *International Law Reports*, vol. 22, pp. 73-75. In his separate judgment, Malik J. referred to Oppenheim's *International Law*, according to which "The wife of a sovereign must likewise be granted ex-territoriality but not other members of a sovereign's family", but preferred Bluntschli's view that the wife of a sovereign would not receive such special treatment in international law (ibid., p. 75).

[305] Civil Court of Brussels (Attachment Jurisdiction), *Mobutu v. SA Cotoni*, reproduced in *International Law Reports*, vol. 91, p. 260 (one of Mobutu's daughters was a minor and the Court found the attachment admissible with regard to the administrator representing the interests of that daughter).

[306] Supreme Court, *W. v. Prince of Liechtenstein*, Judgment of 14 February 2001, 7 Ob 316/00x, para. 11. Reference was made in particular to art. 37 of the Vienna Convention on Diplomatic Relations.

States court dismissed in 1988 a complaint claiming damages for false imprisonment and abduction against the wife of the President of Mexico on the basis of a suggestion of immunity, noting that "under general principles of International Law, heads of state and immediate members of their families are immune from suit".[307] As described above, in the absence of any suggestion from the executive in a civil suit, immunity was denied to the grandson of the ruler of Abu Dhabi and firstborn of the Crown Prince of Abu Dhabi.[308] A District Court also dismissed an action against the Prince of Wales following a suggestion of immunity filed on the basis both that he was heir apparent to the throne and member of the "immediate family and household" of the Queen of the United Kingdom, and that, during the visit in which the facts occurred, he was to be considered an official diplomatic envoy present in the United States on a special diplomatic mission.[309] The legal literature also seems to be divided on the issue.[310]

116. The immunity of family members and the entourage of the head of State may have a lesser justification under a functional approach to the immunity of heads of State, but may still be motivated by the need to preserve the latter's independence.[311] In any event, from the elements of State practice described above (and also by analogy with the position of heads of diplomatic missions), it appears that only the closest members of the family of the head of State who form part of his household could be entitled to this immunity (the argument being even made that only the spouse would have such an entitlement).[312] However, in light of the fragmentary practice, the view has authoritatively been expressed that immunities

---

[307] *Kline v. Kaneko*, p. 788.

[308] *Jungquist v. Sheikh Sultan Bin Khalifa al Nahyan*, p. 531.

[309] District Court for the Northern District of Ohio, Eastern Division, *Kilroy v. Windsor*, Civ. No. C-78-291 (1978). The arguments referred to in the text were contained in the letter of the Legal Adviser to the Department of State to the Attorney-General requesting that the Department of Justice file a suggestion of immunity in respect of the Prince (reproduced in *International Law Reports*, vol. 81, p. 605).

[310] See, in favour of the immunity of family members: *Oppenheim's International Law*, H. Lauterpacht (ed.), 8th edition (London, Longmans, Green & Co., 1955), para. 349 (only for the wife of the sovereign); Watts, op. cit., p. 76 (but, see also ibid., pp. 80-81, where he considers it doubtful that they would be entitled to immunities and privileges when making a private visit abroad, not in the company of the head of State); Cahier, op. cit., p. 337; F. Deák, in M. Sørensen (ed.), *Manual of Public International Law* (New York, St. Martin's Press, 1968), p. 387. Mallory, op. cit., p. 188; Mitchell, op. cit., pp. 230-231. See, against the immunity of family members: Catherine Kessedjian, "Immunités", *Repertoire Dalloz droit international*, 2nd edition (1998), No. 46; Verhoeven, "Rapport provisoire", op. cit., p. 550; Fox, "The Resolution of the Institute of International Law", op. cit., p. 120 (commenting the resolution of the Institut quoted below in the text).

[311] Verhoeven, "Rapport provisoire", op. cit., p. 531, referring to Cahier, op. cit., p. 437.

[312] See Watts, op. cit. (1994), pp. 77-78, who notes that "a reference to a person forming part of someone's 'household' does not bear the same meaning in the context of members of a Head of State's family as it does in relation to the members of an ambassador's family. In the circumstances of a diplomatic mission membership of an ambassador's household may be thought to require an element of dependence on the ambassador, and residence under the same roof. But a Head of State's circumstances may be very different; if a monarch, his household may well be regarded as containing adult members of the immediate Royal family who, although living in a separate establishment from that of the monarch, nevertheless share in and assist with the exercise of certain Royal constitutional and representational functions". See, however, the finding of the Austrian Supreme Court in the *W. v. Prince of Liechtenstein* case described in para. 115 above.

and privileges are accorded to members of the family of heads of State on the basis of international comity rather than in accordance with established rules of international law. This was the position of the Special Rapporteur on jurisdictional immunities of States and their property[313] and of the Institut, whose resolution on the topic of immunities from jurisdiction and execution of heads of State and of Government in international law provides:

> "Neither family members nor members of the suite of the Head of State benefit from immunity before the authorities of a foreign State, unless afforded as a matter of comity. This is without prejudice to any immunities they may enjoy in another capacity, in particular as a member of a special mission, while accompanying a Head of State abroad."[314]

117. Under article 39 of the Convention on Special Missions, 1969, members of the families of representatives of the sending State in the special mission (including the head of State, in the case provided for under article 21, paragraph 1) shall, if they accompany such members of the special mission and provided that they are not nationals of or permanently resident in the receiving State, enjoy the privileges and immunities in the Convention, including the immunity from foreign criminal jurisdiction under article 31, paragraph 1.[315]

(b) Heads of Government and ministers for foreign affairs

118. The Judgment of the International Court of Justice in the *Arrest Warrant* case contains a categorical pronouncement in favour of the immunity *ratione personae* of heads of Government and ministers for foreign affairs:

> "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".[316]

119. In that case, while the Court considered that the provisions of the Vienna Convention on Diplomatic Relations and the Convention on Special Missions, which had been referred to by the parties in the proceedings, provided useful guidance on certain aspects of the question of immunities, it noted that they did not contain any provision specifically defining the immunities enjoyed by a minister for foreign affairs. The Court therefore needed to decide this question on the basis of customary international law.[317] Its motivation on this point deserves to be quoted in full:

---

[313] See Preliminary report by Motoo Ogiso, Special Rapporteur (A/CN.4/415 and Corr.1, para. 49, in *Yearbook ... 1988*, vol. II (Part One), p. 103. See also the commentary by the Commission in *Yearbook ... 1989*, vol. II (Part Two), pp. 102-103, para. 446. For the debate in the Commission, see Part One, sect. C.2, above.

[314] Art. 5 of the resolution of the Institut.

[315] As explained by the Commission in its commentary to the corresponding draft article, this provision is based on art. 37, para. 1, of the Vienna Convention on Diplomatic Relations but omits the expression "forming part of his household" (*Yearbook ... 1967*, vol. II, p. 364), since the Commission "considered that, in view of the characteristics of special missions, it should be possible for members to be accompanied by persons of their family who do not normally form part of their household" (ibid., p. 363).

[316] *Arrest Warrant*, para. 51.

[317] Ibid., para. 52.

> "In customary international law, the immunities accorded to Ministers for Foreign Affairs are not granted for their personal benefit, but to ensure the effective performance of their functions on behalf of their respective States. In order to determine the extent of these immunities, the Court must therefore first consider the nature of the functions exercised by a Minister for Foreign Affairs. He or she is in charge of his or her Government's diplomatic activities and generally acts as its representative in international negotiations and intergovernmental meetings. Ambassadors and other diplomatic agents carry out their duties under his or her authority. His or her acts 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 (see, for example, Article 7, paragraph 2 (*a*), of the 1969 Vienna Convention on the Law of Treaties). In the performance of these functions, he or she is frequently required to travel internationally, and thus must be in a position freely to do so whenever the need should arise. He or she must also be in constant communication with the Government, and with its diplomatic missions around the world, and be capable at any time of communicating with representatives of other States. The Court further observes that a Minister for Foreign Affairs, responsible for the conduct of his or her State's relations with all other States, occupies a position such that, like the Head of State or the Head of Government, he or she is recognized under international law as representative of the State solely by virtue of his or her office. He or she does not have to present letters of credence: to the contrary, it is generally the Minister who determines the authority to be conferred upon diplomatic agents and countersigns their letters of credence. Finally, it is to the Minister for Foreign Affairs that chargés d'affaires are accredited.
>
> "The Court accordingly concludes that the functions of a Minister for Foreign Affairs are such that, throughout the duration of his or her office, he or she when abroad enjoys full immunity from criminal jurisdiction and inviolability. That immunity and that inviolability protect the individual concerned against any act of authority of another State which would hinder him or her in the performance of his or her duties."[318]

120. In other words, the Court followed a functional justification of the immunity *ratione personae* granted to the minister for foreign affairs: in light of the latter's diplomatic and representative functions, which are recognized to him under international law solely by virtue of his office, he was found to be required to frequently travel internationally and to be in constant need to communicate with his Government and representatives of other States.

121. The Court's findings constitute an authoritative assessment of the state of customary international law with respect to the immunity *ratione personae* of the minister for foreign affairs, which could be used, mutatis mutandis, to justify the immunity of the incumbent head of Government. They have indeed been followed in subsequent national judicial decisions. In particular, the Belgian Court of Cassation dismissed a criminal complaint against Mr. Sharon, the incumbent Prime Minister of

[318] Ibid., paras. 53 and 54.

Israel, on the grounds that the latter enjoyed immunity from criminal jurisdiction in Belgian courts.[319]

122. Nevertheless, it should be emphasized that, prior to the pronouncement by the International Court of Justice, some doubts had been expressed as to whether the immunities generally recognized to the head of State could be extended to heads of Government and ministers for foreign affairs. These doubts were echoed by certain Judges in their opinions attached to the *Arrest Warrant* Judgment.[320] In their joint separate opinion, Judges Higgins, Kooijmans and Buergenthal noted that the immunity of the head of State was traditionally predicated on status, on the basis that he was seen as personifying the sovereign State[321] and found "no basis for the argument that Ministers for Foreign Affairs are entitled to the same immunities as Heads of State".[322] Referring to the works of the Commission and the Institut de droit international, these Judges agreed with the Court that "the purpose of the immunities attaching to Ministers for Foreign Affairs under customary international law is to ensure the free performance of their functions on behalf of their respective States", but were of the view that a minister for foreign affairs would only be "entitled to full immunity during official visits in the exercise of his function" or "whenever and wherever engaged in the functions required by his office and when in transit therefor".[323] They found, however, that "whether he is also entitled to immunities during private travels and what is the scope of any such immunities, is far less clear" and concluded that "he or she may not be subjected to measures which would prevent effective performance of the functions of a Foreign Minister", such as detention or arrest.[324]

123. In his dissenting opinion, Judge Al-Khasawneh expressed the view that, with regard to immunity from criminal process, the position of the minister for foreign affairs was "far from clear", given in particular "the total absence of precedents",[325]

---

[319] *H.S.A. et al. v. S.A. et al*., Decision related to the indictment of Ariel Sharon, Amos Yaron and others, No. P.02.1139.f, 12 February 2003, reproduced in *International Legal Materials*, vol. 42, No. 3 (2003), pp. 596-605. While it is true that Belgian authorities were in a special situation, insofar as the judgment of the Court in the *Arrest Warrant* case was binding upon Belgium under art. 59 of the Statute of the Court, this case actually applied a broader principle, since it referred to the immunity from criminal jurisdiction of a head of Government. The Court of Cassation made no reference to the Judgment of the International Court of Justice in its decision.

[320] Some commentators have also criticized the Judgment of the Court on these grounds, see: Maurice Kamto, "Une troublante 'Immunité totale' du Ministre des affaires étrangères", *Revue belge de droit international*, vol. 35 (2002), pp. 519-523; Jean Salmon, "Libres propos sur l'arrêt de la C.I.J. du 14 février 2002 dans l'affaire relative au mandat d'arrêt du 11 avril 2000, R.D.C. c. Belgique,", *Revue belge de droit international*, 2002, p. 513; Jan Wouters, "The Judgment of the International Court of Justice in the Arrest Warrant case: Some Critical Remarks", *Leiden Journal of International Law*, vol. 16 (2003), pp. 256-258.

[321] Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal, para. 80.

[322] Ibid., para. 81.

[323] Ibid., para. 83. As noted by the Judges, this was also recognized by the Belgian investigating judge in the arrest warrant of 11 April 2000, which was the object of the dispute.

[324] Ibid., para. 84. These Judges were therefore of the view that, given that "the arrest warrant of 11 April 2000 was directly enforceable in Belgium and would have obliged the police authorities to arrest Mr. Yerodia had he visited that country for nonofficia1 reasons … the very issuance of the warrant therefore must be considered to constitute an infringement on the inviolability to which Mr. Yerodia was entitled as long as he held the office of Minister for Foreign Affairs of the Congo" (ibid.).

[325] Dissenting Opinion of Judge Al-Khasawneh, ibid., para. 1.

and that it could not be assimilated either to that of diplomatic representatives (whose immunity depended on the discretional accreditation by the host State)[326] nor to that of the head of State (who is seen as personifying the State).[327] According to Judge Al-Khasawneh,

> "a Minister for Foreign Affairs is entitled to immunity from enforcement when on official mission for the unhindered conduct of diplomacy would suffer if the case was otherwise, but the opening of criminal investigations against him can hardly be said by any objective criteria to constitute interference with the conduct of diplomacy".[328]

124. Judge ad hoc Van den Wyngaert reached a similar conclusion in her dissenting opinion, arguing that "there is no evidence" in support of the proposition that there exists a rule of customary international law protecting incumbent Foreign Ministers against criminal prosecution.[329] She also criticized the analogies made by the Court to the immunities of diplomatic agents (who reside and exercise their functions on the territory of the receiving State, following an accreditation)[330] and those of heads of State (who "impersonate" the State and are the "State's alter ego").[331] She suggested that "there may be some political wisdom in the proposition that a Foreign Minister should be accorded the same privileges and immunities as a Head of State, but this may be a matter of courtesy". In her view, by virtue of the application of the principle contained in article 21 of the Convention on Special Missions, 1969, an arrest warrant against a minister for foreign affairs could not be enforced when he is on an official visit (immunity from execution), but international law did not preclude a criminal action against him.[332]

125. As was noted above, the United Nations Convention on Jurisdictional Immunities of States and their Property contains a provision that safeguards the privileges and immunities accorded under international law to heads of State *ratione personae*, but remains silent as to immunities of other State officials. The discussions held on this provision during the preparatory works, which have been described in Part One above,[333] show that the Commission had left the question open. The Convention on Special Missions seems to suggest that certain facilities,

---

[326] Ibid., para. 1.

[327] Ibid., para. 2.

[328] Ibid., para. 4. Judge Al-Khasawneh also based his argument on the fact that immunity is by definition an exception from the general rule that man is responsible legally and morally for his actions and, as such, should be narrowly defined (ibid., para. 3). His conclusion was that the arrest warrant issued against Mr. Yerodia was not in breach of obligations owed by Belgium to the Democratic Republic of the Congo, since it contained express language to the effect that it was not to be enforced if the individual was on Belgian territory on an official mission (ibid., para. 4).

[329] Dissenting Opinion of Judge ad hoc Van den Wyngaert, ibid., para. 10, and para. 11. More specifically, Judge Van den Wyngaert observed that "there is no settled practice (*usus*) about the postulated 'full' immunity of Foreign Ministers" and that a "negative practice" of States could not, in itself, be seen as evidence of *opinio juris* (ibid., para. 13).

[330] Ibid., para. 15.

[331] Ibid., para. 16.

[332] Ibid., paras. 18 and 22. In support of her criticism of the Court's position on the immunity of ministers for foreign affairs, she further referred to the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, 1973 (ibid., para. 19), the legal doctrine (ibid., para. 20) and the works of the Institut de droit international (ibid., para. 21).

[333] See Part One, sect. C.2, above.

privileges and immunities are accorded to heads of Government and ministers for foreign affairs under general international law. Under article 21, paragraph 2, of that Convention:

> "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."

126. The Convention, however, fails to identify the said facilities, privileges and immunities (and, in particular, to specify whether they would include immunity from criminal jurisdiction) and the Commission, in its commentary to the corresponding draft article, provided no explanation as to their possible nature and scope.[334] In the preparation of the draft, the Special Rapporteur stated that he had found no rules specially applicable to "high-level special missions" besides "those relating to the treatment of these distinguished persons in their own State, not only as regards the courtesy accorded to them but also as regards the scope of the privileges and immunities".[335] In any event, it is clear that heads of Government and ministers for foreign affairs participating in (or leading) a special mission shall enjoy immunity from the criminal jurisdiction of the receiving State, as recognized under article 31 of the Convention.

127. Instances of State practice on the immunity of heads of Government and ministers for foreign affairs are scarce. The national laws that explicitly contemplate the immunity of the head of State generally do not contain a similar provision applying to the head of Government or minister for foreign affairs.[336] The Restatement (Second) of Foreign Relations Law of the United States, on the other hand, considered that the head of Government and foreign minister enjoyed the same immunity as the head of State for official and private acts.[337] Domestic case law is limited and mainly concerns civil cases.[338] A French court, in 1961, while dismissing a claim to immunity by a Minister of State of Saudi Arabia in a civil suit, seemed to suggest that immunity would have been granted if the individual had been a minister for foreign affairs.[339] In 1963, a United States court dismissed a civil

---

[334] Para. (3) of the commentary to draft article 21 in *Yearbook ... 1967*, vol. II, p. 359, which limits itself to note that para. 2 of that article lays down a similar rule to that applicable to heads of State leading a mission (covered under para. 1).

[335] *Third report by Milan Bartoš, Special Rapporteur* (A/CN.4/189 and Add.1 and 2), in *Yearbook ... 1966*, vol. II, para. 272.

[336] See Section 20 of the United Kingdom State Immunity Act of 1978 and Section 36 of the Australian Foreign States Immunities Act of 1985.

[337] See *Restatement (Second) of Foreign Relations Law of the United States* (St. Paul, American Law Institute, 1962), para. 66, pp. 200 and 202. United States courts have referred to the Restatement even in recent times: see *Lafontant v. Aristide*, p. 133.

[338] *The Schooner Exchange v. McFaddon* contained a reference to "the immunity which all civilized nations allow to foreign ministers", which has sometimes been invoked to justify the immunity of ministers for foreign affairs (see, e.g., the suggestion of immunity filed by the Executive Branch in the *Tachiona v. Mugabe* case, reproduced in *The American Journal of International Law*, vol. 95, p. 874). The reading of the judgment, however, reveals that the United States Supreme Court used the expression "foreign minister" in that case to refer rather to the diplomatic representative of the sovereign residing in a foreign State, pp. 138-139.

[339] Court of Appeal of Paris, *Ali Ali Reza v. Grimpel*, Judgment of 28 April 1961, reproduced in the *International Law Reports*, vol. 47, pp. 275-277 (original French version in *Revue générale de*

action filed against Mr. Kim Yong Shik, the Minister for Foreign Affairs of the Republic of Korea, during his transit through the State of Hawaii while on an official visit to the United States, on the basis of a suggestion of immunity filed by the executive power that had argued that "under customary international law, recognized and applied in the United States, the head of a foreign government, its foreign minister and those designated by him as members of his official party are immune from the jurisdiction of United States federal and state courts" and that "the Department of State recognizes the diplomatic status of His Excellency, Kim Yong Shik, on the occasion of his visit to the United States".[340] In 1988, another United States court dismissed a claim for compensation for death, personal injury and damage to property caused by an aerial bombardment on the Libyan Arab Republic against inter alia Ms. Thatcher, an incumbent Prime Minister of the United Kingdom, finding that the suggestion of immunity filed by the State Department on her behalf was conclusive in this regard.[341] In 2001, a United States District Court honoured a suggestion of immunity filed by the Executive Branch on behalf of, inter alia, the incumbent Minister for Foreign Affairs of Zimbabwe, in a class action brought, among others, under the Alien Tort Claims Act.[342] As mentioned above, the scarcity of this practice was considered by some Judges at the International Court of Justice as failing to evidence the *usus* and *opinio juris* necessary for the existence of a rule of customary international law. A different interpretation, however, was given by the Rapporteur at the Institut du droit international, who noted that, while few decisions confirmed the immunities of heads of Government and ministers for foreign affairs, "there was, however, no decision that contradicted such immunities, thus giving rise to the belief that such immunities were generally recognized".[343]

---

droit international public (1962), p. 418), cited and interpreted as in the text by Watts, op. cit., p. 106. The Court indicated that "Ali Ali Reza's status as Minister of State and not Minister of Foreign Affairs is not enough to assure him the benefit of" immunity as an envoy of a foreign Government; p. 276.

340 Circuit Court of the First Circuit (State of Hawaii), *Chong Boon Kim v. Kim Yong Shik and David Kim*, Civil action No. 12565, Judgment of 9 September 1963. The text of the suggestion of immunity is reproduced in *The American Journal of International Law*, vol. 58 (1964), pp. 186-187, under the heading "Exemption from judicial process — special missions".

341 *Saltany v. Reagan*, reproduced in the *International Law Reports*, vol. 80, p. 21. Ms. Thatcher was sought to be held liable because the United Kingdom Government had given permission for United States Air Force planes based in the United Kingdom to depart from and return to their bases to participate in the mission.

342 *Tachiona v. Mugabe*, p. 297. The class action also concerned Mr. Mugabe, the President of Zimbabwe, the Zimbabwe African National Union-Patriotic Front and other senior officers of Zimbabwe.

343 Verhoeven, "Rapport provisoire", op. cit., p. 546 [translated by the Secretariat]. Verhoeven maintained this position after the 2002 Judgment, supporting the reasoning of the Court: "No one would dispute that fact that, in this case, the practice on which a customary rule must be based is not very clear. However, the fact remains that there are no known cases in which a minister for foreign affairs has been criminally prosecuted and sentenced abroad; in the few known cases when some have tried to do this, his immunity from jurisdiction has been unambiguously recognized; and the vast majority of legal opinion attests to the existence of such immunity. It is also true that a minister for foreign affairs may be seriously impeded in the exercise of his responsibilities if, at any time, he could be subject to criminal prosecution abroad. It is not surprising therefore that the Court has not contested his immunity from jurisdiction in principle" (Joe Verhoeven, "Quelques réflexions sur l'affaire relative au mandat d'arrêt du 11 avril 2000", *Revue belge de droit international*, vol. 35 (2002), p. 532). See also Gionata P. Buzzini, *Le droit international général au travers et au-delà de la coutume. Essai de*

128. The legal literature appears to be divided on the issue. One solution, however, seems to be widely accepted, namely that heads of Government and ministers for foreign affairs would enjoy immunity *ratione personae*, or at least absolute inviolability, while on official visit, a conclusion that is further confirmed by article 31 of the Convention on Special Missions referred to above.[344] Beyond this, positions diverge. Those who uphold immunity even on private visits (or when the individual is absent from the forum State) rely, in particular, on the functional justification for the immunity of the head of State and see no obstacle to the extension of the same immunity to cover heads of Government and ministers for foreign affairs, whose international functions are generally as important as those of the head of State (if not more important than these).[345] On the contrary, those who reject a broadening of immunity *ratione personae* to these two categories of State officials rather emphasize the special representative character of the head of State, and his unique position as personifying the State itself.[346]

129. The work of the Institut du droit international on this issue deserves separate consideration. The Rapporteur and the 13th Commission were of the view that international law granted to the head of Government and minister for foreign affairs inviolability and immunity from jurisdiction similar to those of the head of State, and had proposed a draft article providing accordingly.[347] The latter, however, was

---

conceptualisation d'une réalité aux contours fluctuants, Doctoral Dissertation, No. 741, University of Geneva (Graduate Institute of International Studies), 2007, pp. 266-268 and 292-294. The author considers that the deductive reasoning followed by the International Court of Justice in the *Arrest Warrant* case was justified, since the conclusions to which it led are not contradicted by international practice.

344 As previously described in the text, this conclusion was upheld even by the Judges of the minority in the judgment of the Court in the *Arrest Warrant* case, although there seems to be some divergence whether only inviolability, or also immunity from criminal jurisdiction, should be recognized. See also: Watts, op. cit. (1994), p. 106; Wouters, op. cit., p. 256 (after the *Arrest Warrant* judgment).

345 Notably, Verhoeven, "Rapport provisoire", op. cit., pp. 543-544 and 546. See also: Chanaka Wickremasinghe, "Immunities Enjoyed by Officials of States and International Organizations", in Malcolm D. Evans (ed.), *International Law*, Second Edition (Oxford, Oxford University Press, 2006), p. 408 (after the *Arrest Warrant* judgment).

346 Notably, Watts, op. cit. (1994), pp. 102-103 ("heads of governments and foreign ministers, although senior and important figures, do not symbolize or personify their States in the way that Heads of States do. Accordingly, they do not enjoy in international law any entitlement to special treatment by virtue of qualities of sovereignty or majesty attaching to them personally"). See also: Michael Bothe, "Die Straftrechtliche Immunität fremder Staatsorgane", *Zeitschrift für Auslandisches Öffentlisches Recht und Völkerecht*, vol. 31 (1971), pp. 264-265; Adam Day, "Crimes against Humanity as a Nexus of Individual and State Responsibility: Why the ICJ Got *Belgium v. Congo* Wrong", *Berkeley Journal of International Law*, vol. 22 (2004), pp. 498-499 (after the *Arrest Warrant* judgment); Prouvèze, op. cit. (2002), pp. 296-297 (criticizing the Court's reasoning); Wouters, op. cit., p. 257 (criticizing the Court's reasoning). In *Pinochet* (No. 3) (p. 644), Lord Millett expressed the view that immunity *ratione personae* is enjoyed by the serving head of State "by reason of his special status as the holder of his state's highest office. He is regarded as the personal embodiment of the state itself"; it follows that, according to him, this immunity "is not available to serving heads of government who are not also heads of state".

347 For the position of the Rapporteur, see Verhoeven, "Rapport provisoire", Institut, *Annuaire*, op. cit., pp. 543-547 and 550 (point viii) (see also Verhoeven, "Rapport définitif", ibid., p. 595). At the subsequent debate in the 13th Commission, the views of the Rapporteur were explicitly supported by Valticos (ibid., p. 555), Salmon (ibid., pp. 577-578), Sucharitkul (ibid., p. 582) and Morin (ibid., pp. 584-585). Tomuschat warned against the use of the expression "mutatis

subsequently revised to refer explicitly only to the head of Government and to introduce a safeguard clause for the other members of Government (including the minister for foreign affairs).[348] In the discussion in plenary, several voices were heard in favour of the immunity of one or both categories of State officials.[349] The final resolution by the Institut provides:

> "1. The Head of Government of a foreign State enjoys the same inviolability, and immunity from jurisdiction recognised, in this Resolution, to the Head of the State. This provision is without prejudice to any immunity from execution of a Head of Government.
>
> "2. Paragraph 1 is without prejudice to such immunities to which other members of the government may be entitled on account of their official functions."

(i) Determination of whether an individual is head of Government or minister for foreign affairs

130. The determination, for the purposes of granting immunity, whether the individual concerned is a head of Government or a minister for foreign affairs of another State does not seem to raise any specific legal problem. The observations made above with respect to the determination of the status of head of State (particularly, regarding the role of recognition) are nevertheless also valid for these two other categories of officials.[350]

---

mutandis" in this context (ibid., p. 587). The article submitted to the plenary, which remained in brackets given that it exceeded the mandate of the Commission, provided as follows:

> "The Head of Government and the Minister of Foreign Affairs of a foreign State enjoy, on the territory of the forum, an inviolability, as well as an immunity from jurisdiction and an immunity from measures of execution similar to those recognised, in the present Resolution, to the Head of their State." (Ibid., pp. 610-611; French version in ibid., p. 606).

[348] See art. 15 of the revised draft resolution No. 1 (ibid., p. 646; French version in ibid., p. 640), the text of which is similar to that of the final resolution reproduced below in the text (albeit it recognized immunity from execution to the head of government: a reference that was later deleted probably taking into account the remarks by Gaja in plenary). The *Annuaire* does not contain a formal justification to the exclusion of ministers from foreign affairs in the substantive part of art. 15, but the explanations provided by Salmon during the plenary debate, confirmed by the Rapporteur, suggest that the said revision was motivated by the scope of the mandate of the Commission, rather than by the conviction that the minister for foreign affairs would not enjoy immunities comparable to those of the head of Government (ibid., pp. 677-678).

[349] For that discussion, see ibid., pp. 674-679. See, in particular, the statements of Morin, Sahovic (who expressed some doubts, however, with regard to the formulation of the provisions), Gaja (who believed, however, that no immunity from execution was granted to the head and other members of government), McWhinney, Lalive, Salmon, Shahabuddeen (who noted that, without such a provision, the resolution would have no functional relevance to several parts of the world, such as the Caribbean, Canada and the United Kingdom; he also said, however, that elements of the text of the article did not in fact correspond to what generally occurs in State practice) and Torres Bernárdez. Franck was of the view that the Institut should not take position before the conclusion of the *Arrest Warrant* case before the International Court of Justice.

[350] Whereas the identification of a head of State is usually straightforward, the determination whether an individual is a State official other than a head of State may prove more difficult to achieve, since it may require a more in-depth examination of the internal structure of the State concerned. For the head of Government and the minister for foreign affairs, however, the information is usually readily available and should not cause particular problems. In those

(ii) Family members and members of the entourage

131. There appears to be no State practice regarding the granting of immunity to the family and members of the entourage of heads of Governments and ministers for foreign affairs.[351] It has been suggested that the same considerations referred to above with regard to the family and entourage of the head of State would be relevant in this context.[352] In any event, article 39 of the Convention on Special Missions, granting privileges and immunities to the members of the families of representatives of the sending State in a special mission (provided that they accompany the latter and are not nationals or permanent residents of the receiving State) would also be applicable to families of heads of Government and ministers for foreign affairs participating in such missions.

(c) Other high-ranking officials

132. It has been suggested that other high-ranking State officials (particularly, other ministers or members of the cabinet) would enjoy immunity *ratione personae* from foreign criminal jurisdiction while in office. In its general statement referred to above, according to which "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",[353] the International Court of Justice seemed to leave the door open for this possibility. Its subsequent reasoning with respect to the minister for foreign affairs, however, makes it clear that, in the opinion of the Court, the criterion of "high rank" is not conclusive as such, and that the nature of the functions performed by the State official and the circumstances in which such functions are carried out play a determinant role in granting immunity: in reaching its conclusion, the Court insisted on the foreign minister's diplomatic and representative duties at the international level and on the fact that he is frequently called to travel abroad.[354]

133. As it was noted for heads of Government and ministers for foreign affairs, the provision of the United Nations Convention on Jurisdictional Immunities of States and their Property safeguarding the immunity *ratione personae* of the heads of State does not make any reference to other officials, but the preparatory works show that the Commission had left the question open.[355] In general, national laws that explicitly contemplate the immunity of the head of State do not extend a similar immunity to other State officials.[356] The Restatement (Second) of Foreign Relations Law of the United States, which recognized immunity *ratione personae* of heads of Government and foreign ministers, considered that the immunity of other public ministers, officials or agents of the State was restricted to acts performed in their

---

countries where the judiciary follows the suggestions of immunity of the executive branch for the establishment of immunity of the head of State, tribunals also consider as controlling such suggestions of immunity with regard to the head of Government and minister for foreign affairs: see, for the United States, the *Saltany v. Reagan* and *Chong Boon Kim v. Kim Yong Shik and David Kim* cases referred to above.

351 Verhoeven, "Rapport provisoire", op. cit., p. 547.

352 Ibid.

353 *Arrest Warrant*, para. 51 (emphasis added).

354 Ibid., paras. 53-55.

355 See Part One, sect. C.2. above.

356 See Section 20 of the State Immunity Act of 1978 of the United Kingdom and Section 36 of the Australian Foreign States Immunities Act of 1985.

official capacity.[357] In the oral proceedings before the International Court of Justice in the *Djibouti v. France* case, both parties seemed to agree that neither the Public Prosecutor nor the Chief of National Security of the Republic of Djibouti would enjoy as such immunity *ratione personae* under international law.[358] This was clearly confirmed by the Court in its judgment of 4 June 2008.[359]

134. Here again, the case law does not seem to be conclusive. It is reported, for instance, that French courts have denied immunity to a minister of State[360] and a minister of the interior[361] of foreign Governments. In 1987, a United States District Court took the unusual step of rejecting a suggestion of immunity filed by the State Department on behalf of Mr. Ordonez, the Philippines Solicitor General, who had been served with a subpoena requiring him to appear for a deposition in the context of civil proceedings. The Court noted that the Government's argument that Mr. Ordonez was "entitled to head-of-state immunity, despite the fact that he is neither a sovereign nor a foreign minister, the two traditional bases for a recognition or grant of head-of-state immunity", sought "to expand the head-of-state doctrine to encompass all government officials of a foreign state to whom the State Department chooses to extend immunity" and that "there is no precedent for such a radical departure from past custom".[362] In 2004, the Italian Court of Cassation, in a Judgment that was already described above, considered that the immunity granted under customary international law to acting heads of State, heads of Government and ministers for foreign affairs did not extend (and could not be applied by analogy) to individuals who held such offices within entities that did not have the status of a sovereign State, such as a Member State of a federation (*in specie*, the President of Montenegro).[363] In 2005, a British Divisional Court similarly denied immunity to the Governor and Chief Executive of a constituent State of the Federal

---

[357] See *Restatement (Second) of Foreign Relations Law of the United States*, para. 66, p. 200.

[358] See: CR 2008/3, p. 15 (Condorelli, on behalf of Djibouti, who argued, however, that the two above-mentioned officials enjoy immunity *ratione materiae* (ibid., pp. 15-17)); CR 2008/5, pp. 42-47 and 50 (Pellet, on behalf of France).

[359] *Djibouti v. France*, p. 58, para. 194: "The Court notes first that 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."

[360] See *Ali Ali Reza v. Grimpel*, reproduced in *International Law Reports*, vol. 47, pp. 275-277, already described above.

[361] See the *Ben Barka* case, involving the Minister of Interior of Morocco, as reported in Bothe, op. cit., p. 264, footnote 86.

[362] District Court of the Northern District of California, *Republic of the Philippines v. Marcos*, 665 F.Supp. 793, Judgment of 11 February 1987, pp. 797-798. The Court reached that conclusion even if it recognized that Ordonez was "a very high ranking official of the Republic of the Philippines". In its suggestion of immunity, the State Department had invoked the *Chong Boon Kim v. Kim Yong Shik* and *Kilroy v. Windsor* cases already described above, which the Court found unpersuasive for the purposes of determining the immunity of the Solicitor General. See also *Tachiona v. Mugabe*, p. 289 (noting that "while the courts uniformly have accepted the claim [of head-of-state immunity] as to heads-of-state and heads-of-government recognized by the United States, questions remain as to how far down the hierarchical chain the protection could legitimately extend" and referring to the case above) and *El Haddad v. Embassy of the United Arab Emirates*, 69 F.Supp.2d 69 (D.D.C.1999), p. 82, footnote 10 (noting that the head-of-State doctrine "is limited only to the sitting official head-of-state …" The Court declines to expand the head of State immunity to cover all agents of the head of State).

[363] *Public Prosecutor (Tribunal of Naples) v. Milo Djukanovic*, para. 10.

Republic of Nigeria, noting, inter alia, that the said State was not engaged in international relations and had very limited powers which were subject to the overriding authority of the Federal Government.[364] In an *obiter dictum* in a 2005 case concerning the extradition of a former Minister of Atomic Energy of the Russian Federation, the Swiss Federal Tribunal, however, seemed to accept a wider scope of immunity, noting that immunity from criminal jurisdiction aimed at protecting Governments from being impeded in the exercise of their functions by politically motivated criminal proceedings against their "high officials" abroad.[365] In the 2008 Judgment that granted immunity from criminal jurisdiction to the current Head of State of Rwanda, already described above, the Spanish Audiencia Nacional confirmed the criminal charges against high-ranking military commanders in office, including the incumbent Chief of Staff of the Rwandan Army, without raising the question of their immunity.[366]

135. Two recent decisions rendered by courts in the United Kingdom deserve special consideration in that, in granting immunity to high-ranking officials, they relied on the reasoning in the *Arrest Warrant* case. In a 2004 Judgment on an application for arrest warrant against General Shaul Mofaz, acting Defence Minister of Israel, the Bow Street Magistrates' Court interpreted paragraph 51 of the 2002 Judgment as indicating that other categories of high-ranking officials — besides the head of State, head of Government and minister for foreign affairs — could enjoy immunity if their functions included travel or diplomatic missions on behalf of the State. While expressing the view, in an *obiter dictum*, that it would be "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", the Court considered that, on the contrary, "the roles of defence and foreign policy are very much intertwined", in light of the 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 therefore concluded that "a Defence Minister would automatically acquire State immunity in the same way as that pertaining to a Foreign Minister" and therefore declined to issue the warrant requested.[367] Similarly, in a 2005 decision on a request for arrest warrant against Mr. Bo Xilai, the incumbent Minister for Commerce and International Trade of China, the Bow Street Magistrates' Court concluded that the latter's "functions are equivalent to those exercised by a Minister for Foreign Affairs and, adopting the reasoning of the International Court of Justice in [the *Arrest Warrant* case] …, that under the customary international law rules Mr. Bo ha[d] immunity from prosecution as he would not be able to perform his functions unless he is able to travel freely".[368]

---

[364] *R (on the application of Diepneye Solomon Peter Alamieyeseigha) v. The Crown Prosecution Service)*, paras. 37-48 (already described above). This decision made incidental reference to the *Arrest Warrant* case (ibid., para. 22), which however does not seem to be the main basis of its reasoning.

[365] *Evgeny Adamov v. Federal Office of Justice*, 1st Public Law Chamber, Nr. 1A.288/2005, partly published as *Bundesgerichtsent-scheide* 132 II 81, para. 3.4.2.

[366] *Auto del Juzgado Central de Instrucción No. 4* (2008), pp. 157-181.

[367] District Court (Bow Street), *Re General Shaul Mofaz*, Judgment of 12 February 2004, reproduced in *International and Comparative Law Quarterly*, vol. 53 (2004), pp. 771-773. See also the commentary by Warbick therein, which criticizes in particular the *obiter dictum* referred to above (ibid., pp. 773-774).

[368] Bow Street Magistrates' Court, *Re Bo Xilai*, Judgment of 8 November 2005, reproduced in

136. Up to 2002, the legal literature had generally not considered the question whether officials other than the head of State, head of Government or minister for foreign affairs would enjoy immunity *ratione personae*; when it did so, the tendency seems to have been towards rejecting such immunity.[369] Following the *Arrest Warrant* judgment, however, commentators have interpreted the reasoning of the Court as allowing for the possibility of immunity *ratione personae* of senior officials, at least in specific circumstances and having due regard to the functions performed.[370] The issue was also raised in the works of the Institut de droit international[371] and resulted in the adoption of a provision, which while recognizing the inviolability and immunity from jurisdiction of heads of Government, stated that it remained "without prejudice to such immunities to which other members of the government may be entitled on account of their official functions".[372] The records of the discussion reveal that this provision was intended to take into account immunities that may be granted to members of Government, other than the head or the foreign minister, who perform representative functions at the international level.[373]

International Law Reports, vol. 128, pp. 713-715. It should be noted, however, that the judge thereafter noted that, at the relevant time, Mr. Bo formed part of the official delegation for the State visit of the President of the People's Republic of China and that therefore he was a member of a special mission enjoying as such immunity under customary international law, as embodied by the Convention on Special Missions, 1969. The conclusion of the Judgment makes it clear that the latter argument was preponderant: "I am therefore satisfied that particularly by virtue of being a member of a Special Mission Mr. Bo has immunity from prosecution and I am declining to issue a warrant".

369 See, e.g., Bothe, op. cit., pp. 264-265; and Robertson, op. cit., p. 402 (with special reference to generals, police chiefs and ministers).

370 See, e.g.: Cassese, "When May Senior State Officials …", op. cit., p. 864 (immunity *ratione personae* applies "only to *some categories* of state officials, namely diplomatic agents, heads of state, heads of government, perhaps (in any case under the doctrine set out by the Court [in the *Arrest Warrant* case]) foreign ministers and possibly even other senior members of cabinet"); Wouters, op. cit., p. 265 (who indicates, however, that "the general tone of the judgment gives the impression that the Court would be reluctant to accept any exception to the rule of absolute immunity of other high officials"); Wickremasinghe, op. cit. (2006), p. 409 ("How far such immunities can also be extended to other Ministers or officials may depend on analogous reasoning, based on the involvement of such persons in international relations").

371 Although the issue exceeded the limits of the topic as determined by the Institut (which was restricted to the immunities of heads of State and of government), the Rapporteur asked the 13th Commission whether it would find it desirable to extend its consideration to the immunities of all public officials (see point No. 3 of the questionnaire in Institut, *Annuaire*, op cit., p. 453). In the debate (ibid., pp. 453-482; summarized by the Rapporteur on this point at ibid., pp. 485-486), most members of the Commission preferred not to consider this issue, either because it was of less importance or because it would bring the Commission into "uncharted territory" (see, however, Bedjaoui, who suggested consideration of the immunities of ministers; ibid., p. 473).

372 Art. 15, para. 2, of the Institut Resolution of 26 August 2001.

373 As described above (see footnote 346), the original proposed provision, which recognized to the head of Government and foreign minister immunities similar to those of the head of State and contained no reference to other members of the Government, was revised to limit such recognition to the head of Government and to cover all other members of the Government under the safeguard clause reproduced in the text. Although the *Annuaire* does not contain any formal explanation of this revision, the following comments were made in plenary. Sahovic indicated that paragraph 2 of article 15 "is explained by the desire to reflect general developments in the representation of States in international relations, in which the Minister for Foreign Affairs is

2. Acts covered

137. Immunity *ratione personae* from foreign criminal jurisdiction covers all acts carried out by the State official concerned, both in his official or private capacity and including conduct preceding his term of office. The material scope of this immunity is well settled both in judicial decisions[374] and the legal literature,[375]

---

not the sole representative of a State; other members of the Government represent the State, for example in the economic area" (Institut, *Annuaire*, vol. 69 (2000-2001), p. 676. Gaja considered that the provision had no justification given that the draft resolution contained no other reference to other members of government (ibid.). Salmon explained that the members of the 13th Commission "had in mind the case of Councils of Ministers in Brussels where, for example, European ministers of finance, agriculture or the economy meet. They questioned whether or not the draft resolution should address such cases. While restricting the draft to heads of State and Government, the members of the Commission considered it useful to specify that this did not prejudice the privileges and immunities that other members of the Government may be entitled to under public international law. There could be no question here, for example, of interfering with the rules applicable to special missions" (ibid., p. 677). Torres Bernárdez noted that, while the role in international law of foreign ministers was well established, that of other members of Government remained uncertain (ibid., p. 678). Rapporteur Verhoeven confirmed the statement by Salmon on the preparatory work on the provision (ibid.). In a later commentary to the resolution, Fox stated that the provision was justified by the fact that the Institut had "concluded that in modern practice other ministers and members of the government, such as the Finance Minister, represented to equal or greater extent [then the foreign minister] the State in international matters" (Fox, "The Resolution of the Institute of International Law", op. cit., p. 120).

[374] See, specifically on immunity from criminal jurisdiction: *Arafat e Salah, Rivista di diritto internazionale*, vol. LXIX (1986), p. 886; *Ferdinand et Imelda Marcos c. Office fédéral de police*, English version, op. cit., p. 202 ("By contrast with immunity from civil jurisdiction, the immunity from criminal jurisdiction of Heads of State is absolute … This immunity would also appear to cover, without reservation, the private activities of Heads of State", with doctrinal references); *Pinochet* (No. 3), p. 592 ("This immunity enjoyed by a head of state in power … is a complete immunity attaching to the person of the head of state … and rendering him immune from all actions or prosecutions whether or not they relate to matters done for the benefit of the state" (Lord Browne-Wilkinson)); France, *Gaddafi*, *International Law Reports*, vol. 125, p. 509 ("International custom precludes Heads of State in office from 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"); *H.S.A. et al. v. S.A. et al*., *International Legal Materials*, vol. 42, 2003, p. 599 ("customary international law opposes the idea that heads of State and heads of government may be subject of prosecutions before criminal tribunals in a foreign State, in the absence of contrary provisions of international law obliging the States concerned"); *Tatchell v. Mugabe*, *International and Comparative Law Quarterly*, vol. 53, p. 770 ("international customary law … provides absolute immunity to any head of State"); Supreme Court of Sierra Leone, *Issa Hassan Sesay a.k.a. Issa Sesay, Allieu Kondewa, Moinina Fofana v. President of the Special Court, Registrar of the Special Court, Prosecutor of the Special Court, Attorney-General and Minister of Justice*, Judgment of 14 October 2005, SC no. 1/2003 ("A serving Head of State is entitled to absolute immunity from process brought before national courts as well as before the national courts of third States except it has been waived by the State concerned"); Spain, *Auto del Juzgado Central de Instrucción No. 4* (2008), pp. 156-157.

[375] In explaining the *ratio legis* of what was to become art. 3, para. 2, of the United Nations Convention on Jurisdictional Immunities of States and their Property, the Commission referred to "the immunities extended under existing international law to foreign sovereigns or other heads of State in their private capacities, *ratione personae*" and that the reservation contained in that provision "refers exclusively to the private acts or personal immunities and privileges recognized and accorded in the practice of States" (*Yearbook … 1991*, vol. II (Part Two), p. 22). See also, inter alia: Cahier, op. cit., p. 338; Klingberg, op. cit., p. 544; Pierson, op. cit., pp. 273-274; *Restatement (Second)* …, op. cit., p. 202, para. 66 ("Reporters' Note"); Rousseau,

which often express this idea by qualifying immunity *ratione personae* as "complete", "full", "integral" or "absolute". In the *Arrest Warrant* case, the International Court of Justice described and justified the scope of the immunity of an incumbent minister for foreign affairs in the following terms:

> "In this respect, no distinction can be drawn between acts performed by a Minister for Foreign Affairs in an 'official' capacity, and those claimed to have been performed in a 'private capacity', or, for that matter, between acts performed before the person concerned assumed office as Minister for Foreign Affairs and acts committed during the period of office. Thus, if a Minister for Foreign Affairs is arrested in another State on a criminal charge, he or she is clearly thereby prevented from exercising the functions of his or her office. The consequences of such impediment to the exercise of those official functions are equally serious, regardless of whether the Minister for Foreign Affairs was, at the time of arrest, present in the territory of the arresting State on an 'official' visit or a 'private' visit, regardless of whether the arrest relates to acts allegedly performed before the person became the Minister for Foreign Affairs or to acts performed while in office, and regardless of whether the arrest relates to alleged acts performed in an 'official' capacity or a 'private' capacity. Furthermore, even the mere risk that, by travelling to or transiting another State a Minister for Foreign Affairs might be exposing himself or herself to legal proceedings could deter the Minister from travelling internationally when required to do so for the purposes of the performance of his or her official functions."[376]

138. The same statement could be used mutatis mutandis to describe and explain the position of the head of State, head of Government or any other official enjoying the same immunity.

139. The material scope of immunity *ratione personae* of State officials from foreign criminal jurisdiction is often compared to that of the similar immunity granted to heads of diplomatic missions under customary international law, as reflected in article 31, paragraph 1, of the Vienna Convention on Diplomatic Relations.[377] This methodology may be useful to find reasonable solutions to the

---

op. cit., pp. 124-126; Jean Salmon, *Manuel de droit diplomatique* (Brussels: Bruylant, 1994), pp. 596-599 (see also Salmon, op. cit. (2002), p. 513); *Satow's Guide to Diplomatic Practice*, op. cit., chap. 2, paras. 2.2-2.4; Gilbert Sison, "A King No More: The Impact of the Pinochet decision on the Doctrine of Head of State Immunity", *Washington University Law Quarterly*, vol. 78 (2000), p. 1588 ; Alfred Verdross and Bruno Simma, *Universelles Völkerrecht*, 3rd edition (Berlin: Duncker und Humblot, 1984), pp. 640-641; Verhoeven, "Rapport provisoire", op cit., p. 516 ("it is not disputed that the head of State enjoys absolute criminal immunity before the courts of a foreign State. The absolute nature of the immunity precludes the application of any exception to that immunity, for example based on the nature of the offence of which he is accused or the date when it was committed"); Watts, op. cit. (1994), p. 54; and Zappalà, op. cit., p. 598; etc. Mallory (op. cit., pp. 177-178) considers that "while a survey of the international community's approach to head of state immunity reveals wide agreement that heads of state are entitled to some immunity, there is no consensus on the extent of that immunity". For a critical position on the absolute material scope of the immunity of a foreign minister adopted by the International Court of Justice, see: Kamto, op. cit., p. 524.

376 *Arrest Warrant*, para. 55.

377 This provision reads as follows: "A diplomatic agent shall enjoy immunity from the criminal jurisdiction of the receiving State …". An equivalent provision is found in art. 31, para. 1, of the Convention on Special Missions, 1969, under which: "The representatives of the sending State

various problems arising in the present context, particularly given the limited amount of State practice on the granting of immunity to State officials other than diplomatic agents.[378] For example, the State Immunity Act in the United Kingdom, which regulates the immunity *ratione personae* of heads of State, does so by extending to the latter the application of the domestic Act implementing the Vienna Convention, subject to "any necessary modifications".[379] Judicial decisions and the legal literature have also occasionally established a parallel between the two types of immunity, often using this technique to explain the scope of the immunity of the head of State.[380] Rather than invoking a simple analogy, this reasoning relies on the fact that, given the head of State's functions as the highest representative of the State and his position as hierarchical superior of diplomatic agents, he should be granted immunities at least comparable to those accorded under the Vienna Convention.[381] The same argument was incidentally referred to by the International Court of Justice in its examination of the immunity of the minister for foreign affairs,[382] and could easily be extended mutatis mutandis to the head of Government; on the contrary, it could not be applied directly to other ministers, whose tasks are unrelated to the general conduct of foreign relations of the State. In any event, it has been emphasized that the position of the head of State (and the same argument applies to the other above-mentioned officials) should not be fully identified with that of the diplomatic agent for the purposes of immunity. The head of State's representative powers are not conditioned to accreditation by any receiving State and is opposable to all third States.[383] In addition, "the ambassador temporarily resides in a foreign State while a Head of State is an occasional visitor; and … a Head of State's representative capacity is both qualitatively greater than an ambassador's, and more extensive in subject matter, time and geographical spread, whereas an ambassador's is limited to the State to which he is accredited".[384]

---

in the special mission and the members of its diplomatic staff shall enjoy immunity from the criminal jurisdiction of the receiving State".

[378] Verhoeven, "Rapport provisoire", op. cit., p. 511.

[379] This is the case of Section 20 of the State Immunity Act of 1978 of the United Kingdom, which refers to the Diplomatic Privileges Act of 1964. Section 36 of the Australian Foreign States Immunities Act of 1985 extends to the head of State the Diplomatic Privileges and Immunities Act 1967 "with such modifications as are necessary".

[380] See Verhoeven, "Rapport provisoire", op. cit., pp. 510-511. In the legal literature, he refers to F. Berber, *Lehbruch des Völkerrecths*, 1960, p. 269; Benedetto Conforti, *Diritto internazionale*, (3rd edition), (Naples, Editoriale Scientifica, 1987) p. 222; Deák, op. cit., p. 388; Salmon, op. cit. (1994), p. 596 (for immunity from criminal jurisdiction); and Zappalà, op. cit., p. 598. In judicial case law, see: *Ferdinand et Imelda Marcos c. Office fédéral de la police*, op. cit., p. 535 (English version, op. cit., p. 202); *In re Grand Jury Proceedings, Doe No. 700*, 817.2d1108, Judgment of 5 May 1987, reproduced in *International Law Reports*, vol. 81, pp. 599 and 602; *Pinochet* (No. 3), p. 592 (Lord Browne-Wilkinson).

[381] Verhoeven, "Rapport provisoire", op. cit., pp. 510-511, who quotes in particular a memorandum, dated 31 January 1981, of the Legal Bureau of the Canadian Ministry of Foreign Affairs according to which "indeed it might better be said that even greater respect is owed to the dignity of the visiting sovereign or Head of State, since his own diplomatic envoys in the host State are clearly inferior to him" (reproduced in *Canadian Yearbook of International Law*, 1981, p. 325). See also Watts, op. cit., p. 40. See also Bynkerschoek, in Part One, sect. C.1 (a) above.

[382] See *Arrest Warrant*, para. 53 ("it is generally the Minister who determines the authority to be conferred upon diplomatic agents and countersigns their letters of credence").

[383] Verhoeven, "Rapport provisoire", op. cit., p. 511.

[384] Watts, op. cit. (1994), p. 40. In *Pinochet* (No. 3), Lord Goff of Chieveley explained that "the legislative history of the [United Kingdom State Immunity Act of 1978] … was originally

140. During the work of the Institut de droit international on immunities from jurisdiction and execution of heads of State and of Government in international law, the Rapporteur had supported the absolute immunity from criminal jurisdiction of the incumbent head of State. In so doing, he rejected, in particular, the argument according to which such immunity would not cover unlawful acts under the laws of the forum State, an exception which would have defeated, in his view, the very purpose of immunity.[385] He also noted that, although it might be desirable that such immunity be set aside in the case of particularly serious offences, State practice did not confirm the existence of an exception even in this case.[386] The other members agreed with the views of the Rapporteur[387] and accordingly the Institut adopted a resolution which, under article 2, provides that: "In criminal matters, the Head of State shall enjoy immunity from jurisdiction before the courts of a foreign State for any crime he or she may have committed, regardless of its gravity". This provision is of particular interest in that it adopts a self-standing description of the immunity of the head of State, which appears to be more precise than article 31, paragraph 1, of the 1961 Vienna Convention, since it specifies that the immunity holds regardless of the gravity of the crime.

3. Possible exceptions, based on the nature of the criminal conduct

141. Although the broad scope of immunity *ratione personae* as regards the acts covered remains unchallenged, the question has arisen, especially in recent years, whether the absolute character of such immunity would find an exception in the case of crimes under international law.[388] In other words, the question arises, notably in the wake of the *Pinochet* proceedings in the United Kingdom, whether a foreign tribunal would still be barred from exercising criminal jurisdiction vis-à-vis an incumbent high-ranking official, such as a head of State, a head of Government or a minister for foreign affairs, facing charges of genocide, war crimes, crimes against humanity or other offences entailing the criminal responsibility of the individual under international law.

---

intended to apply only to a sovereign or other head of state in this country at the invitation or with the consent of the government of this country, but was amended to provide also for the position of a head of state who was not in this country … We have, therefore, to be robust in applying the Vienna Convention to heads of state 'with the necessary modifications'. In the case of a head of state, there can be no question of tying Article 39 (1) or (2) to the territory of the receiving state … Once that is realized, there seems to be no reason why the immunity of a head of state under the Act should not be construed as far as possible to accord with his immunity at customary international law, which provides the background against which this statute is set" (*Pinochet* (No. 3), p. 598).

385 Verhoeven, "Rapport provisoire", op. cit., p. 513. At p. 516, he explained: "it is not disputed that the head of State enjoys absolute criminal immunity before the courts of a foreign State. The absolute nature of the immunity precludes the application of any exception to that immunity, for example based on the nature of the offence of which he is accused or the date when it was committed". In this respect, see : *Duke of Brunswick v. King of Hanover*, 2 H.L.C. 1 (1848), holding that a foreign sovereign cannot be held responsible in another country for a sovereign act done in his own country regardless of whether the act was right or wrong.

386 Ibid., pp. 513-514.

387 For elements of the discussion with respect to a possible exception for crimes under international law, see the following subsection.

388 For a definition of the notion of "crimes under international law" for purposes of the present study, see *supra*, Part One, sect. B.1.

142. Two preliminary remarks should be made in this respect. The first is that this exception remains controversial with respect to criminal proceedings before foreign domestic jurisdictions: it is generally accepted that even an incumbent high-ranking official would not be covered by immunity when facing similar charges before certain *international* criminal tribunals where they have jurisdiction. This was confirmed in the *Arrest Warrant* case.[389] It is the object of a specific provision in the Rome Statute of the International Criminal Court,[390] and is illustrated by actual international criminal proceedings engaged against incumbent officials enjoying immunity *ratione personae* in the past.[391] The second remark is that, for reasons explained below, the discussion of this issue has particularly focused on the existence of an exception to the immunity *ratione materiae* of former State officials. Accordingly, the various theories invoked to justify such exception will be examined in detail in the next section of the present study, while the following paragraphs will be devoted to a description of those arguments arising more specifically in the context of immunity *ratione personae*.

143. The question of an exception to immunity *ratione personae* was famously put to the International Court of Justice in the *Arrest Warrant* case. In justifying the legality under international law of the issue and circulation of the arrest warrant of 11 April 2000 against Mr. Yerodia, Belgium had alleged that "immunities accorded to incumbent Ministers for Foreign Affairs can in no case protect them where they are suspected of having committed war crimes or crimes against humanity", invoking in support of this position various legal instruments creating international criminal tribunals, examples from national legislation and the jurisprudence of national and international courts.[392] In its Judgment, the Court rejected Belgium's argument:

> "The Court has carefully examined State practice, including national legislation and those few decisions of national higher courts, such as the House of Lords [in the *Pinochet* case] or the French Court of Cassation [in the *Gaddafi* case]. It has been unable to deduce from this practice that there exists under customary international law any form of exception to the rule according immunity from criminal jurisdiction and inviolability to incumbent Ministers for Foreign Affairs, where they are suspected of having committed war crimes or crimes against humanity."[393]

144. The Court was similarly unconvinced that the existence of such exception in regard to national courts could be deduced from the rules concerning the immunity or criminal responsibility of State officials contained in the legal instruments creating international criminal tribunals, nor in the decisions of international criminal tribunals cited by Belgium.[394] The Court therefore concluded that the issue and circulation of the arrest warrant failed to respect the immunity from criminal jurisdiction and the inviolability of Mr. Yerodia, as the incumbent Congolese

---

[389] See, in particular, *Arrest Warrant*, para. 61.

[390] Art. 27, para. 2. For the text, see Part One, sect. D.4 above.

[391] Notably, the first indictment by the International Criminal Tribunal for the Former Yugoslavia against Milosevic was filed while the latter was incumbent head of State of the Federal Republic of Yugoslavia (see the initial indictment on Kosovo against Slobodan Milosevic and others, dated 22 May 1999, Case No. IT-99-37).

[392] *Arrest Warrant*, para. 56.

[393] Ibid., para. 58.

[394] Ibid.

Minister for Foreign Affairs.[395] The Court, however, went on to specify, in an *obiter dictum*,[396] that the immunity in question would not represent a bar to criminal prosecution in four circumstances: (a) in case of prosecution in the country of the individual; (b) if the State which the individual represented decides to waive the immunity; (c) in case of foreign prosecution when the individual is no longer in office in respect of acts committed prior or subsequent to his period of office or committed during that period in a private capacity; and (d) in case of criminal proceedings before certain international criminal courts, where they have jurisdiction.[397]

145. The solution suggested by the Court finds support in elements of State practice, including national judicial decisions, and has been further confirmed since. In national legislation, for instance in the relevant United Kingdom and Australian Acts which recognize the immunity of heads of State, there is no express reference to any exception to that immunity.[398] The 1993 Belgian Act concerning the punishment of grave breaches of international humanitarian law, as amended in 1999, on the contrary, seemed to recognize an exception to immunities for the offences covered under that Act:[399] Article 5, paragraph 2, originally provided that "the immunity attributed to the official capacity of a person does not prevent the application of the present Act".[400] In 2003, however, this Act was further amended to bring it in line with the Judgment of the Court, and the Belgian legislation now states that "in accordance with international law, there shall be no prosecution with regard to … Heads of State, heads of government and ministers for foreign affairs, during their terms of office, and any other person whose immunity is recognized by international law".[401]

146. A number of domestic criminal cases, already reported in the present study, are also relevant in that they concerned charges for offences under international law. Thus, for instance, in 2001, the French Court of Cassation, in the *Gaddafi* case, reversed the previous decision of a lower court that had found that "no immunity could cover complicity in the destruction of property as a result of an explosion

---

[395] Ibid., para. 78 (D) (2).

[396] Ibid., para. 61

[397] Ibid.

[398] See Section 20 of the State Immunity Act of 1978 of the United Kingdom and Section 36 of the Australian Foreign States Immunities Act of 1985. There seems to have been no proposal to interpret the reference to the application of diplomatic immunity with "any necessary modifications" as entailing any sort of restriction to that immunity. The lack of a reference any exception, however, should be taken with caution: as observed by Lord Browne-Wilkinson in the *Pinochet* (No. 3) case, in passing Section 20 of the State Immunity Act, "Parliament cannot have intended to give heads of state and former heads of state greater rights than they already enjoyed under international law" (*International Legal Materials*, vol. 38 (1999), p. 593). In fact, in that case, despite the silence of the Act on this issue, the majority of the Lords interpreted British law in such a way as to recognize an exception to the immunity of a former head of State in case of torture, in conformity with international law.

[399] See, however, the reasoning of the Belgian Court of Cassation with respect to Mr. Sharon, described hereinafter in the text.

[400] Act Concerning the Punishment of Grave Breaches of International Humanitarian Law, 16 June 1993, as amended by the Law of 10 February 1999 (reproduced in *International Legal Materials*, vol. 38 (1999), pp. 921-925).

[401] See art. 13 of Belgium's Act Concerning the Punishment of Grave Breaches of International Humanitarian Law, as further amended on 23 April 2003 (reproduced in *International Legal Materials*, vol. 42 (2003), pp. 1258-1283, together with the original French version).

causing death and involving a terrorist undertaking" and granted immunity to Colonel Gaddafi.[402] Even before the latest amendment to the 1993 Act, the Belgian Court of Cassation declared inadmissible a criminal action against Mr. Sharon, incumbent Prime Minister of Israel, for genocide, crimes against humanity and war crimes, on the grounds that "customary international law opposes the idea that heads of State and heads of government may be the subject of prosecutions before criminal tribunals in a foreign State, in the absence of contrary provisions of international law obliging the States concerned". The Court found, in particular, that article 5, paragraph 3, of the original 1993 Act "would contravene the principle of customary international criminal law on jurisdictional immunity if it were to be interpreted as having as its purpose to set aside the immunity sanctioned by such principle", and that "this domestic law cannot have such a purpose, but rather must be understood only as preventing the official capacity of a person from absolving the person from criminal responsibility for crimes enumerated by this law".[403] In 2004, immunity was granted to Mr. Mugabe, the President of Zimbabwe, before British courts in a case based on allegations of torture.[404] Similarly, two British courts invoked immunity, as construed by the International Court of Justice, to decline the issue of arrest warrants against the Israeli Defence Minister (accused of grave breaches to the Fourth Geneva Convention) and the Chinese Minister of Commerce (for offences of conspiracy to torture).[405] The reasoning of the International Court of Justice also formed the basis for the Spanish Audiencia Nacional's recent decision to grant immunity to Mr. Kagame, incumbent President of Rwanda, accused of genocide, crimes against humanity, war crimes and terrorist acts.[406] As noted above, the Law Lords in the *Pinochet* (No. 3) case also made it clear that General Pinochet would have enjoyed immunity with regard to criminal charges of torture if he had been in office at the time of the proceedings.[407]

147. The position held by the International Court of Justice in the *Arrest Warrant* case is also supported by part of the legal literature.[408] During the work at the

---

[402] *Affaire Kadhafi*, p. 509 (original French version, op. cit., p. 474). On the argument according to which this decision may be interpreted as containing an implicit recognition of exceptions to immunity *ratione personae*, see below in the text.

[403] *H.S.A. et al. v. S.A. et al*., op. cit., pp. 600-601.

[404] *Tatchell v. Mugabe*, op. cit., p. 770.

[405] See, respectively: *Re General Shaul Mofaz*, op. cit., pp. 771-773, and *Re Bo Xilai*, op. cit., pp. 713-715. In his commentary to the former decision, Colin Warbick notes that the Judge, while invoking the *Pinochet* (No. 3) case, does not examine whether the argument proved decisive for the Law Lords in that case would extend to conduct falling within grave breaches of the Geneva Conventions. He further points out that the Judgment "makes no reference to any argument that the immunity might be limited by the nature of the charges (grave breaches), doubtless accepting that that question had been disposed of by the ICJ" (*International and Comparative Law Quarterly*, vol. 53 (2004), pp. 773-774).

[406] *Auto del Juzgado Central de Instrucción No. 4* (2008), pp. 151-157. As noted in that Judgment (ibid., pp. 152-153), the Audiencia Nacional has reached the same conclusion in criminal cases brought, for offences amounting to international crimes, against the President of Cuba (*Auto del Pleno de la Sala de lo Penal*, op. cit.), the King of Morocco and the President of Equatorial Guinea.

[407] See the passages referred in footnote 239 above. For commentaries on this aspect of the decision of the Lords, see: Cosnard, op. cit. (1999), pp. 322-323; and Santiago Villalpando, "L'affaire Pinochet: beaucoup de bruit pour rien? L'apport au droit international de la décision de la Chambre des Lords du 24 mars 1999", *Revue générale de droit international public*, vol. 104 (2000), pp. 418-420.

[408] This position is also held by authors who consider that, on the contrary, immunity *ratione*

Institut de droit international, the Rapporteur noted that, while it might be considered appropriate to make an exception to the immunity of incumbent heads of State in the case of international crimes or other particularly serious breaches, this exception could not be taken for granted at the present time.[409] He therefore proposed no exception to the rule of absolute immunity from criminal jurisdiction for the incumbent head of State.[410] This proposal was generally accepted by the members of the Institut[411] and article 2 of the resolution finally adopted by the Institut therefore contains no reference to any possible exception to the immunity from criminal jurisdiction of the incumbent head of State.

148. The operation of immunity *ratione personae* even with respect to international crimes is generally justified by the need to ensure the effective performance of the functions of the officials concerned on behalf of their State (which appears to be particularly pressing when the individual is a high-ranking official and during his period of office) and the proper functioning of the network of mutual inter-State relations.[412] This idea is reflected, in particular, in the reasoning of the International Court of Justice in the *Arrest Warrant* case, but is also found in certain pronouncements of national tribunals[413] or the legal literature.[414]

---

materiae may not constitute a bar for the prosecution of international crimes. See, e.g., Dapo Akande, "International law immunities and the International Criminal Court", *The American Journal of International Law*, vol. 98 (2004), p. 411; Cassese "When May Senior State Officials …", op. cit., pp. 855 and 864-865; Klingberg, op. cit., p. 551; Mary Margaret Penrose, "It's Good to Be the King!: Prosecuting Heads of State and Former Heads of State Under International Law", *Columbia Journal of Transnational Law*, vol. 39 (2000), p. 200; Salmon, op. cit. (1994), pp. 596-599 (when the head of State is on official visit, he resides openly in a foreign State or is absent from the forum State); Tunks, op. cit., p. 678; and Verhoeven, "Quelques réflexions sur l'affaire …", op. cit., pp. 533 and 536.

409 Verhoeven, "Rapport provisoire", op. cit., p. 519: "It might certainly be considered appropriate to make an exception to immunity in the case of crimes under international law or other particularly serious offences. However, for the immediate future, this should not be taken for granted. At most, we are seeing 'the emergence of a new rule', even though 'caution should be exercised' in forming judgements".

410 Ibid., pp. 548-549.

411 At the 13th Commission see explicitly the statements by Salmon (Institut, *Annuaire*, op. cit., pp. 563-567) and Fox (ibid., pp. 580-581). During the discussion of article 2 at the plenary (ibid., pp. 649-654), the absolute immunity reflected in the text of that provision was accepted, but the discussion also focused on whether article 11 should contain, as proposed by the 13th Commission, a clause safeguarding the "indispensable development of international criminal law, and in particular the law ensuring the repression of crimes of an international character" (this reference was deleted in the final text of the resolution). In the general debate, Abi-Saab (ibid., p. 626) took the position that immunity *ratione personae* would not operate in the case of international crimes: "Head of State immunity was inoperative in relation to international crimes, that is crimes under general international law. At present there were only three 'hardcore' categories of such crimes, namely war crimes, crimes against humanity and genocide. Immunity was unavailable in respect of these crimes to anyone and was unavailable *ab initio*, not just when the official functions of the accused had come to an end".

412 *Arrest Warrant*, Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal, para. 75. As noted by these Judges, the issue of a possible exception to immunity puts into play a balancing of interests: on the one scale, there is "the interest of the community of mankind to prevent and stop impunity for perpetrators of grave crimes against its members" and, on the other, "the interest of the community of States to allow them to act freely on the inter-State level without unwarranted interference" (ibid.).

413 See, in the *Pinochet* (No. 3) case, Lord Philips of Worth Matravers, p. 657. In the same case, Lord Hope of Craighead proposed a different explanation, based on the alleged *jus cogens*

149. This position, however, remains a matter of controversy, even after the 2002 Judgment of the Court. A criticism of the position of the Court is found in the opinions appended thereto by certain Judges. Judges Higgins, Kooijmans and Buergenthal, while agreeing with the *dispositif*, noted that, in its reasoning, "the Court diminishe[d] somewhat the significance of Belgium's arguments" and expressed their doubts as to the practical significance of the circumstances, highlighted by the Court at paragraph 61, in which immunity would not represent a bar to criminal prosecution.[415] In his dissenting opinion, Judge Al-Khasawneh took the view that "the effective combating of grave crimes has arguably assumed a *jus cogens* character reflecting recognition by the international community of the vital community interests and values it seeks to protect and enhance. Therefore when this hierarchically higher norm comes into conflict with the rules on immunity, it should prevail".[416] In her dissenting opinion, Judge ad hoc Van den Wyngaert found a "fundamental problem" in the Court's general approach "that disregards the whole recent movement in modern international criminal law towards recognition of the principle of individual accountability for international core crimes", preferring "an extremely minimalist approach by adopting a very narrow interpretation of the 'no immunity clauses' in international instruments".[417]

150. The position according to which immunity *ratione personae* would not bar criminal proceedings with regard to crimes under international law may find support in some elements of State practice. As observed above, although it is generally recognized that article 27 of the Rome Statute is to be interpreted as excluding the defence of immunity before the International Criminal Court alone,[418] certain national laws implementing the Statute include provisions that appear to set aside immunity in domestic criminal proceedings concerning crimes under international law.[419] In an action for damages against the Islamic Republic of Iran and certain of its officials, brought by the estate of a university student killed in a suicide bomb

---

character of the rule granting immunity *ratione personae* to incumbent head of State (ibid., p. 624); for a criticism to this position, see Villalpando, op. cit., p. 419.

[414] See, for instance, Verhoeven, "Rapport provisoire", op. cit., p. 519 ("It remains difficult to accept that a head of State, including when he is passing through a foreign State, could be criminally prosecuted there — and where appropriate detained — solely on the basis of the allegations of a national or foreign individual who, rightly or wrongly, accuses him of criminal behaviour. The (effective) functioning of international relations might become seriously disrupted as a result").

[415] Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal, *Arrest Warrant*, para. 78.

[416] Dissenting Opinion of Judge Al-Khasawneh, ibid., para. 7. He also criticized what he considered to be an artificial distinction drawn by the Court between immunity as a substantive defence, on the one hand, and immunity as a procedural defence, on the other (ibid., para. 5) and the circumstances highlighted by the Court at para. 61 of the Judgment (ibid., para. 6).

[417] Dissenting Opinion of Judge ad hoc Van den Wyngaert, ibid., para. 27. In the following pages, Judge Van den Wyngaert supports Judge Al-Khasawneh's assessment of the said movement, with references to various sources. She then criticizes two specific propositions contained in the Court Judgment, namely the distinction between substantive and procedural defences, and the idea that immunities are not a bar to prosecution (as reflected in para. 61 of the Judgment).

[418] See, e.g., Gaeta, op. cit. (2002), p. 996.

[419] See, for instance, Section 4 of the South African Act No. 27 of 2002 on the Implementation of the Rome Statute of the International Criminal Court or art. 6, para. 3, of the Croatian Law on the Application of the Statute of the International Criminal Court and on the Prosecution of Criminal Acts against the International Law on War and Humanitarian Law of 4 November 2003 (see also Part One, sect. D above).

attack in Israel, a District Court in the United States found that the defence of head of State immunity is not available in actions brought pursuant to the State-sponsored terrorism exception to the Foreign Sovereign Immunities Act.[420] In an order dated 6 November 1998 initiating criminal proceedings against Pinochet for crimes under international law, a Belgian *juge d'instruction* observed, in general terms that appeared to cover also incumbent heads of State, that the immunity recognized to Heads of State did not seem to apply in respect of crimes under international law, such as war crimes, crimes against peace and crimes against humanity.[421] Commentators have also interpreted the 2001 Judgment of the French Court of Cassation in the *Gaddafi* case as implicitly admitting that international law does recognize, for other crimes, exceptions to the immunity of incumbent heads of State, although the precise scope of these exceptions remains unclarified.[422] The said Judgment, in fact, based its finding granting immunity to Colonel Gaddafi on the position that "in the current stage of international law the alleged crime, however serious, did not constitute one of the exceptions to the principle of the jurisdictional immunity of foreign Heads of State in office".[423]

151. This exception to immunity *ratione personae* is supported by part of the legal literature. It has been argued, for instance, that the general trend in international law towards the acceptance of the principle of individual criminal responsibility regardless of the official position of the person concerned would also have an impact on immunity, including that of incumbent high-ranking officials. Reference is therefore made to various instruments and judicial decisions that have recognized the responsibility of heads of State, heads of Government and other public officials for crimes under international law, including article 227 of the Versailles Treaty;[424]

---

[420] *Flatow v. Iran*, pp. 24-25. It should be emphasized, however: (a) that this decision appears to have remained isolated; (b) that it concerned civil proceedings; and (c) that it relied on the theory according to which "head of State immunity is a matter of grace and comity, rather than a matter of right" (ibid., p. 24).

[421] Order of *juge d'instruction* Vandermeersch, *Pinochet*, 6 November 1998, (reproduced in *Revue de droit pénal et de criminologie*, Brussels, Palais de Justice, 1999, p. 278), sect. 3.2, referring, in support to this statement, to Eric David, *Eléments de Droit pénal international* (Brussels, Presses Universitaires de Bruxelles, 1997-1998), pp. 36-37 and the Judgment of the Nürnberg International Military Tribunal.

[422] See, e.g., Marco Sassòli, " L'arrêt Yerodia: quelques remarques sur une affaire au point de collision entre les deux couches du droit international", *Revue belge de droit international*, vol. 106 (2002), p. 808; and Zappalà, op. cit., pp. 600-601.

[423] *Affaire Kadhafi*, op. cit., p. 509. The original French passage reads as follows: "en l'état du droit international, le crime dénoncé, quelle qu'en soit la gravité, ne relève pas des exceptions au principe de l'immunité de juridiction des chefs d'Etats étrangers en exercice" ("under international law as it currently stands, the crime alleged, irrespective of its gravity, does not come within the exceptions to the principle of immunity from jurisdiction for incumbent foreign Heads of State") (*Revue générale de droit international public*, vol. 105, 2001, p. 474): "La coutume internationale s'oppose à ce que les chefs d'Etat en exercice puissent, en l'absence de dispositions internationales contraires s'imposant aux parties concernées, faire l'objet de poursuites pénales d'un Etat étranger" ("International custom precludes Heads of State in office from 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") (English translation in *International Law Reports*, vol. 125, pp. 508-510).

[424] On the significance of this precedent in particular, see Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties, 29 March 1919, Carnegie Endowment for International Peace, Division of International Law, Pamphlet No. 32: "in the hierarchy of persons in authority, there is no reason why rank, however exalted, should in any circumstances

the Charters and Judgments of the International Military Tribunals of Nuremberg and Tokyo;[425] the Statutes of the International Criminal Tribunals for the former Yugoslavia and Rwanda;[426] and the Rome Statute of the International Criminal Court, and so on.[427] In this context, mention has also been made of the draft Code of Crimes against the Peace and Security of Mankind.[428] Another justification to the exception has been found, by the supporters of this view, in the incompatibility of immunity with the proposition that serious international crimes are subject to

---

protect the holder of it from responsibility when that responsibility has been established before a properly constituted tribunal. This extends even to the case of heads of states. An argument has been raised to the contrary based upon the alleged immunity, and in particular the alleged inviolability, of a sovereign of a state. But this privilege, where it is recognized, is one of practical expedience in municipal law, and is not fundamental. However, even if, in some countries, a sovereign is exempt from being prosecuted in a national court of his own country the position from an international point of view is quite different. ... If the immunity of a sovereign is claimed to extend beyond the limits above stated, it would involve laying down the principle that the greatest outrages against the laws and customs of war and the laws of humanity, if proved against him, could in no circumstances be punished. Such a conclusion would shock the conscience of civilized mankind." (Reproduced in *American Journal of International Law*, vol. 14 (1920), p. 116.)

425 Most notably, see the dictum of the Nürnberg Tribunal according to which: "The principle of international law, which under certain circumstances, protects the representative of a State, cannot be applied to acts which are condemned as criminal by international law. The authors of these acts cannot shelter themselves behind their official position in order to be freed from punishment in appropriate proceedings" (*Judgment of the International Military Tribunal for the Trial of German Major War Criminals* (with the dissenting opinion of the Soviet Member) — Nürnberg, 30th September and 1st October 1946, Cmd. 6964, Misc. No. 12 (London: H.M.S.O. 1946), p. 42. In his "Report to President Truman on the Legal Basis for Trial of War Criminals", Justice Robert H. Jackson stated: "Nor should such a defense be recognised as the obsolete doctrine that a head of State is immune from legal liability. There is more than a suspicion that this idea is a relic of the doctrine of divine right of kings. It is, in any event, inconsistent with the position we take toward our own officials, who are frequently brought to court at the suit of citizens who allege their rights to have been invaded. We do not accept the paradox that legal responsibility should be the least where power is the greatest. We stand on the principle of responsible government declared some three centuries ago to King James by Lord Chief Justice Coke, who proclaimed that even a King is still 'under God and the law'." (Available at www.yale.edu/lawweb/avalon/imt/jackson/jack08.htm.)

426 Arts. 7 and 6, respectively.

427 See, in particular, Watts, op. cit. (1994), p. 54 (the immunity of the head of State, "while absolute at least as regards the ordinary domestic criminal law of other States, has to be qualified in respect of certain international crimes, such as war crimes"; this passage refers to the incumbent head of State, the same exception being reiterated with regard to the former head of State at p. 89, note 198) or Rousseau, op. cit., pp. 125-126 ("The absolute nature of this immunity [of the head of State] was not disputed in traditional doctrine, according to which neither the head of State nor any member of his family or entourage was subject to foreign criminal jurisdiction under any circumstances. However, this principle today should be considered abandoned in the case where a violation of international law is attributable to a head of State", then referring in particular to article 227 of the Versailles Treaty). This is also the position adopted by Amnesty International in "United Kingdom: The Pinochet Case: Universal Jurisdiction and Absence of Immunity for Crimes Against Humanity" (1 January 1999), pp. 16-25). See also, e.g., Kerry Creque O'Neill, "A New Customary Law of Head of State Immunity? Hirohito and Pinochet", *Stanford Journal of International Law*, vol. 38 (2002), pp. 295-298; Wouters, op. cit., pp. 259-261.

428 Notably, art. 7 of the draft Code and para. 7 of the commentary by the Commission thereto: (*Yearbook … 1996*, vol. II, Part Two, p. 27). For text of article, see Part One, sect. D above. For a more detailed examination of this statement, see below, sect. B.3 (a) (ii).

universal jurisdiction or other mechanisms aiming at the universal punishment of such crimes.[429] Some other authors insist rather on the fact that the prohibition of certain international crimes is enshrined in a rule of *jus cogens* and, as such, should prevail over the rule granting immunity to high-ranking State officials.[430] Another view relies on a systemic approach to the evolution of the international legal system and on the argument that the prohibition of certain acts as crimes under international law aims at the protection of fundamental interests of the international community as a whole. In this perspective, the very notion of international crimes would therefore be inconsistent with any form of immunity shielding individuals behind the screen of their official position.[431] These various theories will be further examined below with respect to immunity *ratione materiae*.[432]

152. Certain solutions to the problem have been proposed that attempt to find a balance between the competing interests of the preservation of immunity *ratione personae* and the prosecution of international crimes. Thus, for instance, it has been suggested that, while the rule of immunity should be given priority in those cases where there is no risk of impunity (and more particularly when the official's own State is willing and prepared to exercise criminal jurisdiction over the individual), the exercise of foreign criminal jurisdiction should be allowed when this is not the case. Thus, for instance, immunity *ratione personae* would cease to operate whenever the courts of the State to which the individual organ belongs lacks jurisdiction over the crimes allegedly committed by the organ, or when there are compelling reasons to believe either that that State will not prosecute the crimes or that arrest and prosecution by its competent authorities will be barred by special national rules pertaining to the particular status of the individual in question.[433]

153. According to another proposed theory, immunity *ratione personae* should only be granted in case of official visits, which are essential for the conduct of international relations, and may on the contrary be denied when the official travels privately.[434] A somewhat more elaborate theory along these lines suggests that immunity *ratione personae* may be refused in case of private visits, but only if it could be proved that the competent authorities of the State exercising jurisdiction (or a competent international body, such as the International Criminal Court or the Security Council acting under Chapter VII) do not (or no longer) consider that official as an appropriate counterpart in international relations.[435]

---

[429] See, for instance, International Law Association, "Final Report on the Exercise of Universal Jurisdiction in Respect of Gross Human Rights Offences", *Report of the 69th Conference held in London, 25-29 July 2000* (London, 2000), p. 416.

[430] See, for instance, Kamto, op. cit., pp. 526-529; and Robertson, op. cit., pp. 408-409.

[431] Bianchi, op. cit. (1999), pp. 260-262 and 276-277. See also: Rosanne van Alebeek, "The Pinochet case: International Human Rights Law on Trial", *British Year Book of International Law*, vol. LXXI (2000), p. 49.

[432] See *infra*, sect. B.

[433] See Gaeta, op. cit. (2002), pp. 986-989. The author specifies, however, that the suggested construction would not apply in the case of incumbent heads of State, who discharge important and sensitive constitutional functions, since it would jeopardize the structure and functioning of the foreign State.

[434] Leen De Smet and Frederik Naert, "Making or breaking international law? An international law analysis of Belgium's act concerning the punishment of grave breaches of international humanitarian law", *Revue belge de droit international*, vol. 35 (2002), pp. 503-504.

[435] See Zappalà, op. cit., pp. 600 and 605-606. According to the author, the denial of immunity *ratione personae* when the State has accepted the official visit of a foreign head of State would

B. Immunity *ratione materiae*

154. Contrary to immunity *ratione personae* dealt with in the previous section, immunity *ratione materiae* covers only official acts, that is, conduct adopted by a State official in the discharge of his or her functions. This limitation to the scope of immunity *ratione materiae* appears to be undisputed in the legal literature[436] and has been confirmed by domestic courts.[437] In its recent judgment in the *Djibouti v. France* case, the International Court of Justice referred in this context to "acts within the scope of [the] duties [of the officials concerned] as organs of State".[438] In this connection, a certain number of questions arise which revolve around three main issues: (a) the criteria for distinguishing between conduct adopted by a State official in the discharge of his or her functions, and conduct adopted in a private capacity; (b) the persons enjoying immunity *ratione materiae*; and (c) the existence of possible exceptions to immunity *ratione materiae*, based on the nature of the alleged crime.

---

intolerably undermine international relations. The additional requirement for the denial of immunity in case of private visits is intended to ensure that the head of State not to be taken by surprise and to avoid abuses: for this purpose "a sort of warning that he or she may not be welcome in a foreign country should be required" (ibid.). The author also notes that "national courts could also rely on principles of self-restraint", notably in those States in which private parties may trigger criminal prosecutions. He further observes that, while this approach "has the undesirable counter-effect of introducing policy considerations into the administration of justice", it "seems to be justified by the highly sensitive character of the questions involved" (ibid.).

436 See, in particular, the authors cited supra, footnote 207.

437 The said limitation has been recognized by domestic courts both in criminal and civil proceedings. See, for instance: Federal Tribunal, *Ferdinand et Imelda Marcos* v. *Office fédéral de la police (recours de droit administratif)*, op. cit.; Court of Appeals for the Second Circuit, *Republic of the Philippines* v. *Marcos and others*, 26 November 1986, 806 F 2d 344 (1986), p. 360, reproduced in *International Law Reports*, vol. 81, pp. 581-599, at p. 597 (recognizing the immunity of a former Head of State, but not in respect of private acts); Court of Appeals for the Fifth Circuit, *Jimenez v. Aristeguieta et al.*, 311 F.2d 547 (1962), reproduced in *International Law Reports*, vol. 33, pp. 353-359 (excluding the defence of act of state for private acts); and Cour d'appel de Paris, *Ex-Roi Farouk d'Egypte* c. *Christian Dior*, 11 April 1957, op. cit. (also excluding the defence of act of state for private acts). See also the judicial decisions cited supra, footnote 206.

438 *Djibouti v. France*, p. 58, para. 191. It should be noted, however, that in its judgment the Court appears to equate immunity *ratione materiae* of State officials (i.e. functional immunity) with the immunity of the State itself; see ibid., p. 57, paras. 187-188:

> "187. In the oral pleadings before the Court, Djibouti for the very first time reformulated its claims in respect of the *procureur de la République* and Head of National Security. It was then asserted that the *procureur de la République* and the Head of National Security were entitled to functional immunities:
>
> > 'What Djibouti requests of the Court is to acknowledge that a State cannot regard a person enjoying the status of an organ of another State as individually criminally liable for acts carried out in that official capacity, that is to say in the performance of his duties. Such acts, indeed, are to be regarded in international law as attributable to the State on behalf of which the organ acted and not to the individual acting as the organ.'
>
> "188. The Court observes that such a claim is, in essence, a claim of immunity for the Djiboutian State, from which the *procureur de la République* and the Head of National Security would be said to benefit."

1. “Official” versus “private” acts

(a) General considerations

155. A first issue to be addressed in determining the legal regime of immunity *ratione materiae* relates to the identification of the criteria for distinguishing between a State organ’s “official” and “private” conduct.

156. The question arises as to whether such criteria correspond to those which govern the attribution of conduct in the context of State responsibility for internationally wrongful acts. It may be argued that this question appears to be linked to the more general issue of the rationale of immunity *ratione materiae*.[439] In fact, if immunity *ratione materiae* is viewed as an implication of the principle that conduct adopted by a State organ in the discharge of his or her functions is to be attributed to the State,[440] there appear to be strong reasons for aligning the immunity regime with the rules on attribution of conduct for purposes of State responsibility.[441] However, whatever position may be adopted with regard to the rationale of immunity *ratione materiae* of State officials,[442] the criteria for attribution of conduct in the context of State responsibility might still be a relevant source of inspiration in determining whether an act is to be considered as “official” or “private” for purposes of that immunity.

157. The articles on responsibility of States for internationally wrongful acts do not explicitly provide the criteria for determining whether the conduct of a State organ is to be considered as performed in the discharge of the official functions of that organ. The text of article 7, which deals with *ultra vires* acts,[443] simply states this requirement by providing that “the organ, person or entity” must act “in that capacity”. However, some clarification on this issue is found in the Commission’s commentary to article 4.[444] On this point, the commentary specifies that the

---

[439] See paras. 88-92 above, introductory remarks to Part Two.

[440] See above, footnote 214.

[441] See, on this point, *Jones*, Lord Hoffmann, para. 74:

> It has now been generally assumed that the circumstances in which a state will be liable for the act of an official in international law mirror the circumstances in which the official will be immune in foreign domestic law. There is a logic in this assumption: if there is a remedy against the state before an international tribunal, there should not also be a remedy against the official himself in a domestic tribunal. The cases and other materials on state liability make it clear that the state is liable for acts done under colour of public authority, whether or not they are actually authorised or lawful under domestic or international law”.

[442] The principle of non-interference in the internal affairs of other States has also been presented as the justification for immunity *ratione materiae*. See, for instance, *Pinochet* (No. 3), Lord Saville of Newdigate, p. 642; Lord Millet, p. 645; and Lord Phillips of Worth Matravers, p. 658.

[443] Article 7, entitled “Excess of authority or contravention of instructions”, provides:

> “The conduct of an organ of a State or of a person or entity empowered to exercise elements of the governmental authority shall be considered an act of the State under international law *if the organ, person or entity acts in that capacity*, even if it exceeds its authority or contravenes instructions.” (Emphasis added.) *Yearbook… 2001*, vol. II (Part Two), para. 76.

[444] Article 4, entitled “Conduct of organs of a State”, provides:

> “1. The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its

determinative consideration is the "apparent authority" of the individual and not the motives inspiring his or her conduct or the abusive character that such conduct might assume:

> "It is irrelevant for this purpose that the person concerned may have had ulterior or improper motives or may be abusing public power. Where such a person acts *in an apparently official capacity, or under colour of authority*, the actions in question will be attributable to the State. […] The case of purely private conduct should not be confused with that of an organ functioning as such but acting *ultra vires* or in breach of the rules governing its operation. In this latter case, the organ is nevertheless acting in the name of the State: this principle is affirmed in article 7. In applying this test, of course, each case will have to be dealt with on the basis of its own facts and circumstances."[445] (Emphasis added; footnote omitted.)

158. The relevance of "apparent authority" in determining the "official" or "private" nature of an act or omission for purposes of immunity *ratione materiae* of State officials finds some support in the legal literature.[446] However, insofar as it disregards the personal motives of the individual concerned, this criterion appears to be at variance with the position adopted by the Institut de droit international, in its 2001 resolution, with respect to the functional immunity of former heads of State or Government.[447] Although recognizing that former heads of State enjoy immunity for official acts performed while in office,[448] article 13 of the resolution lays down an exception to such immunity in the event that the acts in question were "performed exclusively to satisfy a personal interest".[449] In the legal literature, it has also been suggested that an act which is exclusively or predominantly motivated by personal reasons would not be covered by immunity *ratione materiae*.[450] A similar opinion was expressed by Lord Hope of Craighead in the *Pinochet* case.[451]

---

character as an organ of the central Government or of a territorial unit of the State.

"2. An organ includes any person or entity which has that status in accordance with the internal law of the State." Ibid.

[445] Para. (13) of the commentary to article 4, in *Yearbook… 2001*, vol. II (Part Two), para. 77, p. 42. The decisive nature of "apparent authority" is reiterated in para. (8) of the Commission's commentary to article 7, which indicates that an act (or omission) of a State organ which is in excess of the organ's authority or in contravention of instructions received by that organ is nonetheless attributable to the State, provided that the organ was "*purportedly or apparently* carrying out [his or her] official functions. […] *In short, the question is whether [the State officials] were acting with apparent authority*" (emphasis added; footnote omitted); ibid., p. 46.

[446] See, in particular, Watts, op. cit. (1994), p. 56: "The critical test would seem to be whether the conduct was engaged in under the colour of or in ostensible exercise of the Head of State's public authority".

[447] According to art. 16 of the resolution, arts. 13 and 14 are also applicable to former heads of Government.

[448] See art. 13, para. 2, of the resolution, which provides that a former head of State does not enjoy "[…] immunity from jurisdiction, in criminal, civil or administrative proceedings, except in respect of acts which are performed in the exercise of official functions and relate to the exercise thereof […]"; reproduced in Institut, *Annuaire*, op. cit., p. 753.

[449] Ibid.

[450] See, in particular, Robertson, op. cit., p. 402 ("[…] Ex-heads, along with agents such as generals and police chiefs and ministers, enjoy only restrictive immunity (*ratione materiae*), which covers all acts performed officially but does not include actions taken for private gratification.").

[451] *Pinochet*, (No. 3), p. 622. In this respect, Lord Hope of Craighead referred to an exception to

159. A related question is whether acts performed *ultra vires* by State officials are covered by immunity *ratione materiae*. Domestic courts have adopted conflicting positions on the general issue of immunity in connection with *ultra vires* acts. While the plea of immunity has sometimes been rejected in such cases,[452] it has also been held that immunity of State officials in respect of acts performed in the discharge of their functions does not depend on the lawfulness or unlawfulness of such acts.[453]

---

immunity *ratione materiae* in the event of "criminal acts that 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". This position was criticized by Lord Hoffmann in the *Jones* case before the House of Lords (para. 92).

[452] See the case law of several United States Courts in relation to civil proceedings; see, for instance, District Court, Northern District of California, *Jane Doe I, et al., Plaintiffs,* v. *Liu Qi, et al., Defendants; Plaintiff A, et al., Plaintiffs,* v. *Xia Deren, et al., Defendants*, Nos. C 02-0672 CW, C 02-0695 CW, 349 F.Supp.2d 1258, pp. 1285ff (in applying the United States Foreign Sovereign Immunity Act (FSIA) to a case brought by Falun Gong practitioners against local government officials of the People's Republic of China, the District Court held: "[t]he mere fact that acts were conducted under color of law or authority, which may form the basis of state liability by attribution, is not sufficient to clothe the official with sovereign immunity". The Court considered that the legal question was "whether acts by an official which violate the official laws of his or her nation but which are authorized by covert unofficial policy of the state may be deemed to be within the official's scope of authority under the FSIA", and then dismissed the Defendants' claim to immunity because the alleged human rights violations were "inconsistent with Chinese law" (ibid., pp. 1287-1288)). In addition to other cases referred to in the District Court's decision (*ibid*., pp. 1282-1283), see also: Court of Appeals for the Ninth Circuit, *In re Estate of Ferdinand Marcos, Human rights litigation. Maximo Hilao, et al., Class Plaintiffs; Vicente Clemente, et al., Class Plaintiffs; Jaime Piopongco, et al., Class Plaintiffs. Plaintiffs-Appellees,* v. *Estate of Ferdinand Marcos, Defendant-Appellant*, 16 June 1994, 25 F.3d 1467, p. 1472, reproduced in *International Law Reports*, vol. 104, pp. 119-133 (the Court held that acts of torture, execution and disappearances were not covered by the authority enjoyed by President Marcos even while in office and that, therefore, immunity could not be applied); District Court (District of Massachusetts), *Teresa Xuncax, et al., Plaintiffs, v. Hector Gramajo, Defendant; Dianna Ortiz, Plaintiff, v. Hector Gramajo, Defendant,* Judgment of 15 April 1995, 886 F.Supp. 162, p. 175 (the District Court denied immunity to a former Guatemalan Minister of Defence because the alleged acts (summary execution; disappearance; torture; arbitrary detention; cruel, inhuman and degrading treatment) "exceed[ed] anything that might be considered to have been lawfully within the scope of Gramajo's official authority"); and District Court, Southern District of New York, *Bawol Cabiri, Plaintiff,* v. *Baffour Assasie-Gyimah, Defendant*, 18 April 1996, 921 F.Supp. 1189, p. 1198 (in denying immunity to the defendant, a Ghanaian security officer, the District Court observed: "Assasie-Gyimah does not claim that the acts of torture he is alleged to have committed fall within the scope of his authority. He does not argue that such acts are not prohibited by the laws of Ghana; nor could he. […] The Court finds that the alleged acts of torture committed by Assasie-Gyimah fall beyond the scope of his authority as the Deputy Chief of National Security of Ghana. Therefore, he is not shielded from Cabiri's claims by the sovereign immunity provided in the FSIA.").

[453] See for instance, in the context of civil cases, the position of Lord Bingham of Cornhill in the House of Lords decision in the *Jones* case, para. 12; and the Judgment of the Ontario Court of Appeal in *Jaffe* v. *Miller and others* (delivered by Finlayson, J. A.), reproduced in *International Law Reports*, vol. 95, pp. 446-467, at p. 460 ("In my view, the use of adjectives to describe the conduct of the responding defendants cannot deprive them of their status as functionaries of the foreign sovereign. The illegal and malicious nature of the acts alleged do not of themselves move the actions outside the scope of the official duties of the responding defendants.") and pp. 461-462 ("Accordingly, even allowing for the new restrictive approach to immunity, when the immunity exists either under the common law or under the *State Immunity Act,* it is absolute. I am of the opinion that the alleged illegalities do not deprive the respondents of their immunity either at common law or under the *State Immunity Act*."). See also District Court, Northern

The position that immunity *ratione materiae* still operates in respect of *ultra vires* acts was apparently adopted, as early as in 1797, by the United States Attorney-General in the Governor Collot case.[454] This position might be grounded on the principle — clearly recognized by the Commission in article 7 on State responsibility — that *ultra vires* acts remain attributable to the State for purposes of responsibility.[455] However, it has also been argued in the legal literature that immunity *ratione materiae* would not cover acts falling beyond an official mandate.[456]

160. If unlawful or criminal acts were considered, as a matter of principle, to be "non-official" for purposes of immunity *ratione materiae*, the very notion of "immunity" would be deprived of much of its content.[457] However, commentators

---

District of Illinois, Eastern Division, *Plaintiffs A, B, C, D, E, F, and Others Similarly Situated, Wei Ye, and Hao Wang, Plaintiffs, v. Jiang Zemin and Falun Gong Control Office (A.K.A. Office 6/10), Defendants*, No. 02 C 7530, 12 September 2003, 282 F.Supp.2d 875, p. 883 ("States are immune from claims arising from the alleged 'abuse of the power of [a state's] police' because, 'however monstrous such abuse undoubtedly may be, a foreign state's exercise of the power of its police has long been understood for purposes of the restrictive theory as peculiarly sovereign in nature.' *Saudi Arabia v. Nelson*, 507 U.S. 349, 361, 113 S.Ct. 1471, 123 L.Ed.2d 47 (1993). *A fortiori*, the same is true for a head of state.").

454 In connection with a civil suit brought against Collot, Governor of the French island of Guadeloupe, the United States Attorney-General held: "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 that the *extent* of his authority can, with propriety or convenience, be determined only by the constituted authorities of his own nation" (emphasis in the original), reproduced in J. B. Moore, *A Digest of International Law* (1906), vol. II, p. 23.

455 See, on this point, Mizushima Tomonori, "The Individual as Beneficiary of State Immunity: Problems of the Attribution of *Ultra Vires* Conduct", *Denver Journal of International Law and Policy,* vol. 29 (2000-2001), p. 276: "What makes this apparently straightforward question debatable is in part the argument in the field of State responsibility under international law that *ultra vires* conduct of state officials is, at least to some extent, attributable to the state." See also the position of Lord Hoffman in the *Jones* case, para. 78: "It seems thus clear that a state will incur responsibility in international law if one of its officials, under colour of his authority, tortures a national of another state, even though the acts were unlawful and unauthorised. To hold that for the purposes of state immunity he was not acting in an official capacity would produce an asymmetry between the rules of liability and immunity."

456 See van Alebeek, op. cit., p. 66: "A State official can in the — purported — exercise of his official functions commit acts that do not fall within an official mandate and that do not qualify for protection by immunity *ratione materiae*" (footnote omitted).

457 In other terms, as stated by Lord Hope of Craighead (*Pinochet* (No. 3), p. 622), "the conduct does not have to be lawful to attract immunity." A similar view was expressed by Lord Goff of Chievely, ibid., p. 599. See also Verhoeven, "Rapport provisoire", op. cit., p. 538, para. 39 "[…] Quoi qu'il en soit, il n'y a guère de sens à considérer que les actes qui ont été illégalement accomplis doivent nécessairement être: tenus pour 'privés' au motif que la fonction d'un chef d'Etat — ou de tout autre agent — ne peut jamais être d'agir illégalement. […]" (footnote omitted). On the question whether unlawful acts may be considered as "official", see also Sison, op. cit., p. 1586: "The distinction […] between official acts and personal acts is sometimes far from clear. For example, a head of state's conduct can be unlawful or criminal. The concern then turn to whether such acts should qualify as official acts or whether they should be considered performed in personal capacity. Under one view, unlawful or criminal acts are simply common crimes committed in a personal capacity, not official acts warranting immunity [footnote referring to Watts, op. cit., 2006, p. 56 and *Jimenez v. Aristeguieta*, op. cit., p. 353]. However, it is equally possible for a head of state to commit a crime while using the machinery of his office

debate whether serious violations of international law — in particular, those entailing the criminal responsibility of the individual under international law — would still qualify as "official acts" in respect of which State officials would enjoy immunity *ratione materiae*. The issue will be discussed further in a subsection below devoted to the interplay between immunity *ratione materiae* and the rules establishing international crimes.

161. Another question to be considered is whether the distinction between *acta jure imperii* and *acta jure gestionis*, which appears to be relevant in the context of State immunity,[458] also applies in the context of immunity *ratione materiae* of State officials. Though infrequently and only cursorily addressed,[459] this question has given rise to conflicting opinions in the legal literature. While it has been suggested that the distinction between *acta jure imperii* and *acta jure gestionis* is also relevant in the context of immunity of State officials,[460] it has also been considered that the distinction is irrelevant in the latter context[461] and that *acta jure gestionis* performed by a State organ would still qualify as "official".[462] The latter position

---

to carry out his functions as head of state. According to this view, if the criminal act was carried out under the color of public authority, the head of state would be immune from jurisdiction regardless of the legality of the act under the laws of his own state." (Footnotes omitted); Fox, op. cit. ("The Pinochet case No. 3"), p. 688, noting that the Pinochet decision implies "the acceptance, barring Lord Millett, that authorization of murder, it appears, is official business for which a former head of state may claim immunity"; and Watts, op. cit. (1994), p. 112: "For heads of governments and foreign ministers, however, the same problem arises as with Heads of States, namely whether criminal conduct can ever be considered part of their official functions. There is no easy or straightforward answer; as suggested in relation to Heads of States, the critical test would seem to be whether the conduct was engaged in the ostensible exercise of the functions of head of government or foreign minister, in which case it should benefit from the continuing protection afforded to official acts." (Footnotes omitted.) The author refers, however, to an "exception to this continuing immunity" in respect of "official acts which have involved criminal conduct for which there is individual responsibility under international law"; ibid., p. 113.

458 Although the United Nations Convention on Jurisdictional Immunities of States and Their Property, 2004, does not explicitly refer to the distinction between *acta jure imperii* and *acta jure gestionis*, it enumerates several cases in which State immunity cannot be invoked (see arts. 10 to 17, dealing, respectively, with "commercial transactions"; "contracts of employment"; "personal injuries or damage to property"; "ownership, possession and use of property"; "intellectual and industrial property"; "participation in companies or other collective bodies"; "ships owned or operated by a State"; and "effect of an arbitration agreement"). Many of these cases appear to be among those that are generally viewed in the legal literature as falling within the domain of *acta jure gestionis*.

459 Gaeta,, op. cit. (2002), p. 977 (footnote 4), alludes to this question, but in relation to immunity *ratione personae* of heads of State, prime ministers and foreign ministers. In relation to the immunity of a head of State, see also Watts, op. cit. (1994), p. 61, who seriously doubts that such immunity would have been limited to *acta jure imperii*.

460 See Mirella Bojic, "Immunity of High State Representatives with regard to International Crimes: are Heads of State, Heads of Government and Foreign Ministers still Untouchable?", Master Thesis, Faculty of Law, University of Lund, 2005, p. 23; and Bothe, op. cit., p. 257, stating that immunity *ratione materiae* probably does not apply to *acta jure gestionis.*

461 See Cassese, "When May Senior State Officials …", op. cit., p. 869, footnote 42.

462 See, in particular, van Alebeek, op. cit., p. 48, discussing the scope of the immunity *ratione materiae* of former Heads of State: "A head of State who leaves office remains protected by immunity with regard to official acts performed in the exercise of his or her functions as head of State. The consensus on this residual immunity for official acts is somewhat deceptive, since the question of which acts qualify as such is controversial [footnote referring to the controversy with regard to the residual immunity of diplomats]. Immunity for a former head of State extends

was adopted by the Supreme Court of Austria which held that, contrary to State immunity, the immunity of heads of State also covered *acta jure gestionis* performed in an official capacity.[463] The reasons for excluding *acta jure gestionis* from the scope of immunity *ratione materiae* of State officials would appear to be unclear, especially in view of the fact that such acts are attributable to the State in the same way as are *acta jure imperii*.[464] In the light of the foregoing, there would seem to be reasonable grounds for considering that a State organ performing an act *jure gestionis* which is attributable to the State is indeed acting in his or her official capacity and would therefore enjoy immunity *ratione materiae* in respect of that act.

(b) Official acts carried out in the territory of a foreign State

162. The question arises as to whether acts performed by a State official in the territory of another State in the discharge of his or her functions are immune from criminal jurisdiction in the State where such acts were carried out. State practice on this point appears to be scant.[465]

---

beyond those acts that qualify for State immunity *ratione materiae*, since an 'official act performed in the exercise of his functions' is a wider notion than 'sovereign act'. For example, a commercial contract concluded by a head of State on behalf of the State is not a 'sovereign' act in the sense that it is *jure imperii*, but it would qualify as an official act performed in the exercise of the functions of the head of State."

463 Supreme Court, *Prince of X Road Accident Case*, 1964, reproduced in *International Law Reports*, vol. 65, p. 13.

464 See para. (6) of Commission's commentary to art. 4 of the draft Articles on Responsibility of States for Internationally Wrongful Acts (reproduced in *Yearbook ... 2001*, vol. II (Part Two), para. 77, pp. 40-41): "It is irrelevant for the purposes of attribution that the conduct of a State organ may be classified as 'commercial' or as *acta jure gestionis*." (Ibid., p. 41)

465 In the *Rainbow Warrior* incident, upon the arrest by the local police of the Major Mafart and Captain Prieur, two French agents who sank the *Rainbow Warrior* in New Zealand, France took the position that their detention in New Zealand was unjustified "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"; see the ruling of 6 July 1986 of the United Nations Secretary-General, in *United Nations Reports of International Arbitral Awards*, vol. XIX, p. 213. However, in its judgment of 22 November 1985 (preceding the international phase of this affair) in the case *R. v. Mafart and Prieur*, the New Zealand High Court of Auckland condemned the two officers for manslaughter and wilful damage. It should be noted that, during the criminal proceedings, the two officers had pleaded guilty for those charges. The judge accepted that "the fact that military personnel have acted within the terms of their orders may be a matter to be considered in mitigation of penalty for criminal offences that may have been committed if the justice of the case so requires" (*International Law Reports*, vol. 74, p. 250). However, he considered that "the fact that the defendants acted under orders is not a matter upon which I place any great weight in the circumstances of this case" (ibid., p. 251). No issue of immunity or lack of responsibility of the two officers was raised at that stage. Furthermore, during the negotiations preceding the ruling of the Secretary-General in the *Rainbow Warrior* case, France, in its memorandum submitted to the Secretary-General, stated inter alia that "France is ready to assume, as regards New Zealand and the victims of the incident, all the responsibilities incumbent upon it in place of the persons having acted on its behalf, as done, for example, by the British Government in respect of the United States Government when the vessel *Caroline* was destroyed by a British commando unit (*cf.* Moore, *Digest of International Law* (1906), para. 127, p. 409)". It further considered that "it behoves the New Zealand Government to release the two officers" (*International Law Reports*, vol. 74, p. 269). It should be pointed out that, during the negotiations, there was no mention of any alleged immunity of the two officers involved.

163. It has been suggested that, in determining whether acts carried out by a State official in the territory of a foreign State are covered by immunity *ratione materiae*, the crucial consideration would be whether or not the territorial State had consented to the discharge in its territory of official functions by a foreign State organ.[466] In this respect, it has been argued that immunity *ratione materiae* does not cover acts that are in gross violation of the territorial sovereignty of another State, such as sabotage, kidnapping, murder committed by a foreign secret service agent or aerial intrusion.[467]

164. In the oral pleadings in the *Djibouti v. France* case before the International Court of Justice, counsel for Djibouti indicated that the principle of immunity *ratione materiae* of State officials was subject to some exceptions — which, however, were not relevant to the case under examination — in the event of war crimes and acts of espionage and sabotage carried out in the territory of a foreign State.[468]

165. Furthermore, the non-applicability of immunity *ratione materiae* to certain categories of individuals such as spies was alluded to by the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia in its judgment of 29 October 1997 in the *Blaškić* case."[469]

---

[466] See Paola Gaeta, "*Extraordinary renditions* e immunità dalla giurisdizione penale degli agenti di Stati esteri: il caso *Abu Omar*", *Rivista di diritto internazionale*, vol. 89 (2006), pp. 126-130. The author discusses the case of several Central Intelligence Agency (CIA) agents arrested in Italy in connection with the abduction in Milan, on 17 February 2003, of Abu Omar. One of the agents was, at the time of the abduction, a United States consul in Milan. However, by the time of his arrest, his consular functions had expired. The former consul claimed consular immunity in respect of the acts in question. His claim was rejected by the "Judge for preliminary investigations (g.i.p.)" of Milan on the basis that the abduction of an individual was not part of the consular functions as enumerated in the 1967 Vienna Convention on consular relations. The Judge did not examine the question whether the former consul also enjoyed functional immunity as a CIA agent. According to Gaeta, this would depend, among other things, on whether or not Italy had given its consent to the operation conducted on its territory by the CIA; in the absence of such consent, the territorial State would have no obligation under international law to recognize any functional immunity to the foreign agent who acted on its territory; ibid., pp. 127-128. See also Mario Giuliano, Tullio Scovazzi and Tullio Treves, *Diritto internazionale*, vol. II (2nd edition) (Milan: Giuffrè, 1983), p. 537, upholding the view that the obligation of a State to grant immunity with respect to official acts performed on its territory by foreign agents would depend on whether that State had authorized the performance of such acts.

[467] Bothe, op. cit., p. 252 and pp. 257-261.

[468] Oral pleadings, 22 January 2008, ICR 2008/3 (Condorelli), para. 24. See also references to the Nürnberg trials in Part One, sect. C.3 above.

[469] *Prosecutor v. Blaškić*, Subpoena decision, para. 41: "Similarly, other classes of persons (for example, spies, 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), although acting as State organs, may be held personally accountable for their wrongdoing." With respect to acts of espionage in general, attention may also be drawn to a decision of the Federal Constitutional Court of Germany, in which immunity was denied to spies of the former German Democratic Republic in respect of acts performed from the territory of the latter against the Federal Republic of Germany before the reunification of Germany; see Bundesverfassungsgericht (Federal Constitutional Court), Decision of 15 May 1995, *Entscheidungen des Bundesverfassungsgerichts*, vol. 92, pp. 277ff, summarized in the database on State practice regarding State Immunities of the Committee of Legal Advisers on Public International Law (CADHI) of the Council of Europe (http://www.coe.int/t/e/legal_affairs/legal_co-operation/public_international_law/State_Immunities).

2. Individuals covered by immunity *ratione materiae*

(a) Categories of officials

166. There appears to be wide doctrinal support for the proposition that, contrary to immunity *ratione personae*, which accrues to a limited number of high-ranking State officials,[470] immunity *ratione materiae* is enjoyed by State officials in general, irrespective of their position in the hierarchy of the State.[471] In this context, it has been argued that immunity *ratione materiae* "covers official acts of any de jure or de facto state agent".[472]

167. The principle that State officials in general enjoy immunity *ratione materiae* finds support in the jurisprudence of the International Criminal Tribunal for the Former Yugoslavia. In the *Blaškić* case, the Appeals Chamber referred in this context to a "well-established rule of customary international law going back to the eighteenth and nineteenth centuries, restated many times since":

> "The Appeals Chamber dismisses the possibility of the International Tribunal addressing subpoenas to State officials acting in their official capacity. Such officials are mere instruments of a State and their official action can only be 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. In other words, 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: they enjoy so-called 'functional immunity'. This is a well-established rule of customary international law going back to the eighteenth and nineteenth centuries, restated many times since. More recently, France adopted a position based on that rule in the *Rainbow Warrior* case. The rule was also clearly set out by the Supreme Court of Israel in the *Eichmann* case".[473]

> "[…] It is well known that customary international law protects the internal organization of each sovereign State: it leaves it to each sovereign State to determine its internal structure and in particular to designate the individuals acting as State agents or organs. Each sovereign State has the right to issue instructions to its organs, both those operating at the internal level and those operating in the field of international relations, and also to provide for sanctions or other remedies in case of non-compliance with those instructions.

---

[470] See above, Part Two, sect. A.

[471] See, for instance, Gaeta, op. cit. (2002), p. 975 (immunities *ratione materiae* "cover activities performed by *every* State official in the exercise of his functions, regardless of where they are discharged" (the italics are the author's)); Kelsen, op. cit., 1966, pp. 358-359; Klingberg, op. cit., p. 552 ("Under customary international law, former heads of state, like any other state official, enjoy so-called functional immunity with regard to their official acts."); Mitchell, op. cit., p. 231; Robertson, op. cit., p. 402 ("Absolute immunity (*ratione personae*) is bestowed upon those who embody or represent the State (i.e. on heads of state and heads of diplomatic missions) but it lasts only during their tenure of office. Ex-heads, along with agents such as generals and police chiefs and ministers, enjoy only restrictive immunity (*ratione materiae*), which covers all acts performed officially but does not include actions taken for private gratification."); and Wickremasinghe, op. cit. (2006), p. 397 (immunities *ratione materiae* "[…] potentially apply to the official acts of all the State officials […]"; ibid., p. 410: "… from at least the civil jurisdiction of the Courts of other States, where the effect of proceedings would be to undermine or render nugatory the immunity of the employer State.").

[472] Cassese, "When May Senior State Officials …", op. cit., p. 863. See also Bothe, op. cit., p. 255.

[473] *Prosecutor v. Blaškić*, Subpoena decision, para. 38 (footnote omitted).

> The corollary of this exclusive power 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 those acts or transactions. The general rule under discussion is well established in international law and is based on the sovereign equality of States (*par in parem non habet imperium*)."[474]

168. The view that immunity *ratione materiae* applies to State officials in general has also been expressed by the counsel for Djibouti in the *Djibouti v. France* case. Referring to the distinction between immunity *ratione personae* and immunity *ratione materiae*, he claimed that the latter — contrary to the former — was applicable to State officials in general and was based on the principle that official acts of State organs are attributable to the State itself and not to the organ that performed them.[475] In this respect, it is noteworthy that the counsel for France seems to have acknowledged the existence, as a matter of principle, of a rule granting immunity *ratione materiae* to State officials in general.[476] In its judgment of 4 June 2008, the International Court of Justice did not deny as a matter of principle the possibility that State officials such as the Public Prosecutor and the Chief of National Security of the Republic of Djibouti may enjoy immunity *ratione*

---

[474] Ibid., para. 41.

[475] Oral pleadings, 22 January 2008, ICR 2008/3 (Condorelli), p. 12, para. 17, and pp. 14-18, paras. 21-31 (also referring to numerous doctrinal authorities supporting the existence of a "principle of international law stipulating that organs of a State benefit from immunity from the jurisdiction of foreign States for acts carried out in the performance of that function"); see, also, oral pleadings, 28 January 2008, ICR 2008/6 (Condorelli), pp. 50-53, paras. 1-12.

[476] Oral pleadings, CR 2008/5 (Pellet), p. 50, para. 74 [translation]: "But in legal terms, the principal argument put forward by Professor Condorelli (which is novel when compared with the arguments in the Memorial) is stranger still. It is based on the principle that 'any State must regard the acts of the organ of a foreign State acting in an official capacity as attributable to that State, and not to the person possessing the status of organ, who cannot be held criminally liable for it as an individual'. In fact, by itself, there is nothing extravagant about this proposition, and I would be careful not to contradict the authorities asserting it, which my learned opponent quoted at length. What is debatable is not the principle; it is the truly unacceptable consequences he draws from it — moreover, more by implication than explicitly." (Footnotes omitted.) The counsel of France further argued that the question of whether the act in question had been performed in the discharge of the official functions of the organ concerned was to be determined by the competent authorities, before which nothing would have prevented the individuals concerned from invoking their immunity; ibid., pp. 50-53, paras. 75-80, especially para. 79 [translation]: "In this case of subornation of perjury, there was obviously nothing to prevent — or which now prevents — those concerned from invoking the immunities Djibouti now relies on in their name before the French Criminal Court. But to do so, they must enable it to appraise their arguments to this effect. Neither of the two has availed itself of those immunities — even by letter. […] Instead of doing so, those concerned have focused on the so-called non-reciprocity allegedly constituted by France's conduct." See also oral pleadings, 29 January 2008, CR 2008/7 (Pellet), pp. 45-53, paras. 17-30.

materiae (i.e. functional immunity) as organs of the State,[477] although the Court seemed to equate such immunity with the immunity enjoyed by the State itself.[478]

169. Furthermore, the principle according to which immunity *ratione materiae* is enjoyed by State officials in general finds support in the case law of domestic courts. In the context of criminal cases, attention may be drawn to the position adopted by the Swiss Federal Tribunal in its judgment in the *Adamov* case.[479] Mention can also be made of the view expressed by Lords Browne-Wilkinson,[480] Goff of Chievely,[481] Millet[482] and Phillips of Worth Matravers[483] in the *Pinochet* (No. 3) case before the House of Lords. Moreover, it should be noted that domestic courts have granted immunity *ratione materiae* to a variety of state officials, including low-ranking, in cases that were not of a criminal nature.[484]

---

[477] *Djibouti v. France*, paras. 181-200. However, the Court concluded that France did not violate such immunities. On the one hand, "it ha[d] not been 'concretely verified' before [the Court] that the acts which were the subject of the summonses as *témoins assistés* issued by France were indeed acts within the scope of their duties as organs of State"; para. 191. On the other hand, such immunities were not invoked by the State of Djibouti before the French authorities; see paras. 196-197.

[478] Ibid., paras. 187-188.

[479] *Evgeny Adamov* v. *Federal Office of Justice*, op. cit.

[480] *Pinochet* (No. 3), p. 594: "Immunity *ratione materiae* applies not only to ex-heads of state and ex-ambassadors but to all state officials who have been involved in carrying out the functions of the state".

[481] Ibid., p. 606: "State immunity *ratione materiae* operates therefore to protect former heads of state, and (where immunity is asserted) public officials, even minor public officials, from legal process in foreign countries in respect of acts done in the exercise of their functions as such, including accusation and arrest in respect of alleged crimes."

[482] Ibid., p. 644 Immunity *ratione materiae* "[…] is available to former heads of state and heads of diplomatic missions, and any one whose conduct in the exercise of the authority of the state is afterwards called into question, whether he acted as head of government, government minister, military commander or chief of police, or subordinate public official. The immunity is the same whatever the rank of the office-holder."

[483] Ibid., p. 657. "This is an immunity of the state which applies to preclude the courts of another state from asserting jurisdiction in relation to a suit brought against an official or other agent of the state, present or past, in relation to the conduct of the business of the state while in office.

[484] See, in particular, House of Lords, *Jones* (a civil action for alleged mistreatment brought against the Kingdom of Saudi Arabia as well as military and police officers of the Kingdom and its Minister of Interior), especially Lord Bingham of Cornhill, para. 11, and Lord Hoffmann, para. 66. See, also, Federal Republic of Germany, Federal Supreme Court, *Church of Scientology Case*, Case No. VIZR267/76, 1978, reproduced in *International Law Reports*, vol. 65, pp. 193ff. (granting immunity to the acts of the Head of Scotland Yard); *Jaffe v. Miller and others* (delivered by Finlayson J. A.), op. cit., (The plaintiff brought an action for damages against certain officials of the State of Florida (the Attorney General; a State Attorney; two assistant State Attorneys; an investigator; and a State lawyer), alleging that they were responsible for laying false criminal charges against him and conspiring to kidnap him, after having tried unsuccessfully to obtain his extradition. The Court of Appeal held that the respondents enjoyed immunity in respect of acts performed "within the scope of their duties as functionaries of the State of Florida": "I am of the opinion that the position at common law and under the *State Immunity Act* is the same on this issue. Whether the tortious acts alleged in the statement of claim occurred before or after the *State Immunity Act* came into force, the acts that the personal responding parties performed were within the scope of their duties as functionaries of the State of Florida, and they are entitled to state immunity if immunity is available to the State of Florida. The fact that the Act is silent on its application to employees of the foreign state can only mean that Parliament is content to have the determination of which employees are entitled to immunity determined at common law. It will be a matter of fact for the court to

(b) Former officials

170. In the *Arrest Warrant* case, the International Court of Justice seems to have implicitly recognized the immunity of a *former* minister for foreign affairs in respect of acts committed *in an official capacity* while in office. The Court indicated that:

> "[…] after a person ceases to hold the office of Minister for Foreign Affairs, he or she will no longer enjoy all of the immunities accorded by international law in other States. Provided that it has jurisdiction under international law, a court of one State may try a former Minister for Foreign Affairs of another State in respect of acts committed prior or subsequent to his or her period of office, *as well as in respect of acts committed during that period of office in a private capacity*."[485] (Emphasis added.)

171. Scholars are almost unanimous in recognizing that — contrary to immunity *ratione personae* which is enjoyed only by a limited number of *incumbent* State officials — immunity *ratione materiae* continues to apply after the cessation of the State official's functions.[486] In fact, it appears that only in very few instances a contrary view has been expressed or the principle has been questioned.[487] In this

---

decide in each case whether any given person performing a particular function is a functionary of the foreign state."; ibid., p. 459); Ireland, Supreme Court, *Norburt Schmidt v. Home Secretary of the United Kingdom*, 24 April 1997, holding that an agent of the Metropolitan Police of the United Kingdom was entitled to rely on sovereign immunity before the Irish courts (summarized in the database on State practice regarding State Immunities of the Committee of Legal Advisers on Public International Law (CADHI) of the Council of Europe (http://www.coe.int/t/e/legal_affairs/legal_co-operation/public_international_law/State_Immunities/); and United States, District Court, Southern District of New York, *Ra'Ed Mohamad Ibrahim Matar, et al., Plaintiffs, v. Avraham Dichter, former Director of Israel's General Security Service, Defendant*, 2 May 2007, 500 F.Supp.2d 284, pp. 288-292.

485 *Arrest Warrant*, para. 61. See also the joint separate opinion of Judges Higgins, Kooijmans and Buergenthal, para. 85: "Nonetheless, that immunity prevails only as long as the Minister [of Foreign Affairs] is in office and continues to shield him or her after that time only for 'official' acts."

486 See, *ex multis*, Cassese, "When May Senior State Officials …", op. cit., p. 863; Gaeta, op. cit. (2002), p. 975; Campbell McLachlan, "Pinochet Revisited", *International and Comparative Law Quarterly*, vol. 51 (2002), p. 961; Mitchell, op. cit., p. 231; and Wouters, op. cit., p. 256 (indicating that support for functional immunity for ministers for foreign affairs can be found in State practice and *opinio juris*). Concerning former Heads of State, see in particular Dominicé, op. cit., pp. 302-303; Klingberg, op. cit., p. 552; Mitchell, op. cit., p. 231 ("Regarding [the United Kingdom State Immunity Act (1978), Section 20(1)] in conjunction with the *Diplomatic Privileges Act* 1964 Art. 39(2), it is clear that a former head of state does not enjoy immunity in respect of personal or private acts (immunity *ratione personae*), but continues to enjoy immunity in respect of public acts performed in his or her capacity as head of state (immunity *ratione materiae*.)"; Shaw, op. cit. (2003), pp. 657-658; Melinda White, "Pinochet, Universal Jurisdiction, and Impunity", *Southwestern Journal of Law and Trade in the Americas*, vol. 7 (2000), p. 219; and Zappalà, op. cit., p. 596; as well as the references provided by Verhoeven, in *Institut, Annuaire*, op. cit., p. 536.

487 See, in particular, Andrea Bianchi, op. cit. (1999), p. 259. The author questions the existence of a customary rule providing functional immunity to high and low ranking state officials, or of an ad hoc rule on Heads of State. In this respect, he makes the following observation: "As recent studies purport, apart from the case of the immunity of diplomats and consuls for their official (and authorized by the territorial state) activities, it is difficult to establish the existence, under customary international law, of either a general regime of residual or functional immunity for high and low rank foreign state officials for acts performed in the exercise of their functions, or an ad hoc rule on heads of state [footnote citing Pasquale De Sena, *Diritto internazionale e*

respect, it has been suggested that the continued application of immunity *ratione materiae* after the cessation of the State official's functions is grounded in the fact that this type of immunity attaches to the act rather than to its author.[488]

172. The continuing application of immunity *ratione materiae* from foreign criminal jurisdiction has been clearly recognized by the Institut de droit international with respect to former heads of State and former heads of Government.[489]

173. Also, some domestic tribunals have recognized that former State officials remain entitled to immunity *ratione materiae* in respect of acts performed in their official capacity while in office.[490]

---

immunità funzionale degli organi statali (1996)]." See also the *amicus curiae* submitted to United States District Court by 23 Democrat United States Congress members in the case *A, B, C, D, E, F v. Zemin* op. cit., arguing against the granting of immunity to "a former head of a country that is a totalitarian regime and that does not afford the opportunity for its citizens to petition its government for grievances or to make claims against the governments for wrongdoing …." According to the *amicus curiae*, "international law makes clear that individuals that are responsible for gross violations of human rights may be subject to prosecution even if they were heads of state at the time that the offenses occurred. See, e.g., the Convention on the Prevention and Punishment of the Crime of Genocide (specifying that 'persons committing genocide' are subject to punishment, 'whether they are constitutionally responsible rulers, public officials or private individuals')."

488 See Klingberg, op. cit., p. 544, according to whom "[f]unctional immunities […] are accorded because the official acts of any state agent are to be attributed to the state and regarded as state acts. Because of the sovereign equality of states, states are precluded from judging the acts of other states (*par in parem non habet jurisdictionem*). As functional immunities attach to the quality of the act rather than to the quality of the person acting as state agent, they do not cease at the end of the discharge of official functions by that agent."

489 2001 resolution, art. 13, para. 2, reproduced in *Institut, Annuaire*, op. cit., p. 753 (combined with art. 16 as regards heads of Government).

490 See, in particular, Federal Tribunal, *Ferdinand et Imelda Marcos c. Office fédéral de la police (recours de droit administratif)*, op. cit., pp. 501-502, 534-537, where the Swiss Federal Tribunal held that a former Head of State enjoyed immunity *ratione materiae* from foreign criminal jurisdiction, unless the immunity is waived by his or her State. See also, in civil cases, Pakistan, Supreme Court, *Qureshi v. URSS*, 8 July 1981, reproduced in *International Law Reports*, vol. 64, pp. 586-653, at p. 617 (invoking some legal literature — Satow, *Guide to Diplomatic Practice* — supporting the continuing immunity of a former Head of State in respect of acts performed in an official capacity); *Hatch v. Baez*, 1876, 7 Hun. 596, p. 600 (where a United States Court held, in a case involving former President of St. Domingo: "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."); Court of Appeals for the Second Circuit, *Republic of the Philippines v. Marcos and others*, 26 November 1986, 806 F 2d 344 (1986), p. 360, reproduced in ILR, vol. 81, pp. 581-599, at p. 597 (recognizing the immunity of a formerHead of State, although not in respect of private acts); and *Plaintiff A, B, C, D, E, F, and Others Sinilarly Situated, Wei Yu, and Hao Want, Plaintiffs v. Jiang Zemin and Falun Gong Control Office (A.K.A. Office 6/10), Defendants*, op. cit., p. 883, excerpt reproduced in *The American Journal of International Law*, vol. 97, 2003, p. 977 ("Plaintiffs cite no holding by any court that head-of-state immunity for acts committed during one's tenure as ruler disappears when a leader steps down. The Second Circuit has stated in dictum that 'there is respectable authority for denying head-of-state immunity to former heads-of-state.'" Court o Appeals, Second Circuit *in re Doe*, Judgment of 19 October 1988, 860 F.2d 40, p. 45. However, the cases the court cited in support of this proposition suggest merely that a former head of state may not be entitled to immunity (1) for his private acts, see *The Schooner Exchange,* p. 145;

(c) Officials or former officials of unrecognized States or Governments

174. The potential role of recognition or lack of recognition of States or Governments on the granting of immunities to State officials has already been discussed in relation to the immunity *ratione personae* enjoyed by a limited number of incumbent, high-ranking State officials.[491] The same issue may arise in the context of the immunity *ratione materiae* of lower ranking State officials as well as former State officials.

175. With respect to the latter case, mention should be made of the proceedings brought against the de facto former ruler of Panama, Manuel Noriega, before a United States District Court. The District Court dismissed Noriega's claim to head of State immunity on the ground that the United States had never recognized General Noriega as Panama's Head of State.[492] The District Court's decision was confirmed on appeal.[493]

176. Moreover, in an order rendered on 6 November 1998 in the proceedings brought against Augusto Pinochet in Belgium, Judge Vandermeersch pointed to the need for examining, in the course of the investigations, to what extent Pinochet had been recognized by Belgium as "lawful Head of State" ("*Chef d'Etat légal*") of Chile, in order to determine whether he was entitled to claim immunity by reason of that status before the Belgian authorities.[494]

177. As regards the potential role of recognition in the granting of immunity to de jure or de facto State officials, it is also worth recalling the position adopted by the United States Supreme Court, as early as in 1897, with respect to certain conduct assumed by a military commander who carried out operations under the authority of a revolutionary government in Venezuela. The Supreme Court held:

Republic of Philippines v. Marcos, 806 F.2d 344, 360 (2d Cir. 1986) stating in dicta that head-of-state immunity may not 'go[] so far as to render a former head of state immune as regards his *private acts'* (emphasis added)), or (2) when the foreign state waives the immunity of its former leader, see *In re Grand Jury Proceedings*, 817 F.2d 1108, 1111 (4th Cir. 1987). Neither scenario is present here. Moreover, the cornerstones of foreign sovereign immunity, comity and the mutual dignity of nations, are not implicated ny denying immunity in the types of matters cited in *Doe* — in the first scenario because the head of state is being sued for acts taken as a private person and in the second because the foreign state disavows immunity for its former leader. By contrast, the rationale for head-of-state immunity is no less implicated when a former head of state is sued in a United States court for acts committed while head of state than it is when a sitting head of state is sued."

491 See above, Part Two, sect. A.1 (a).

492 District Court, Southern District of Florida, *United States of America v. Noriega*, Omnibus order of 8 June 1990, 746 F.Supp. 1506, reproduced in *International Law Reports*, vol. 99, pp. 151-183, at pp. 161-163.

493 Court of Appeals for the Eleventh Circuit, *United States of America v. Noriega*, 7 July 1997, 117 F 3d 1206 (1997), reproduced in *International Law Reports*, pp. 591-599, at pp. 595-596.

494 *Juge d'instruction au tribunal de première instance de Bruxelles*, Damien Vandermeersch**,** Order of 6 November 1998, op. cit., Section 3.1. See the critical remarks by Anne Weyembergh, "Sur l'ordonnance du juge d'instruction Vandermeersch rendue dans l'affaire Pinochet le 6 novembre 1998", *Revue belge de droit international*, vol. 32 (1999), pp. 182-184, observing that, contrary to the United States jurisdictions, Belgian jurisdictions had not relied upon this argument because Belgium recognizes only new States and not new governments. The author also argues that, in any event, States base their recognition of governments upon effectiveness as opposed to legitimacy or legality.

"[…] The acts complained of were the acts of a military commander representing the authority of the revolutionary party as a government, which afterwards succeeded, and was recognized by the United States. We think the circuit court of appeals was justified in concluding 'that the acts of the defendant were the acts of the government of Venezuela, and as such are not properly the subject of adjudication in the courts of another government.' […]".[495]

(d) Officials of a State that has disappeared

178. There may be some question as to whether officials of a State that has ceased to exist may still enjoy immunity *ratione materiae* from foreign criminal jurisdiction in respect of acts performed in their capacity as organs of that State. On this point, State practice appears to be scant and the solutions remain uncertain.[496]

179. For example, the judicial authorities of the Federal Republic of Germany denied immunity to officials of the former German Democratic Republic, including former Head of State Erich Honecker, on the ground that the State no longer existed.[497] This radical position might be explained, to a certain extent, in view of the peculiar situation which the reunification of Germany presented.[498]

---

[495] *Underhill v. Hernandez*, op. cit., p. 254. This case concerned a claim for damages in relation to the plaintiff's detention which had allegedly been caused by General Hernandez's refusal to grant the plaintiff a passport to leave the country.

[496] See Verhoeven "Rapport provisoire", op. cit., p. 540: "However, it remains difficult to determine what would justify maintaining a personal immunity in the absence of a State whose own interests alone fundamentally require that it should be granted." (Footnote omitted.)

[497] See, in particular, Federal Constitutional Court, 21 February 1992, rejecting the immunity defence of Honecker, former Head of State of the German Democratic Republic (published in German in *Deutsche Rechtsprechung zum Völkerrecht und Europarecht, 1986-1993*, Berlin, Springer, 1997, pp. 129-130), with a headnote in English which reads: "The immunity of a head of state cannot outlast the existence of the state which he or she represented. After the extinction of a state its representatives can therefore be subject to the criminal jurisdiction of other states." See also Federal Supreme Court (BHG), *Border Guards Prosecution*, Judgment of 3 November 1992, reproduced in *International Law Reports*, vol. 100, pp. 372-373 ("[…] the defendants are not to be treated as representatives of a foreign State for the simple reason that the GDR [German Democratic Republic] no longer exists."); and, similarly, Federal Constitutional Court (Bundesverfassungsgericht), Decision of 24 October 1996, *Entscheidungen des Bundesverfassungsgerichts* vol. 95, pp. 96 ff, summarized in the database on State practice regarding State Immunities of the Committee of Legal Advisers on Public International Law (CADHI) of the Council of Europe (http://www.coe.int/t/e/legal_affairs/legal_co-operation/public_international_law/State_Immunities/).

[498] See the remarks made by Watts (op. cit. (1994), p. 89) in commenting the criminal proceedings brought in Germany in 1992 against Erich Honecker, and discontinued in early 1993 because of Honecker's ill-health. According to the author, "[i]t seems probable that the view was taken that as the German Democratic Republic (GDR) had the competence to prosecute its own Head of State, on its accession to the Federal Republic of Germany (FRG) that competence passed to the FRG, which it exercised by bringing proceedings on the basis of the law formerly applicable in the GDR. Other relevant considerations are that with the accession of the GDR to the FRG the latter could be considered to have succeeded to the former's right to waive the Head of State's immunity, which it exercised by necessary implication by the institution of proceedings; and that since Head of State immunity exists to protect the interests of the State rather than those of the individual holder of the office, the disappearance of the State deprived that immunity of any continuing justification."

3. Possible exceptions, based on the nature of the criminal conduct

(a) Crimes under international law

180. The question arises as to whether immunity *ratione materiae* also covers crimes under international law.[499]

181. As previously mentioned,[500] in the *Arrest Warrant* case the International Court of Justice held that the immunity from criminal jurisdiction of an incumbent minister for foreign affairs was not subject to any exception in the event of crimes under international law. However, the Court did not directly address the question of the possible existence of such an exception in connection with the immunity *ratione materiae* of a *former* minister for foreign affairs. Nevertheless, the judgment of the Court contains the following *obiter dictum*, which has been interpreted as implicitly denying the existence of such an exception:[501]

> "Provided that it has jurisdiction under international law, a court of one State may try a former Minister for Foreign Affairs of another State in respect of acts committed prior or subsequent to his or her period of office, as well as in respect of acts committed during that period of office *in a private capacity*."[502] (Emphasis added.)

182. Indeed, since no mention at all is made here of the right of a State to prosecute a former minister for foreign affairs for crimes under international law, the Court's dictum might be interpreted as denying such a right, although a different conclusion could be reached by considering that such crimes would, by definition, be in excess of the functions of a State organ and should therefore be qualified as "private" acts.[503] Insofar as it might be interpreted as denying the existence of any exception

---

[499] For a definition of the notion of "crimes under international law" for purposes of the present study, see above, Part One, sect. B.1.

[500] See above, Part Two, sect. A.3.

[501] See, for instance, Wouters, op. cit., p. 267: "The Court's judgment can unfortunately … be read to the effect that persons may continue to be immune from prosecution for international crimes after ceasing to hold their ministerial post." See also Paola Gaeta, "*Ratione Materiae* Immunities of Former Heads of State and International Crimes: the *Hissène Habré* Case", *Journal of International Criminal Justice*, vol. 1 (2003-1), p. 189: "In sum, in the Court's opinion the general rule on *ratione materiae* immunities, whereby States cannot exercise jurisdiction over a foreign State official for acts he or she executed in his or her public capacity, without the consent of the State to which the State official belonged, also applies to alleged international crimes".

[502] *Arrest Warrant*, para. 61.

[503] See, on this point, the critical observations made by Jean Salmon, op. cit. (2002), pp. 516-517: "The formulation normally used is that, after the expiration of [a person's] functions, immunities shall subsist in respect of *acts performed by that person in the exercise of his functions*. The *ratio legis* of this rule is simple: a State official must not be prosecuted for acts which, at the time when they were performed, did not entail the responsibility of the person but that of the State for which he acted. This traditional formulation is itself susceptible to various interpretations. [...] A standard question raised by this expression is whether an unlawful act (from the international perspective) may be an act performed in the exercise of one's functions. In the present case, this question is important with respect to war crimes and crimes against humanity, which, it may be argued, have been carried out for the purposes of State policy and, thus, in the exercise of one's functions. In any case, it was not this traditional formulation that was used by the Court but rather the reverse formulation: there is no immunity for acts performed during the period in which the official exercised his functions if he has acted 'in a private capacity'. This formulation is worse than the previous one, if the intention is to exclude

to immunity *ratione materiae* in respect of crimes under international law, the Court's dictum has been criticized by several authors as being at variance with the current state of international law.[504] The Court's dictum has also been viewed as a potential cause of uncertainty among States as to the current status of international

---

war crimes and crimes against humanity from immunity; for, while it is still possible to argue that a policy of genocide, forced disappearance or ethic cleansing is not (normally) an act performed as a State function, it certainly could not be argued that this is an act performed in a private capacity, unless we are known to be dealing with a depraved and dangerous psychopath who has acted behind the backs of the authorities of his country! The formulation adopted by the Court — which it must be hoped was the result of an oversight — is therefore particularly regrettable, since it in no way represents customary international law. If the Court believed that war crimes and crimes against humanity should be considered to be private acts, it should have said so. By failing to do that, it has protracted and inflamed the controversy." See also Shaw, op. cit. (2003), p. 659 (referring to the dictum of the International Court of Justice): "This appears to leave open the question of prosecution for acts performed in violation of international law (such as, for example, torture), unless these are deemed to fall within the category of private acts."

[504] See, in particular, Cassese, "When May Senior State Officials …", op. cit., pp. 866-870, especially p. 868 ("Hence, if one construes the legal propositions of the Court literally, it would follow that foreign ministers could never, or in any event rarely, be prosecuted for international crimes perpetrated *while in office*. However, a more radical question to be raised is as follows: *why* should one confine trials by foreign courts to acts performed 'in a private capacity'? *Which international rules* would exclude official acts?" (Emphasis in the original.)); David S. Koller, "Immunities of Foreign Ministers: Paragraph 61 of the Yerodia Judgment As It Pertains to the Security Council and the International Criminal Court", *American University International Law Review*, vol. 20 (2004), pp. 16-17, referring to *Arrest Warrant*, para. 61 ("The Court specifies four instances when immunity does not exist, with the clear implication that in any circumstances outside of this exhaustive list, the foreign minister retains absolute immunity."; and ibid., p. 18: "As the Court intended Paragraph 61 to provide an exhaustive list of those circumstances where immunity does not apply, the clear consequence of this statement is that immunity protects all acts of a former foreign minister committee in an official capacity. This includes serious international crimes, including crimes against humanity, war crimes, genocide, and torture, thereby placing the Court's judgement at variance with well-established principles of international law."); and Sassòli, op. cit., pp. 800-801 ("It is unclear why it was necessary [for the International Court of Justice] to clarify that among the acts committed during a period in office only those performed in a private capacity could be prosecuted, since Mr. Yerodia had committed the acts of which he was accused prior to becoming a minister. This passage, however, clearly implies that a governing official continues to enjoy criminal immunity before the courts of third States for public acts (*actes de fonction*). The Court does not explain the reasons for such a temporal extension of immunity to acts in a public capacity. […] The restriction of this immunity to acts in a public capacity is probably motivated by an old illusion, which is based on a purely inter-State approach to international law and which should have disappeared at least 57 years ago. Indeed, this was the argument employed by the defenders of the major Nazi war criminals at Nuremberg, namely that an act attributable to or even entered into by a State could no longer entail the responsibility of the individuals who had committed it. […] Serious doubts are permitted as to whether this conception of the principle *par in parem non habet imperium* is reflected in practice. States and courts determined that an individual, even one of high rank, could be dissociated from 'his' State when they affirmed that the status of a governing official could not exonerate a person from his individual criminal responsibility. This practice covers not only proceedings before international courts, but also national proceedings. It is incompatible with the extension of the principle *par in parem non habet imperium* to individuals acting on behalf of the State.") See also Buzzini, op. cit., p. 294, fn 933, who considers that the Court's dictum is hardly compatible with recent developments in international criminal law.

law with regard to immunity *ratione materiae* in respect of crimes under international law.[505]

183. In contrast, the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia clearly stated, in its subpoena judgment in the *Blaškić* case, that immunity *ratione materiae* did not exist in respect of crimes under international law such as war crimes, crimes against humanity and genocide. The relevant passage of the judgment reads as follows:

> "These exceptions [to the customary rule granting functional immunity to State officials] arise from the norms of international criminal law prohibiting war crimes, crimes against humanity and genocide. Under these norms, those responsible for such crimes cannot invoke immunity from national or international jurisdiction even if they perpetrated such crimes while acting in their official capacity. […]"[506]

184. The non-applicability of immunity *ratione materiae* in respect of international crimes also finds some support in the case law of domestic courts. In this context, reference is often made to the judgment of the Supreme Court of Israel in the *Eichmann* case.[507] It should be recalled that the issue was examined by the Supreme Court from the perspective of the "act of State" doctrine. However, since the Supreme Court provided a definition of "act of State" which appears to coincide with the concept of immunity *ratione materiae* examined in the present study,[508] the Court's findings in the *Eichmann* case may be relevant.[509] The Supreme Court,

---

[505] According to Gaeta (op. cit. (2003), p. 195), the uncertainty generated by the Court's dictum might explain the position adopted by the Belgian authorities in the criminal proceedings against former President of Chad Hissène Habré. The author points to the fact that the Belgian investigating judge "felt it necessary to address Chad's authorities on the issue of immunities, if any, accruing to the former dictator" in respect of charges of crimes against humanity and torture. The author then discusses the legal nature of the letter of 7 October 2002 sent to the Belgian investigating judge by Chad's Minister of Justice, in which it was indicated that Habré "may not claim any immunity from the Chadian authorities" (the text of the letter is available at: http://hrw.org/french/press/2002/tchad1205a.htm). In this respect, the author notes that "[…] this waiver was grounded in the relevant internal statute lifting Hissène Habré's *immunities from national jurisdiction* for the crimes he allegedly committed in Chad when he was Head of State. […] It thus seems that the Government of Chad confused immunities before Chad's national courts, i.e. the immunities granted to some State officials by virtue of *public internal law*, with immunities before foreign national courts, i.e. the immunities that *international law* confers on some specific categories of State officials before foreign courts." The question of waiver is addressed in sect. C of the present Part.

[506] *Prosecutor v. Blaškić*, Subpoena decision, para. 41.

[507] Cited above, Part One, sect. C.3. Villalpando, op. cit., p. 424, views the *Eichmann* case as a precedent providing additional arguments to reject the plea of immunity *ratione materiae* in respect of crimes under international law.

[508] *Eichmann* case (Supreme Court of Israel), pp. 308-309, para. 14: "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 the 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 therefor, 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 States based on their Sovereignty." (Footnote omitted.)

[509] See the comment made by De Sena, op. cit., p. 383: "In the *Eichmann* case, the central idea underlying the Israeli Supreme Court's rejection of the plea of 'act of State' was actually the *exceptional* non-applicability of the immunity of state organs, *even though* the crimes committed by Eichmann could be traced back to the German State." (Emphasis in the original.)

confirming the judgment of the District Court of Jerusalem on this point,[510] dismissed Eichmann's plea of "act of State" by holding that such a defence did not operate in respect of crimes under international law. In so doing, the Supreme Court relied, in particular, on Article 7 of the Charter of the Nürnberg Tribunal and Principle No. III of the Nürnberg Principles.[511] The Supreme Court's position is well reflected in the following passages of its judgment:

> "In any event, there is no basis for the doctrine when the matter pertains to acts prohibited by the law of nations, especially when they are international crimes of the class of 'crimes against humanity' (in the wide sense). Of such odious acts it must be said that in point of international law they are completely outside the 'sovereign' jurisdiction of the State that ordered or ratified their commission, and therefore those who participated in such acts must personally account for them and cannot shelter behind the official character of their task or mission, or behind the 'Laws' of the State by virtue of which they purported to act. Their position may be compared with that of a person who, having committed an offence in the interests of a corporation which he represents, is not permitted to hide behind the collective responsibility of the corporation therefore. In other words, international law postulates that it is impossible for a State to sanction an act that violates its severe prohibitions, and from this follows the idea which forms the core of the concept of 'international crime', that a person who was a party to such a crime must bear individual responsibility for it. If it were otherwise, the penal provisions of international law would be a mockery."[512]
>
> "[…]
>
> "[…] The discriminatory and plunderous decrees of that evil State and the murderous edicts of the autocrat who directed its affairs are not laws in the contemplation of international law and can in no manner render these terrible crimes valid or absolve those who participated in committing them from the personal responsibility they bear."[513]

185. Attention should also be drawn to the House of Lords' decision in the *Pinochet* (No. 3) case. The House of Lords examined the issue of immunity from the perspective of public international law, as on this issue the British legislation simply referred, mutatis mutandis, to the immunities which are recognized to the heads of diplomatic missions.[514] However, in the reasoning of the Lords, the justification for denying Pinochet immunity *ratione materiae* in respect of the crimes he allegedly committed during his presidency was essentially based on the operation of the Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or

---

[510] Judgment of 12 December 1961, reproduced in *International Law Reports*, vol. 36, pp. 18-276, at pp. 44-48.

[511] See para. 14 (c) of the Supreme Court's judgment.

[512] Ibid., para. 14 (b).

[513] Ibid., para. 14 (d).

[514] Article 20 (1) of the British State Immunity Act of 1978 of the United Kingdom. Since the Diplomatic Privileges Act of 1964 incorporated the 1961 Vienna Convention on Diplomatic Relations, article 39 (2) of the latter, dealing with the immunities of a diplomat who has ceased functions, was applicable.

Punishment, 1984,[515] as opposed to a general exception for crimes under international law that would be provided by customary law.[516]

186. Other decisions of, or proceedings before, domestic courts appear to uphold the non-applicability of immunity *ratione materiae* in respect of crimes under international law. For instance, in requesting the extradition of Pinochet on 3 November 1998, the Spanish authorities clearly expressed their position that former heads of State did not enjoy immunity in respect of crimes under international law.[517] Similarly, in a recent judgment, the Spanish Audiencia

---

[515] *Pinochet* (No. 3). See, in particular, the positions of Lords Browne-Wilkinson, pp. 594-595; Hope of Craighead, pp. 623-627; and Saville of Newdigate, pp. 642-643. *Compare* with the dissenting position of Lord Goff of Chieveley, pp. 600ff (holding that no "waiver" of immunity had occurred by means of ratification of the Torture Convention). For a commentary on the Lords' lines of reasoning, see Villalpando, op. cit., p. 412ff. The author emphasizes that denial of immunity to Pinochet in the decision of the House of Lords of 24 March 1999 was limited to the acts of torture and conspiracy to commit torture that occurred after 8 December 1988 (i.e., after the ratification of the Torture Convention by the United Kingdom, which corresponded to the date from which the United Kingdom courts had jurisdiction to prosecute those crimes extra-territorially). The author further notes (pp. 414-416) that in order to exclude immunity in respect of torture, the seven Lords adopted seven different lines of reasoning, which are slightly difficult to reconcile. He also points out (pp. 417-418) that the Lords' reasonings are, in any event, based on the Torture Convention and have therefore many limitations *ratione materiae* (i.e., with respect to the crimes)*, personae* (i.e., with respect to the States parties to the Convention) and *temporis* (i.e., with respect to date of entry into force of the Convention). See also O'Neil, op. cit., p. 317 ("The *Pinochet* decision creates precedent for the denial of head of state immunity only in situations where a former head of state is charged with a crime of international law under a governing treaty that applies to heads of state and that has been signed by both the leader's country and the country hearing the dispute."); Clive Nicholls, "Reflections on Pinochet", *Virginia Journal of International Law*, vol. 41 (2000), p. 146 ("Pinochet No. 3 established that a former head of state has no immunity for the international crime of torture. The law governing immunity in the United Kingdom is section 20 of the State Immunity Act 1978, read with section 39(2) of Schedule 1 of the Diplomatic Privileges Act 1964. The Appellate Committee held by a majority that, generally, a head of state had immunity under those provisions ratione personae (by virtue of his status as a head of state) and a former head of state ratione materiae (in respect of his official or governmental acts). However, by a majority, *Pinochet* (No. 3) decided that a former head of state did not have immunity in respect of acts of torture or conspiracy to torture after 8 December 1988, the date by which Spain, Chile and the United Kingdom had ratified the Torture Convention, because they could not have intended that immunity for former heads of state survive their ratification."); and Cosnard, op. cit. (1999), pp. 314-320.

[516] See, however, the opinion of Lord Hope of Craighead, in *Pinochet* (No. 3), pp. 625-627. As noted by Villalpando (op. cit., p. 416), Lord Hope of Craighead, in denying immunity with regard to acts of systematic or widespread torture having occurred after 1988, based his argument on the customary obligations that were binding upon the United Kingdom with respect of international crimes at the moment of ratifying the Torture Convention, rather than on the convention itself.

[517] Request for extradition delivered on 3 November 1998, *Auto de solicitud de extradición de Pinochet*, Madrid, 3 November 1998 (reproduced in http://www.ua.es/up/pinochet/documentos/auto-03-11-98/auto24.htm), fourth paragraph, 5 (d), stating that the position of former heads of State is, in this respect, very different from that of incumbent heads of State ("The situation is very different, however, with respect to former heads of State. International law does not require their protection, for the same principles also applicable to the Act of State Doctrine, which does not extend to crimes under international law. In this regard, all of contemporary international criminal law, whether expressly or implicitly but clearly, rejects defence on the grounds of official acts or based on the immunities of heads of State or similar persons.").

Nacional implicitly recognized that a former head of State would not enjoy immunity *ratione materiae* in respect of acts of genocide.[518] The inapplicability of immunity *ratione materiae* of State officials in respect of crimes under international law has also been upheld by the Italian Corte di cassazione in the *Ferrini* case.[519]

187. It is also worth mentioning the case of former President of Chad, Hissène Habré, accused of crimes under international law allegedly committed while in office. In 2006, the African Union mandated the Republic of Senegal to prosecute Habré "on behalf of Africa".[520] The Committee of African Jurists established by the African Union to examine the question of the prosecution of Hissène Habré took the position that "Hissène Habré cannot shield behind the immunity of a former Head of State to defeat the principle of total rejection of impunity that was adopted by the Assembly".[521]

188. It should be noted, however, that domestic authorities, even recently, have not been unanimous in denying immunity *ratione materiae* to State officials accused of crimes under international law.[522] Thus, the District Prosecutor of Paris granted

---

[518] Audiencia Nacional, *Auto del Juzgado Central de Instrucción No. 4* (2008), p. 157. Although the case involved the incumbent Head of State of Rwanda, Mr. Kagame, and therefore concerned immunity *ratione personae*, the Audiencia Nacional seems to have indicated, *a contrario*, that a former Head of State would not enjoy immunity *ratione materiae* in respect of crimes covered by the 1948 Convention on the Prevention and Punishment of the Crime of Genocide: "Whereas the Genocide Convention establishes that persons accused of this crime shall be tried by the courts of the territory in which the act was committed or before a competent international court, and whereas no such requirements have been met in the present case before the Spanish courts, *therefore, and until such a charge is dismissed*, the immunity that protects him shall prevent his prosecution." (Emphasis added.)

[519] Court of Cassation, *Ferrini v. Federal Republic of Germany*, Judgment of 11 March 2004 (No. 5044), in *Rivista di diritto internazionale*, 2004, Fasc. II, pp. 540-551, para. 11. In the context of a civil case brought against Germany for damages suffered as a result of the arrest, deportation and forced labour inflicted to the plaintiff by the German troops during the Second World War, the Italian Court of Cassation considered it to be "undisputed" that State officials do not enjoy functional immunity in respect of crimes under international law, and also held that there was no reason why the solution should be different in the context of State immunity. On this judgment, see Andrea Bianchi, "Ferrini c. Repubblica federale di Germania (Italian Court of Cassation; Judgment of 11 March 2004); a Comment", *American Journal of International Law*, vol. 99 (2005), pp. 242-248.

[520] See Assembly of the African Union, Seventh ordinary session, 1-2 July 2006, Banjul, The Gambia, Decision on the Hissène Habré case and the African Union (Assembly/AU/Dec.127(VII), para. 5 (ii), available at http://www.africa-union.org/root/au/Conferences/Past/2006/July/summit/doc/Decisions_and_Declarations/Assembly-AU-Dec.pdf. In para. 5 (iv) of the same decision, the Assembly "requests all the Member States to cooperate with the Government of Senegal on this matter" and, in para. 5 (v) thereof, the Assembly "*calls upon* the International Community to avail its support to the Government of Senegal". Art. 4 (h) of the Constitutive Act of the African Union provides for the right of the Union to intervene in a Member State pursuant to a decision of the Assembly in respect of grave circumstances, namely: war crimes, genocide and crimes against humanity; http://www.africa-Union.org/root/au/AboutAU/Constitutive_Act_en.htm.

[521] See para. 13 of the Report of the Committee of Eminent African Jurists on the case of Hissène Habré, submitted to the Summit of the African Union in July 2006, available at: http://www.hrw.org/justice/habre/CEJA_Repor0506.pdf. As previously mentioned (supra, footnote 505), the Chadian authorities had waived Habré's immunity in the criminal proceedings instituted against him in Belgium.

[522] On the attitude of the Netherlands' authorities vis-à-vis Pinochet, see van Alebeek, op. cit., p. 69: "When Pinochet visited the Netherlands in 1994, the Dutch Public Prosecutor did not act

immunity *ratione materiae* to the former United States Secretary of Defense in a criminal procedure involving allegations of acts that could have amounted to crimes under international law.[523] Also, in its decision in the *Jones* case, the United Kingdom House of Lords granted immunity from civil jurisdiction in respect of acts of torture to the Kingdom of Saudi Arabia and some of its officials, on the basis, inter alia, that contrary to the situation in the *Pinochet* case, there was no applicable treaty removing immunity from civil jurisdiction in respect of acts of torture.[524]

---

on the requests for arrest of the General. After Pinochet had safely left the country, a claim was brought against the Public Prosecutor for this failure to prosecute the ex-dictator. The court dismissed the claim, stating that 'it was evident that prosecution of Pinochet … could encounter so many legal and practical problems that the Public Prosecutor was perfectly within his rights not to prosecute' (Gerechsthof Amsterdam, *Chili Komitee Nederland v. Public Prosecutor* (1995), reproduced in *Netherlands Yearbook of International Law*, 28 (1997), pp. 363-365)".

[523] On 25 October 2007, four human rights organizations (the International Federation for Human Rights, the Center for Constitutional Rights, the Ligue des droits de l'Homme et du Citoyen, and the European Center for Constitutional and Human Rights) filed a complaint before the Paris District Prosecutor against Donald Rumsfeld, former United States Secretary of Defense, alleging that the latter was responsible of torture for having directly and personally elaborated and ordered harsh interrogation techniques constituting torture in the detention centers of Guantanamo Bay and Abu Ghraib, in violation of the 1984 Torture Convention, ratified and implemented in France. At the time of the complaint, Donald Rumsfeld was on visit in the French territory. In a letter dated 16 November 2007 (http://www.fidh.org/IMG/pdf/reponseproc23nov07.pdf), the Paris District Prosecutor (*Procureur de la République près le Tribunal de grande instance de Paris*), Jean-Claude Marin, informed the attorney of the parties the dismissal of the case, giving the following explanation:

> "The services of the Ministry of Foreign Affairs have [...] indicated that, pursuant to the rules of customary international law established by the International Court of Justice, immunity from criminal jurisdiction for Heads of State and Government and Ministers for Foreign Affairs subsists after the expiration of their functions in respect of acts performed in an official capacity. As the former Secretary of Defense, Mr. Rumsfeld, by extension, should therefore enjoy the same immunity for acts performed in the exercise of his functions.
>
> In other respects, the stay of the said individual in France is expected to end on 27 October 2007.
>
> My office has therefore dismissed this case (filed under registration number P0729908132)."

[524] *Jones* case, especially the opinion of Lord Hoffmann, para. 71. The reasoning of the Lords was based on the fact that the substantive prohibition of torture and immunity from jurisdiction were different questions, as clearly indicated by Lord Hoffmann, para. 44: "the jus cogens is the prohibition of torture. But the United Kingdom, in according State immunity to the Kingdom [of Saudi Arabia] is not proposing to torture anyone. Nor is the Kingdom [of Saudi Arabia], in claiming immunity, justifying the use of torture." See, on this case, Carlo Focarelli, "I limiti dello jus cogens nella giurisprudenza più recente", *Rivista di diritto internazionale*, vol. 90 (2007), pp. 637-656, at pp. 642-646.

189. In spite of the uncertainty that still appears to surround this question,[525] it is increasingly argued in the legal literature that immunity *ratione materiae* is not applicable in respect of crimes under international law.[526] This principle has been clearly affirmed by the Institut de droit international in article 13, paragraph 2, of its 2001 resolution, providing that a former Head of State (as well as a former Head of Government[527]) "[…] may be prosecuted and tried when the acts alleged constitute a crime under international law […]".[528] In addition to war crimes, crimes against humanity, genocide and torture, the non-applicability of immunity *ratione materiae* has been advanced in relation to "gross human rights offences",[529] aircraft bombing,[530] extraordinary renditions[531] and "serious crimes of international, state-sponsored terrorism".[532]

190. Several arguments and considerations have been relied upon in the legal literature and in judicial decisions to support the inapplicability of immunity *ratione materiae* of State officials in respect of crimes under international law. In spite of the variety of such arguments and considerations, two main lines of reasoning may be identified. The first relies on the disqualification of crimes under international law as being "non-official" acts, therefore excluded from the natural scope of immunity *ratione materiae*. The second is based on the assumption that crimes under international law, whether official acts or not, would be excluded from

---

[525] See Fox, "The Resolution of the Institute of International Law", op. cit., p. 125, commenting on the resolution of the *Institut*: "The removal from a Head of State when he has left office of immunity from criminal jurisdiction for commission of an international crime committed in the course of official functions is uncertain, but is supported by the decision in Pinochet, however controversial that decision may be." See also the observation of Lord Hope of Craighead, *Pinochet* (No. 3), pp. 622-623: "[…] even in the field of such high crimes as have achieved the status of jus cogens under customary international law there is as yet no general agreement that they are outside the immunity to which former heads of state are entitled from the jurisdiction of foreign national courts."

[526] See, in particular, Bianchi, op. cit. (1999), p. 259; Day, op. cit., pp. 499ff (in respect of "core crimes"); Dominicé, op. cit., pp. 305-306 (referring specifically to the immunity of a former Head of State); Klingberg, op. cit., p. 552 ("Under customary international law, former heads of state, like any other state official, enjoy so-called functional immunity with regard to their official acts. However, unlike in the case of personal immunity, it may well be argued that an exception has developed to the rule according functional immunity, where the former state official is suspected of having committed war crimes or crimes against humanity."); as well as the authors mentioned below in the present section, and others cited by Villalpando, op. cit., p. 414, footnote 138.

[527] See art. 16 of the resolution.

[528] Institut*, Annuaire*, op. cit., p. 753.

[529] International Law Association, *Final report …*, op. cit., p. 423, Conclusions and recommendations, No. 4: "No immunities in respect of gross human rights offences subject to universal jurisdiction shall apply on the grounds that crimes were perpetrated in an official capacity."

[530] Zappalà, op. cit., p. 611: "it seems appropriate to argue that aircraft bombing (leading to massive killing of innocent civilians) should be considered a crime under international law and should not permit the plea of immunity for official acts".

[531] See, in particular, Gaeta, op. cit. (2006), p. 129, referring to the abduction of Abu Omar by CIA agents in Milan, Italy, in January 2003. The author argues that such extraordinary renditions would expose the individual to the risk of torture (whose prohibition seems to have acquired the status of *jus cogens*) and could lead to a grave and systematic violation of human rights.

[532] Cassese, "When May Senior State Officials …", op. cit., p. 864.

immunity *ratione materiae* by reason of an exception recognized by international law.[533]

(i) Disqualification on the basis of being "non-official" acts

191. As regards to the first line of reasoning, some authors have suggested that crimes under international law would not qualify as "official acts" because they would not fall within the "normal" functions of the State.[534] This argument was also referred to in the joint separate opinion of Judges Higgins, Kooijmans and Buergenthal in the *Arrest Warrant* case.[535] With respect to torture and conspiracy to commit torture, the same argument was followed by some Law Lords in the House of Lords decision of 25 November 1998 in the *Pinochet* case,[536] and was

---

[533] In his order of 6 November 1998 in the context of criminal proceedings brought against Pinochet in Belgium, Judge Vandermeersch underlined that the acts which Pinochet was accused of were not covered by immunity for two reasons: 1) because they did not fall within the normal exercise of a head of State's functions; and 2) because the immunity enjoyed by Heads of State did not apply to crimes under international law; op. cit., section 3.1. Weyembergh, op. cit., p. 185, criticizes the order of Judge Vandermeersch by observing that the two arguments invoked would boil down to a single argument: according to this author, it is precisely because crimes under international law may not be considered as acts pertaining to the functions of a head of State that such crimes are not covered by the immunity which is granted to former heads of States.

[534] See, in particular, Andrea Bianchi, "Denying State Immunity to Violators of Human Rights", *Austrian Journal of Public and International Law*, vol. 46 (1994), pp. 227-228; Liu M. Sears, "Confronting the 'Culture of Impunity': Immunity of the Heads of State from Nuremburg to *ex parte Pinochet, German Yearbook of International Law*, vol. 42 (1999), p. 126 ("The '*Pinochet* paradox' that results in the case of alleged torture is particularly troubling: International law requires that to constitute a crime, torture be committed by a public official acting in his official capacity, but also provides that the official who is most responsible — the head of the state directing the unlawful torture — enjoys immunity for his official conduct. The issue then presented is whether conduct that is criminal under international law can ever properly be considered 'official conduct'. The decision of the British House of Lords in the case against General Pinochet held that such a result cannot be permitted."); Shaw, op. cit. (2003), p. 658 ("The definition of official acts is somewhat unclear, but it is suggested that this would exclude acts done in clear violation of international law. It may be concluded at the least from the judgment in *Ex parte Pinochet* (No. 3) that the existence of the offence in question as a crime under international law by convention will, when coupled in some way by a universal or extraterritorial mechanism of enforcement, operate to exclude a plea of immunity *ratione materiae* at least in so far as states parties to the relevant treaty are concerned. This may be a cautious reading and the law in this area is likely to evolve further."); Tunks, op. cit., p. 659 (commenting on the *Pinochet* case, the author notes: "While former heads of state still retain immunity for the *official* acts they committed while in power, they enjoy no protection for their international crimes, because such serious abuses cannot fall within the scope of a head of state's legitimate functions. Even though Pinochet served as a head of state at the time, international law deems acts of torture so far outside the bounds of legitimate state action that he must be considered a private actor with respect to such conduct." He then adds: "The abrogation of immunity for *private* acts of former heads of state, including international crimes in any context, is in harmony with the twin purposes of the head-of-state immunity doctrine: respecting state sovereign equality and promoting diplomatic functions."); and White, op. cit., pp. 216-222 (arguing that acts of torture, and crimes against humanity, cannot be regarded as officials acts of a head of State under international law, given that international law has criminalized them). See also Bennouna, in Institut, *Annuaire*, op. cit., p. 616.

[535] Joint separate opinion, para. 85. For a critical comment on this approach, see Koller, op. cit., pp. 29-30.

[536] *Pinochet* (No. 1), Lord Steyn, p. 1337 ("[…] it seems to me difficult to maintain that the

subsequently alluded to by some Lords, although with some ambiguity,[537] in the decision of 24 March 1999 in the same case.[538] Other decisions of national courts appear to support this argument.[539]

192. However, the view that crimes under international law would, by their very nature, not qualify as official acts has been criticized, both in domestic courts[540]

---

commission of such high crimes may amount to acts performed in the exercise of functions of a Head of State"); and Lord Nicholls, p. 1332 ("And it hardly needs saying that torture of his own subjects, or of aliens, would not be regarded by international law as a function of a head of state. All states disavow the use of torture as abhorrent, although from time to time some still resort to it. Similarly, the taking of hostages, as much as torture, has been outlawed by the international community as an offence. International law recognises, of course, that the functions of a head of state may include activities which are wrongful, even illegal, by the law of his own state or by the laws of other states. But international law has made plain that certain types of conduct, including torture and hostage-taking, are not acceptable conduct on the part of anyone. This applies as much to heads of state, or even more so, as it does to everyone else; the contrary conclusion would make a mockery of international law.")

[537] See Cosnard, op. cit. (1999), p. 319.

[538] See the clear position taken by Lord Hutton, *Pinochet* (No. 3), p. 639: "My conclusion that Pinochet is not entitled to immunity is based on the view that the commission of acts of torture is not a function of head of State, and therefore in this case the immunity to which Senator Pinochet is entitled as a former head of State does not arise in relation to, and does not attach, to acts of torture". More ambiguously, see also Lord Browne-Wilkinson, ibid., p. 593: "The question then which has to be answered is whether the alleged organisation of state torture by Senator Pinochet (if proved) would constitute an act committed by Senator Pinochet as part of his official functions as head of state. It is not enough to say that it cannot be part of the functions of the head of state to commit a crime. Actions which are criminal under the local law can still have been done officially and therefore give rise to immunity ratione materiae. The case needs to be analysed more closely."

[539] For instance, in a criminal case against Desi Bouterse, former Head of State of Surinam, the Court of Appeal of Amsterdam rejected Bouterse's claim to immunity on the ground that "the commission of very grave criminal offences of this kind cannot be regarded as part of the official duties of a Head of State"; Judgment of 20 November 2000, para. 4.2, partially reproduced in English in *Netherlands Yearbook of International Law*, vol. XXXII (2001), pp. 276-282, at p. 277. (For a commentary, see Liesbeth Zegveld, "The Bouterse case", ibid., pp. 97-118, especially at pp. 113-116). See also District Court (District of Massachusetts), *Teresa Xuncax*, Judgment of 15 April 1995, 886 F.Supp. 162 (a civil case).

[540] See dissenting opinions in *Pinochet* (No. 1): Lord Slynn of Hadley, p. 1309, and Lord Lloyd of Berwick, ibid., pp. 1323-1324. For a comment, see Pierson, op. cit., p. 291 (noting in particular that "while the dissenters do not phrase it so indelicately their reasoning presupposes that oppressive government is still government"). See also the following cases (although not in criminal proceedings): District Court, Northern District of California, *Jane Doe I, et al., Plaintiffs,* v. *Liu Qi et al., Defendants; Plaintiff A, et al., Plaintiffs,* v. *Xia Deren, et al., Defendants*, pp. 1285ff (in applying the United States Foreign State Immunity Act to a case brought by Falun Gong practitioners against local government officials of the People's Republic of China, the District Court rejected the plaintiffs' argument that "the Defendants in the instant case, by engaging in international law violations, acted beyond their authority and [were] thus not entitled to immunity under the FSIA" (ibid., p. 1280); instead, the District Court held that the "official's scope of authority" was to be "measured by the domestic law of the foreign state" (ibid., p. 1283)); District Court, Southern District of New York, *Ra'Ed Mohamad Ibrahim Matar, et al., Plaintiffs,* v. *Avraham Dichter, former Director of Israel's General Security Service, Defendant*, pp. 292-293 (the District Court rejected the plaintiffs' argument that, since the extrajudicial killings alleged in the complaint violated *jus cogens* principles of international law, they were necessarily beyond the scope of an official's lawful authority for purposes of the Foreign State Immunity Act); Court of Appeals for the District of Columbia Circuit, *Ali Saadallah Belhas et al., Appellants* v. *Moshe Ya'alon, Former Head of Army Intelligence Israel,*

and in the legal literature.[541] It has been observed that "in most cases [international] crimes are precisely committed by or with the support of high-ranking officials as part of a state's policy, and thus can fall within the scope of official acts".[542] The same point has been made by Judge ad hoc Van den Wyngaert in her dissenting opinion in the *Arrest Warrant* case.[543] Furthermore, the approach that considers crimes under international law as being "private" by their very nature may be difficult to reconcile with the principle that a State is to be held responsible for crimes under international law committed by its organs.[544] In this respect, it is worth mentioning the position expressed by a Trial Chamber of the International Criminal Tribunal for the Former Yugoslavia in *Prosecutor v. Kunarac*. The Chamber, far from considering that crimes under international law would not qualify as "official" acts, made the following observation:

> "[...] there is no privilege under international criminal law which would shield state representatives or agents from the reach of individual criminal responsibility. On the contrary, acting in an official capacity could constitute an aggravating circumstance when it comes to sentencing, because the official

---

Appellee, No. 07-7009, 15 February 2008 (rejecting the appellants' argument that General Ya'alon violated *jus cogens* norms of international law, he acted "outside any scope of authority that would provide protection from suit"). With respect to torture, see also the position adopted by Lords Bingham of Cornhill (para. 19) and Hoffmann (para. 72ff) in the *Jones* case before the United Kingdom House of Lords.

[541] See, in particular, Dominicé, op. cit., pp. 304-305, who strongly criticizes the argument according to which, by definition, acts that are contrary to international law (such as torture) should not be considered as acts carried out in an official capacity. Criticism has also been expressed by Akande, op. cit., p. 414; Cosnard, op. cit. (1999), p. 315 (referring to the argumentation of the majority of the Lords in the decision of 25 November 1998 in the *Pinochet* case); De Smet and Naert, op. cit., p. 505; and Sassòli, op. cit., pp. 802-803 (discussing separate and dissenting opinions in the *Arrest Warrant* case before the International Court of Justice concerning the question of whether international crimes are to be considered official acts, and siding ultimately with Judge Al-Khasawneh that international crimes by definition are official acts). See also Verhoeven, "Rapport provisoire", op. cit., p. 514.

[542] Wouters, op. cit., p. 262. The author then criticizes the Court's "ambiguous and controversial criterion of 'official/private acts' instead of recognizing an exception to the granting of immunities to former ministers in the case of international crimes".

[543] Dissenting opinion, p. 162, para. 36: "[The Court] could and indeed should have added that war crimes and crimes against humanity can never fall into [the] category [of private acts]. Some crimes under international law (e.g., certain acts of genocide and of aggression) can, for practical purposes, only be committed with the means and mechanisms of a State and as part of a State policy. They cannot, from that perspective, be anything other than 'official' acts."

[544] See, in this respect, the observations made by Markus Rau, "After *Pinochet*: Foreign Sovereign Immunity in Respect of Serious Human Rights Violations — The Decisions of the European Court of Human Rights in the *Al-Adsani* case", *German Law Journal*, vol. 3 (2002), p. 7: "In fact, the U.S. federal courts, while constantly granting sovereign immunity to foreign states under the FSIA even in cases of gross human rights abuses, tend to regard acts of torture, summary execution and other serious human rights violations as being beyond the official's scope of authority and thus outside of the individual immunities conferred by the FSIA. This approach was, *mutatis mutandis*, rejected in the House of Lord's *Pinochet* decision. It also is hardly compatible with the assumption that the individual's conduct, being a 'private act' not attributable to the sovereign then, still violates international law. Nevertheless, as the ECHR did not pronounce on the immunities of individuals, lawsuits against state officials might, as a matter of fact, still offer an opportunity for redress of human rights violations."

illegitimately used and abused a power which was conferred upon him or her for legitimate purposes".[545]

(ii) Exclusion of immunity ratione materiae as an exception recognized by international law

193. Without denying that crimes under international law may be considered as official acts for purposes of immunity *ratione materiae*, part of the legal literature is nevertheless of the opinion that this type of immunity does not cover such crimes by reason of an exception recognized by international law. This has also been the approach followed by the Institut de droit international in article 13 of its 2001 resolution.[546] The Institut avoided the controversy as to whether crimes under international law may be considered as official acts, by simply excluding such crimes from the operation of immunity *ratione materiae* of former heads of State or Government.[547]

194. Different considerations have been relied upon in affirming the existence of an exception to immunity *ratione materiae* in respect of crimes under international law. Some authors have relied on the alleged *jus cogens* nature of the rules establishing such crimes. The consequence thereof would be that those rules must prevail over the rules on immunity, which would not appear to possess *jus cogens* status.[548] This

---

[545] International Criminal Tribunal for the Former Yugoslavia, Trial Chamber I, *Prosecutor* v. *Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic*, Judgment of 22 February 2001, para. 494.

[546] See *supra* footnote 528.

[547] Salmon, op. cit. (2002), p. 517, commenting on the formulation adopted by the Institut in order to exclude crimes under international law from the scope of the immunity *ratione materiae* of a former head of State: "By this formulation, the Institute explicitly wanted to exempt certain unlawful acts from the immunity of the beneficiary when he is no longer in office ('crimes of international law and acts which constitute a misappropriation of the State's assets and resources') and, thereby, to avoid the controversy as to whether such acts could be considered as part of the exercise of one's functions." See also Verhoeven, "Rapport définitif", op. cit., p. 594, para. 14; and ibid., p. 575 (Salmon) as well as p. 671 (Gaja): "[…] the difficulty arises from the fact that some rules of international law describe the functions of diplomatic or consular agents, whereas international law refers back to domestic law, at least to a certain extent, where the functions of heads of State are concerned. The Commission acted prudently by refraining from addressing this matter and by establishing an exception for crimes of international law."

[548] See, e.g., Bianchi, op. cit. (1999), p. 265 (referring both to immunities *ratione materiae* and immunities *ratione personae*: "As a matter of international law, there is no doubt that *jus cogens* norms, because of their higher status, must prevail over other international rules, including jurisdictional immunities."); van Alebeek, op. cit., p. 49 ("a coherent interpretation of the immunity rule with respect to the international legal system to which it belongs suggests that neither immunity *ratione materiae* nor immunity *ratione personae* should extend to acts that violate the public order of the international community", as enshrined in particular in *jus cogens* [a footnote refers in particular to Bianchi]; ibid., p. 64: "Crimes against international law qualifying as *jus cogens* norms cannot be protected by immunity *ratione materiae*."); H.F. van Panhuys, "In The Borderland Between The Act of State Doctrine and Questions of Jurisdictional Immunities", *International and Comparative Law Quarterly*, vol. 13 (1964), p. 1213 ("Some rules of international law, addressing themselves to individuals, may be of such a cogent nature as to render the plea of immunity *ratione materiae* wholly unjustifiable. This is the case with so-called 'crimes of international law'. Situations may arise in which municipal courts, or international courts instituted by a group of States, must be deemed to have jurisdiction to try persons for such crimes, even though the latter were committed under 'commands of State'."); and Alberto Luis Zuppi, "Immunity v. Universal Jurisdiction: the Yerodia Ndombasi Decision of

argument has also been invoked by Judge Al-Khasawneh in his dissenting opinion in the *Arrest Warrant* case.[549] While the *jus cogens* argument finds some support in the case law of domestic tribunals,[550] other national tribunals have rejected it.[551]

195. The strength of the *jus cogens* argument would seem to depend on whether or not a real conflict exists between the rules on immunity and those establishing international crimes; in this respect, it may not seem to be self-evident that a

---

the International Court of Justice", *Louisiana Law Review*, vol. 63 (2003), p. 323 ("It seems that international law cannot recognize immunity for those acts that on the other side it condemns. It will therefore be difficult to understand that international law recognizes the prohibition of certain hideous crimes as paramount, rising to the level of *jus cogens* but on the other side accepts a shield of sovereign immunity in cases where the perpetrator holds an official position. Consequently, in cases where we speak of practices amounting to one of those categories of crimes against international law, such violations should not be covered by State immunity.") With respect to the prohibition of torture, see Kamto, op. cit., pp. 528-529: "Once the question of the jurisdiction of the court seized is settled, immunity cannot prevail. This appears to be indisputable when the crime for which the Minister for Foreign Affairs is being prosecuted constitutes the breach of a peremptory norm under article 53 of the 1969 Vienna Convention on the Law of Treaties. The same is certainly true for the prohibition of torture, which case law has consistently regarded as a *jus cogens* norm since the now famous *Furundzija* judgement. Unless the principle of the immunity of the Minister for Foreign Affairs is also a *jus cogens* norm (which would appear to be seriously in doubt), the prohibition of torture — assuming that this is the only *jus cogens* norm in the field of human rights — must prevail over the immunity rule".

549 Dissenting Opinion, para. 7. The dissenting judge makes this argument also in relation to the immunity of an incumbent minister for foreign affairs. According to him, "[t]he effective combating of grave crimes has arguably assumed a *jus cogens* character reflecting recognition by the international community of the vital community interests and values it seeks to protect and enhance. Therefore when this hierarchically higher norm comes into conflict with the rules on immunity, it should prevail. Even if we are to speak in terms of reconciliation of the two sets of rules, this would suggest to me a much more restrictive interpretation of the immunities of high-ranking officials than the Judgment portrays. Incidentally, such a restrictive approach would be much more in consonance with the now firmly established move towards a restrictive concept of State immunity, a move that has removed the bar regarding the submission of States to jurisdiction of other States often expressed in the maxim *par in parem non habet imperium*. It is difficult to see why States would accept that their conduct with regard to important areas of their development be open to foreign judicial proceedings but not the criminal conduct of their officials".

550 With respect to torture, attention may be drawn to the position of Lord Millet in *Pinochet* (No. 3), p. 651: "My Lords, the Republic of Chile was a party to the Torture Convention, and must be taken to have assented to the imposition of an obligation on foreign national courts to take and exercise criminal jurisdiction in respect of the official use of torture. I do not regard it as having thereby waived its immunity. In my opinion there was no immunity to be waived. The offence is one which could only be committed in circumstances which would normally give rise to the immunity. The international community had created an offence for which immunity *ratione materiae* could not possibly be available. International law cannot be supposed to have established a crime having the character of a jus cogens and at the same time to have provided an immunity which is co-extensive with the obligation it seeks to impose." See also, in a civil case brought against Germany: Italy, *Court of Cassation, Ferrini v. Federal Republic of Germany*, p. 547, para. 9.1, holding that the rules establishing international crimes, which have a "higher rank", must prevail over the rules on State immunity from foreign jurisdiction.

551 See, in particular, Court of Appeals for the District of Columbia Circuit, *Hwang Geum Joo, et al., v. Japan*, Judgment of 27 June 2003, 332 F.3d 679. In this case concerning a claim for damages brought against Japan by 15 former "confort women" for sexual slavery and torture inflicted before and during the Second World War, the District Court dismissed the claimants' argument that the *jus cogens* nature of the rules allegedly violated would have implied a waiver by Japan of its jurisdictional immunity (ibid., pp. 686-687).

substantive rule of international law criminalizing certain conduct is incompatible with a rule preventing, under certain circumstances, prosecution for that conduct in a foreign criminal jurisdiction. The existence of such a conflict has been denied, as regards to State immunity, in the legal literature[552] and by the European Court of Human Rights in the *Al-Adsani* case.[553] A similar position has been expressed in the United Kingdom House of Lords in the *Jones* case, which involved both State immunity and immunity of State officials from foreign civil jurisdiction.[554] The question arises whether such a conflict indeed exists between the rules establishing international crimes and immunity of State officials from foreign *criminal* jurisdiction.[555] In this respect, it has been argued that immunity for crimes under international law would be difficult to reconcile with the supreme condemnation of such crimes by the international community.[556]

---

[552] See Hazel Fox, *The Law of State Immunity* (Oxford University Press, 2002), p. 525: "State immunity is a procedural rule going to the jurisdiction of a national court. It does not go to substantive law; it does not contradict a prohibition contained in a *jus cogens* norm but merely diverts any breach of it to a different method of settlement. Arguably, then, there is no substantive content in the procedural plea of State immunity upon which a *jus cogens* mandate can bite."

[553] *Case of Al-Adsani* v. *United Kingdom*, paras. 52-67, especially para. 61: "[…] Notwithstanding the special character of the prohibition of torture in international law, the Court is unable to discern in the international instruments, judicial authorities or other materials before it any firm basis for concluding that, as a matter of international law, a State no longer enjoys immunity from civil suit in the courts of another State where acts of torture are alleged. […]"; and para. 66: "The Court, while noting the growing recognition of the overriding importance of the prohibition of torture, does not accordingly find it established that there is yet acceptance in international law of the proposition that States are not entitled to immunity in respect of civil claims for damages for alleged torture committed outside the forum State. The 1978 Act, which grants immunity to States in respect of personal injury claims unless the damage was caused within the United Kingdom, is not inconsistent with those limitations generally accepted by the community of nations as part of the doctrine of State immunity." *Compare* with the joint dissenting opinion of Judges Rozakis and Caflisch, joined by Judges Wildhaber, Costa, Cabral Barreto and Vajić, in particular para. 4: "[…] It is not the nature of the proceedings which determines the effects that a *jus cogens* rule has upon another rule of international law, but the character of the rule as a peremptory norm and its interaction with a hierarchically lower rule. The prohibition of torture, being a rule of *jus cogens*, acts in the international sphere and deprives the rule of sovereign immunity of all its legal effects in that sphere. The criminal or civil nature of the domestic proceedings is immaterial. The jurisdictional bar is lifted by the very interaction of the international rules involved, and the national judge cannot admit a plea of immunity raised by the defendant State as an element preventing him from entering into the merits of the case and from dealing with the claim of the applicant for the alleged damages inflicted upon him. […]".

[554] *Jones*, Lord Hoffmann, especially paras. 45-44: "The jus cogens is the prohibition on torture. But the United Kingdom, in according state immunity to the Kingdom, is not proposing to torture anyone. Nor is the Kingdom, in claiming immunity, justifying the use of torture. […] To produce a conflict with state immunity, it is therefore necessary to show that the prohibition on torture has generated an ancillary procedural rule which, by way of exception to state immunity, entitles or perhaps requires states to assume civil jurisdiction over other states in cases in which torture is alleged. Such a rule may be desirable and, since international law changes, may have developed. But, contrary to the assertion of the minority [of the European Court of Human Rights] in *Al-Adsani*, it is not *entailed* by the prohibition of torture."

[555] The existence of such a conflict is denied by Akande, op. cit., p. 414.

[556] See, in particular, Villalpando, op. cit., p. 424: "[...] the supreme condemnation of crimes against humanity and the principle of universality to suppress this crime appear to be incompatible with defence based on immunity" (footnotes omitted). See also Bianchi, op. cit.

196. This question is particularly relevant in light of the progressive and increasing recognition of the principle according to which the official status enjoyed by the perpetrator of a crime under international law does not exempt him or her from criminal responsibility. The Commission has clearly recognized this principle in its 1954 and 1996 Draft Codes of Offences against the Peace and Security of Mankind.[557] It also seems that this principle of substantive law has been viewed by the Commission, in its commentary to article 7 of the 1996 Draft Code, as incompatible with the assertion of procedural immunities in respect of crimes under international law, although it is not entirely clear whether the Commission was also referring, in this context, to immunities before foreign *national* jurisdictions:[558]

> "As further recognized by the Nürnberg Tribunal in its judgment, the author of crime under international law cannot invoke his official position to escape punishment in appropriate proceedings. The absence of any procedural immunity with respect to prosecution or punishment in appropriate judicial proceedings is an essential corollary of the absence of any substantive immunity or defence. [Footnote 69: Judicial proceedings before an international criminal court would be the quintessential example of appropriate judicial proceedings in which an individual could not invoke any substantive or procedural immunity based on his official position to avoid prosecution and punishment.]"[559]

197. The irrelevance of the defence based on the official status of the perpetrator has also been invoked in the legal literature, in conjunction with other elements, in order to uphold the existence of a *specific rule of customary law* which would have provided an exception to immunity *ratione materiae* in respect of crimes under international law.[560]

198. Commenting on the judgment of the International Court of Justice in the *Arrest Warrant* case, Cassese criticized the fact that the Court did not refer "to the

---

(1999), pp. 260-261: "The inconsistency of the very notion of crimes of international law with any form of immunity which shields individuals behind the screen of their official position is apparent. Immunity as a form of protection which international law grants, under certain circumstances, to particular categories of individuals is incompatible with conduct which runs counter to the fundamental principles of the international legal system. The argument is one of logic. International law cannot grant immunity from prosecution in relation to acts which the same international law condemns as criminal and as an attack on the interests of the international community as a whole."

557 1954 Draft Code of Offences against the Peace and Security of Mankind, and 1996 Draft Code of Crimes against the Peace and Security of Mankind. For texts, see Part One, sect. D.3 above.

558 See Part One, sect. D.3 above.

559 *Yearbook … 1996*, vol. II (Part Two), p. 27, para. (6) of the commentary to art. 7.

560 Among the authors who uphold the existence of a customary rule to that effect, see in particular Cassese, "When May Senior State Officials …", op. cit., pp. 864-866 and 870-874; Gaeta, op. cit. (2002), pp. 979-982; Zappalà, op. cit., pp. 601-602; and Weyembergh, op. cit., 186-191 (supporting the existence of a rule of customary law providing an exception to the principle of immunity of former Heads of State in respect of crimes against humanity, war crimes and crimes against peace; noting that such an exception operates before international and national tribunals; and holding that the existence of such an exception cannot be denied on the ground that, in practice, it has not led so far to the condemnation of a Head of State (pp. 189-190)). See also Akande, op. cit., p. 414 (referring to a "separate rule remov[ing] immunities *ratione materiae* in proceedings relating to international crimes").

customary rule lifting functional immunities for State officials accused of international crimes".[561] According to Cassese,

> "that such a rule has crystallized in the world community is evidenced by a whole range of elements: not only the provisions of the various treaties or other international instruments on international tribunals, but also international and national case law".[562]

On the same issue, another author[563] reached a similar conclusion:

> "[…] the contention can be made that a customary rule has evolved in the international community to the effect that all State officials, including those at the highest level, are not entitled to functional immunities in criminal proceedings — either of a national or international nature — if charged with such offences as war crimes and crimes against humanity (whether or not these latter crimes are committed in time of war). It is apparent that this customary rule constitutes an exception to the general rule granting functional immunity to State organs for acts they perform in their official capacity. Clearly, the relationship between the two rules is one of *lex specialis* to *lex generalis*. Less clear is the rationale behind the special rule. Arguably, the offences under consideration amount to attacks on values that the international community has come to consider as being of paramount importance. Consequently it appears to be unjustifiable to permit the prosecution and trial of minor offenders while leaving the leaders unpunishable, the more so because normally such crimes are perpetrated at the instigation, or with the connivance or at least the toleration, of senior State officials. Since under normal circumstances, national authorities do not bring to trial their own senior officials for the alleged commission of the crimes under discussion, those crimes would go unpunished, should the customary rule on functional immunities continue to protect high-ranking State officials against prosecution and trial before foreign courts or international criminal tribunals."[564] (Footnote omitted.)

199. In the legal literature, several elements are invoked by those who support the existence of a rule of customary international law lifting immunity *ratione materiae* in respect of crimes under international law. Such elements include not only domestic case law (in particular, the courts' findings in the *Eichmann*[565] and *Pinochet*[566] cases) but also various instruments such as: the London Agreement of 8 August 1945 establishing the International Military Tribunal and the judgment related thereto;[567] the Charter of the International Tribunal for the Far East;[568] the 1945 Control Council Law No. 10;[569] the 1948 Convention on the Prevention and

---

[561] Cassese, "When May Senior State Officials …", op. cit., p. 870 ff.
[562] Ibid., pp. 864-865.
[563] Gaeta, op. cit. (2002), pp. 979-983.
[564] Ibid., p. 982.
[565] See para. 184 above.
[566] See para. 185 above.
[567] Article 7 thereof provides: "The official position of the defendants, whether Heads of State or responsible officials in Government Departments, shall not be considered as freeing them from responsibility or mitigating punishment." See also Part One, sect. C.3.
[568] Article 6. For text, see Part One, sect. D, footnote 171 above.
[569] Article II (4) (a) thereof provides: " The official position of any person, whether as Head of State or as a responsible official in a Government Department, does not free him from responsibility for a crime or entitle him to mitigation of punishment."

Punishment of the Crime of Genocide;[570] Principle III of the Nürnberg Principles, affirmed by the United Nations General Assembly in its resolution 95 (I) of 11 December 1946 and subsequently formulated by the Commission;[571] the International Convention on the Suppression and Punishment of the Crime of Apartheid, 1973;[572] the statutes of the International Criminal Tribunal for the Former Yugoslavia[573] and the International Criminal Tribunal for Rwanda;[574] as well as article 27 of the Statute of the International Criminal Court.[575] As regards the customary nature of the principle enshrined in article 7 of the Statute of the International Military Tribunal and article 7 (2) of the Statute of the International Criminal Tribunal for the Former Yugoslavia, attention should be drawn to the findings of the Supreme Court of Israel in the *Eichmann* case[576] and to the case law of the International Tribunal.[577]

200. In order to demonstrate the customary status of the rule lifting immunity *ratione materiae* in respect of crimes under international law, there is also reliance on numerous cases in which State officials were denied immunity by foreign courts

---

[570] Article 4. For text, see Part One, sect. A, footnote 8 above.

[571] Principle III. For the text, see Part One, sect. A, footnote 7 above.

[572] Article III thereof provides: "International criminal responsibility shall apply, irrespective of the motive involved, to individuals, members of organizations and institutions and representatives of the State, whether residing in the territory of the State in which the acts are perpetrated or in some other State, whenever they:

"(a) Commit, participate in, directly incite or conspire in the commission of the acts mentioned in article II of the present Convention;

"(b) Directly abet, encourage or co-operate in the commission of the crime of apartheid."

[573] Article 7 (2). For text, see Part One, sect. D, footnote 171. On the rationale of this provision and its impact on immunities of State officials, see the report of the Secretary-General pursuant to paragraph 2 of Security Council resolution 808 (1993), document S/25704:

"[Para.] 55. Virtually all of the written comments received by the Secretary-General have suggested that the statute of the International Tribunal should contain provisions with regard to the individual criminal responsibility of heads of State, government officials and persons acting in an official capacity. These suggestions draw upon the precedents following the Second World War. *The Statute should, therefore, contain provisions which specify that a plea of head of State immunity or that an act was committed in the official capacity of the accused will not constitute a defence, nor will it mitigate punishment.*

[…]

[Para.] 57. *Acting upon an order of a Government or a superior cannot relieve the perpetrator of the crime of his criminal responsibility and should not be a defence.* Obedience to superior orders may, however, be considered a mitigating factor, should the International Tribunal determine that justice so requires. For example, the International Tribunal may consider the factor of superior orders in connection with other defences such as coercion or lack of moral choice." (Emphasis added.)

[574] Article 6 (2) thereof provides: "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."

[575] For text of article 27, see Part One, sect. D.4, para. 84, above and corresponding footnote.

[576] *International Law Report*, vol. 36, p. 311.

[577] International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, *Prosecutor* v. *Karadzic and others*, Decision of 16 May 1995, paras. 22-24; Trial Chamber, *Prosecutor v. Furundzija*, Judgment of 10 December 1998, para. 140; and Trial Chamber, *Prosecutor v. Slobodan Milosevic* (Decision on preliminary motions), Decision of 8 November 2001, para. 28.

for war crimes, crimes against humanity or genocide.[578] In this connection, while acknowledging that many of those cases concerned military officers, it has been observed that:

> "it would indeed be odd that a customary rule should have evolved only with regard to members of the military and not for all state agents who commit international crimes".[579]

201. On the other hand, there may be some factors that may need to be taken into account in determining whether a rule of customary law has indeed emerged which provides an exception to immunity *ratione materiae* from foreign criminal jurisdiction in respect of crimes under international law.

202. One aspect concerns the relevance to be attached to developments that have occurred in the field of international criminal justice.[580] In this respect, it has been argued that the question of immunities does not even arise before international tribunals.[581] In any event, it has been asked whether the rules on immunities from

---

[578] Cassese mentions the following cases: *Eichmann*; Court of Cassation (Criminal Chamber), *Fédération Nationale des Déportées et Internés Résistants et Patriotes and Others v. Barbie*, 20 December 1985, reproduced in *International Law Report*, vol. 78, pp. 124-148; Netherlands, Special Court of Cassation, *In re Rauter*, 12 January 1949, reproduced in *Annual Digest and Reports of Public International Law Cases*, 1949, Case No. 193, pp. 526-548; Special Court of Cassation, *In re Ahlbrecht*, 11 April 1949, reproduced in ibid., Case No. 141, pp. 397-399; United Kingdom, British Military Court at Venice (Italy), *The trial of Albert Kesselring*, 17 February-6 May 1947, reproduced in *Law Reports of Trial of War Criminals*, vol. 9 (1949), pp. 9-14; United Kingdom, British Military Court at Hamburg (Germany), *In re von Lewinski*, 19 December 1949, reproduced in *Annual Digest and Reports of Public International Law Cases*, 1949, Case No. 192, pp. 509-525; United Kingdom, House of Lords, *Pinochet* (No. 3); Supreme Court of the United States, *Yamashita v. Styer, Commanding General, U.S. Army Forces, Western Pacific*, 4 February 1946, 327 U.S. 1, 66 S. Ct. 340; and Poland, Supreme National Tribunal, *In re Buhler*, 10 July 1948, reproduced in *Annual Digest and Reports of Public International Law Cases* (1948), pp. 680-682.

[579] Cassese, "When May Senior State Officials …", op. cit., p. 871. In this context, the author refers to the United States Department of the Army Field Manual, The Law of Land Warfare (July 1956). He points out that para. 510 thereof states: "The fact that a person who committed an act which constitutes a war crime acted as the head of a state or as a responsible government official does not relieve him from responsibility for his act." The same argument is made by Gaeta, op. cit. (2003), p. 190.

[580] See, on this point, Klingberg, op. cit., pp. 552-556, commenting upon the *Arrest Warrant* case before the International Court of Justice: "To support its argument [that immunities do not protect from prosecution for war crimes or crimes against humanity], Belgium had relied on, inter alia, the practice of the International Military Tribunals at Nuremberg and Tokyo. Yet, it seems doubtful whether from the practice of the Tribunals it could be deduced that the immunity of *third state* nationals may be derogated from, where they are alleged to have committed international crimes. It can well be argued and has been argued that the Allies, when establishing the International Military Tribunal at Nuremberg, were acting as the effective sovereigns of Germany. As regards the International Military Tribunal at Tokyo, it has been maintained that Japan, in the instrument of surrender, consented to the prosecution of Japanese national before the Tribunal: In that instrument, Japan committed itself to carrying out the so-called Potsdam declaration which provides, inter alia, that 'stern justice shall be meted out to all war criminals'." However, the author then concludes that even though reliance on the Nürnberg and Tokyo military tribunals would be inappropriate "in an increasing number of cases, national courts have declined to afford former heads of state and other state officials immunity for international crimes". (citing *Pinochet, Bouterse, Habré and Qaddafi*).

[581] See, for instance, Dominicé, op. cit., p. 307 ("[…] de toute manière, la notion d'immunité de juridiction est irrelevante devant un tribunal international").

foreign criminal jurisdiction would also apply to international tribunals.[582] Moreover, to the extent that the statutes or the practice of international tribunals would appear to be at variance with established rules of customary law on immunities, it remains to be assessed whether those developments constitute a derogation from customary law[583] or elements that would have determined, in conjunction with others, an evolution of the law. With regard to the interplay between article 27 of the Statute of the International Criminal Court and customary international law, it has been argued that the lifting of immunities *ratione materiae* in respect of the crimes covered by the Rome Statute simply reflects an evolution that has occurred in customary international law.[584]

203. There could also be some question as to whether the various elements of practice supporting the principle of the irrelevance of the official status of an individual in respect of crimes under international law would necessarily entail the non-applicability, in relation to such crimes, of immunity *ratione materiae* from foreign criminal jurisdiction.[585] This question would seem to remain open if immunity *ratione personae* and immunity *ratione materiae* are both considered as mere *procedural* bars to the exercise of jurisdiction by a foreign State.[586] In contrast, if immunity *ratione materiae* from foreign criminal jurisdiction were considered to be a *substantive defence* predicated on the ground that the official acts of a State organ are to be attributable to the State and not the individual,[587] there would appear to be convincing reasons for holding that such a defence cannot

---

[582] See the negative findings of the Appeals Chamber of the Special Court for Sierra Leone, referred to in Part One, sect. D.1, above. *Compare* Casey and Rivkin, "The Rome Statute's Unlawful Application to Non-State Parties", *Virginia Journal of International* Law, vol. 44 (2003-2004), p. 82, who consider that the Statute of the International Criminal Court cannot sweep aside well-established customary rules on immunities and that this would not affect the legal position of States that have not ratified the Rome Statute, unless they accept the Court's jurisdiction in a particular case.

[583] Concerning, in particular, the International Criminal Tribunal for the Former Yugoslavia and International Criminal Tribunal for Rwanda, see the discussion in Day, op. cit., p. 502.

[584] Gaeta, op. cit. (2002), p. 990: "Article 27 (1) does not depart from customary international law as far as functional immunities laid down in international rules are concerned. It restates the customary rule whereby for the purpose of establishing criminal responsibility the plea of acting in an official capacity is of no avail." (Footnote omitted.) See also Part One, sect. D.4, above.

[585] In this respect, doubts have been expressed by some Lords in *Pinochet* (No. 3); see Lord Goff of Chievely (dissenting), pp. 596, 599 and 609; Lord Hope of Craighead, pp. 622-623; and Lord Phillips of Worth Matravers, p. 660.

[586] See Wickremasinghe, op. cit. (2006), p. 397: "It might be noted that both of these types of immunity [immunity *ratione personae* and immunity *ratione materiae*] operate simply as procedural bars to jurisdiction, and can be waived by appropriate authorities of the sending State, thus enabling the courts of the receiving State to assert jurisdiction."

[587] This is the position adopted, in particular, by Morelli, op. cit., pp. 215-216, and Cassese, "When May Senior State Officials …", op. cit., p. 863.

operate in respect of conduct that has been criminalized by the international legal order.[588]

204. In any event, in assessing whether a customary rule has emerged which would have lifted immunity *ratione materiae* in respect of crimes under international law, due account should also be taken of the judicial developments mentioned above,[589] which might be viewed as indicating a trend pointing in that direction.

205. It has also been argued that immunity *ratione materiae* would be incompatible with the recognition of extraterritorial jurisdiction or universal jurisdiction in respect of certain international crimes. The link between the establishment of universal jurisdiction over an international crime and the non-applicability of immunity *ratione materiae* in respect of that crime was expressly made, in the *Pinochet* case, by some of the Law Lords in relation to the regime introduced by the 1984 Torture Convention.[590] Similarly, Lord Saville of Newdigate deduced from the "*aut dedere aut judicare*" regime under the Torture Convention a clear exception to the immunity *ratione materiae* of a former head of State.[591] In contrast, the International Court of Justice held, in the *Arrest Warrant* case, that the various international conventions requiring States parties to extend their jurisdiction over certain crimes did not affect immunities under customary international law.[592]

---

[588] A similar view was expressed by Akande, op. cit., pp. 414-415: "This immunity is not available in such proceedings because the reasons for which such immunity is conferred do not apply to prosecutions for international crimes. Firstly, the general principle that only the state and not the officials may be held responsible for acts done by officials in their official capacity does not apply to acts that amount to international crimes. On the contrary, it is well established that the official position of individuals does not exempt them from individual responsibility for acts that are crimes under international law, and thus does not constitute a substantive defense. […]" (Footnote omitted.)

[589] See paras. 183-187 above.

[590] *Pinochet* (No. 3). See, in general terms, Lord Phillips of Worth Matravers, pp. 661: "International crimes and extra-territorial jurisdiction in relation to them are both new arrivals in the field of public international law. I do not believe that state immunity ratione materiae can co-exist with them. The exercise of extra-territorial jurisdiction overrides the principle that one state will not intervene in the internal affairs of another. It does so because, where international crime is concerned, that principle cannot prevail. An international crime is as offensive, if not more offensive, to the international community when committed under colour of office. Once extra-territorial jurisdiction is established, it makes no sense to exclude from it acts done in an official capacity." Similarly, Lord Browne-Wilkinson, ibid., pp. 594-595, underlined that the "elaborate structure of universal jurisdiction" established by the 1984 Torture Convention would be rendered "abortive" if immunity *ratione materiae* were to be recognized to State officials in respect of those crimes. See also Lord Hope of Craighead, ibid., pp. 625-627.

[591] Ibid., pp. 642-643.

[592] *Arrest Warrant*, para. 59. For quote, see footnote 766 below.

206. The incompatibility between universal jurisdiction and immunity *ratione materiae* has been upheld by some scholars and scientific associations.[593] In particular, the view that immunity *ratione materiae* is "fundamentally incompatible" with the establishment of universal jurisdiction in respect of gross human rights violations has been expressed by a Committee of the International Law Association.[594] It has also been suggested that universal jurisdiction creates equal jurisdiction for all nations.[595] Consequently, those States that establish universal

---

[593] See, in particular, Akande, op. cit., p. 415 ("[…] immunity *ratione materiae* cannot logically coexist with such a grant of [universal] jurisdiction. Indeed, to apply in such cases, the prior rule according immunity would serve to deprive the subsequent jurisdictional rule of practically all meaning. This constitutes the best explanation for the decision of the English House of Lords in the *Pinochet* case (No. 3). Most of the judges in that case held that since the Torture Convention limited the offence of torture to acts committed in the exercise of official capacity, the granting of immunity *ratione materiae* would necessarily have been inconsistent with the provisions of the Convention that accord universal jurisdiction over the offense. Accordingly, immunity *ratione materiae* must be regarded as having been displaced by the rule according universal jurisdiction for acts of torture. Similarly, since grave breaches of the 1949 Geneva Conventions and other war crimes committed in an international armed conflict are almost by definition acts committed by military and other officials of states, the treaty rules according universal jurisdiction over such crimes cannot logically coexist with the grant of immunity *ratione materiae* to state officials. However, because genocide, crimes against humanity, and war crimes committed in an internal armed conflict may be committed by nonstate actors, the rules permitting universal jurisdiction with respect to these crimes are not practically coextensive with immunity *ratione materiae* (which is the case with torture and war crimes committed in an international armed conflict). Nevertheless, it may be argued that these jurisdictional rules contemplate the domestic prosecution of state officials and, for that reason, prevail over the prior rule according immunity *ratione materiae*. Therefore, immunity *ratione materiae* does not exist with respect to domestic criminal proceedings for any of the international crimes set out in the Statute of the ICC." (Footnotes omitted.)); De Smet and Naert, op. cit., pp. 505-506 (relying — in support of the existence of an exception to functional immunity in respect of international crimes — on the concept of individual criminal responsibility and on the fact that such crimes "are a matter of concern to all States and may be adjudged by any State even if they are committed by, or on behalf of, another State. The latter reason also explains why the exercise of universal jurisdiction over these crimes is permitted. In fact, universal jurisdiction is not without importance for the question of immunity: to the extent that national courts are competent to adjudicate extraterritorially those crimes which are by definition committed in an official capacity, this is incompatible with immunity *ratione materiae*. Arguably, the same is true for crimes which are not necessarily but nevertheless mostly committed in an official capacity, such as crimes against humanity." (Footnotes omitted.)); Koller, op. cit., p. 21 (noting that: "As the [International Law Association] recently declared, the notion of immunity from criminal liability for crimes against international law perpetrated in an official capacity, whether by existing or former office holders, is fundamentally incompatible with the proposition that gross human rights offenses are subject to universal jurisdiction.)"; Villalpando, op. cit., p. 424; and White, op. cit., pp. 216-222 (arguing that international law has recognized, as a *jus cogens* rule, universal jurisdiction for crimes against humanity and that it follows from this that immunity for those acts should be denied.

[594] International Law Association, "Final report", op. cit., p. 416: "[…] it would appear that the notion of immunity from criminal liability for crimes under international law perpetrated in an official capacity, whether by existing or former office holders, is fundamentally incompatible with the proposition that gross human rights offences are subject to universal jurisdiction" (Footnote omitted.); ibid., p. 423 [Conclusions and recommendations]: "4. No immunities in respect of gross human rights offences subject to universal jurisdiction shall apply on the grounds that crimes were committed in an official capacity." See also art. 5 of the Princeton Principles, op. cit.

[595] Wheaton, op. cit., § 124, fn making this argument in respect of piracy.

jurisdiction for international crimes effectively create a web of horizontal jurisdictional relationships that would make it difficult to sustain an immunity plea. This situation may be far from being realized, although domestic implementation of the Rome Statute of the International Criminal Court may be suggestive of a trend.[596]

207. The alleged incompatibility between universal jurisdiction and immunity from foreign criminal jurisdiction has at the same time been questioned[597] or the matter has been left open. The Institut de droit international, in its 2005 resolution on "Universal criminal jurisdiction with regard to the crime of genocide, crimes against humanity and war crimes", did not address the question of immunities in respect of those crimes. In accordance with paragraph 6 of the resolution, the provisions of the latter "[…] are without prejudice to the immunities established by international law".[598]

(b) Other crimes of international concern

208. The question may be asked whether immunity *ratione materiae* from foreign criminal jurisdiction should also be excluded in respect of certain crimes of international concern that would not yet have acquired the status of "crimes under international law". This question is infrequently addressed in the legal literature, and the view has been expressed that "immunity should only be denied in relation to offences recognized as crimes of international law".[599]

209. However, the 2001 resolution of the Institut de droit international provides an additional exception to the immunity of a former head of State or of Government from foreign criminal jurisdiction. According to article 13, paragraph 2, of the resolution, immunity will not apply when the acts "[…] constitute a misappropriation of the State's assets and resources".[600] Commenting on this provision, Fox states that:

> "the new charge is very loosely defined. It would seem that where it is prosecutable as a municipal offence (and national legislation may be required to make it effective), it is to be read subject to a *de minimis* rule; only misappropriation on a grand scale of State assets will remove the immunity

---

[596] A report by REDRESS, "Universal Jurisdiction in Europe, Criminal Prosecutions in Europe since 1990 for War Crimes, Crimes against humanity, torture and genocide" (30 June 1999), notes that prosecuting such crimes on the basis of universal jurisdiction was becoming accepted practice, but that there was a long way to go before it was firmly established (p. 2). In particular, an adequate legal basis for exercising it was lacking in many instances (p. 5); available from www.redress.org/publications/UJEurope.pdf.

[597] See Jean-Yves de Cara, "L'affaire Pinochet devant la Chambre des Lords", *Annuaire français de droit international*, vol. 45 (1999), p. 99: "Finally, there is no reason why the immunity of the head of State, which paralyses foreign jurisdiction exercised on a territorial basis, as an exception, cannot paralyse universal jurisdiction."

[598] For the text of the resolution, see Institut, *Annuaire*, vol. 71-II (Krakow Session), 2006, pp. 296-301. This provision was introduced in the draft resolution following a proposal by Fox (ibid., p. 214), and the new paragraph was adopted by consensus (ibid., p. 282).

[599] Bianchi, op. cit. (1999), p. 261.

[600] Institut, *Annuaire*, op. cit., p. 753. This additional exception was included in the draft resolution following the suggestions made by certain members; see, in particular, Fox, ibid., p. 615; Collins, ibid., p. 617; and Feliciano, ibid., p. 619.

which a Head enjoys in relation to disposals relating to State assets or resources in the exercise of his official functions."[601]

210. The same author considers that the removal of immunity for the offence of misappropriation in article 13 of the resolution is a "novel de lege ferenda" provision.[602]

211. Similarly, it has been suggested that certain acts (such as embezzlement or drug trafficking), although linked with the exercise of power, may not be considered as public acts ("*actes de fonction*") for purposes of immunity from foreign jurisdiction.[603] In this context, reference has been made[604] to the findings of United States Courts in cases involving former heads of State accused of narcotics trafficking or financial crimes.[605]

212. Attention may also be drawn to a recent judgment in which the Swiss Federal Tribunal held that the immunity *ratione materiae* of a former Minister would not impede prosecution for corruption or in respect of common crimes committed in a private capacity.[606]

---

[601] Fox, "The Resolution of the Institute of International Law ...", op. cit., p. 123.

[602] Ibid., p. 124.

[603] Dominicé, op. cit., p. 304: "Among the private acts of the Head of State that are covered by immunity from criminal jurisdiction for as long as he is in office, but not once this has come to an end, and the official acts that he clearly performs in the exercise of his functions, there is undoubtedly a sort of intermediate area where one encounters acts and behaviour linked to the exercise of power that are not however public acts, or that at least must be questioned. Examples might include the embezzlement of public funds or proceeds due to the State for the purposes of personal financial gain. These are acts carried out in connection with, or as part of, the exercise of functions, but which should not be held to be public acts in the context of immunity from criminal jurisdiction of the former head of State. The same can be said for drug trafficking, which may be practised under colour of authority or by taking advantage of an official position, but which cannot be considered as public acts for the purposes of immunity from jurisdiction. " (Footnotes omitted.)

[604] Ibid.

[605] *United States of America, Plaintiff,* v. *Manuel Antonio Noriega, et al., Defendants*, op. cit., p. 1519, footnote 11 ("Criminal activities such as the narcotics trafficking with which Defendant is charged can hardly be considered official acts or governmental duties which promote a sovereign state's interests, especially where, as here, the activity was allegedly undertaken for the sole personal benefit of the foreign leader. In light of the Court's disposition on other grounds, however, it reserves discussion of this issue for Defendant's act of state defense, *infra.*" In dismissing the act of State defense, the District Court considered that the inquiry was "not whether Noriega used his official position to engage in the challenged acts, but whether those acts were taken on behalf of Noriega instead of Panama" (ibid., p. 1523); in this respect, Noriega had failed to demonstrate "that his alleged drug-related activities were in fact acts of state rather than measures to further his own private self-interest" (ibid.)); and *Marcos Perez Jimenez, Appellant,* v. *Manuel Aristeguieta, Intervenor, Appellee, and John E. Maguire, Appellee*, op. cit. (denying the applicability of the act of state defence to former Venezuelan Chief Executive in respect of financial crimes).

[606] *Evgeny Adamov* v. *Federal Office of Justice*, op. cit. Regarding corruption, it is not entirely clear whether the Federal Tribunal excluded from the scope of immunity *ratione materiae* corruption in general or only acts of corruption committed by a State official in a private capacity.

C. Procedural aspects

213. While the vast majority of the doctrine concerning the immunity of State officials in foreign criminal jurisdictions concerns substantive notions of immunity, the Commission may also find it necessary in its work to deal with multiple procedural issues which arise in the invocation and application of such immunity. The present section considers such procedural aspects. First, it examines the invocation of immunity, including whether immunity must be invoked at all, and if so who may invoke it and what is the timing of that invocation. Secondly, it considers the determination of immunity, emphasizing that States follow different practices as to which authorities are empowered to determine that a foreign official is immune from jurisdiction. Thirdly, it examines the legal effects of the operation of immunity from criminal jurisdiction, including the distinction between immunity from jurisdiction and immunity from execution, the question of immunity of State officials not accused of a criminal act, and the issue of which particular acts are precluded by the operation of immunity. Finally, it considers waiver of immunity, including both express and implied forms of waiver, the authority competent to waive immunity, and the legal effects that a waiver of immunity might have.

214. As there is a relative dearth of treatment of the topic's procedural aspects in both practice and doctrine, the present section will serve to raise possible issues which may require attention. While the present study aims to highlight those procedural practices which exist relating specifically to immunities of State officials, the Commission may find it necessary to supplement this sometimes sparse practice by relying, when appropriate,[607] on procedural practices employed in the context of other forms of immunities (such as immunities accorded to diplomatic agents and the jurisdictional immunities of States). Consequently, the present section also makes reference to the procedural practices employed with respect to these other forms of immunity, when it appears appropriate.

1. The invocation of immunity

(a) Whether immunity must be invoked and, if so, by whom

215. An initial procedural question which arises with regard to immunities of State officials concerns whether or not immunity must be invoked, and if it does, who is entitled to invoke it (the individual, the government of that individual, the government of the forum, or the judge *proprio motu*). On the one hand, some take the position that invocation of immunity is unnecessary because it is presumed to apply absent any explicit waiver of that immunity, without any specific need to invoke it. In other words, rather than triggering a state of immunity through its invocation, it is instead a state of non-immunity which requires triggering through waiver. In this regard, de Cara notes that a tribunal should automatically raise an immunity defence unless it has been expressly waived by the government of the

[607] In particular, procedural differences which exist between civil and criminal proceedings must consistently be borne in mind.

State official.[608] This corresponds with the findings of the present Study, which revealed much more practice with regard to waiver of immunity than invocation of immunity.[609] It is also consistent with the position taken in the Resolution of the Institut de droit international, which, rather than providing for a method for invocation of immunity, provides instead that immunities shall be afforded by the foreign criminal jurisdiction "as soon as that [individual's] status [as a head of State] is known to them".[610] Similarly, in *In Re Doe*, the United States Court of Appeals for the Second Circuit stated in dicta that "when lacking guidance from the executive branch, … a court is left to decide for itself whether a head of State is or is not entitled to immunity".[611] It could be implied from this argument that even if immunity is not invoked by the individual or his Government, it may still be raised by the Government of the forum or by the court *proprio motu.* The position that immunity applies without a specific need to invoke it would also appear to be consistent with practice concerning other forms of immunity — such as diplomatic immunity, consular immunity, and the immunity in the context of special missions — which have been codified in their substantive aspects without consideration as to the specifics of the invocation of that immunity.[612]

---

[608] De Cara, op. cit., p. 76 ("In the case of a mandatory exception, the court must raise it *ex officio*. However, the sending State may waive the immunity of persons who enjoy it, provided that this is an express waiver."). See also Rousseau, op. cit., p. 17 ("The lack of jurisdiction of domestic courts with respect to foreign States must be raised *ex officio* by the judge"). Shaw also appears to accept the notion that immunity applies without a specific need to invoke it, noting in the context of State immunity that "it is clear that the burden of proof lies upon the plaintiff to establish that an exception to immunity applies" Shaw, op. cit. (2003), p. 666 (citing J. Slaughton in *Raynier v. Department of Trade and Industry* (1987) Buttersworth Company Law Cases, vol. 667). Compare Pierson, op. cit., pp. 280-281 ("A revisionist reading of *Schooner Exchange* sees it as standing not for absolute immunity but for the proposition that a forum state has jurisdiction over all persons and things within its territory unless it waives jurisdiction. The consequences of this reading are enormous for it shifts the burden of proof onto human rights violators, requiring them to show why immunity should apply rather than presuming immunity unless a customary rule or statutory provision can be found denying immunity. If non-immunity is taken as the default position, it becomes much more difficult to argue that heads of state are immune for international crimes. … Hersch Lauterpacht also maintains that the general rule of international customary law is that of non-immunity. Jordan Paust declares that in the context of human rights abuses the general rule of international customary law is that of non-immunity.").

[609] Waiver of immunity is discussed in detail infra.

[610] Institut, Resolution, art. 6.

[611] See *In Re Doe*, op. cit. The statement is *obiter dicta* because the Court determined that any immunity that the Marcos's may have had had been waived in any case; ibid., p. 44.

[612] See Vienna Convention on Diplomatic Relations, art. 31; Vienna Convention on Consular Relations, art. 43; and Convention on Special Missions, art. 41. According to Denza, with regard to diplomatic immunity, the issue of procedure is therefore "left to the law of each State party". Eileen Denza, *Diplomatic Law: A Commentary on the Vienna Convention on Diplomatic Relations*, 2nd edition (Oxford: Oxford University Press, 1998), p. 253.

216. On the other hand, some consider that immunity must be specifically invoked by one of the parties for it to be applicable.[613] For example, in the case *Djibouti v. France* before the International Court of Justice, counsel for France argued in the oral proceedings that immunities must be invoked by the party seeking them: "In this case …, there was obviously nothing to prevent or which now prevents those concerned from invoking the immunities Djibouti now relies on in their name before the French Criminal Court. But to do so, they must enable it to appraise their arguments to this effect. Neither of the two has availed itself of those immunities even by letter."[614] Counsel for France appears to limit this argument to immunities *ratione materiae*, arguing that while individuals enjoying immunity *ratione personae* benefit from a presumption of immunity, individuals enjoying only immunity *ratione materiae* do not enjoy such a presumption and such immunities must be decided (presumably after being pleaded) in each case:

> "In the case of an incumbent Head of State (or Minister for Foreign Affairs) the 'presumption of immunity' is absolute and probably irrebuttable. It is covered by the immunities and that is all; on the other hand, where the other officials of the State are concerned, that presumption does not operate and the granting (or refusal to grant) of immunities must be decided on a case-by-case basis, on the basis of all the elements in the case. This supposes that it is for national courts to assess whether we are dealing with acts performed or not in the context of official functions."[615]

---

[613] Institut, *Annuaire*, op. cit., intervention of Jacques-Yves Morin, p. 584 (arguing that "immunity must be pleaded"). Concerning diplomatic immunity, see also J. M. T. Labuschagne, "Diplomatic Immunity: A Jurisdictional or Substantive-law Defence?", *South African Yearbook of International Law,* vol. 27 (2002), p. 294: ("Diplomatic immunity must be pleaded; it does not follow simply as a consequence of a party's position or function.") (analysing *Portion 20 of Plot 15 Athol (Pty) Ltd* v. *Rodrigues 2001 1 SA 1285 (W*)). In the discussions by the Institut, the question of whether or not immunity must be pleaded was seen by Morin to relate to its procedural nature, specifically whether immunity is an issue of jurisdiction (*compétence*) or admissibility (*recevabilité*). In particular, Morin argued that if immunity were considered a jurisdictional question, it would not need to be pleaded by the parties to by invoked by the court, but that the more common approach in his view was that immunity must be pleaded, and is therefore an issue of admissibility; Institut, *Annuaire*, op cit., intervention of Morin, p. 584 ("[I]f immunity touched upon the jurisdiction of the court, it would not need to be pleaded and the court would have to decline jurisdiction *ex officio*, where appropriate. It appears to me that practice demonstrates that immunity must be pleaded, which supports the notion of inadmissibility."). The position that immunity is an issue of admissibility has also received the support of commentators, notably Rousseau, who notes that "[I]f immunity touched upon the jurisdiction of the court, it would not need to be pleaded and the court should decline jurisdiction ex officio, where appropriate. It appears to me therefore that practice demonstrates that immunity must be pleaded, which supports the idea of inadmissibility."; Rousseau, op. cit., p. 17 (citing Cass. Civ., 22 April 1958, D. 1958.1.633, note Malaurie, *Journal de Droit International* (1958), p. 788, note Sialelli et *Revue Critique de Droit International Privé*, 1958, p. 591; Nancy, 18 May 1961, *Juris-Classeur Périodique*, 1961.II.12421, note J.A and *Journal de Droit International* (1962), p. 436). While this distinction between jurisdiction and admissibility is common in international law (see, e.g., Hugh Thirlway, "The Law and Procedure of the International Court of Justice 1960-1989" (Part Eleven), *British Year Book of International Law*, vol. 71 (2000), pp. 73-83) and civil law (Georges Abi-Saab, *Les exceptions préliminaires dans la procédure de la Cour internationale* (Paris, Pedone, 1967), p. 9), no precise equivalent appears to exist in common law.

[614] *Djibouti* v. *France*, CR 2008/5, 25 January 2008, para. 79 (Pellet) (translation).

[615] Ibid., para. 77.

217. Counsel for Djibouti rejected the notion of a presumption, arguing that "there is really no place for the least presumption which might a priori and in the abstract tilt the scales one way or another".[616] However, even in making this argument, he also appears to support the notion that immunities must be raised in order to be considered: "The issue is not to presume anything whatsoever, but to verify concretely the acts in question, *when of course the issue of immunity has been raised*."[617] He does not, however, specify who (i.e., the parties or the court *proprio motu*) is entitled or required to raise immunities, noting that "it would be absurd to claim that the fact that the two Djiboutian high officials have yet to avail themselves of their immunity within the context of the investigation into subornation of perjury wrongfully initiated against them in France prevents the Republic of Djibouti from asking the Court to adjudge and declare that France is violating to its detriment the principles of international law on immunities".[618]

218. In its judgment of 4 June 2008, the International Court of Justice addressed the question of the invocation of immunity in relation to the issuing of summonses as *témoins assistés* to the *procureur de la République* and to the Head of National Security of Djibouti. In this regard, the Court observed that the "various claims regarding immunity were not made known to France, whether through diplomatic exchanges or before any French judicial organ, as a ground for objecting to the issuance of the summonses in question".[619] The absence of any invocation of immunity before the French authority was one of the reasons that led the Court to dismiss Djibouti's claims regarding immunity in respect of its *procureur de la République* and its Head of National Security.[620]

219. If immunity does require invocation, the additional question arises as to who is entitled to effectuate such an invocation. As just mentioned, in the *Djibouti v. France* case, the International Court of Justice referred to the failure to invoke immunity on the part of the State of Djibouti itself, and not of the officials

---

[616] *Djibouti* v. *France*, CR 2008/6, 28 January 2008, para. 7 (Condorelli) (translation).

[617] Ibid. (emphasis added).

[618] Ibid., para. 8.

[619] *Djibouti* v. *France*, para. 195. The Court recalled that "the French authorities were rather informed that the Djiboutian *procureur de la République* and Head of National Security would not respond to the summonses issued to them because of the refusal of France to accede to the request for the Borrel file to be transmitted to the Djiboutian judicial authorities". See also para. 196:

> "At no stage have the French courts (before which the challenge to jurisdiction would normally be expected to be made), nor indeed this Court, been informed by the Government of Djibouti that the acts complained of by France were its own acts, and that the *procureur de la République* and the Head of National Security were its organs, agencies or instrumentalities in carrying them out. The State which seeks to claim immunity for one of its State 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 in issue committed by such organs."

[620] Ibid., para. 197. Another reason explaining the Court's rejection of these claims relates to the scope of functional immunity. See para. 191 of the judgement: "The Court observes that it has not been 'concretely verified' before it that the acts which were the subject of the summonses as *témoins assistés* issued by France were indeed acts within the scope of their duties as organs of State."

concerned. This approach is easily understandable as the Court appeared to equate functional immunities of State officials with the immunity of the State itself.[621] In the Swiss case against Ferdinand and Imelda Marcos, the court questioned the ability of Marcos to invoke immunity on behalf of himself and his wife, concluding that an individual who is no longer in charge of a State should not be able to invoke immunity with regard to its interests.[622] In the context of diplomatic law, Denza reports that in United States practice immunity of a foreign diplomat may be invoked either by that individual or his Government, which then must be certified by the United States Government.[623]

(b) Timing of invocation and consideration

220. Concerning the question of timing of the request for immunity, it is generally considered that immunity must be raised and considered at the beginning of the proceeding, such as at the moment of a request for extradition. In its advisory opinion concerning the *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights,* the International Court of Justice stated explicitly that "questions of immunity are … preliminary issues which must be expeditiously decided *in limine litis.* This is a generally recognized principle of procedural law".[624] It concluded by fourteen votes to one "that the Malaysian courts had the obligation to deal with the question of immunity from legal process as a preliminary issue to be expeditiously decided *in limine litis*".[625] Verhoeven has taken the same position, considering that immunity needs to be pleaded *in limine litis*, because it raises issues of the admissibility of the action itself.[626]

221. The Appeals Chamber for the Special Court for Sierra Leone reached a similar conclusion in its decision on the immunity from jurisdiction in respect of Charles Taylor. Responding to a preliminary objection that the Applicant's Motion

---

[621] Ibid., paras. 187-188.

[622] *Ferdinand et Imelda Marcos c. Office fédéral de la police*, op. cit., p. 534 ("At the time concerning the *immunity from execution* that a former head of State and his spouse intended to invoke against the country that they had ruled, Marcos believed that this privilege was recognized in his country's own interest.")

[623] Denza, op. cit., pp. 254-255.

[624] *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights, Advisory Opinion,* op. cit., para. 63.

[625] Ibid., para. 67 (2) (b). It further noted in its reasoning that because Malaysia had not ruled on the question of immunity *in limine litis*, it had "nullif[ied] the essence of the immunity rule contained in Section 22 (b) [of the Convention on the Privileges and Immunities of the United Nations]". Ibid., p. 88, para. 63.

[626] Institut, *Annuaire*, vol. 69 (2000-2001), Verhoeven, Rapport provisoire, p. 514 ("The effect of immunity is to render proceedings brought against the person who invokes it inadmissible, which is why immunity must be ruled out if that person does not request it *in limine litis*. Under various formulations, some nevertheless maintain that immunity calls into question the jurisdiction of the court seized more than the admissibility of the claim brought before it. In other words, the prohibition to hear proceedings against a (head of) State would appear to reflect a certain fundamental lack of jurisdiction of the courts over the acts of a foreign sovereign. This theory has distant antecedents. It was formalized more specifically by Niboyet in the aftermath of the Second World War, before being reflected, more or less clearly, by certain mainly French-influenced authors.") (Citing Niboyet, "Immunité de juridiction et incompétence d'attribution", *Rev. Crit. Dip*, 1950, pp. 139 *et seq*.; Michel Cosnard, *La soumission des Etats aux tribunaux internes* (1996)).

concerning immunity was premature because "it does not raise 'an issue relating to jurisdiction' … [but rather] an 'issue relating to immunity', which should be decided by the Trial Chamber once Mr. Taylor is before it in person",[627] the Appeals Chamber concluded that:

> "Technically, an accused who has not made an initial appearance before this court cannot bring a preliminary motion … and in a normal case such application may be held premature and accordingly struck out. However, this case is not in the normal course. To insist that an incumbent Head of State must first submit himself to incarceration before he can raise the question of his immunity not only runs counter, in a substantial manner, to the whole purpose of the concept of sovereign immunity, but would also assume, without considering the merits, issues of exceptions to the concept that properly fall to be determined after delving into the merits of the claim to immunity."[628]

222. The Appeals Chamber therefore rejected the preliminary objection, "exercise[ing] its inherent power and discretion to permit the Applicant to make th[e] application notwithstanding the fact that he has not made an initial appearance".[629]

223. National courts have reached the same result. In *Peter Tatchell v. Robert Mugabe* before a district judge in the United Kingdom, the issue of immunity was considered at the moment of the request for extradition.[630] In *Honecker*, the issue was considered in the most preliminary stage dedicated to assigning the case to a competent court, dismissing the application for determination of a competent court on immunity grounds rather than assigning the case to a court to consider the question of immunity.[631] In the *Pinochet* (No. 3) case, the question was raised at the stage of the review of the arrest warrant against Pinochet, issued following a request for extradition by Spain, before the examination of the request of extradition per se. In the judgement in the *Application for Arrest Warrant Against General Shaul Mofaz* in the United Kingdom, the district court stated:

> "it has been argued by the Applicant that if the General enjoys any kind of immunity, and that is not accepted by the Applicant, then the proper time to raise it would be at the first hearing after the warrant has been issued. I am afraid that I disagree with that proposition and take the view that state immunity is one of the issues that I must consider [already at the stage of the issuance of the arrest warrant]."[632]

224. While it is thus commonly accepted that immunity is addressed at the outset of proceedings, it has been observed that, in the context of State immunity, it may be

---

[627] Appeals Chamber, *The Prosecutor v. Charles Ghankay Taylor*, Decision on Immunity from Jurisdiction, op cit., para. 21.

[628] Ibid., para. 30 (noting that "Although the present Applicant is no longer an incumbent Head of State, a statement of general principles must embrace situations in which an Applicant remains an incumbent Head of State. The application with which this decision is concerned was made when the Applicant was a Head of State.").

[629] Ibid.

[630] *Tatchell v. Mugabe*, op. cit.

[631] Federal Supreme Court (Second Criminal Chamber), *In re Honecker,* op cit. , pp. 365-366.

[632] District Court — Bow Street, *Application for Arrest Warrant Against General Shaul Mofaz.*

raised by the defending State at any point in the litigation, even after the conclusions on the merits.[633]

225. The question of timing of the invocation of immunity can prove quite important in practice, because as discussed supra, different substantive rules of immunity may apply depending on whether a given individual is a sitting State official or former State official. For example, in *Estate of Silme G. Domingo v. Republic of the Philippines*, Plaintiffs commenced suit in 1981 while the Marcos's were still in power and consequently a suggestion of immunity filed by the State Department was honoured and the claims against the Marcos's were dismissed on immunity grounds. In 1987, however, when Marcos had left office, plaintiffs moved to reinstate the earlier dismissed claims, and the court granted the motion, emphasizing that "although the State Department filed a suggestion of immunity when Marcos was president, it has not filed a new suggestion of immunity since Marcos left office" and that "the suggestion of immunity had significance when filed in 1982, but has none given the change of circumstance."[634] The Appeals Chamber for the Special Court for Sierra Leone faced a similar situation in its decision on the immunity from jurisdiction in respect of Charles Taylor.[635] Taylor's indictment by the Special Court and his application to annul it both occurred when he was an incumbent Head of State, but the Appeals Chamber did not consider that application until after Taylor stepped down from the presidency.[636] The Appeals Chamber noted, therefore, that if it were to sustain the motion to annul the warrant, "the question may then arise as to the extent of Mr. Taylor's immunity as a former Head of State."[637] Although the Appeals Chamber ultimately dismissed the motion to annul the warrant on the grounds that it was an international tribunal before which immunities existing in national courts could not be claimed,[638] it noted in the final paragraph of its decision that "the Applicant had at the time the Preliminary Motion was heard ceased to be a Head of State. The immunity *ratione personae* which he claimed had ceased to attach to him. Even if he had succeeded in his

---

[633] Rousseau, op. cit., p. 18 ("The objection to jurisdiction may be raised by the defending State at any time during the dispute, even after the submission of conclusions on the merits").

[634] District Court for the Western District of Washington, *Estate of Domingo v. Republic of the Philippines*, 694 F.Supp. 782, Judgment of 29 August 1988, p. 782 (citing District Court for the Western District of Washington, *Domingo v. Republic of the Philippines,* 808 F.2d 1349, Judgment of 26 January 1987, p. 1351 ("neither the State Department, nor the Philippine Government has interceded on Marcos's behalf in the present dispute over his deposition")).

[635] *The Prosecutor v. Charles Ghankay Taylor*, Decision on Immunity from Jurisdiction.

[636] Ibid., para. 20. It should be noted that initially the Government of Liberia was a co-applicant with Taylor on the application to annul the indictment. On an objection by the prosecutor arguing that the Government of Liberia was not a party to the proceedings, the Liberian Government was struck out, and the Appeals Chamber concluded from this that "[c]onsequently, the Government of Liberia cannot be said to be claiming before this court that Mr. Taylor is not subject to criminal proceedings before the Special Court". Ibid., para. 56. Despite the conclusion of the Appeals Chamber on this point, Liberia was claiming immunity for Taylor before other courts: Before Charles Taylor resigned, Liberia filed a parallel proceeding before the International Court of Justice challenging the arrest warrant on immunity grounds. *See* International Court of Justice, Press Release 2003/26: *Liberia applies to the International Court of Justice in a dispute with Sierra Leone concerning an international arrest warrant issued by the Special Court for Sierra Leone against the Liberian President* (5 August 2003). No action was taken on this case because Sierra Leone has not consented to the Court's jurisdiction. Ibid.

[637] Ibid.

[638] Ibid., para. 53.

application the consequence would have been to compel the Prosecutor to issue a fresh warrant."[639]

2. The determination of immunity

226. States follow varying approaches as to which authorities are empowered to make determinations of immunity of foreign State officials. On the one hand, in civil law countries this determination is generally undertaken by the judiciary alone, without input from the minister for foreign affairs or the executive branch in general.[640] By contrast, courts in common law countries are more likely to accord weight to immunity determinations of the executive branch.[641] However, this distinction is not always clear; for example, in the United Kingdom O'Neil notes that "the U.K. State Immunities Act equates head of state immunity with diplomatic immunity. The British courts thus have specific statutory guidelines to follow in regards to head of state immunity. While the government may attempt to influence the judicial proceedings, it is ultimately not responsible for making decisions regarding head of state immunity".[642] Other Commonwealth countries, such as Canada, Australia, South Africa, Pakistan, and Singapore have adopted a similar approach based on the model of the State Immunities Act.[643]

227. Even within the same State, the balance of power between the judiciary and executive branches in immunity decisions may prove contentious, as the case of the United States makes clear. While United States courts have historically accorded significant weight to the executive power in all immunity decisions — including both State immunity and head of State immunity — through the highly persuasive "suggestions of immunity" issued by the State Department,[644] the Foreign Sovereignty Immunities Act granted the judiciary the power to make sovereign immunity decisions, an approach which aimed to "depoliticize the issue of sovereign immunity by placing the responsibility for its resolution exclusively in the hand of the judiciary".[645] United States Courts are divided as to whether the FSIA also empowered the judiciary to make independent determinations as to head of State immunity: while some courts have concluded that the FSIA shifted the responsibility for determining all claims of foreign immunity — including those filed on behalf of heads of State — from the State department to the judiciary,[646]

---

639 Ibid., para. 59.

640 Verhoeven, "Rapport provisoire", op. cit., p. 496.

641 Ibid.

642 O'Neil, op. cit., p. 312.

643 Verhoeven, "Rapport provisoire", op. cit., p. 495.

644 O'Neil, op. cit., pp. 312-313.

645 George Kahale, III and Matias A. Vega, "Immunity and Jurisdiction: Toward a Uniform Body of Law in Actions against Foreign States", *Columbia Journal of Transnational Law*, vol. 18 (1979), pp. 219-220 (citing House of Representatives Report No. 1487, 94th Congress, 2d Session, 7, reprinted in [1976] United States Code, *Congressional and Administrative News*, 6604, 6605).

646 See, e.g., Court of Appeals for the 9th Circuit, *Chuidian v. Philippine National Bank*, op. cit., p. 1101; United States, Court of Appeals for the 5th Circuit, *Byrd v. Corporacion Forestal y Industrial de Olancho S.A.,* 182 F.3d 380, Judgment of 10 August 1999 (holding that two individual officers of a state governmental corporation doing business with parties in the United States qualified as State entities and that FSIA accorded immunity for their official acts); District Court for the Northern District of California, *Doe v. Qi*, op. cit., p. 1287 (holding that "under the FSIA as interpreted by *Chuidian* and consistent with Congressional policy, an official obtains sovereign immunity as an agency or instrumentality of the state only if he or she acts under a valid and constitutional grant of authority").

other courts have held that the FSIA does not apply to claims of immunity asserted by heads of State and that the pre-FSIA common law practice of deferring to the State Department's suggestions of immunity remains valid.[647] Courts in this latter group argue that "the judicial branch is not the most appropriate one to define the scope of immunity for heads-of-state. … [T]he executive branch naturally has greater experience and expertise in this area. Moreover, flexibility to react quickly to the sensitive problems created by conflict between individual private rights and interests of international comity are better resolved by the executive, rather than by judicial decision".[648] One court has even gone so far as to extend this deference to the executive to cases involving *jus cogens* norms.[649] This executive control over immunity decisions of State officials has been criticized by some commentators.[650]

---

[647] Court of Appeals for the Seventh Circuit, *Wei Ye, Hao Wang, Does, A, B, C, D, E, F, and others similarly situated v. Zemin*, 383 F.3d. 620, Judgment of 8 September 2004, p. 625 ("The FSIA does not … address the immunity of foreign heads of states. The FSIA refers to foreign states, not their leaders. The FSIA defines a foreign state to include a political subdivision, agency or instrumentality of a foreign state but makes no mention of heads of state. Because the FSIA does not apply to heads of states, the decision concerning the immunity of foreign heads of states remains vested where it was prior to 1976-with the Executive Branch."); District Court for the Central District of California, *Gerritsen v. de la Madrid,* No. CV-85-5020-PAR, Slip Opinion of 5 February 1986, pp. 7-9 (accepting the State Department's suggestion of immunity on behalf of the Mexican President, noting that the FSIA "does not refer to individual representatives of foreign governments"); Court of Appeals for the Eleventh Circuit, *United States v. Noriega,* 117 F.3d 1206, Judgment of 7 July 1997, p. 1212; District Court for the District of Columbia, *Saltany v. Reagan,* 702 F.Supp. 319, Judgment of 23 December 1988, p. 320 (claim against British Prime Minister Margaret Thatcher dismissed on the basis of the Government's suggestion of immunity for a sitting head of Government), *affirmed in part, reversed in part,* Court of Appeals for the District of Columbia, 886 F.2d 438; District Court for the Eastern District of New York, *Lafontant v. Aristide*, op. cit., p. 137; District Court for the District of Columbia, *First American Corp. v. Al-Nahyan,* 948 F.Supp. 1107, Judgment of 26 November 1996, p. 1119 ("The enactment of the FSIA was not intended to affect the power of the State Department ... to assert immunity for heads of state or for diplomatic and consular personnel .... The United States has filed a Suggestion of Immunity on behalf of H.H. Sheikh Zayed, and the courts of the United States are bound to accept such head of state determinations as conclusive"); District Court for the Southern District of New York, *Tachiona v. Mugabe*, op. cit., p. 288 ("*Tachiona I*") ("[I]n enacting the FSIA, Congress did not envision disturbing the traditional practice of the State Department, through filing its suggestions of immunity, conferring upon recognized heads-of-state absolute protection from the exercise of jurisdiction by courts in this country"), *affirmed in part, reversed in part,* Court of Appeals for the Second Circuit, op. cit. (without revisiting the finding on Head of State immunity). One commentator, acknowledging the circuit split between those honouring executive suggestions of immunity and those considering that FSIA covers immunity of State officials, proposes a compromise statutory framework "bestowing discretionary authority on the President [to make head of State immunity decisions] in a range of circumstances defined by statute." Bass, op. cit., p. 312.

[648] Court of Appeals for the Second Circuit, *In re Doe,* op. cit., p. 45.

[649] Court of Appeals for the Seventh Circuit, *Wei Ye, Hao Wang, Does, A, B, C, D, E, F, and others similarly situated v. Zemin*, op. cit., p. 627 ("The Executive Branch's determination that a foreign leader should be immune from suit [applies] even when the leader is accused of acts that violate *jus cogens* norms.").

[650] In particular, Mallory argues, first, that the State Department's immunity determinations risk being arbitrary, as it lacks a clear standard for making them; Mallory, op. cit., pp. 183-184. Secondly, the State Department lacks the necessary adjudicative machinery to make consistent and fair immunity determinations, in that it has no machinery to conduct judicial hearings, and no power to compel testimony, secure witnesses, or allow appeals; ibid., pp. 184-186. Thirdly, Mallory argues that the State Department is susceptible to undue foreign political pressure when

228. While United States courts overwhelmingly honour "suggestions of immunity" when issued by the executive branch,[651] it should be noted that in the absence of a suggestion of immunity those courts may still find that a foreign State official enjoys immunity. In this regard, Tunks notes that "one can discern that US courts will recognize the immunity of foreign heads of state for private unofficial acts, even when the executive branch does not suggest immunity, when three conditions are met: (a) the person seeking immunity is a sitting head of State; (b) the United States recognizes the person as the legitimate head of State; and (c) the foreign State has not waived immunity".[652] In other words, a certain asymmetry exists in United States practice with regard to deference to executive determinations on immunity: while American courts almost never refuse immunity in the presence of a Suggestion of Immunity issued by the executive,[653] "when lacking guidance from the executive branch, … a court is left to decide for itself whether a head of State is or is not entitled to immunity".[654]

229. The question of competence to make determinations of immunity has also surfaced within the context of immunity of a United Nations agent. In the advisory opinion concerning the *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, the International Court of Justice concluded that:

> "The Secretary-General, as the chief administrative officer of the Organization, has the primary responsibility to safeguard the interests of the Organization; to that end, it is up to him to assess whether its agents acted within the scope of their functions and, where he so concludes, to protect these agents, including experts on mission, by asserting their immunity. …. When national courts are seised of a case in which the immunity of a United Nations agent is in issue, they should immediately be notified of any finding by the Secretary-General concerning that immunity. That finding, and its documentary expression, creates a presumption which can only be set aside for the most compelling reasons and is thus to be given the greatest weight by national courts."[655]

---

making immunity determinations, because it "faces the unpleasant choice" of either offending a foreign State by a refusal to suggest immunity or making a determination of immunity which may appear unjustified on the merits in order to maintain good diplomatic relations; ibid., pp. 183-187.

651 In contrast, in certain cases the United States Government issues a non-binding "Statement of Interest" akin to an *amicus curiae* brief rather than a binding "Suggestion of Immunity". See United States, *Tachiana I*, p. 283, footnote 91. When a Statement of Interest rather than a Suggestion of Immunity is at issue, United States Courts have at times refused to honour it. See, e.g., United States, *Chuidian v. Philippine National Bank*, p. 1101; United States, *Tachiona I,* p. 284, footnote 106.

652 Tunks, op. cit., p. 669.

653 Supreme Court, *Republic of Mexico v. Hoffman,* 324 U.S. 30, Judgment of 5 February 1945, p. 35 ("[T]he courts should not so act as to embarrass the executive arm in its conduct of foreign affairs …. It is therefore not for the courts to deny an immunity which our government has seen fit to allow"); *Tachiana I*, p. 271 and p. 282, footnote 91 (implying that no American court had ever ignored a Suggestion of Immunity). *But compare* District Court of the Northern District of California, *Republic of the Philippines v. Marcos,* op. cit., pp. 797-98 (rejecting a suggestion of immunity filed by the State Department on behalf of the Philippines Solicitor General).

654 *In re Doe,* op. cit., p. 45.

655 *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights,* op. cit., paras. 60-61.

The Court concluded that because the Malaysian Government failed to transmit the Secretary-General's finding to its courts, Malaysia had not complied with its obligations under Article 105 of the Charter and under the Convention on the Privileges and Immunities of the United Nations.[656] Thus, in the specific context of immunity of a United Nations agent, the Court concluded that the determination of the Secretary-General as to whether an agent is entitled to immunity should be accorded the greatest weight by national courts.

3. Legal effects of the operation of immunity from foreign criminal jurisdiction

(a) Immunity from jurisdiction distinguished from immunity from execution

230. The immunity of a State official from the jurisdiction of courts of a foreign State must be distinguished from immunity from measures of execution, including both prejudgment measures of execution such as prejudgment attachment or arrest and post-judgment measures such as the seizing of that official's property. While the topic of the Commission is principally concerned with the former immunity from jurisdiction itself, the possibility was raised in the preliminary outline of the topic that the Commission consider the related issue of immunity from execution or enforcement.[657] This distinction has been clearly identified with respect to other forms of immunity. For example, in the context of jurisdictional immunities of States, the commentary to the Commission's Draft Articles on Jurisdictional Immunities of States and their Property provides that "theoretically, immunity from measures of constraint is separate from jurisdictional immunity of the State in the sense that the latter refers exclusively to immunity from the adjudication of litigation",[658] noting that significant support existed in practice for this separation between immunity from execution and immunity from jurisdiction.[659]

231. Commenting on State immunity from execution, Jennings and Watts emphasize that it is separate from immunity from jurisdiction, stating that "even where a foreign state is properly subject to the jurisdiction of the local courts, execution of any judgment against the state may not as a rule be levied against its property".[660] Similarly, Brownlie notes (also in the context of State immunity) that:

> "The issue of immunity from jurisdiction (procedural immunity) is distinct from the question of immunity from measures of constraint consequent upon

---

656 Ibid., para. 62.

657 Roman A. Kolodkin, "Immunity of State officials from foreign criminal jurisdiction", in *Official Records of the General Assembly, Sixty-first session* (A/61/10), annex A, p. 443.

658 Draft Articles on Jurisdictional Immunities of States and their Property, with commentaries 1991, *Yearbook ... 1991*, vol. II (Part Two), p. 56.

659 Ibid. (citing the jurisprudence reported in the seventh report of Special Rapporteur Sompong Sucharitkul's *Yearbook, 1985*, vol. II (Part One), p. 21, document A/CN.4/388 and Corr.1, paras. 73-77; Second report of Motoo Ogiso, *Yearbook ... 1989*, vol. II (Part One), p. 59, document A/CN.4/422 and Corr.1 and Add.1 and Corr.1, paras. 42-44).

660 Jennings and Watts, op. cit., pp. 350-351 (noting that "The European Convention on State Immunity 1972 thus, under optional provisions of the Convention, permits execution against a state's property to enforce a final judgment in proceedings brought against the state in circumstances where the Convention provides for no immunity from jurisdiction, so long as the proceedings related to an industrial or commercial activity in which the state was engaged in the same manner as a private person, and the property in question was used exclusively in connection with such an activity".).

> the exercise of jurisdiction. Such measures comprise all measures of constraint directed against property of the foreign state (including funds in bank accounts) either for the purpose of enforcing judgments (*exécution forée*) or for the purpose of pre-judgment attachment (*saisie conservatoire*). The distinction between 'immunity from jurisdiction' and 'immunity from execution' reflects the particular sensitivities of states in face of measures of forcible execution directed against their assets, and measures of execution may lead to serious disputes at the diplomatic level. At the same time, there are strong considerations of principle which militate in favour of the view that, if there is competence of the municipal legal system in order to exercise jurisdiction and to render a judgment, enforcement jurisdiction in respect of that judgment should also be exercisable."[661]

232. Moreover, Kahale and Vega note with respect to United States practice that "[a] striking feature of the law of sovereign immunity prior to the [Foreign Sovereign Immunities Act] was the marked distinction which prevailed between the rules governing immunity from suit and immunity from execution".[662] An analysis of diplomatic immunity yields similar results. For example, article 31(3) of the Vienna Convention on Diplomatic Relations provides that, subject to certain exceptions, "no measures of execution may be taken in respect of a diplomatic agent".[663] In her commentary on this provision, Denza states that immunity from execution of a diplomatic agent has been "long established in customary international law" and is "derived from the diplomat's inviolability of person, residence, and property as well as from his immunity from civil jurisdiction".[664]

---

[661] Brownlie, op. cit., p. 338.

[662] George Kahale and Matias A. Vega, "Immunity and Jurisdiction: Toward a Uniform Body of Law in Actions against Foreign States", *Columbia Journal of Transnational Law*, vol. 18 (1979-1980), p. 217.

[663] Vienna Convention on Diplomatic Relations, art. 31. Exceptions to this rule are provided in the following cases:

> "(a) A real action relating to private immovable property situated in the territory of the receiving State, unless he holds it on behalf of the sending State for the purposes of the mission;
>
> "(b) An action relating to succession in which the diplomatic agent is involved as executor, administrator, heir or legatee as a private person and not on behalf of the sending State;
>
> "(c) An action relating to any professional or commercial activity exercised by the diplomatic agent in the receiving State outside his official functions. Ibid., at art. 31(1)."

[664] Denza, op. cit., p. 263 (noting that "insofar as it was ever treated in practice or by the writers as a matter separate from immunity from civil jurisdiction, this was usually in the context of the rule (now set out in Article 32.4) that waiver of immunity from jurisdiction does not imply waiver of immunity in respect of executions"). See also ibid. at p. 284 (questioning whether a separate waiver would be required in criminal proceedings).

233. This same distinction between immunity from jurisdiction and immunity from execution also appears to exist with respect to State officials. For example, the 2001 resolution of the Institut de droit international contains separate provisions concerning the two with respect to serving heads of State,[665] former heads of State,[666] and heads of Government.[667] Moreover, in *In re Grand Jury Proceedings*, the court distinguished immunity from jurisdiction from immunity from service of process.[668] Commenting on the *Ghaddafi* case decided by the French *Cour de cassation*, Zappalà traced a similar distinction between immunity from jurisdiction and immunity from execution, noting that Ghaddafi's immunity *ratione personae*, as de facto head of State "might have allowed French courts to uphold jurisdiction, on the one hand, on civil suits by the families of victims and, on the other hand, on in absentia criminal proceedings (permitted under French law). Nonetheless, any measure of enforcement, and above all the arrest of Colonel Ghaddafi would always be precluded in case of official visits".[669]

234. In the context of State officials faced with criminal proceedings, the separation of immunity from jurisdiction and immunity from execution raises specific issues, since an individual could face "prejudgment measures of execution" of a peculiar kind (such as arrest or preventive detention) before immunity from jurisdiction is ever considered. For this reason, a division of immunity from execution into both prejudgment and post-judgment measures of constraint — as was adopted in the case of jurisdictional immunities of States — may be worth exploring.[670] This may have the effect of creating three procedurally separate immunities: immunity from prejudgment measures of constraint, immunity from jurisdiction (whether or not the individual enjoyed immunity from prejudgment constraint), and immunity from post-judgment measures of constraint (in the event that any immunity from jurisdiction was denied and a judgment was rendered).

235. Immunity from execution is also to be distinguished from the notion of inviolability of the State official. In the work of the Institut de droit international, the term immunity from execution was used in connection with the property or a

---

[665] Compare Institut Resolution, art. 2 (concerning immunity from jurisdiction),with ibid., at art. 4(1) (concerning immunity from execution).

[666] Compare ibid., art. 13(2) (concerning immunity from jurisdiction) from ibid. at art. 13(3) (concerning immunity from execution).

[667] Ibid. at art. 15(1) ("The Head of Government of a foreign State enjoys the same ... immunity from jurisdiction recognized, in this Resolution, to the Head of State. This provision is without prejudice to any immunity from execution of a Head of Government.").

[668] *In re Grand Jury Proceedings*, op. cit., p. 602 ("The issue in this case, however, is not whether the Marcos's may be civilly liable, but whether they are wholly immune from process.").

[669] Zappalà, op. cit., p. 612.

[670] Compare United Nations Convention on Jurisdictional Immunities of States and Their Property, 2004, art. 18 (prejudgment immunities) with ibid., at art. 19 (post-judgment immunities). Indeed, it was noted in the Report of the Chairman of the Working Group that this distinction was for some delegations "based on the fact that State immunity should be broader in respect of pre-judgement [sic] measures of constraint than in respect of measures taken with a view to executing a judgement [sic]". Convention on jurisdictional immunities of States and their property, Report of the Chairman of the Working Group, Sixth Committee, fifty-fourth session, document A/C.6/54/L.12, para. 35. Other delegations, however, did not support the distinction between prejudgment and post-judgment measures of constraint, and the issue was subject to extensive debate in the Working Group. See Convention on jurisdictional immunities of States and their property, Report of the Chairman of the Working Group, Sixth Committee, fifty-fifth session, document A/C.6/55/L.12, paras. 53-83.

head of State or Government,[671] while the term inviolability was used with respect to the person.[672] However, the two concepts are closely related, since attachment or execution could also risk infringing the immunity of the State official. This interrelatedness was recognized in draft article 25(2) proposed by Special Rapporteur Sompong Sucharitkul in the context of the Jurisdictional Immunities of States and their Property, which stated that "no measures of attachment or execution may be taken in respect of property of a personal sovereign or head of State if they cannot be taken without infringing the inviolability of his person or of his residence".[673] In the *Arrest Warrant* case, Judge ad hoc Van den Wyngaert noted in her dissenting opinion that while the Court in its *dispositif* finds that Belgium failed to respect the immunity from criminal jurisdiction *and* inviolability for incumbent foreign ministers, "the Judgment does not explain what is meant by the word 'inviolability', and simply juxtaposes it to the word 'immunity'".[674] She attempts to distinguish the two, noting that in the case of diplomatic immunity, "the issuance of a charge or summons is probably contrary to the diplomat's *immunity*, whereas its execution would be likely to infringe the agent's *inviolability*".[675] In its recent judgment in the *Djibouti v. France* case, the International Court of Justice mentioned Article 29 of the Vienna Convention on Diplomatic Relations, dealing with inviolability, in relation to Djibouti's claim that "the communication to Agence France-Presse, in breach of the confidentiality of the investigation, of information concerning the witness summons addressed to its Head of State, was to be regarded as an attack on his honour or dignity".[676]

---

[671] Resolution adopted by the Institut in 2001, art. 4 ("Property belonging personally to a Head of State and located in the territory of a foreign State may not be subject to any measure of execution except to give effect to a final judgment, rendered against such Head of State.").

[672] Ibid., at art. 1 ("When in the territory of a foreign State, the person of the Head of State is inviolable.").

[673] Draft art. 25(2), proposed by Special Rapporteur Sompong Sucharitkul in his seventh report, op. cit., p. 45. As discussed supra, Part One, draft art. 25 was not retained in the final version of the articles. Sinclair originally proposed its replacement by a safeguard clause which, although not employing the word "inviolability" explicitly, made a direct reference to constraints against private property: "The present articles are without prejudice to the extent of immunity, whether immunity from jurisdiction or immunity from measures of constraint against private property, enjoyed by a personal sovereign or head of State under international law in respect of acts performed in his personal capacity." Summary record of the 1944th meeting, op. cit., Sinclair, para. 26. The version adopted on first reading omitted this reference, stating in more general terms that "the present articles are … without prejudice to the privileges and immunities accorded under international law to heads of State *ratione personae*". Draft art. 4(2) adopted on first reading, *Yearbook ...1986*, vol. II (Part Two), p. 9. This language was retained in the final version of the draft article — which became draft art. 3(2) — adopted by the Commission in 1991. *Yearbook ... 1991*, vol. II (Part Two), p. 21.

[674] Dissenting Opinion of Judge ad hoc Van den Wyngaert, para. 75 (citing *Arrest Warrant*, Judgment, para. 78(2)).

[675] Ibid. (citing J. Brown, "Diplomatic Immunity: State Practice under the Vienna Convention on Diplomatic Relations", *International and Comparative Law Quarterly*, vol. 37 (1988) p. 53). Compare Cosnard, op. cit. (1999), p. 312 (considering that inviolability of former heads of States only exists to the extent that their jurisdictional immunities do not prevent criminal prosecution against them).

[676] *Djibouti v. France*, para. 174, as well as para. 175:

> "[...] The Court observes that if it had been shown by Djibouti that this confidential information had been passed from the offices of the French judiciary to the media, such an act could have constituted, in the context of an official visit by the Head of State of Djibouti to France, not only a violation of French law, but also a violation by France of its

236. It appears that immunity from execution is considered in some cases to be a more expansive form of immunity than immunity from jurisdiction. Rousseau emphasizes in the context of State immunity that according to dominant practice and doctrine, immunity from execution is broader than that of immunity from jurisdiction because the potential harm to the sovereignty of the foreign State is greater.[677] Kahale and Vega note (also in the context of State immunity) that even after the restrictive theory of State immunity was adopted with respect to immunity from suit, the absolute theory of immunity prevailed in the context of immunity from execution, and thus "a private litigant might have defeated a defense of immunity from suit in a purely commercial action against a foreign state, only to be frustrated in its efforts to collect upon the resulting judgment."[678] The commentary to the Draft Articles on Jurisdictional Immunities of States and Their Property calls immunity from execution "the last bastion of State immunity" and states that "if it is admitted that no sovereign State can exercise its sovereign power over another equally sovereign State (*par in parem imperium non habet*), it follows *a fortiori* that no measures of constraint by way of execution or coercion can be exercised by the authorities of one State against another State and its property."[679] This same basic trend of a more expansive immunity from enforcement is also identified with respect to immunity of State officials. For example, in the *Arrest Warrant* case, the International Court of Justice noted that although the warrant at issue stated that "the position of Minister for Foreign Affairs currently held by the accused does not entail immunity from jurisdiction and enforcement", it made the exception of according immunity of enforcement to "all State representatives welcomed as such onto the territory of Belgium (on 'official visits')".[680]

---

international obligations. However, the Court must recognize that it does not possess any probative evidence that would establish that the French judicial authorities are the source behind the dissemination of the confidential information in question."

Compare with the Separate Opinion of Judge ad hoc Yusuf (especially paras. 54-55), who considers that the mediatisation of the summons, as well as its issuance while the Djiboutian President was present in France to attend an international conference, constituted a violation of his dignity and his honour. For a similar conclusion, see Separate Opinion of Judge Koroma, para. 13. In contrast, Judge Skotnikov observed, in his Separate Opinion, that the terms of Article 29 of the Vienna Convention relate to inviolability of the person and do not provide "protection from negative media reports" (para. 20).

677 Rousseau, op. cit., p. 16 ("According to dominant practice and doctrine, immunity from execution is broader than that of immunity from jurisdiction because of the grave violation of the sovereignty of the foreign State. In any case, the use of coercive measures against a State is incompatible with its independence."). See also Shaw, op. cit. (2003), p. 659 ("Express waiver of immunity from jurisdiction ... does not of itself mean waiver of immunity from execution.").

678 Kahale and Vega, op. cit., p. 217. See also ibid., pp. 221-222 and footnote 53 (noting that the Foreign Sovereign Immunities Act in the United States "modified the rules of immunity from execution to conform more closely to those concerning immunity from suit under the restrictive theory" but that "execution is still not allowed in all cases in which a foreign state may be subject to suit". They offer the example of a party who contracts to paint an embassy, which may bring suit against the foreign Government for breach of contract under the commercial activity exception in FSIA § 1605(a)(2), but may not be able to collect on the judgment in the absence of waiver, because FSIA § 1610(a)(2) limits execution to property used for the commercial activity upon which the claim is based).

679 *Yearbook ... 1991*, vol. II (Part Two), p. 56, para. (2) of the commentary to art. 18.

680 *Arrest Warrant*, para. 68.

(b) Immunity of State officials not themselves accused of a criminal act

237. It must be considered whether State officials benefit from immunity only when accused of a criminal act, or also in other circumstances, such as when they are called as witnesses in a criminal procedure. Although practice is quite limited, the general trend appears to be to extend immunity from exercises of power by a foreign criminal justice system also to those State officials who are not themselves directly accused of a criminal act. In *Prosecutor v. Blaškić*, the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia considered whether it could issue a subpoena *duces tecum* to the Defence Minister of the Republic of Croatia to order him to produce certain documents relevant to the case against the accused. The Appeals Chamber unanimously concluded that it may not address "binding orders" to State officials acting in their official capacity,[681] and specifically noted in its reasoning that the State official's functional immunity would prevent it from issuing a subpoena *duces tecum* ordering the production of documents.[682] Although the case concerns immunity before an international tribunal rather than a national criminal court, the Appeals Chamber noted that exercises of judicial authority of the Tribunal follow similar rules to those of a national court.[683]

238. Similarly, in a civil judgment of the German *Bundesverwaltungsgericht* (Federal Administrative Court) challenging the government's rejection of an asylum application by a Tamil from Sri Lanka,[684] the asylum seeker moved for cross-examination of the Indian Minister of Defence to support his allegation that Indian troops had engaged in indiscriminate killings of Tamils in Sri Lanka. The *Bundesverwaltungsgericht* denied this motion, concluding that the unlimited immunity enjoyed by sovereign States extends to the officials acting for those States and specifically prevents subpoenas which would direct them to testify as witnesses concerning those sovereign acts absent special provisions in a treaty. Despite the fact that the Defence Minister himself was not accused of a criminal act, the court concluded that his testimony concerned the mission of Indian troops deployed in Sri Lanka, their motives and their official acts, and thus undoubtedly concerned sovereign acts. It thus concluded that the minister was under no legal obligation to testify, nor was he required to do so by a rule of international comity.[685]

---

681 *Prosecutor v. Blaškić, Subpoena decision*, Disposition, para. 2.

682 Ibid., para. 38. The Tribunal concludes that "if a Judge or a Chamber intends to order the production of documents, the seizure of evidence, the arrest of suspects etc., being acts involving action by a State, its organs or officials, they must turn to the relevant State". Ibid., para. 43.

683 Ibid., para. 54 (arguing that in a "horizontal" paradigm of equal sovereign States, "any manifestation of investigative or judicial activity (the taking of evidence, the seizure of documents, the questioning of witnesses, etc.) requested by one of the contracting States is to be exercised exclusively by the relevant authorities of the requested State" and that "[t]his same approach has been adopted by these States *vis-à-vis* the International Tribunal, in spite of the position of primacy accruing to the International Tribunal under the Statute and its 'vertical' status").

684 *Bundesverwaltungsgericht* (Federal Administrative Court), Judgment of 30 September 1988, *Deutsches Verwaltungsblatt* 1989, p. 261 et seq., summarized in Council of Europe, Committee of Legal Advisers on Public International Law (CADHI)/, Database on State practice regarding State Immunities, online at http://www.coe.int/t/e/legal_affairs/legal_co-operation/public_international_law/State_Immunities/ (last accessed 3 March 2008).

685 Ibid.

239. This principle is also supported by reference to diplomatic law. In particular, the Vienna Convention on Diplomatic Relations states that "a diplomatic agent is not obliged to give evidence as a witness".[686] Similarly, the Convention on Special Missions of 1969 provides that "the representatives of the sending State in the special mission and the members of its diplomatic staff are not obliged to give evidence as witnesses".[687]

240. Most recently, the application of immunity to State officials not themselves accused of criminal acts has been discussed at some length in the written and oral pleadings in *Certain Questions of Mutual Assistance in Criminal Matters*,[688] although the Court has yet to render a judgment as of the time of the present Study. In particular, the issue of relevance to the current discussion concerns the issuance of two witness summons (*convocation à témoin*) by French judicial authorities to the President of the Republic of Djibouti requesting his testimony in connection with a criminal complaint for subornation of perjury against X in the "Case against X for the murder of Bernard Borrel". Djibouti argued that the President of Djibouti is immune from testimony because head of State immunity applies not only to the outcome of a litigation but also other types of acts adopted by a magistrate, including the attempt to oblige such persons to testify.[689] Referring to the *Arrest Warrant* case, where the Court found that the "mere issu[ance of an arrest warrant] violated the immunity" of the State official in question,[690] Djibouti argued that while a witness summons is not an act of constraint on the same level as an arrest warrant, it is indisputably an act of constraint over the summoned individual and thus an act to which immunity applies.[691] France appears to accept that head of State immunity would apply to a binding witness summons, arguing instead that the witness summons at issue was a non-binding invitation to provide testimony which could thus be refused without consequence.[692] In this regard, France argued that

---

[686] Art. 31(2).

[687] Art. 31(3).

[688] Memorial of the Republic of Djibouti, 15 March 2007, paras. 133-138; Counter-Memorial of the French Republic, 13 July 2007, paras. 4.6-4.27; Djibouti, CR 2008/1 (21 January 2008) (van den Biesen), pp. 36-37, 50-51; France, CR 2008/5 (25 January 2008) (Pellet), pp. 25-40; Djibouti, CR 2008/6 (28 January 2008), (van den Biesen), pp. 18-26; France, CR 2008/7 (29 January 2008) (Pellet), pp. 40-45.

[689] Memorial of the Republic of Djibouti, op. cit., para. 134 ("This concept covers not only rulings on the substance of a dispute, but also other types of acts adopted by a magistrate, including those used to attempt to force the persons in question to testify.").

[690] *Arrest Warrant*, para. 70.

[691] Memorial of the Republic of Djibouti, op. cit., para. 135 ("It should be recalled in that regard that the Court, in the *Arrest Warrant* case, examined how the issuance and circulation of an international arrest warrant violated the rules governing immunity in relation to the nature and scope of this act. The Court noted in that context that the very issuance of such a warrant 'represents an act by the Belgian judicial authorities intended to enable the arrest'. While a witness summons is not itself an act of coercion comparable to an arrest warrant, it indisputably has a coercive component because of the notification to appear that is sent to the person summoned: such notification is therefore also inconsistent with immunity from jurisdiction.").

[692] Counter-Memorial of the French Republic, op. cit., paras. 4.6-4.12, especially para. 4.11 ("[A] witness summons sent through the diplomatic channel to a representative of a foreign power — (which is what the head of a foreign State clearly is par excellence) — is merely an invitation that does not impose any obligation on the person to whom it is addressed."); France, CR 2008/5 (25 January 2008) (Pellet), pp. 28-31, 33-35, especially p. 28, para. 15 ("International law … certainly does not preclude internationally protected persons being invited to testify in connection with a criminal investigation"); p. 30, para. 21 ("The investigating judge had no

immunity only applies to acts which may lead to the arrest of the individual or which, more generally, limit his or her freedom to accomplish his functions on the international plane (and by consequence affect the conduct of his or her State's international relations).[693] France concluded that:

> "there has been no infringement of the immunities of the President of the Republic of Djibouti, or of his dignity, of course, by an invitation to testify which he was entirely free to accept or reject;
>
> "this invitation, which was not accompanied by any compulsion or threat thereof conforms in all respects to diplomatic customs and to the principles of international law applicable to the heads of foreign States;
>
> "the refusal, which did not have to be justified and was not justified, by President Guelleh to give written testimony has closed the episode and any decision by the Court here on this point is in any case without object."[694]

241. For the purposes of the present study, it is notable that the debate between the two parties concerned whether the witness summons were of a binding or non-binding variety under French law.[695] Both parties appeared to agree that, under international law, head of State immunity applies to a binding witness summons (even when issued to a head of State who is not directly accused of a criminal act) because it acts as an external constraint against his actions, while it is irrelevant to a non-binding witness summons because the head of State is free to disregard it. In its judgment, the Court recognized that a witness summons may violate the jurisdictional immunity of a head of State if it subjects the latter to a "constraining act of authority".[696] However, the Court held that this was not the case of the witness summonses addressed by the French investigating judge to the head of State of Djibouti. The Court pointed out that the summons of 17 May 2005

> "was not associated with the measures of constraint provided for by Article 109 of the French Code of Criminal Procedure; it was in fact merely an invitation to testify which the Head of State could freely accept or decline. Consequently, there was no attack by France on the immunities from criminal

---

intention of subjecting these high-ranking figures from Djibouti to any form of threat of compulsion"); p. 31, para. 23 ("To use an analogy that is, perhaps, more familiar to lawyers within the common law system, an 'ordinary' witness … must testify *subpoena*, whereas the Ambassador and the President are invited to do so of their own free will and without threat."); p. 33, para. 26 ("Judge Clément invited the President of the Republic of Djibouti to testify as an ordinary witness and not a *témoin assisté* [legally represented witness]; that means that she did not consider that there was any charge imputable to him, and, indeed, that this was no ordinary witness summons but an invitation to testify which involved no threat of compulsion."); p. 35, para. 31 ("It is hard to see how a simple invitation to testify, which was not accompanied by any threat of enforcement, could, in any way, constitute an attack on the dignity of a Head of State.").

693 Counter-Memorial of the French Republic, op. cit., para. 4.9.

694 France, CR 2008/5 (25 January 2008) (Pellet), p. 40, para. 47.

695 See, e.g., Djibouti, CR 2008/6 (28 January 2008), (van den Biesen), pp. 18-26; France, CR 2008/7 (29 January 2008) (Pellet), pp. 40-45.

696 *Djibouti v. France*, para. 170.

jurisdiction enjoyed by the Head of State, since no obligation was placed upon him in connection with the investigation of the *Borrel* case".[697]

With respect to the summons of 14 February 2007, the Court observed:

"The consent of the Head of State is expressly sought in this request for testimony, which was transmitted through the intermediary of the authorities and in the form prescribed by law. This measure cannot have infringed the immunities from jurisdiction enjoyed by the Djiboutian Head of State."[698]

---

[697] Ibid., para. 171. According to the Court, the fact that this summons order was not issued in conformity with the formal procedures laid down by article 656 of the French Code of Criminal Procedure did not amount to a violation by France of its international obligations regarding the immunity from criminal jurisdiction and the inviolability of foreign heads of State (para. 173). However, the Court observed that the French investigating judge "failed to act in accordance with the courtesies due to a foreign Head of State" (para. 172) and that the French Ministry of Foreign Affairs should have offered apologies to the Djiboutian President (paras. 172 and 173). For a different conclusion, see Separate Opinion of Judge Koroma, para. 13:

"The Court thus recognizes that international law imposes on receiving States the obligation to respect the inviolability, honour and dignity of Heads of State. Inviolability has been construed to imply immunity from all interference whether under colour of law or right or otherwise, and connotes a special duty of protection, whether from such interference or from mere insult, on the part of the receiving State. Yet the Court found that by 'inviting' the Head of State to give evidence by sending him a facsimile and by setting him a short deadline without consultation to appear at the investigating magistrate's office, France failed to act in accordance with the courtesies due to a foreign Head of State and no more. In my view, the actions complained of involved not merely matters of courtesy, they concerned the obligation in the *inviolability* of, and the need to respect the honour and dignity of, the Head of State, and his immunity from legal process, in whatever form, which was breached when the witness summonses were sent to him, and this was compounded by the leaks to the press. It is clear that the intention was a failure to show the proper respect due, as well as a deliberate violation of the dignity and honour of, the Head of State. Accordingly, the Court should have considered whether the Head of State's inviolability was infringed in relation to the respect he was entitled to as a Head of State; and, if the Court came to the conclusion that it was infringed, whatever form the infringement had taken — formal defects or otherwise — then the apology, as a remedy, which the Court considered due from France for the breach should have been reflected in the operative paragraph as a finding of the Court."

See also the Separate Opinion of Judge ad hoc Yusuf (paras. 42-51), who considered that the summons was indeed a constraining act of authority because the President of Djibouti, as a result of his non-compliance with the summons, could have been forced to appear before the investigating judge in application of articles 101 and 109 of the French Code of Criminal Procedure, and could also have been subject to a pecuniary sanction by virtue of article 434-15-1 of the French Criminal Code (see, in particular, paras. 44-45).

[698] *Djibouti v. France*, para. 179. For a different conclusion, see Separate Opinion of Judge ad hoc Yusuf, para. 53:

"The summons of 14 February 2007 only appears to follow the procedure set out in article 656 of the French Code of Criminal Procedure. That provision governs *written depositions* by representatives of a foreign Power. In the present case, however, the investigating judge sought to obtain the *testimony* of the Head of State of Djibouti. France, by not respecting the provisions of its own legislation, acted in violation of the customary rules of international law concerning the immunities of Heads of State."

(c) Acts precluded by the operation of immunity

242. Once it has been established that a given State official enjoys immunity, it must be clarified whether that immunity precludes a foreign State from pursuing any criminal procedures in relation to that person, or only certain procedures, such as those that restrict his or her freedom of movement or those that restrict his or her ability to perform official functions.[699] In its recent judgment in the *Djibouti v. France* case, the International Court of Justice reaffirmed, in respect of a head of State, its findings in the *Arrest Warrant* case to the effect that "full immunity from criminal jurisdiction and inviolability" means protection "against any act of authority of another State which would hinder [the State official] in the performance of his or her duties".[700] Thus, according to the Court, "the determining factor in assessing whether or not there has been an attack on the immunity of the Head of State lies in the subjection of the latter to a constraining act of authority".[701] Although practice is relatively limited, it appears that where immunity applies, it provides a general immunity from all exercises of power of the criminal justice system over the individual. In *Honecker*, it was determined that not only does immunity bar formal proceedings against a head of State, but also that "any inquiry or investigation by the police or the public prosecutor is therefore inadmissible".[702] Similarly, in *Doe* concerning immunity from subpoenas *duces tecum* against the accused to provide voice and handwriting exemplars, palm prints, fingerprints, and financial records, the court ultimately decided that the Government of the Philippines had expressly waived any immunity that the accused enjoyed. The implication of the court's reasoning is that had they enjoyed immunity, that immunity would have extended to bar the validity of such subpoenas.[703] Similarly, in *Lasidi, S.A. v. Financiera Avenida, S.A.*, a civil defamation action, plaintiffs sought to depose His Highness Shaikh Zayed bin Sultan al Nahayan, the Absolute Ruler of Abu Dhabi, who resisted the deposition based on head of State immunity.[704] The United States Department of State filed a "suggestion of interest" that "any intrusion on the dignity of Shaikh Zayed's office" be minimized and that "the United States assumes that U.S. courts will not require personal discovery from a foreign head of state in the absence of a demonstrated need."[705] The court

---

[699] The present subsection is related to the previous subsection because the ancillary acts of the type under investigation here (e.g., subpoenas or witness summons) may in many cases be the same type of acts considered with regard to individuals not accused of a criminal act. The present subsection is different than the previous, however, because while the prior subsection considered whether immunity applies at all based on the category of individuals (those not accused of a criminal act, the present subsection begins from the premise that the individual at issue enjoys immunity and examines the scope of that immunity, in particular to what extent it covers ancillary acts of constraint by the criminal justice system of another State.

[700] *Djibouti v. France*, para. 170. See also *Arrest Warrant*, p. 22, para. 54.

[701] *Djibouti v. France*, para. 170.

[702] *In re Honecker*, Judgment of 14 December 1984, op. cit., pp. 365-366.

[703] *In re Doe*, op. cit., pp. 43-46. See also *In re Grand Jury Proceedings, Doe No. 700*, op. cit., p. 1111, reproduced in *International Law Reports*, vol. 81, p. 602 ("The issue in this case, however, is not whether the Marcos's may be civilly liable, but whether they are wholly immune from process"). See also Mallory, op. cit., p. 196 ("In cases in which the head of state becomes party to legal proceedings, courts should conduct pretrial discovery in a manner consistent with the dignity of the office of the head of state.").

[704] Court of Appeals for the State of New York, *Lasidi, S.A. v. Financiera Avenida, S.A.*, 538 N.E.2d 332, Judgment of 28 March 1989, pp. 948-951.

[705] Ibid., p. 949. As to the non-binding nature of such a "suggestion of interest" ("statement of

ultimately decided this case on waiver grounds as well, concluding that the "voluntary action in interposing counterclaims resulted in a waiver of any testimonial immunity that the Shaikh might otherwise have had".[706] Implicit in this conclusion, however, is that had such immunity not been waived, it would have applied to the deposition.

243. This broad scope of immunity extending to all acts by the criminal justice system which could affect the inviolability of the individual finds some support in the practice of diplomatic law. It should be noted, however, that the relevant provision in article 31(2) of the Vienna Convention on Diplomatic Relations is intended to be a substantive exemption from the obligation to provide evidence for diplomats, not a procedural immunity from it, a point which was debated at length in the Commission.[707] This substantive exemption has been tested several times in practice. For example, in 1856, when the Dutch Minister witnessed a homicide in the United States, he declined to testify about the matter before a United States court. The Government of the United States raised the issue with the Government of the Netherlands, emphasizing that "it was not doubted that both by the usage of nations and by the laws of the United States, M. Dubois has the legal right to decline to give his testimony", but requested he do so purely in the interests of justice. The minister ultimately did not testify in the matter[708] and was declared persona non grata.[709] In 1864, concerning a *subpoena ad testificandum* which was intended to transmit through the British Foreign Office to the French Ambassador, English law officers advised:

> "that, according to the settled principles of international law, an Ambassador is not amenable to the jurisdiction of the Courts of the nation to which he is accredited, either for the purpose of being summoned to give testimony or for any other purpose; … It would, of course, be competent to any Government to which an Ambassador was accredited in any case in which there might be reason for believing that the interests of justice would be promoted by his voluntary appearance as a witness before the Tribunals to make any representation which they might think proper, with a view to induce him to consent to waive his undoubted privilege, and to give evidence, of course without any subpoena."[710]

Thus, the law officers traced a distinction between voluntary invitations to give evidence, which are acceptable under international law, and compulsory subpoenas to appear, which are not consistent with immunities a State official may enjoy.[711]

---

interest") in United States law compared to the binding "suggestion of immunity", see *supra*, footnote 642.

706 Ibid., p. 950.

707 *Yearbook ... 1958*, vol. I, pp. 147-152; Denza, op. cit., pp. 259-260. The Malaysian Supreme Court upheld this distinction in *Public Prosecutor v. Orhan Ormez* (1987), discussed infra, footnote 736 and accompanying text.

708 Denza, op. cit., p. 258.

709 Ibid., p. 260.

710 Ibid., pp. 258-259.

711 Denza notes that the resolutions of the Institut de droit international on diplomatic immunities in 1985 and 1929 contained a provision that "persons enjoying legal immunity may refuse to appear as witnesses before a territorial court, on condition that, if they are so requested through diplomatic channels, they shall give their testimony, in the diplomatic residence, to a magistrate of the country sent to them for the purpose", but adds that the provision is not completely

244. The notion that immunity should extend not just to those acts which directly prevent a State official from performing his or her official functions but to all exercises of power of the criminal justice system over the individual can be seen as logically following from the rationale for immunity, which is founded on a prospective premise that in order to accomplish his or her official duties, a State official must be free to travel, work, and interact in a foreign jurisdiction without threat of interference in his or her work. For example, the Court in the *Arrest Warrant* judgment emphasized that "even the *mere risk* that, by travelling to or transiting another State a Minister for Foreign Affairs might be exposing himself or herself to legal proceedings could deter the Minister from travelling internationally when required to do so for the purposes of the performance of his or her official functions".[712] In other words, the prospective threat of interference or constraint, although it does not directly prevent the performance of official functions, may limit the ability of a State official to carry out official functions effectively.[713] This point was also illustrated in the *Arrest Warrant* case when the Court rejected Belgium's argument "that the enforcement of the warrant in third States was 'dependent on some further preliminary steps having been taken' and that, given the 'inchoate' quality of the warrant as regards third States' there was no 'infringe[ment of] the sovereignty of the [Congo]".[714] Rejecting this position, the Court concluded that the very issue and circulation of the warrant "effectively infringed Mr. Yerodia's immunity as the Congo's incumbent Minister for Foreign Affairs and was furthermore liable to affect the Congo's conduct of its international relations".[715] It emphasized that since Yerodia was often called upon to travel in his capacity as foreign minister, "the mere international circulation of the warrant, even in the absence of 'further steps' by Belgium, *could have* resulted … in his arrest while abroad" and therefore constituted a violation of an obligation of Belgium towards the Congo.[716] Because an inchoate act — such as the issuance of an arrest warrant or subpoena — can affect the ability of a State official to carry out his or her official

---

indicative of customary international law because although many States made provision in their law for diplomats to provide evidence under special circumstances, "there is no indication that the immunity of the diplomat from compulsion in regard to giving evidence was ever made conditional on his agreeing to make use of such special facilities, and there were many legal systems such as those of England and the United States where evidence given under such conditions was inadmissible". Ibid., p. 259.

712 *Arrest Warrant*, paras. 53-55 (emphasis added).

713 It could be, however, that that immunity applies only if the act in question interferes with the official functions of the individual. For example, art. 43(1) of the Vienna Convention on Consular Relations, while providing immunity from "the jurisdiction of the judicial or administrative authorities of the receiving State in respect of acts performed in the exercise of consular functions", does indeed limit immunity in the narrow area of liability to give evidence to cases in which would interfere with their official functions. Ibid., art. 44(3) ("Members of a consular post are under no obligation to give evidence concerning matters connected with the exercise of their functions or to produce official correspondence and documents relating thereto."). See also ibid. at art. 44(2) ("The authority requiring the evidence of a consular officer shall avoid interference with the performance of his functions. It may, when possible, take such evidence at his residence or at the consular post or accept a statement from him in writing."). With respect to the provision of evidence which does not interfere with the exercise of their official functions, it provides that such officials "shall not … decline to give evidence". Ibid., art. 44(1).

714 *Arrest Warrant*, para. 71 (brackets in original).

715 Ibid.

716 Ibid. (emphasis added).

duties, it follows that immunity extends also to such actions and not merely to those exercises of power which directly and immediately prevent the official from performing his or her official duties.[717] In contrast, Judge Al-Khasawneh argued in his dissenting opinion that:

> "A Minister for Foreign Affairs is entitled to immunity from enforcement when on official mission … but the mere opening of criminal investigations against him can hardly be said by any objective criteria to constitute interference with the conduct of diplomacy. A faint-hearted or ultra-sensitive Minister may restrict his private travels or feel discomfort but this is a subjective element that must be discarded."[718]

245. Judge ad hoc Van den Wyngaert adopted an intermediate position in her dissenting opinion under which a complaint could be investigated as a general matter without infringing the immunity of a State official, but that a direct order upon that State official to testify or appear for interrogation would be barred by immunity.[719]

4. Waiver of immunity

246. A common aspect of various types of immunity is the ability of the beneficiary to waive that immunity. For example, with respect to State immunity, the United Nations Convention on Jurisdictional Immunities of States and their Property, provides that:

> "a State cannot invoke immunity from jurisdiction in a proceeding before a court of another State with regard to a matter or case if it has expressly consented to the exercise of jurisdiction by the court with regard to the matter or case (*a*) by international agreement, (*b*) in a written contract, or (*c*) by a declaration before the court or by a written communication in a specific proceeding."[720]

---

[717] Ibid., para. 54 ("[I]mmunity and … inviolability [of a Minister for Foreign Affairs] 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."). The full effect of the *Arrest Warrant* judgment on national laws providing for the prosecution of foreign State officials remains unclear. See Wouters, op. cit., pp. 264-265 (noting that ambiguities remain as to the acts that may be taken against persons enjoying immunities under art. 5(3) of the Belgian Law, as amended).

[718] Dissenting Opinion of Judge Al-Khasawneh, para. 4.

[719] Dissenting Opinion of Judge ad hoc Van den Wyngaert, para. 75. These various positions are discussed in Wouters, op. cit., pp. 258-259 (noting that *stricto sensu* the Court only pronounced itself on the issuing and the circulation of an arrest warrant, that the arrest warrant had not yet been enforced, that further steps were needed by Belgium to enforce the arrest warrant in third States, but that these factors did not prevent the Court from reaching the conclusion that the issuance of the warrant infringed Yerodia's immunity. He then considers the question of whether mere acts of investigating criminal charges against a minister for foreign affairs should pass the functionality criterion that the Court upholds). See also Verhoeven, "Quelques réflexions sur l'affaire …", op. cit., p. 534 (examining the *Arrest Warrant* case and concluding: "It follows from this argument that any official opening of criminal proceedings against the Minister for Foreign Affairs of a foreign State is, in principle, contrary to international law. It does not matter that, initially, the proceedings involve only informational duties and investigative actions. This conclusion is wise. Moreover, it has long been accepted in diplomatic law.").

[720] Art. 7(1).

247. The principle is also reflected in regional treaties,[721] decisions of national courts,[722] and national laws[723] concerning State immunity, and is supported by commentators.[724] Similarly, with respect to diplomatic immunity, the Vienna Convention on Diplomatic Relations provides that "the immunity from jurisdiction of diplomatic agents and of persons enjoying immunity under [this Convention] may be waived by the sending State".[725]

248. Like the cases of diplomatic and State immunity, there is wide agreement that immunity of State officials can also be waived.[726] The International Court of Justice has concluded that State officials "will cease to enjoy immunity from foreign jurisdictions if the State which they represent or have represented decides to waive that immunity",[727] a position that has been explicitly endorsed by national courts.[728] Similarly, the resolution of the Institut du droit international states that "the Head of State may no longer benefit from the inviolability, immunity from jurisdiction or immunity from measures of execution conferred by international law, where the benefit thereof is waived by his or her State."[729] Watts concludes unequivocally that "where an immunity exists, it may be waived and consent given to the exercise of jurisdiction".[730] In *Grand Jury Proceedings*, a federal circuit court honoured the recognized Government of the Philippines' waiver of immunity of

---

[721] See, e.g., European Convention on State Immunity, 1972, art. 2.

[722] See, e.g., Judgment of the Court of Appeal of Bucharest of 29 May 2003 (concluding that Romanian Courts are not competent to consider any kind of disputes in which a foreign State or its representative of the diplomatic representation is defendant, excepting for cases where the respective State waives its immunity), summarized in Council of Europe, Committee of Legal Advisers on Public International Law (CADHI)/, Database on State practice regarding State Immunities, online at http://www.coe.int/t/e/legal_affairs/legal_co-operation/public_international_law/State_Immunities/ (last accessed 3 March 2008).

[723] See, e.g., United Kingdom, State Immunity Act, 1978, s2(1) and (2); United States, FSIA, § 1605(a)(1).

[724] See, e.g., Jennings and Watts, op. cit., p. 351 ("A state, although in principle entitled to immunity, may waive its immunity.").

[725] Art. 32(1).

[726] In fact, numerous national courts have looked specifically to the close link between these various forms of immunity, noting that immunity of State officials has developed from and is analogous to the doctrine's diplomatic and state immunity, in concluding that it may also be waived. See, e.g., Switzerland, *Ferdinand et Imelda Marcos c. Office fédéral de la police*, op. cit., p. 536 ("Articles 32 and 39 of the Vienna Convention shall therefore apply analogously to heads of State. Under article 32, the sending State may waive the immunity from jurisdiction of its agents, but it must always do so expressly, conclusive acts being insufficient."); *Lafontant v. Aristide*, op. cit., p. 587 ("Waiver of head of State immunity is analogous to waiver provisions in the Vienna Convention of Diplomatic Relations, Articles 31(a), 31(2), and 29, which provide that the immunity of diplomatic agents may be waived by the sending state."); *In re Grand Jury Proceedings, Doe No. 700*, op. cit., p. 602 (discussing waiver under the Vienna Convention on Diplomatic Relations and concluding that "it is true that this provision of the Vienna Convention applies only to diplomats, but we see no reason that its rationale should not also apply to heads of state. It would be anomalous indeed if a state had the power to revoke diplomatic immunity but not head of State immunity."); *In re Doe*, op. cit., p. 45 (concluding that head of State immunity evolved "from the related doctrines of diplomatic immunity and foreign sovereign immunity" and that because those two doctrines allow for waiver, "the related doctrine of head of State immunity is logically similarly waivable".).

[727] *Arrest Warrant*, para. 61.

[728] See, e.g., Spain, Audiencia Nacional, *Auto del Juzgado Central de Instrucción No. 4*, op. cit.

[729] Art. 7(1).

[730] Watts, op. cit. (1994), p. 67.

Ferdinand Marcos, the former President, and his wife Imelda, who were consequently found civilly liable for failing to comply with federal grand jury subpoenas.[731] Similarly, in *Paul v. Avril*, it was held that the Haitian Government had waived the immunity of the ex-Lieutenant-General of the Armed Forces of Haiti and former military ruler of Haiti, and that waiver extended to whatever "residual" head of State immunity defendant possessed.[732]

249. The rationale underlying waiver of immunity — like the rationale for immunity itself — is based on the sovereign equality of States and the principle of *par in parem non habet imperium*.[733] In other words, "abrogating immunity in the case of waiver leaves the goals of promoting sovereign equality and diplomacy intact, because it does not permit jurisdiction to be exercised without the interested state's consent".[734] While, as a function of this sovereignty, States are generally considered free to determine for themselves when they will waive immunity of one of their officials, the Resolution of the Institut du droit international provides that "such a waiver should be made when the Head of State is suspected of having committed crimes of a particularly serious nature, or when the exercise of his or her functions is not likely to be impeded by the measures that the authorities of the forum may be called upon to take".[735]

(a) Form of waiver

250. An important question with regard to waiver of immunity of State officials is what form such a waiver can take. First, the issue arises whether a waiver must be express, or whether an implied waiver is sufficient. Secondly, if an implied waiver is allowed, additional questions arise as to what specifically it must consist of. The present subsection will treat both express and implied waiver in turn.

(i) Express waiver

251. There is strong support for the proposition that an express waiver of immunity of a State official is valid, and indeed, certain tribunals have concluded that only express waiver is valid. For example, the Swiss Federal Tribunal concluded that waiver of head of State immunity must be express ("*renonciation expresse*").[736] In *Lafontant v. Aristide*, it was concluded that waiver of head of State immunity "must be explicit".[737] In *Ahmed v. Government of the Kingdom of Saudi Arabia*, it was held that waiver of immunity (State immunity) must be by way of prior written agreement, and must be an express and complete agreement to submit to jurisdiction.[738] Several commentators have also argued that waiver must be express.[739]

---

[731] *In re Grand Jury Proceedings, Doe No. 700*, op. cit., p. 602. See also, *Mr. and Mrs. Doe v. United States*, op. cit., p. 46.

[732] District Court for the Southern District of Florida, *Paul v. Avril*, Judgment of 14 January 1993, 812 F.Supp.207, p. 211.

[733] *In re Grand Jury Proceedings, Doe No. 700*, op. cit., p. 602 (concluding that the rationale for immunity is "founded on the need for comity among nations and respect for the sovereignty of other nations … [and] should apply only when it serves these goals".).

[734] Tunks, op. cit., p. 673.

[735] Art. 7(2).

[736] *Ferdinand et Imelda Marcos c. Office fédéral de la police*, op. cit., p. 536.

[737] *Lafontant v. Aristide*, op. cit., p. 587.

[738] *Ahmed v. Government of the Kingdom of Saudi Arabia*, Decision of 6 July 1995, summarized in

252. Several examples of express waiver of immunity can be identified in practice. First, in *Paul v. Avril*, the Minister of Justice of the Republic of Haiti stated that:

> "Prosper Avril, ex-Lieutenant-General of the Armed Forces of Haiti and former President of the Military Government of the Republic of Haiti, enjoys absolutely no form of immunity, whether it be of a sovereign, a chief of state, a former chief of state; whether it be diplomatic, consular, or testimonial immunity, or all other immunity, including immunity against judgment, or process, immunity against enforcement of judgments and immunity against appearing before court before and after judgment."[740]

253. The court in that case noted that the waiver was executed by the Minister of Justice of the Republic of Haiti, with the seal of the Minister of Justice affixed to the document, and that the "wording of the waiver could hardly be more strenuous".[741] Similarly, in *Ferdinand et Imelda Marcos c. Office fédéral de la police*, the following express waiver of immunity by the Philippines was noted:

> "The Government of the Philippines hereby waives all (1) State, (2) head of State or (3) diplomatic immunity that the former President of the Philippines, Ferdinand Marcos, and his wife, Imelda Marcos, might enjoy or might have enjoyed on the basis of American law or international law ... This waiver extends to the prosecution of Ferdinand and Imelda Marcos in the above-mentioned case (the investigation conducted in the southern district of New York) and to any criminal acts or any other related matters in connection with which these persons might attempt to refer to their immunity."[742]

The court concluded that this note verbale constituted an express waiver of immunity by the Philippines.[743] Finally, in the case against Hissène Habré in

---

Council of Europe, Committee of Legal Advisers on Public International Law (CADHI)/, Database on State practice regarding State Immunities, online at http://www.coe.int/t/e/legal_affairs/legal_co-operation/public_international_law/State_Immunities/ (last accessed 3 March 2008).

739 See, e.g., Fox, op. cit.("The Pinochet case No. 3"), p. 697 ("As Lord Goff impressively affirmed in his dissenting judgment international law requires waiver of State immunity to be express. That this is so is further confirmed by the US Supreme Court in *Amerada Hess* in rejecting as erroneous a District Court's ruling that State immunity for breach of a diplomat's immunities were implicitly waived by the USSR when it became a party to the 1961 [Vienna Convention on Diplomatic Relations] and the Convention on Internationally Protected Persons of 1973 … Nor do we see how a foreign state can waive its immunity … by signing an international agreement that contains no mention of waiver of immunity to suit in United States courts. She criticizes for this reason the reliance of some Lords in the Pinochet case on the theory of waiver in the Torture Convention without an implicit provision to that effect."); and Fenet, op. cit., pp. 593-594 (arguing that waiver may not be presumed and needs to be explicit).

740 *Paul v. Avril*, op. cit., p. 210.

741 Ibid.

742 *Ferdinand et Imelda Marcos c. Office fédéral de la police*, op. cit., p. 537.

743 Ibid. Similarly, *In re Doe v. United States*, a civil litigation involving the Marcos before a federal court in the United States, the Government of the Philippines issued a diplomatic note containing the following explicit waiver of head of State immunity: "The Government of the Philippines hereby waives any residual sovereign, head of state, or diplomatic immunity that former Philippine President Ferdinand Marcos and his wife Imelda Marcos may enjoy under international and U.S. law, including, but not limited to, Article 39(2) of the [VCDR], by virtue of their former offices in the Government of the Philippines. This waiver extends only to provision of evidence, directives, and other material from Ferdinand and Imelda Marcos in the above Grand Jury investigation, and not to the Government of the Philippines itself or to any of

Brussels, the Ministry of Justice of the Republic of Chad expressly waived immunity in the following terms:

> "The National Sovereign Conference, held in N'djaména from 15 January to 7 April 1993, officially waived any immunity from jurisdiction with respect to Mr. Hissène Habré. This position was confirmed by Act No. 010/PR/95 of 9 June 1995, which granted amnesty to political prisoners and exiles and to persons in armed opposition, with the exception of 'the former President of the Republic, Hissène Habré, his accomplices and/or accessories'. It is therefore clear that Mr. Hissène Habré cannot claim any immunity whatsoever from the Chadian authorities since the end of the National Sovereign Conference."[744]

254. The question arises whether, in order to constitute an express waiver, a State must specifically enunciate the waiver of immunity of the State official, or whether the clear intention to do so is sufficient. For example, in *Libra Bank Ltd. v. Banco Nacional de Costa Rica*, the Banco Nacional de Costa Rica — an instrumentality of Costa Rica and thus in principle entitled to sovereign immunity under the law of the forum — made four promissory notes in favour of the four plaintiff banks, each of which stating that "the Borrower hereby irrevocably and unconditionally waives any right or immunity from legal proceedings including suit judgment and execution on grounds of sovereignty which it or its property may now or hereafter enjoy".[745] In a civil suit over prejudgment attachment of the bank's assets, the four plaintiff banks argued that the promissory note did not constitute an express waiver of immunity from prejudgment attachment since it did not specifically mention prejudgment attachment in *haec verba*. The court found that the requirement under the FSIA that immunity must be "explicitly waived"[746] was meant "to preclude inadvertent, implied, or constructive waiver in cases where the intent of the foreign state is equivocal or ambiguous …. [and that u]nder this interpretation of the statute, Banco Nacional's waiver was clearly explicit."[747] According to this court, therefore, a manifestation of intent to waive "any right or immunity" is enforceable; an explicit waiver does not need to specifically list each possible type of immunity in order to waive them.[748] This rule is further clarified by another case in the same jurisdiction

---

its current or former officials …" *In re Doe v. United States*, op. cit., p. 43. The court concluded "that whatever immunity the Marcos's … possessed as heads-of-state has been waived by the successor Aquino government". Ibid. at p. 44 (assuming, without deciding, that Mrs. Marcos as a former First Lady of the Philippines is a head of State for purposes of the doctrine).

744 Letter from the Minister of Justice of the Republic of Chad to the Juge d'Instruction de l'arrondissement de Bruxelles, dated 7 October 2002, available online at www.hrw.org/french/press/2002/tchad1205a.htm. For further discussion, see Paola Gaeta, "*Ratione Materiae* Immunities of Former Heads of State …" (2003), pp. 186-196; and Bruce Baker, "Twilight of Impunity for Africa's Presidential Criminals", *Third World Quarterly*, vol. 25 (2004), p. 1491.

745 Court of Appeals for the Second Circuit, *Libra Bank Ltd. v. Banco Nacional de Costa Rica, S.A.*, 676 F.2d 47, Judgment of 12 April 1982, p. 49.

746 28 U.S.C. § 1610(d)(1) ("The property of a foreign state, as defined in section 1603(a) of this chapter, used for a commercial activity in the United States, shall not be immune from attachment prior to the entry of judgment in any action brought in a court of the United States or of a State … if the foreign state has explicitly waived its immunity from attachment prior to judgment …").

747 *Libra Bank Ltd. v. Banco Nacional de Costa Rica, S.A.*, p. 49.

748 By contrast, the district court in the case and the defendant on appeal raised several cases dealing with a Treaty of Amity between the United States and Iran which waived immunity "from taxation, suit, execution of judgment or other liability", *Libra Bank Ltd. v. Banco Nacional de Costa Rica, S.A.*, p. 50 (citing the Treaty of Amity, Economic Relations and

which held that a statement in a trade agreement prohibiting State owned parties from "claim[ing] or enjoy[ing] immunities from suit or execution of judgment or other liability" was not a waiver of immunity for prejudgment attachment because "it is by no means clear that prejudgment attachments are liabilities."[749] Thus, a waiver drafted in broad language ("any right or immunity") was sufficient to manifest an intent to waive forms of liability that it had not specifically listed, but a waiver lacking such broad language and containing only a specific list was insufficient to waive liability not specifically enunciated. It is unclear, however, to what extent these trends are relevant to criminal proceedings.

255. Finally, the issue arises whether any immunity which may exist with regard to efforts to compel a State official to give evidence in a proceeding[750] may be subject to an explicit waiver, either specific to the provision of evidence or a general waiver. This issue has been the subject of some practice with respect to diplomatic law. In *Public Prosecutor v. Orhan Ormez*, the Supreme Court of Malaysia held that a diplomatic note to the effect that the First Secretary of the Turkish Embassy was authorized to give evidence "solely for the authentication of legal documents" was not a waiver of immunity since no obligation to provide evidence existed in diplomatic law. It based this finding on the fact, discussed above, that article 31, paragraph 2, of the Vienna Convention on Diplomatic Relations is a substantive exemption from the obligation to provide evidence, not a procedural waiver of an existing substantive obligation.[751]

Consular Rights, 15 August 1955, United States-Iran, art. XI, para. 4, U.S.T. vol. 8, p. 899, at p. 909, T.I.A.S. No. 3853), arguing that these previous cases had failed to construe this "other liability" language as an explicit waiver of immunity from prejudgment attachment (citing District Court for the Central District of California, *Security Pacific National Bank v. Iran*, 513 F.Supp. 864, 1981, pp. 879-80; District Court for the Southern District of New York, *New England Merchants National Bank v. Iran Power Generation & Transmission Co.*, 502 F.Supp. 120, 1980, pp. 126-27, remanded, 646 F.2d 779 (2d Cir. 1981); District Court for the Northern District of Texas, *E-Systems, Inc. v. Islamic Republic of Iran*, 491 F.Supp. 1294, 1980, pp. 1301-1302; District Court for the Southern District of New York, *Reading & Bates Corp. v. National Iranian Oil Co.*, 478 F.Supp. 724, 1979, p. 728; District Court for the District of New Jersey, *Behring International, Inc. v. Imperial Iranian Air Force*, 475 F.Supp. 383, 1979, pp. 392-93. Compare District Court of the Southern District of New York, *Reading & Bates Drilling Co. v. National Iranian Oil Co.*, Bench Ruling of 29 November 1979; District Court of the Southern District of New York, *Electronic Data Systems Corp. v. Social Security Organization of the Government of Iran*, Bench Ruling of 23 May 1979, remanded, 610 F.2d 94 (2d Cir. 1979). The court in *Libra Bank* concluded that "to the extent that it may be said that these cases might suggest that a waiver by a foreign state of all immunities is not an explicit waiver of immunity from prejudgment attachment, we would disagree and note that they are not controlling on this Court". Ibid.

749 Court of Appeals for the Second Circuit, *S & S Machinery Co. v. Masinexportimport*, 706 F.2d 411, Judgment of 26 April 1983, p. 417 (followed in United States, Court of Appeals for the Second Circuit, *O'Connell Machinery Company, Inc. v. M.V. "Americana" and Italia Di Navigazione, S.p.A.*, 734 F.2d 115, Judgment of 4 May 1984, pp. 115-118; District Court for the Southern District of New York, *ICC Chemical Corporation v. The Industrial and Commercial Bank of China*, 886 F.Supp. 1, Judgment of 9 May 1995, pp. 1-2).

750 *See* supra sect. C.3 (c) on "Acts precluded by the operation of immunity".

751 *Public Prosecutor v. Orhan Ormez*, 1987, reproduced in *International Law Reports*, vol. 87, p. 212 (discussed in Denza, op. cit., p. 261). This is consistent with the position taken by the Commission, discussed *supra*, footnote 707 and accompanying text.

(ii) Implied waiver

256. The most controversial aspect concerning the waiver of immunity of State officials is whether an implied waiver of such immunity is valid, and if so what form such a waiver may take. The concern over implied waiver arises out of the fact that — consistent with State sovereignty and the principle of *par in parem non habet imperium* underlying immunity itself — any waiver must accurately interpret the intention of the State making it. Watts concluded in this regard that "in any case involving a Head of State's immunity, no court is likely lightly to imply a waiver, and obviously an express waiver is highly desirable".[752] Nevertheless, cases may arise in which a clear intent to waive immunity is discernable from a State's words or actions, without the existence of an express waiver. In this regard, the Institut de droit international stated that "waiver may be explicit or implied, provided it is certain".[753] Similarly, Verhoeven, the Rapporteur on the topic at the Institut, stated that "[t]o prevent abuses in the affirmation of implied decisions, it is specified that the waiver of immunity must in principle be explicit and that, if it is not, the intention of the competent authority must then not be in any doubt".[754] It should be noted that this approach differs from that accepted with respect to diplomatic immunities, as evident from article 32, paragraph 2, of the Vienna Convention on Diplomatic Relations, which states that "waiver must always be express".[755]

257. In order to best determine the extent to which implied waiver is accepted under current international law, it is necessary to separate two distinct phenomena. While both have been considered implied waiver by certain courts and commentators, it appears that one enjoys significantly more support than the other. First, there is relatively strong support for a form of implied waiver under which that waiver is implied through the initiation of proceedings by an authority competent to waive immunity.[756] For example, in *Lasidi, S.A. v. Financiera Avenida, S.A.*, a civil defamation action in New York State Court implicating His Highness Shaikh Zayed bin Sultan al Nahayan, the Absolute Ruler of Abu Dhabi, the court held that the "voluntary action in interposing counterclaims resulted in a waiver of any testimonial immunity that the Shaikh might otherwise have had".[757] In the context of diplomatic immunity, although the Vienna Convention on Diplomatic Relations states that "waiver must always be express",[758] it further states that "the initiation of proceedings by a diplomatic agent or by a person enjoying immunity from jurisdiction under [this Convention] shall preclude him from invoking immunity from jurisdiction in respect of any counterclaim directly connected with the principal claim".[759] Thus, either the Vienna Convention considers initiation of proceedings to constitute a form of express waiver, or it accepts this limited form of implied waiver.[760] Indeed, Watts notes that the Convention on Special Missions

---

752 Watts, op. cit. (1994), p. 68.

753 Art. 7(1).

754 Institut, *Annuaire*, op. cit., p. 593, para. 8.

755 Art. 32(2).

756 The question of which authority is competent to waive immunity is discussed in the following subsection.

757 *Lasidi, S.A. v. Financiera Avenida, S.A.*, op. cit., p. 950.

758 Art. 32(2).

759 Art. 32(3).

760 It should be noted that the Commission's draft article on this point allowed for both express and implied waiver in the context of civil (but not criminal) proceedings. This provision was ultimately altered to require express waiver in both civil and criminal proceedings because it was argued in both the Commission and Vienna Conference that it was illogical to permit

maintains the same position, as does article 7 of the Articles on the Responsibility of States, and concludes that "the only exception which is common in all three texts covers the case where a Head of State himself initiates proceedings: this not only amounts to an acceptance of the forum State's jurisdiction, but precludes an assertion of immunity in relation to a directly connected counter-claim".[761] In this regard, Verhoeven commented in his report to the Institut de droit international that provided that a State's intention to waive the immunity of one of its current or former officials is clear, it need not necessarily be in writing. Instead, it could be implied by the decision of the competent authority to pursue a former head of State abroad to recuperate property he is suspected of having misappropriated.[762]

258. Second, and in contrast, a more controversial form of implied waiver arises in cases where immunity is inferred by a State's acceptance of an instrument or agreement which has the necessary implication that its current or former officials will be subject to criminal proceedings in another jurisdiction.[763] For example, in *Pinochet* (No. 3), the issue of waiver revolved around Chile's ratification of the Convention Against Torture, and waiver was addressed on some level by all seven of the Lords.[764] While one Lord considered this to be a case of express waiver, six Lords did not even consider it to be a case of implied waiver, yet five of the seven Lords concluded that it ultimately operated so as to manifest Chile's consent to have its former head of State subject to jurisdiction.[765] Thus, the question arises whether

---

implied waiver when immunities belonged to the sending State and not to the individual member of the diplomatic mission. See commentary to the Vienna Convention on Diplomatic Relations by Denza, op. cit., p. 278.

761 Watts, op. cit. (1994), p. 68.

762 Verhoeven, "Rapport provisoire", op. cit., p. 550 ("While the intention to waive immunity must be clear, it need not necessarily be in writing; for example, it is necessarily implied by the decision of the competent authority to prosecute abroad a (former) head of State in order to recover property and other assets that he is suspected of having unlawfully obtained".). Similarly, Watts and Jennings, op. cit., provide in the context of State immunity that "A state may … be considered to have waived its immunity by implication, as by instituting or intervening in proceedings, or taking any steps in the proceedings relating to the merits of the case" but noting that "A state is not regarded as having waived its immunity if it appears in proceedings against it in order to assert its immunity, or to assert an interest in property which is the subject of proceedings to which it is not a party and where it would have had immunity if the proceedings had been brought against it". (pp. 354-355).

763 This same distinction between accepted and controversial forms of implied immunity has been observed by commentators in the context of State immunity in United States law under the Foreign Sovereign Immunities Act. Referring to Section 1605(a)(1) of the Act (which provides that a foreign state is not entitled to immunity in any case in which it has waived its immunity "either explicitly or by implication"), Kahale and Vega examine in the Section-by-Section Analysis of the legislative history the provision which provides: "With respect to implicit waivers, the courts have found such waivers in cases where a foreign state has agreed to arbitration in another country or where a foreign state has agreed that the law of a particular country should govern a contract. An implicit waiver would also include a situation where a foreign state has filed a responsive pleading in an action without raising the defense of sovereign immunity. Kahale and Vega, op. cit., pp. 232-233 (citing House of Representatives Report No. 1487, 94th Congress, 2d. Session, p. 18). The authors argue that "it appears that the Section-by-Section Analysis overstates the existing law on implicit waivers. While the principle of waiver based upon a general appearance is clear, the proposition that a choice-of-law or arbitration clause waived immunity prior to the Immunities Act is of dubious validity." Ibid. at p. 233.

764 See discussion in O'Neil, op. cit., pp. 314-316.

765 As discussed infra, this includes Lord Saville of Newdigate, Lord Millet, Lord Philips of Worth Matravers, Lord Browne-Wilkinson, and Lord Hutton.

some sort of implied waiver in fact operated.[766] Lord Hope of Craighead noted that "Section 1605(a)(1) of the United States Federal Sovereignty Immunity Act provides for an implied waiver, but this section has been narrowly construed".[767] Indeed, in *Argentine Republic v. Amerada Hess Shipping Corporation* the United States Supreme Court interpreted this implied waiver provision and held that "a foreign state can[not] waive its immunity … by signing an international agreement that contains no mention of a waiver of immunity to suit in United States courts or even the availability of a cause of action in the United States".[768] In a similar vein, commentators have concluded that "where a state has agreed in a contract to submit disputes arising out of the contract to arbitration, courts will usually reject a claim by the state to immunity either in the arbitration proceedings or in proceedings to enforce the arbitration award against it".[769] Thus, there appears to be reluctance to accept a form of implied immunity based on acceptance of an agreement which merely has the implication that immunity is waived because such immunity would be somehow incompatible with the tenor of the agreement, without the agreement expressly saying as much.[770]

259. In light of the general reluctance to accept an implied waiver based on the acceptance of an agreement, the result in *Pinochet* (No. 3) — largely based on Chile's ratification of the Torture Convention — seems quite extraordinary. While the fact that six out of seven Lords denied that the case involved waiver of immunity is consistent with this general reluctance, further analysis is required to understand how they avoided characterizing this as a case of implied waiver. Because an understanding of their reasoning will help to clarify whether this form of

---

[766] At least one other case has adopted a similar approach. Discussing *Von Dardel v. USSR*, a civil case before a United States federal district court in the District of Columbia, Koivu notes that the court concluded "that it had become accepted among jurists that a sovereign may implicitly waive its immunity for human rights violations by ratifying human rights agreements. Thus the ratification of a human rights convention could be seen as a waiver of immunity in respect of violations of human rights subject to criminal proceedings in a foreign state". Koivu, op. cit., p. 318.

[767] *Pinochet* (No. 3), p. 623 (citing *Siderman de Blake v. Republic of Argentina* (1992) 965 F.2d 699, p. 720; *Princz v. Federal Republic of Germany* (1994) 26 F.3d 1166, p. 1174; *Argentine Republic v. Amerada Hess Shipping Corporation* (488 U.S. 428, 109 S.Ct 683, Judgement of 23 January 1989, p. 693).

[768] Supreme Court, *Argentine Republic v. Amerada Hess Shipping Corporation*, op. cit., pp. 442-443.

[769] Jennings and Watts, op. cit., p. 352.

[770] Some scholars have also considered whether signature of the Rome Statute of the International Criminal Court constitutes a waiver of immunities before national courts. Compare Koller, op. cit., pp. 40-41 ("There is little in the text of the ICC Statute that one could construe to constitute a waiver of immunities among domestic courts, but at least one scholar contends that the ICC statute waives immunities both before the ICC and in trials before national courts. Moreover, Article 9 of the DRC's Draft Legislation on the Implementation of the International Criminal Court Statute, which provides for domestic trials, states '[t]he immunities or rules of special procedures associated with persons of official capacity, by virtue of internal or international law, do not prevent the judge from exercising his/her competence with regards to the person in question'.") with Klingberg, op. cit., pp. 549-550 ("Article 27 Rome Statute allows the ICC to disregard immunities otherwise enjoyed by nationals of the Contracting Parties; to this extent, the provision constitutes a waiver of such immunity. Construing the provision as also depriving third state nationals of their immunities, however, would bring Article 27 in conflict with the principle of *pacta tertiis non nocent* enshrined in Article 34 Vienna Convention on the Law of Treaties (VCLT) and forming part of customary international law. … The same is true as regards Article 6 para. 2 Special Court Statute.").

implied waiver exists, this analysis is attempted here in some detail. Concerning the possibility of express waiver, only two judges addressed this possibility. On the one hand, Lord Saville of Newdigate argued that the ratification of the Torture Convention constituted an express waiver:

> "So far as the states that are parties to the Convention are concerned, I cannot see how, so far as torture is concerned, this immunity can exist consistently with the terms of that Convention. Each state party has agreed that the other state parties can exercise jurisdiction over alleged official torturers found within their territories, by extraditing them or referring them to their own appropriate authorities for prosecution; and thus to my mind can hardly simultaneously claim an immunity from extradition or prosecution that is necessarily based on the official nature of the alleged torture. ... It is … said that any waiver by states of immunities must be express, or at least unequivocal. I would not dissent from this as a general proposition, but it seems to me that the express and unequivocal terms of the Torture Convention fulfil any such requirement."[771]

260. In contrast, the sole dissenting judge, Lord Goff of Chieveley, failed to find any express waiver of head of State immunity in the Torture Convention, or even any discussions to that effect in the *travaux préparatoires*. Having also rejected the concept of implied waiver of head of State immunity,[772] he concluded that Pinochet therefore did enjoy immunity *ratione materiae*.[773]

261. The rest of the Lords generally concluded that Chile's ratification of the Torture Convention created neither an express nor an implied waiver. One judge, Lord Hope of Craighead, concluded that waiver was not at issue because it was the development of a customary prohibition of an international crime of torture, rather than Chile's ratification of the Torture Convention, which was incompatible with head of State immunity. Beginning with the premise that article 32, paragraph 2, of the Vienna Convention on Diplomatic Relations, incorporated into United Kingdom law and made applicable in the case of immunities of heads of State, requires that any waiver of immunity "must always be express",[774] he concluded:

> "I would not regard this as a case of waiver. Nor would I accept that it was an implied term of the Torture Convention that former heads of state were to be deprived of their immunity *ratione materiae* with respect to all acts of official torture as defined in article 1. It is just that the obligations which were recognized by customary international law in the case of such serious international crimes by the date when Chile ratified the Convention are so strong as to override any objection by it on the ground of immunity *ratione materiae* to the exercise of the jurisdiction over crimes committed after the date which the United Kingdom had made available."[775]

---

[771] *Pinochet* (No. 3), pp. 642-643.

[772] Ibid., pp. 602-604.

[773] Ibid., pp. 604-609.

[774] Ibid., pp. 623.

[775] Ibid., p. 626. In other points in his reasoning, however, Lord Hope of Craighead does appear to place some reliance on the development of the Convention regime. See, e.g., ibid. at p. 626 ("In my opinion, once the machinery which it provides was put in place to enable jurisdiction over such crimes to be exercised in the courts of a foreign state, it was no longer open to any state which was a signatory to the Convention to invoke the immunity ratione materiae in the

262. The remaining judges adopted an approach whereby Chile's ratification of the Torture Convention does operate to remove head of State immunity, but rather than operating as a procedural waiver it created a substantive conflict between the norms of prohibition of torture and head of State immunity. Some judges took the position that by definition torture constitutes an official function of the head of State and used this premise to argue that waiver was not at issue.[776] By contrast, other judges took the position that torture cannot constitute a function of a head of State, and used this premise to argue that waiver was not at issue.[777]

---

event of allegations of systematic or widespread torture committed after that date being made in the courts of that state against its officials or any other person acting in an official capacity."). Furthermore, Lord Hope "consider[s] that the date as from which the immunity ratione materiae was lost was 30 October 1988, which was the date when Chile's ratification of the Torture Convention on 30 September 1988 took effect". Ibid. However, Lord Hope ultimately concedes that Chile's ratification of the Torture Convention does not bear directly on the question of immunity under his view but rather was the point at which Chile "was deprived of the right to object to the extra-territorial jurisdiction which the United Kingdom was able to assert over these offences when the section came into force". Ibid.

[776] For example, Lord Millet concluded that because torture under article 1 of the Convention "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", United Kingdom, "there is no immunity to be waived [because t]he offence is one which could only be committed in circumstances which would normally give rise to the immunity". *Pinochet* (No. 3), p. 651. He thus reasoned that "the international community had created an offence from which immunity *ratione materiae* could not possibly be available" because "international law cannot be supposed to have established a crime having the character of a *jus cogens* and at the same time have provided an immunity which is co-extensive with the obligation it seeks to impose". Ibid. Lord Philips of Worth Matravers took a similar approach. Ibid., p. 661 ("The only conduct covered by this Convention is conduct which would be subject to immunity ratione materiae, if such immunity were applicable. The Convention is thus incompatible with the applicability of immunity ratione materiae. There are only two possibilities. One is that the States Parties to the Convention proceeded on the premise that no immunity could exist ratione materiae in respect of torture, a crime contrary to international law. The other is that the States Parties to the Convention expressly agreed that immunity ratione materiae should not apply in the case of torture. I believe that the first of these alternatives is the correct one, but either must be fatal to the assertion by Chile").

[777] By this logic, rather than creating a procedural waiver, the ratification of the Torture Convention definitively criminalizes torture and thus makes it impossible for it to constitute an official function to which immunity *ratione materiae* is available. For example, Lord Browne-Wilkinson concluded that "if, as alleged, Senator Pinochet organized and authorized torture after 8 December 1988, he was not acting in any capacity which gives rise to immunity *ratione materiae* because such actions were contrary to international law, [and] Chile had agreed to outlaw such conduct". Ibid., p. 595. See also ibid., p. 594 ("How can it be for international law purposes an official function to do something which international law itself prohibits and criminalizes?"). Lord Hutton adopted a similar approach, concluding that while Pinochet was not entitled to immunity, "there has been no waiver of the immunity of a former head of state in respect of his functions as head of state" but rather "that the commission of acts of torture is not a function of a head of state, and therefore in this case the immunity to which Senator Pinochet is entitled as a former head of state does not arise in relation to, and does not attach to, acts of torture". *Pinochet* (No. 3), p. 639 ("I consider, with respect, that the conclusion that after 29 September 1988 the commission of acts of torture was not under international law a function of the head of state of Chile does not involve the view that Chile is to be taken as having impliedly waived the immunity of a former head of state. In my opinion there has been no waiver of the immunity of a former head of state in respect of his functions as head of state. My conclusion that Senator Pinochet is not entitled to immunity is based on the view that the commission of acts of torture is not a function of a head of state, and therefore in this case the

263. Overall, the majority of the judges in *Pinochet* (No. 3) traced a very thin line between procedural waiver (which they denied was at issue) and a substantive conflict between the norms of prohibition of torture and head of State immunity (which they claimed was at issue). This distinction has been criticized by some commentators. For example, O'Neil argues that "although some of the judges stated explicitly that this was not a case of waiver of immunity, their analysis betrays them. … If a right is no longer open to a state because of its decision to sign a treaty, it seems apparent that the state has waived that right".[778] O'Neil concludes that the reason that "the majority of the judges were loathe to state that this was indeed a case of waiver [was a] … fear that any abrogation of the customary rule of explicit waiver of immunity would create the potential for 'international chaos [if] the courts of different state parties to a treaty were to reach different conclusions on the question whether a waiver of immunity was to be implied'".[779] Similarly, McLachlan argues that "the great virtue of this approach, as a matter of international acceptation, was that it rested, and was seen to rest, on state consent. The problem with it is that such consent is essentially a fiction. As Lord Goff aptly pointed out in his dissent: 'how extraordinary it would be, and indeed, what a trap would be created for the unwary, if state immunity could be waived in a treaty *sub silentio*'".[780] McLachlan and O'Neil both conclude, however, that the International Court of Justice "decisively rejected" this sort of substantive waiver approach of the majority of Lords in *Pinochet* when it concluded in *Arrest Warrant* that:

> "Although various international conventions on the prevention and punishment of certain serious crimes impose 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 for Foreign Affairs. These remain opposable before the courts of a foreign state, even where those courts exercise such a jurisdiction under these conventions."[781]

This conclusion by the International Court of Justice does indeed appear to directly contradict the approach taken by the majority of the House of Lords in *Pinochet* (No. 3).

264. In summary, while it is almost universally accepted that States may waive the immunity of their current or former officials through an express waiver, the notion of implied waiver is more controversial. This situation is complicated by the fact that two distinct phenomena have been characterized as an implied waiver by courts and commentators. On the one hand, there is relatively strong support, particularly in civil proceedings, for an implied waiver of jurisdiction in a particular case created through the initiation of proceedings by an authority competent to waive immunity. On the other hand, a much more controversial form of implied waiver arises where immunity is inferred by a State's acceptance of an instrument or agreement which has the necessary implication that its current or former officials will be subject to criminal proceedings in another jurisdiction. While the conclusion of the House of

---

immunity to which Senator Pinochet is entitled as a former head of state does not arise in relation to, and does not attach to, acts of torture.").

[778] O'Neil, op. cit., pp. 314-315.

[779] Ibid. at p. 316 (citing *Pinochet* No 3, dissenting opinion of Lord Goff of Chieveley, p. 604).

[780] McLachlan (2002), op. cit., p. 961 (citing *Pinochet* (No. 3), opinion of Lord Goff of Chieveley, p. 608).

[781] *Arrest Warrant*, para. 59.

Lords in *Pinochet* (No. 3) appears to recognize a waiver along these lines, all of the Lords explicitly deny that any implied waiver operated,[782] and the International Court of Justice subsequently concluded that the ratification of international conventions on the prevention and punishment of serious crimes in no way affects immunities under customary international law.

(b) Authority competent to waive immunity

265. Concerning the authority competent to waive a State official's immunity, it is generally accepted that such immunity may only be waived by the sitting Government of the foreign official.[783] In this regard, Verhoeven stated in his report to the Institut de droit international that:

> "It is not the role of the head of the foreign State to personally waive the immunities to which he is entitled under international law, since these protect the functions that he exercises in the sole interest of the State of which he is the head. It is the competent authorities of this State that have the responsibility to withdraw or to waive these immunities, if they consider this appropriate."[784]

266. Concerning the rationale behind such a rule, Tunks notes that in international law it is considered "that head of State immunity is a privilege granted to a foreign state for the purpose of promoting international respect, diplomacy, and comity, not a power held by the individual leader".[785] Thus, it follows that it should be the State itself, not the head of State or other State official, which is vested in the power to waive this privilege.

267. The principle that waiver of immunity of State officials may only be effected by the current sitting Government of that individual takes on added complexity when the official Government is contested. For example, in *Lafontant v. Aristide*, two days after the killing which was allegedly ordered by Aristide and which forms the basis for the suit, Aristide was ousted from power by a military coup and sought exile in the United States.[786] Joseph Nerette became the temporary president of Haiti according to Haitian constitutional law, and a warrant was issued under Haitian law for Aristide's arrest.[787] Aristide also allegedly signed a letter relinquishing his title as President of the Republic of Haiti.[788] Nevertheless, the Executive Branch of the United States continued to recognize Aristide as the lawful Head of State.[789] The plaintiff argued that the Nerette Government impliedly waived Aristide's immunity by failing to honour an agreement it had signed with him which allowed him to return to Haiti.[790] The Court refused to accept this waiver argument, holding that although generally "the government of a foreign state which is recognized by the Executive Branch may waive its head of State immunity",[791] in

---

[782] One Lord concluded rather that it was a case of express waiver, and the remaining six concluded that no waiver at all operated. See *supra*, footnote 765 and accompanying text.

[783] *Arrest Warrant*, para. 61.

[784] Verhoeven, "Rapport provisoire", p. 550.

[785] Tunks, op. cit., pp. 672-673.

[786] *Lafontant v. Aristide*, op. cit., p. 130, reproduced in *International Law Reports*, vol. 103, p. 583.

[787] Ibid., p. 584.

[788] Ibid.

[789] Ibid., pp. 583-584.

[790] Ibid., pp. 584, 587.

[791] Ibid., p. 586.

this particular case "because the United States does not recognize the *de facto* government, that government does not have the power to waive President Aristide's immunity".[792]

268. Finally, it must be addressed which particular organ or authorities of the recognized sitting government of the State official are competent to waive that official's immunity. The resolution of the Institut de droit international states that "the domestic law of the State concerned determines which organ is competent to effect such a waiver".[793] The Swiss Federal Tribunal in *Ferdinand et Imelda Marcos c. Office fédéral de la police* did not look into the specifics of which minister or ministry issued the waiver, but rather came to a general conclusion that the declaration had come from the governing organs of the Philippines which it could consider as a qualified representative of that State.[794] In *Paul v. Avril*, the waiver of immunity of a former Haitian military leader was effectuated by the Minister of Justice of the Republic of Haiti.[795] If resort is had to the practice with respect to State immunity, Kahale and Vega note that the Foreign Sovereign Immunities Act in the United States "is silent on the question of the authority of the person or body waiving immunity before United States courts".[796] The State Immunity Act of the United Kingdom, by contrast, provides that "the head of a State's diplomatic mission in the United Kingdom, or the person for the time being performing his functions, shall be deemed to have authority to submit on behalf of the State in respect of any proceedings".[797] Moreover, although the problem does not appear common in practice, Watts raises the concern that "waiver of a Head of State's immunity … is complicated by the fact that he is the ultimate authority within his own State … [and] by virtue of his position in his State, may be thought to be able to effectively waive his own immunity".[798] Looking to the definition of a "State" in article 2(b)(1) of the draft Articles on Jurisdictional Immunities of States and their Property, he argues that because that definition includes both the head of State and the State's Government as part of the State, "it would seem that a waiver by either

---

[792] Ibid., p. 587. Although this approach of looking to the law of the forum State in determining which government is entitled to waive immunity raises sovereignty concerns (since it can, as this case shows, contradict the constitutional process of the State official's State), it does have logical appeal if one considers that the rationale behind immunity operates principally to ensure good diplomatic relations between governments, since it is with the government which the forum State recognizes that it will have diplomatic relations.

[793] Resolution of the Institut in 2001, art. 7(1). In this regard, Kahale and Vega note (in the context of State immunity): "The problem may typically arise in cases where the Constitution or laws of a foreign country forbid any waiver of sovereign immunity by the foreign government whatsoever. Where such a construction of foreign law is clear and extant at the time of the claimed waiver, an argument could be made that the waiver was *ultra vires* and invalid, particularly if the private party has notice of the foreign law prohibiting the waiver. So long as conventional choice-of-law rules on the issue of authority remain a potential factor in this analysis, prudence would dictate that a private party relying upon a contractual waiver should carefully examine foreign law … in order to determine the validity of the waiver thereunder". Kahale and Vega, op. cit., pp. 231-232.

[794] *Ferdinand et Imelda Marcos c. Office fédéral de la police*, op. cit., p. 537 ("As regards form, this declaration emanates from one of the governing bodies of the Philippines, which the Federal Tribunal can consider as a qualified representative of that State").

[795] *Paul v. Avril*, op. cit., p. 210.

[796] Kahale and Vega, op. cit., p. 231.

[797] United Kingdom, State Immunity Act, 1978, § 2(7), cited in Kahale and Vega, op. cit., pp. 231-232, footnote 102.

[798] Watts, op. cit., p. 67.

would be effective for purposes of the draft Articles".[799] With regard to proceedings brought against a head of State in his private capacity, Watts argues that "it is clearer that he himself can make an effective waiver of that immunity",[800] but also believes his State would be able to do so.[801]

(c) Legal effects of the waiver of immunity

269. Concerning the legal effects of the waiver of immunity — including any residual immunity not covered by the waiver — in the case of express waiver this question should be clarified by the express terms of the waiver itself. As noted above, express waivers are generally quite broad and leave little room for interpretation, stating for example that the individual "enjoys absolutely no form of immunity",[802] or removing "toute immunité (1) d'Etat, (2) de chef d'Etat ou (3) diplomatique".[803] The legal breadth of an implied waiver depends on the kind of implied waiver at issue. If it is of the first variety discussed above (waiver implied through the initiation of proceedings by authority competent to waive immunity), such a waiver may be limited to those proceedings. If an implied waiver of the second variety is at issue (waiver implied from the acceptance of an international agreement the necessary implication of which is that that its current or former officials will be subject to criminal proceedings in another jurisdiction) the effect is even less clear, as the differences between the judges in *Pinochet* (No. 3) discussed above illustrate.[804] Regardless of how immunity is waived, however, it is clear at least with regard to diplomatic immunity[805] and State immunity[806] that a waiver of immunity from jurisdiction does not imply a waiver of immunity from execution, for which a separate waiver is necessary. It is unclear, however, the extent to which this rule requiring a separate waiver would properly be applicable in criminal proceedings.[807]

---

[799] Ibid.

[800] Ibid. (citing *Prince of X Road Accident Case*, op. cit., p. 13).

[801] Ibid.

[802] Waiver of Prosper Avril, ex-Lieutenant-General of the Armed Forces of Haiti, *supra*, footnote 740 and accompanying text.

[803] Waiver of former Philippine President Ferdinand Marcos, supra, footnote 742 and accompanying text.

[804] See supra, footnotes 764-777 and accompanying text.

[805] Art. 32(4) of theVienna Convention on Diplomatic Relations. This provision is discussed in detail in Denza, op. cit., pp. 284-286

[806] See, e.g., Rousseau, op. cit., p. 16 ("An important consequence of the dissociation of the two immunities is that a waiver of immunity from jurisdiction does not necessarily imply a waiver of immunity from execution. For its part, jurisprudence in France has always held that the loss of immunity from jurisdiction does not entail the loss of immunity from execution: since the latter has an 'absolute nature', the sovereignty and independence of foreign States can never be undermined by enforcement actions, including the use of the law enforcement authorities").

[807] For example, in her commentary on the Vienna Convention on Diplomatic Rights, Denza notes: "Art. 32(4) deals only with civil and administrative proceedings. There is no mention of the position in regard to criminal proceedings. It may therefore be argued that the implication of the text is that in respect of criminal proceedings no separate waiver in respect of execution of any penalty is necessary and that waiver of immunity in a criminal case cannot be confined to the proceeding to determine guilt." Denza, op. cit., p. 284. She further notes, however, that:

> "The omission of any reference to criminal proceedings in Article 32 is probably accidental. The original draft of Article 32.4 by the Special Rapporteur provided that: 'Waiver of immunity from jurisdiction in respect of legal proceedings shall not be held to imply waiver

of immunity regarding execution of the judgment.' On this the Chairman of the International Law Commission commented that it 'laid down a principle that was, he thought, universally recognized', and it was debated no further. The Drafting Committee of the Commission, however, limited the provision to 'civil proceedings'. The reason for this was probably that the earlier part of the Article had been modified to provide that while in criminal proceedings waiver must always be express, it could be implied in civil proceedings. It was therefore not necessary to make clear for criminal proceedings that waiver of immunity in regard to proceedings did not imply waiver of immunity in regard to execution, since an express waiver would usually make that position clear. But since implied waiver was then to be permitted for civil proceedings it was important to make clear that waiver of immunity from execution in civil proceedings could not be implied. The Conference reversed the decision of the Commission on the question of implied waiver, but appear to have overlooked the implication for the formulation of paragraph 4." Ibid., pp. 284-285.

Denza argues that although "the argument against requiring a separate waiver in regard to execution, or permitting a waiver extending only to the point of a finding of guilt or innocence, is that criminal proceedings are an indivisible whole and that the penalty is inseparable from a finding of guilt", this is "not in practice how criminal proceedings are carried out". Ibid., p. 285.

Annex

Select bibliography

I. Treaties and similar documents

Convention with respect to the Laws and Customs of War on Land (Hague II) (29 July 1899), in *Treaties and Other International Agreements of the United States of America 1776-1949* (compiled under the direction of Charles I. Bevans LL.B., Assistant Legal Advisor, Department of State), Volume 1: Multilateral 1776-1917, Department of State Publication 8407, Washington, D.C., Government Printing Office, 1968. (Also available at http://www.yale.edu/lawweb/avalon/lawofwar/hague02.htm).

Convention for the Unification of Certain Rules concerning the Immunity of State Owned Ships (Brussels, 10 April 1926), League of Nations, *Treaty Series*, vol. 176, p. 199.

Charter of the International Military Tribunal for the Far East, *A Decade of American Foreign Policy: Basic Documents*, 1941-1949, Prepared at the request of the Senate Committee on Foreign Relations by the Staff of the Committee and the Department of State, Washington, D.C., Government Printing Office, 1950. (Also available at http://www.yale.edu/lawweb/avalon/imtfech.htm.)

London Agreement of 8 August 1945, available at: http://www.yale.edu/lawweb/avalon/imt/proc/imtchart.htm.

Convention on the Prevention and Punishment of the Crime of Genocide (New York, 9 December 1948), United Nations, *Treaty Series*, vol. 78, p. 277.

Vienna Convention on Diplomatic Relations (New York, 18 April 1961), United Nations, *Treaty Series*, vol. 500, p. 95.

Vienna Convention on Consular Relations (24 April 1963), United Nations, *Treaty Series*, vol. 596, p. 261.

Convention on Special Missions (New York, 8 December 1969), United Nations, *Treaty Series*, vol. 1400, p. 231.

Convention for the Suppression of Unlawful Seizure of Aircraft (The Hague, 16 December 1970), United Nations, *Treaty Series*, vol. 860, p. 105.

Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (Montreal, 23 September 1971), United Nations, *Treaty Series*, vol. 974, p. 177.

European Convention on State Immunity and Additional Protocol (Basel, 16 May 1972), *European Treaty Series*, No. 74. (Also available at http://conventions.coe.int/Treaty/en/Treaties/Word/074.doc.)

Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents (New York, 14 December 1973), United Nations, *Treaty Series*, vol. 1035, p. 167.

Convention on the Safety of United Nations and Associated Personnel (New York, 9 December 1994), United Nations, *Treaty Series*, vol. 2051, p. 363.

Vienna Convention on the Representation of States in Their Relations with International Organizations of a Universal Character (14 March 1975), *Official Records of the United Nations Conference on the Representation of States in their Relations with International Organizations,* vol. II (United Nations publication, Sales No. E.75.V.12).

International Convention against the Taking of Hostages (New York, 17 December 1979), United Nations, *Treaty Series*, vol. 1316, p. 205.

Convention on the Physical Protection of Nuclear Material (New York and Vienna, 3 March 1980), United Nations, *Treaty Series*, vol. 1456, p. 124.

Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (New York, 10 December 1984), United Nations, *Treaty Series*, vol. 1465, p. 85.

Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (Rome, 10 March 1988), United Nations, *Treaty Series*, vol. 1678, p. 221.

Rome Statute of the International Criminal Court (17 July 1998), United Nations, *Treaty Series*, vol. 2187, p. 3.

Agreement between the United Nations and the Government of Sierra Leone pursuant to Security Council resolution 1315 (2000) of 14 August 2000, United Nations, *Treaty Series*, vol. 2178, p. 138.

Statute of the Special Court for Sierra Leone, available at: www.sc-sl.org/Documents/scsl-statute.html.

International Convention for the Suppression of Terrorist Bombings (New York, 15 December 1997), United Nations, *Treaty Series*, vol. 2149, p. 256.

United Nations Convention on Jurisdictional Immunities of States and Their Property, 2 December 2004, document A/59/508; depositary notification C.N.141.2005. TREATIES-4 of 28 February 2005. See also General Assembly resolution 59/38, annex.

International Convention for the Suppression of Acts of Nuclear Terrorism (New York, 13 April 2005), General Assembly resolution 59/290.

International Convention for the Suppression of the Financing of Terrorism (New York, 9 December 1999), General Assembly resolution 54/109.

II. International jurisprudence

A. Permanent Court of International Justice

S.S. "Lotus" (France v. Turkey), P.C.I.J. 1927 (Series. A), No. 10, p. 4.

B. International Court of Justice

Western Sahara, Advisory Opinion, I.C.J. Reports 1975, p. 12.

Case concerning the United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran) I.C.J. Reports 1980, p. 3.

Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights, Advisory Opinion, I.C.J. Reports 1999, p. 62.

Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), Judgment, I.C.J. Reports 2002, p. 3.

Case concerning Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France), Judgment of 4 June 2008, available at: www.icj-cij.org.

C. Nürnberg Tribunal

Judgment of the International Military Tribunal for the Trial of German Major War Criminals, Nürnberg, 30th September and 1st October 1946, Cmd. 6964, Misc. No. 12, London: H.M.S.O 1946.

D. International Criminal Tribunal for the Former Yugoslavia

Prosecutor v. Karadzic and others, (Case No. IT-95-5/18), Trial Chamber, Decision of 16 May 1995.

Prosecutor v. Blaškić, (Case No. IT-95-14), Appeals Chamber, Judgment on the Request of the Republic of Croatia for the review of the decision of Trial Chamber II of 18 July 1997.

Prosecutor v. Furundzija, (Case No. IT-95-17/1), Trial Chamber, Judgment of 10 December 1998.

Prosecutor v. Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic, (Case No. IT-96-23 and IT-96-23/1), Trial Chamber, Judgment of 22 February 2001.

Prosecutor v. Slobodan Milosevic (Decision on preliminary motions), (Case No. IT-02-54), Trial Chamber, Decision of 8 November 2001.

E. European Court of Human Rights

Case of Al-Adsani v. United Kingdom, Application No. 35763/97, Judgment of 21 November 2001.

F. Special Court for Sierra Leone

Appeals Chamber, *The Prosecutor v. Charles Ghankay Taylor*, Case No. SCSL-2003-01-I, Decision on Immunity from Jurisdiction, 31 May 2004.

III. Documents of the United Nations

A. General Assembly resolutions

Resolution 95 (I) of 11 December 1946, Affirmation of the Principles of International Law recognized by the Charter of Nürnberg Tribunal.

Resolution 3 (I) of 13 February 1946, Extradition and punishment of war criminals.

Resolution 170 (II) of 31 October 1947, Surrender of war criminals and traitors.

Resolution 375 (IV) of 6 December 1949, Draft Declaration on Rights and Duties of States.

Resolution 3074 (XXVIII) of 3 December 1973, Principles of international cooperation in the detection, arrest, extradition and punishment of persons guilty of war crimes and crimes against humanity.

B. Security Council resolutions

Resolution 827 (1993) of 25 May 1993, adopting the Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991.

Resolution 955 (1994) of 8 November 1994, with annex containing the Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States between 1 January 1994 and 31 December 1994.

C. Documents of the International Law Commission

Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal, in *Yearbook of the International Law Commission, 1950*, vol. II, pp. 374-378, paras. 97-127.

Report on the Question of International Criminal Jurisdiction, by Mr. Ricardo J. Alfaro, Special Rapporteur, document A/CN.4/15 and Corr.1, in *Yearbook of the International Law Commission, 1950*, vol. II, pp. 1-18.

Draft Code of Offences against the Peace and Security of Mankind, Report of the International Law Commission on the work of its sixth session (3 June-28 July 1954), in *Yearbook of the International Law Commission, 1954*, vol. II, para. 54.

Second report on Special Missions, by Milan Bartoš, Special Rapporteur, document A/CN.4/179, in *Yearbook of the International Law Commission, 1965*, vol. II, pp. 109-144.

Third report on Special Missions, by Milan Bartoš, Special Rapporteur, document A/CN.4/189 and Add.1 and 2, in *Yearbook of the International Law Commission, 1966*, vol. II, pp. 125-168.

Second report on jurisdictional immunities of States and their property, by Sompong Sucharitkul, Special Rapporteur, document A/CN.4/331 and Add.1, in *Yearbook of the International Law Commission, 1980*, vol. II (Part One), pp. 199-230.

Seventh report on jurisdictional immunities of States and their property, by Sompong Sucharitkul, Special Rapporteur, document A/CN.4/388 and Corr.1 and 2, in *Yearbook of the International Law Commission, 1985*, vol. II (Part One), pp. 21-47.

Preliminary report on jurisdictional immunities of States and their property, by Motoo Ogiso, Special Rapporteur, document A/CN.4/415 and Corr.1, in *Yearbook of the International Law Commission, 1988*, vol. II (Part One), pp. 96-123.

Second report on jurisdictional immunities of States and their property, by Motoo Ogiso, Special Rapporteur, document A/CN.4/422 and Corr.1 and Add.l and Corr.1, in *Yearbook of the International Law Commission, 1989*, vol. II (Part One), pp. 59-73.

Third report on jurisdictional immunities of States and their property, by Motoo Ogiso, Special Rapporteur, document A/CN.4/431 and Corr.1, in *Yearbook of the International Law Commission, 1990*, vol. II (Part One), pp. 3-22.

Report of the International Law Commission on the work of its forty-eighth session (6 May-26 July 1996), document A/51/10, in *Yearbook of the International Law Commission, 1996*, vol. II, (Part Two), pp. 17-56.

Draft Articles on Jurisdictional Immunities of States and their Property, with commentaries, 1991, in *Yearbook of the International Law Commission, 1991*, vol. II (Part Two), para. 28, pp. 13-62.

Draft Code of Crimes against the Peace and Security of Mankind, Report of the International Law Commission on the work of its forty-eighth session (6 May-26 July 1996), document A/51/10, reproduced in *Yearbook of the International Law Commission, 1996*, vol. II (Part Two), pp. 17-56.

Report of the Working Group on jurisdictional immunities of States and their property, document A/CN.4/L.576, in *Yearbook of the International Law Commission, 1999*, vol. II (Part Two), annex.

Articles on responsibility of States for internationally wrongful acts, with commentaries, in *Yearbook of the International Law Commission, 2001*, vol. II (Part Two), para. 77, pp. 31-143.

D. Studies prepared by the Secretary-General or the Secretariat

Memorandum submitted by the Secretary-General, *The Charter and Judgment of the Nürnberg Tribunal, History and Analysis*, document A/CN.4/5 (United Nations publication, Sales No. 1949.V.7).

Analytical survey prepared in accordance with Economic and Social Council resolution 1691 (LII), Principles of international cooperation in the detection, arrest, extradition and punishment of persons guilty of war crimes and crimes against humanity, report of the Secretary-General, document A/8823, 17 October 1972.

Study by the Secretariat, *Historical Review of Developments relating to Aggression* (United Nations publication, Sales No. E.03.V.10).

Study prepared by the Secretary-General, *Study as regards ensuring the arrest, extradition and punishment of persons responsible for war crimes and crimes against humanity and exchange of documentation*, documents E/CN.4/983 and Add.1 and 2 and A/8345.

Memorandum submitted by the Secretary-General, *Historical Survey of the Question of International Criminal Jurisdiction*, document A/CN.4/7/Rev.1 (United Nations publication, Sales No. 1949.V.8).

E. Other

United Nations Transitional Administration in East Timor, section 15 of Regulation No. 2000/15 of 6 June 2000 on the establishment of Panels with the exclusive jurisdiction over serious criminal offences.

IV. Documents of other international organizations

African Union

Assembly of the African Union, Seventh ordinary session, 1-2 July 2006, Banjul, *Decision on the Hissène Habré case and the African Union* (Assembly/AU/Dec.127(VII).

Report of the Committee of Eminent African Jurists on the case of Hissene Habré, presented to the Summit of the African Union in July 2006, available at: http://www.hrw.org/justice/habre/CEJA_Repor0506.pdf.

Council of Europe

Committee of Legal Advisers on Public International Law (CAHDI), *Immunities of Heads of State and Government and Certain Categories of Senior Officials vis-à-vis the States' Obligations to Prosecute Perpetrators of International Crimes*, Report, 23rd meeting, 4-5 March 2002.

V. National legislation and jurisprudence

A. National legislation and related materials

Australia

Diplomatic Privileges and Immunities Act 1967.

Foreign States Immunities Act (Act No. 196 of 1985) (reproduced in Andrew Dickinson, Rae Lindsay and James P. Loonam (eds.), *State Immunity: Selected Materials and Commentary* (Oxford, Clifford Chance, Oxford University Press, 2004), pp. 469-487.

International Criminal Court Act 2002, No. 41, available in the database established by the International Criminal Court on national legislation, at: http://www.icc-cpi.int/legaltools/.

Belgium

Act Concerning the Punishment of Grave Breaches of International Humanitarian Law, 16 June 1993, as amended by the Law of 10 February 1999 (reproduced in *International Legal Materials*, vol. 38 (1999), pp. 921-925).

Act Concerning the Punishment of Grave Breaches of International Humanitarian Law, as further amended on 23 April 2003, reproduced in *International Legal Materials*, vol. 42 (2003), pp. 1258-1283, together with the original French version.

Canada

State Immunity Act, reproduced in Andrew Dickinson, Rae Lindsay and James P. Loonam (eds.), *State Immunity. Selected Materials and Commentary* (Oxford, Clifford Chance, Oxford University Press, 2004), pp. 488-495.

Crimes Against Humanity and War Crimes Act (2000, c. 24).

Colombia

Decree Number 2764 of 2002 promulgating the Rome Statute of the International Criminal Court, *Diario Oficial Year CXXXVIII*, No. 45015, 30 November 2002.

Croatia

Law on the Application of the Statute of the International Criminal Court and on the Prosecution of Criminal Acts against the International Law on War and Humanitarian Law, 4 November 2003, available in the database established by the International Criminal Court on national legislation, at: http://www.icc-cpi.int/legaltools/.

Georgia

Law on Cooperation between the International Criminal Court and Georgia, available in the database established by the International Criminal Court on national legislation, at: http://www.icc-cpi.int/legaltools/.

Liechtenstein

Law of 20 October 2004 on Cooperation with the International Criminal Court and other International Tribunals, available in the database established by the International Criminal Court on national legislation, at: http://www.icc-cpi.int/legaltools/.

Pakistan

Pakistani State Immunity Ordinance No. VI of 1981, reproduced in Andrew Dickinson, Rae Lindsay and James P. Loonam (eds.), *State Immunity. Selected Materials and Commentary* (Oxford, Clifford Chance, Oxford University Press, 2004), pp. 496-503.

Singapore

State Immunity Act of 1979, reproduced in Andrew Dickinson, Rae Lindsay and James P. Loonam (eds.), *State Immunity. Selected Materials and Commentary* (Oxford, Clifford Chance, Oxford University Press, 2004), pp. 504-512.

South Africa

Foreign States Immunities Act No. 87 of 1981, reproduced in Andrew Dickinson, Rae Lindsay and James P. Loonam (eds.), *State Immunity. Selected Materials and Commentary* (Oxford, Clifford Chance, Oxford University Press, 2004), pp. 513-522.

Diplomatic Immunities and Privileges Act 37 of 2001, available in the database established by the International Criminal Court on national legislation, at: http://www.icc-cpi.int/legaltools/.

Act No. 27 of 2002 on the Implementation of the Rome Statute of the International Criminal Court, available in the database established by the International Criminal Court on national legislation, at: http://www.icc-cpi.int/legaltools/.

Switzerland

Federal Law on Cooperation with the International Criminal Court of 22 June 2001, available in the database established by the International Criminal Court on national legislation, at: http://www.icc-cpi.int/legaltools/.

United Kingdom of Great Britain and Northern Ireland

State Immunity Act of 20 July 1978, reproduced in *International Legal Materials*, vol. 17, 1978, p. 1123.

International Criminal Court Act, 2001, available in the database established by the International Criminal Court on national legislation, at: http://www.icc-cpi.int/legaltools/.

United States of America

Alien Tort Claims Act, enacted in 1789 and codified as 28 U.S.C.§ 1350.

Foreign Sovereign Immunities Act (FSIA), 28 U.S.C. §§ 1602-1611 (1976).

Omnibus Diplomatic Security and Antiterrorism Act of 1986, 18 U.S.C. (now codified as 18 U.S.C. § 2332).

Antiterrorism and Effective Death Penalty Act of 1996, Section 221, Public Law 104-132, 110 Stat. 1214 (1996).

B. National jurisprudence and documents relating to national criminal proceedings

Austria

Supreme Court, *Prince of X Road Accident Case*, 1964, reproduced in *International Law Reports*, vol. 65, p. 13-15.

Supreme Court, *W. v. Prince of Liechtenstein*, Judgment of 14 February 2001, 7 Ob 316/00x.

Belgium

Juge d'instruction au tribunal de première instance de Bruxelles, Damien Vandermeersch, Order of 6 November 1998, Section 3.1, reproduced in *Revue de droit pénal et de criminologie*, vol. 79, No. 2 (1999), Brussels, Palais de Justice, p. 278.

Civil Court of Brussels (Attachment Jurisdiction), *Mobutu v. SA Cotoni*, reproduced in *International Law Reports*, vol. 91, pp. 259-263.

Court of Cassation, *H.S.A. et al. v. S.A. et al.*, Decision related to the indictment of Ariel Sharon, Amos Yaron and others, No. P.02.1139.f, 12 February 2003, reproduced in *International Legal Materials*, vol. 42, No. 3 (2003), pp. 596-605.

Canada

Bouzari et al. v. Islamic Republic of Iran, (2004), reproduced in *International Law Reports*, vol. 128, p. 586.

Ontario Court of Appeal, *Jaffe v. Miller and others* (delivered by Finlayson, J. A.), reproduced in *International Law Reports*, vol. 95, pp. 446-467

France

Cour d'appel de Paris, *Mellerio c. Isabelle de Bourbon, ex-Reine d'Espagne*, 3 June 1872.

Tribunal civil de la Seine, *Seyyid Ali Ben Hammond, Prince Rashid c. Wiercinski*, 25 July 1916.

Cour d'appel de Paris, *Ex-Roi Farouk d'Egypte c. s.a.r.l. Christian Dior*, 11 April 1957, reproduced in Journal du droit international (1957), pp. 716-718.

Cour d'appel de Paris, *Ali Ali Reza v. Grimpel*, Judgment of 28 April 1961, reproduced in *International Law Reports*, vol. 47, pp. 275-277 (original French version in *Revue générale de droit international public* (1962), p. 418), cited and interpreted as in the text by Watts, op. cit., p. 106 (*International Law Reports*, vol. 47, p. 276).

Tribunal de Grande Instance de la Seine, *Société Jean Dessès c. Prince Farouk et Dame Sadek*, 12 June 1963, reproduced in *Clunet* (1964), p. 285 (English version in *International Law Reports*, vol. 33, pp. 37-38).

Cour de cassation (Chambre criminelle), *Fédération Nationale des Déportées et Internés Résistants et Patriotes and Others v. Barbie*, 20 December 1985, reproduced in *International Law Reports*, vol. 78, pp. 124-148.

Conseil constitutionnel, Decision 98-408 DC of 22 January 1999 on the Treaty laying down the Statute of the International Criminal Court, available at: http://www.conseil-constitutionnel.fr/langues/anglais/a98408dc.pdf.

Cour d'appel de Paris (Chambre d'accusation), *Affaire Kadhafi*, Judgment of 20 October 2000, partly reproduced in *Revue générale de droit international public*,

vol. 105, 2001, p. 475-476; English version in *International Law Reports*, vol. 125, p. 493-498.

Cour de cassation, *Affaire Kadhafi*, Judgment No. 1414 of 13 March 2001, reproduced in *Revue générale de droit international public*, vol. 105 (2001), p. 474; English version in *International Law Reports*, vol. 125, p. 508-510.

Federal Republic of Germany

Federal Supreme Court, *Church of Scientology Case*, Case No. VIZR267/76, 1978, reproduced in *International Law Reports*, vol. 65, p. 193.

Federal Supreme Court (Second Criminal Chamber), *Re Honecker*, Case No. 2 ARs 252/84, Judgment of 14 December 1984, reproduced in *International Law Reports*, vol. 80, pp. 365-366.

Federal Administrative Court, Judgment of 30 September 1988, in *Deutsches Verwaltungsblatt* 1989, summarized in Council of Europe, Committee of Legal Advisers on Public International Law (CADHI)/, Database on State practice regarding State Immunities, available at: http://www.coe.int/t/e/legal_affairs/legal_co-operation/public_international_law/State_Immunities/ (last accessed 3 March 2008).

Federal Constitutional Court, 21 February 1992, *Honecker*, published in German in *Deutsche Rechtsprechung zum Völkerrecht und Europarecht, 1986-1993* (Berlin, Springer, 1997), pp. 129-130.

Federal Supreme Court, *Border Guards Prosecution*, Judgment of 3 November 1992, reproduced in *International Law Reports*, vol. 100, pp. 372-373.

Federal Constitutional Court, Decision of 15 May 1995, *Entscheidungen des Bundesverfassungsgerichts*, vol. 92, pp. 277ff, summarized in the database on State practice regarding State Immunities of the Committee of Legal Advisers on Public International Law (CADHI) of the Council of Europe, available at: http://www.coe.int/t/e/legal_affairs/legal_co-operation/public_international_law/State_Immunities/.

Federal Constitutional Court, *Former Syrian Ambassador to the German Democratic Republic*, Case No. 2 BvR 1516/96, reproduced in *International Law Reports*, vol. 115, pp. 596-618.

India

High Court of Allahabad, *Rani Amrit Kunwar v. Commissioner of Income Tax*, 21 December 1945, reproduced in *International Law Reports*, vol. 22, pp. 73-75.

Supreme Court, *Colonel H.H. Raja Sir Harinder Singh Barar Bans Ahadur v. Commissioner of Income Tax*, Judgment of 15 October 1971, reproduced in *International Law Reports*, vol. 64, pp. 523-534.

Ireland

Supreme Court, *Norburt Schmidt v. Home Secretary of the United Kingdom*, 24 April 1997.

Israel

Supreme Court (sitting as a Court of Criminal Appeal), *Attorney-General of the Government of Israel v. Adolf Eichmann*, Judgement of 29 May 1962, reproduced in *International Law Reports*, vol. 36, pp. 277-343.

District Court of Jerusalem, *Attorney-General of the Government of Israel v. Adolf Eichmann*, Judgment of 12 December 1961, reproduced in *International Law Reports*, vol. 36, pp. 5-276.

Italy

Court of cassation, *Bacchelli v. Comune di Bologna*, Judgment of 20 February 1978, (No. 804), reproduced in *Italian Yearbook of International Law*, vol. IV (1978-1979) (note by Luigi Condorelli), pp. 137-145.

Court of cassation, *Arafat e Salah*, Judgment of 28 June 1985 (No. 1981), reproduced in *Rivista di diritto internazionale*, vol. LXIX, pp. 884-889.

Court of cassation, *Ferrini v. Federal Republic of Germany*, Judgment of 11 March 2004 (No. 5044), in *Rivista di diritto internazionale*, 2004, Fasc. II, pp. 540-551.

Court of cassation, *Public Prosecutor (Tribunal of Naples) v. Milo Djukanovic*, No. 49666, Judgment of 28 December 2004.

The Netherlands

Special Court of cassation, *In re Rauter*, 12 January 1949, reproduced in *Annual Digest and Reports of Public International Law Cases* (1949), Case No. 193, pp. 526-548.

Special Court of cassation, *In re Ahlbrecht*, 11 April 1949, reproduced in *Annual Digest and Reports of Public International Law Cases* (1949), Case No. 141, pp. 397-399.

New Zealand

High Court of Auckland, *R. v. Mafart and Prieur*, Judgment of 22 November 1985, reproduced in *International Law Reports*, vol. 74.

Pakistan

Supreme Court, *Qureshi v. URSS*, 8 July 1981, reproduced in *International Law Reports*, vol. 64, pp. 586-653.

Poland

Supreme National Tribunal, *In re Buhler*, 10 July 1948, reproduced in *Annual Digest and Reports of Public International Law Cases* (1948), pp. 680-682.

Senegal

Court of Appeal of Dakar (Chambre d'accusation), *Hissène Habré* case, 4 July 2000, and Court of Cassation, 20 March 2001, *International Law Reports*, vol. 125, pp. 569-580.

Sierra Leone

Supreme Court, *Issa Hassan Sesay a.k.a. Issa Sesay, Allieu Kondewa, Moinina Fofana v. President of the Special Court, Registrar of the Special Court, Prosecutor of the Special Court, Attorney-General and Minister of Justice*, Judgment of 14 October 2005, SC no. 1/2003.

Spain

Auto de solicitud de extradición de Pinochet (Request for extradition delivered on 3 November 1998), available at: http://www.ua.es/up/pinochet/documentos/auto-03-11-98/auto24.htm.

Audiencia Nacional, *Auto del Pleno de la Sala de lo Penal*, 4 March 1999, No. 1999/2723 (regarding Fidel Castro).

Audiencia Nacional, *Auto del Juzgado Central de Instrucción No. 4*, 6 February 2008 (regarding Mr. Kagame, current Head of State of Rwanda).

Switzerland

Federal Tribunal, *Ferdinand et Imelda Marcos v. Office fédéral de la police (recours de droit administratif)*, Judgment of 2 November 1989 (ATF 115 Ib 496), partially reproduced in *Revue suisse de droit international et de droit européen* (1991), pp. 534-537 (English version in *International Law Reports*, vol. 102, pp. 198-205).

Federal Tribunal, *Evgeny Adamov v. Federal Office of Justice*, Judgment of 22 December 2005, ATF 132 II 81.

United Kingdom

House of Lords, *Government of the Republic of Spain v. SS "Arantzazu Mendi"* and others, 23 February 1939, *American Journal of International Law*, vol. 33, No. 3, pp. 583-588.

House of Lords, *Regina v. Bartle and the Commissioner of Police for the Metropolis and Others Ex Parte Pinochet Ugarte*, 25 November 1998, reproduced in *International Legal Materials*, vol. 37 (1998), pp. 1302-1339 (cited as "*Pinochet* (No. 1)").

House of Lords, *Regina v. Bartle and the Commissioner of Police for the Metropolis and Others Ex Parte Pinochet Ugarte*, 24 March 1999, reproduced in *International Legal Materials*, vol. 38 (1999), pp. 581-663 (cited as "*Pinochet* (No. 3)").

House of Lords, *Kuwait Airways Corp v. Iraqi Airways Co. et al.* (No. 2), 16 May 2002, [2002] UKHL 19, also available at: http://www.publications.parliament.uk/pa/ld200102/ldjudgmt/jd020516/kuwait-1.htm.

House of Lords, *Jones (Respondent)* v. *Ministry of Interior Al-Mamlaka Al-Arabiya AS Saudiya (the Kingdom of Saudi Arabia) (Appellants); Mitchell and others (Respondents)* v. *Al-Dali and others and Ministry of Interior Al-Mamlaka Al-Arabiya AS Saudiya (the Kingdom of Saudi Arabia) (Appellants); Jones (Appellant)* v. *Ministry of Interior Al-Mamlaka Al-Arabiya AS Saudiya (the Kingdom of Saudi Arabia) (Respondents) (Conjoined Appeals)*, Appellate Committee, 14 June 2006, [2006] UKHL 26.

Court of Appeal, *Parlement Belge*, (1880) LR 5 PD 197.

House of Lords, *Duke of Brunswick v. King of Hanover*, 2 H.L.C. 1 (1848).

British Military Court at Hamburg (Germany), *In re von Lewinski (called Von Manstein)*, 19 December 1949, reproduced in *Annual Digest and Reports of Public International Law Cases* (1949), Case No. 192, pp. 509-525.

British Military Court at Venice (Italy), *The Trial of Albert Kesselring*, 17 February-6 May 1947, reproduced in *Law Reports of Trial of War Criminals*, vol. 9 (1949), pp. 9-14.

Court of Appeal, *Ahmed v. Government of the Kingdom of Saudi Arabia*, Decision of 6 July 1995, summarized in Council of Europe, Committee of Legal Advisers on Public International Law (CADHI), Database on State practice regarding State Immunities, online at http://www.coe.int/t/e/legal_affairs/legal_co-operation/public_international_law/State_Immunities/ (last accessed 3 March 2008).

Senior District Judge at Bow Street, *Tatchell v. Mugabe*, Judgment, 14 January 2004, reproduced in *International and Comparative Law Quarterly*, vol. 53 (2004), pp. 769-770.

District Court (Bow Street), *Re General Shaul Mofaz*, Judgment of 12 February 2004, reproduced in *International and Comparative Law Quarterly*, vol. 53 (2004), pp. 771-774.

CL Pratt, District Court — Bow Street, *Application for Arrest Warrant Against General Shaul Mofaz*, Judgment of 12 February 2004 (Bow St. Mag. Ct. 12 Feb., 2004) (per Pratt, Dist. J.).

Bow Street Magistrates Court, *Re Bo Xilai*, 8 November 2005, *International Law Reports*, vol. 128, pp. 713-715.

Queen's Bench Division (Divisional Court), *R (on the application of Diepreye Solomon Peter Alamieyeseigha) v. The Crown Prosecution Service*, Judgment of 25 November 2005.

United States

Supreme Court, *The Schooner Exchange v. McFaddon*, 11 U.S. 116 (1812).

Supreme Court, *Hilton v. Guyot* (1895), 159 U.S. 113, 16 S.Ct.139, 143 L.Ed. 95.

Supreme Court, *Underhill v. Hernandez*, 29 November 1897, 168 U.S. 250.

Supreme Court, *Republic of Mexico v. Hoffman*, 5 February 1945, 324 U.S. 30.

Supreme Court, *Yamashita v. Styer, Commanding General, U.S. Army Forces, Western Pacific*, 4 February 1946, 327 U.S. 1, 66 S. Ct. 340.

Supreme Court, *Argentine Republic v. Amerada Hess Shipping Corporation*, Judgment of 23 January 1989, 488 U.S. 428.

Court of Appeals for the Second Circuit, *Banco Nacional de Cuba v. Sabbatino*, 6 July 1962, 307F 2d 845.

Court of Appeals for the Fifth Circuit, *Marcos Perez Jimenez, Appellant,* v. *Manuel Aristeguieta, Intervenor, Appellee, and John E. Maguire, Appellee*, 12 December 1962, 311 F.2d 547, reproduced in *International Law Reports*, vol. 33, pp. 353-359.

Court of Appeals for the Second Circuit, *Libra Bank Ltd. v. Banco Nacional de Costa Rica, S.A.*, Judgment of 12 April 1982, 676 F.2d 47.

Court of Appeals for the Second Circuit, *S & S Machinery Co. v. Masinexportimport*, Judgment of 26 April 1983, 706 F.2d 411.

Court of Appeals for the Second Circuit, *O'Connell Machinery Company, Inc. v. M.V. "Americana" and Italia Di Navigazione, S.p.A.*, Judgment of 4 May 1984, 734 F.2d 115.

Court of Appeals for the Second Circuit, *Republic of the Philippines* v. *Marcos and others*, 26 November 1986, 806 F 2d 344 (1986), p. 360, reproduced in *International Law Reports*, vol. 81, pp. 581-599.

Court of Appeals for the Fourth Circuit, *In re Grand Jury Proceedings, Doe No. 700*, 817 F.2d 1108, Judgment of 5 May 1987, reproduced in *International Law Reports*, vol. 81, pp. 599-604.

Court of Appeals for the Second Circuit, *In re Doe*, Judgment of 19 October 1988, 860 F.2d 40.

Court of Appeals for the State of New York, *Lasidi, S.A. v. Financiera Avenida, S.A.*, Judgment of 28 March 1989, 538 N.E.2d 332.

Court of Appeals for the District of Columbia Circuit, *Saltany v. Reagan*, 29 September 1989, 886 F.2d 438, reproduced in *International Law Reports*, vol. 80, pp. 19-21.

Court of Appeals for the Ninth Circuit, *Chuidian v. Philippine National Bank*, 912 F.2d 1095 (9th Cir. 1990) (reproduced in *International Law Reports*, vol. 92, pp. 480-493.

Court of Appeals for the Ninth Circuit, *Siderman de Blake v. Republic of Argentina* (1992), 965 F.2d 699.

Court of Appeals for the District of Columbia Circuit, *Princz v. Federal Republic of Germany*, 1994, 26 F.3d 1166.

Court of Appeals for the Ninth Circuit, *In re Estate of Ferdinand Marcos, Human Rights Litigation. Maximo Hilao, et al., Class Plaintiffs; Vicente Clemente, et al., Class Plaintiffs; Jaime Piopongco, et al., Class Plaintiffs. Plaintiffs-Appellees, v. Estate of Ferdinand Marcos, Defendant-Appellant, 16 June 1994*, 25 F.3d 1467, reproduced in *International Law Reports*, vol. 104, pp. 119-133.

Court of Appeals for the Second Circuit, *Kadic v. Karadzic*, Judgment of 13 October 1995, 70 F.3d 232.

Court of Appeals for the Eleventh Circuit, *United States of America v. Noriega*, 7 July 1997, 117 F.3d 1206 (1997), reproduced in *International Law Reports*, pp. 591-599.

Court of Appeals for the Fifth Circuit, *Byrd v. Corporacion Forestal y Industrial de Olancho S.A.*, Judgment of 10 August 1999, 182 F.3d 380.

Court of Appeals for the District of Columbia Circuit, *Hwang Geum Joo, et al., v. Japan*, Judgment of 27 June 2003, 332 F.3d 679.

Court of Appeals for the Seventh Circuit, *Wei Ye, Hao Wang, Does, A, B, C, D, E, F, and others similarly situated v. Zemin*, Judgment of 8 September 2004, 383 F3d. 620.

Court of Appeals for the District of Columbia Circuit, *Ali Saadallah Belhas et al., Appellants v. Moshe Ya'alon, Former Head of Army Intelligence Israel, Appellee*, No. 07-7009, 15 February 2008.

Circuit Court of the First Circuit (State of Hawaii), *Chong Boon Kim v. Kim Yong Shik and David Kim*, Civil action No. 12565, Judgment of 9 September 1963, reproduced in *American Journal of International Law*, vol. 58 (1964), pp. 186-187.

District Court for the Northern District of Ohio, Eastern Division, *Kilroy v. Windsor*, Civ. No. C-78-291, 1978, reproduced in *International Law Reports*, vol. 81, pp. 605-607.

District Court of the Southern District of New York, *Electronic Data Systems Corp. v. Social Security Organization of the Government of Iran*, Bench Ruling of 23 May 1979, remanded, 610 F.2d 94 (2d Cir. 1979).

District Court of the Southern District of New York, *Reading & Bates Drilling Co. v. National Iranian Oil Co.*, Bench Ruling of 29 November 1979, 478 F.Supp. 724.

District Court for the District of New Jersey, *Behring International, Inc. v. Imperial Iranian Air Force* (1979), 475 F.Supp. 383.

District Court for the Northern District of Texas, *E-Systems, Inc. v. Islamic Republic of Iran*, 491 F.Supp. 1294, 1980.

District Court for the Southern District of New York, *New England Merchants National Bank v. Iran Power Generation & Transmission Co.*, 502 F.Supp. 120, 1980, remanded, 646 F.2d 779 (2d Cir. 1981).

District Court for the Central District of California, *Security Pacific National Bank v. Iran*, 1981, 513 F.Supp. 864.

District Court for the Southern District of New York, *Mueller v. Diggelman*, No. 82 Civ. 5513, 13 May 1983, 1983 WL 25419.

District Court for the Central District of California, *Gerritsen v. de la Madrid*, Slip Opinion of 5 February 1986, No. CV-85-5020-PAR.

District Court for the Western District of Washington, *Domingo v. Republic of Philippines*, Judgment of 26 January 1987, 808 F.2d 1349.

District Court of the Northern District of California, *Republic of Philippines v. Marcos*, Judgment of 11 February 1987, 665 F.Supp. 793.

District Court for the District of Columbia, *Farag M. Mohammed Saltany v. Reagan*, Judgment of 23 December 1988, 702 F.Supp. 319.

District Court for the Western District of Washington, *Estate of Domingo v. Republic of the Philippines*, Judgment of 29 August 1988, 694 F.Supp. 782.

District Court for the Southern District of Florida, *United States of America, Plaintiff, v. Manuel Antonio Noriega, et al., Defendants*, Omnibus order of 8 June 1990, 746 F.Supp. 1506, reproduced in *International Law Reports*, vol. 99, pp. 151-183.

District Court for the Southern District of Florida, *Paul v. Avril*, Judgment of 14 January 1993, 812 F.Supp. 207.

District Court of Eastern District of New York, *Lafontant v. Aristide*, 844 F. Supp. 128, Judgment of 27 January 1994, reproduced in *International Law Reports*, vol. 103, pp. 581-593.

District Court for the District of Massachusetts, *Teresa Xuncax, et al., Plaintiffs, v. Hector Gramajo, Defendant*, 12 April 1995, 886 F.Supp. 162.

District Court for the Southern District of New York, *ICC Chemical Corporation v. The Industrial and Commercial Bank of China*, Judgment of 9 May 1995, 886 F.Supp. 1.

District Court for the District of Massachusetts, *Dianna Ortiz, Plaintiff, v. Hector Gramajo, Defendant*, Judgment of 15 April 1995, 886 F.Supp. 162.

District Court for the Southern District of New York, *Bawol Cabiri, Plaintiff, v. Baffour Assasie-Gyimah, Defendant*, 18 April 1996, 921 F.Supp. 1189.

District Court for the District of Columbia, *First American Corp. v. Al-Nahyan*, Judgment of 26 November 1996, 948 F.Supp. 1107.

District Court for the District of Columbia, *Jungquist v. Sheikh Sultan Bin Khalifa al Nahyan*, Judgment of 20 September 1996, 940 F.Supp. 312 (1996), reproduced in *International Law Reports*, vol. 113, pp. 522-533.

District Court for the District of Columbia, *Flatow v. Islamic Republic of Iran*, 76 F.Supp. 2d 28 (D.D.C. 1999).

District Court for the Southern District of New York, *Tachiona v. Mugabe* ("*Tachiona I*"), Judgment of 30 October 2001, 169 F.Supp.2d 259.

District Court, Northern District of Illinois, Eastern Division, *Plaintiff A, B, C, D, E, F, and Others Similarly Situated, Wei Ye, and Hao Wang, Plaintiffs, v. Jiang Zemin and Falun Gong Control Office (A.K.A. Office 6/10), Defendants*, No. 02 C 7530, 12 September 2003, 282 F.Supp.2d 875, excerpt reproduced in *American Journal of International Law*, vol. 97, 2003, p. 977.

District Court for the Northern District of California, *Plaintiff A, et al., Plaintiffs,* v. *Xia Deren, et Liu Qi., Defendants*, Nos. C 02-0672 CW, C 02-0695 CW, Judgment of 8 December 2004, 349 F.Supp.2d 1258.

District Court for the Southern District of New York, *Ra'Ed Mohamad Ibrahim Matar, et al., Plaintiffs,* v. *Avraham Dichter, former Director of Israel's General Security Service, Defendant*, 2 May 2007, 500 F.Supp.2d 284.

Supreme Court of the State of New York, *Hatch v. Baez* (1876), 7 Hun. 596.

Supreme Court of the State of New York, County of New York, *Kline v. Kaneko*, Judgment of 31 October 1988, 141 Misc.2d 787.

VI. Academic institutions

A. Institut de droit international

"Compétence des tribunaux dans les procès contre les Etats et souverains étrangers", *Annuaire de l'Institut de droit international* (1891), pp. 408-438.

"L'immunité de juridiction et d'exécution forcée des Etats étrangers", in: *Institut de droit international, Tableau général des résolutions, 1873-1956* (Bâle, 1957), pp. 14-18.

Resolution on Immunities from Jurisdiction and Execution of Heads of State and of Government in International Law, adopted by the Institut at its Vancouver session in 2001, in *Annuaire de l'Institut de droit international*, vol. 69 (2000-2001), pp. 742-755.

Resolution on Universal Criminal Jurisdiction with respect to the Crime of Genocide, Crimes against Humanity and War Crimes adopted by the *Institut* at its Krakow session in 2005, in *Annuaire de l'Institut de droit international*, vol. 71-II, pp. 296-301.

"Les immunités de juridiction et d'exécution du chef d'Etat et de gouvernement en droit international" ("Rapport provisoire"), Joe Verhoeven, Rapporteur, in *Annuaire de l'Institut de droit international*, vol. 69 (2000-2001), pp. 441-709.

B. International Law Association

Draft Statute of the International Penal Court, as amended by the Permanent International Criminal Court Committee of the International Law Association, *Report of the Thirty-fourth Conference (Vienna, August 5th to 11th 1926)* (1927), pp. 106-225.

Committee on International Human Rights Law and Practice, "Final Report on the Exercise of Universal Jurisdiction in Respect of Gross Human Rights Offences", *Report of the Sixty-ninth Conference held in London 25-29th July 2000* (London, 2000), pp. 403-431.

C. American Law Institute

Restatement of the Law: the Foreign Relations Law of the United States (3rd edition) (1987).

D. Harvard University

Harvard Research in International Law, "Competence of Courts in regard to Foreign States", *American Journal of International Law*, vol. 26 (Supplement) (1932), pp. 451-649.

Harvard Research in International Law, "Study on Jurisdiction with respect to crime, Draft convention with respect to crime", *American Journal of International Law*, vol. 29 (Supplement) (1935), pp. 435-651.

E. Princeton University

Princeton University Program in Law and Public Affairs, *The Princeton Principles on Universal Jurisdiction 28*, 2001, available at: http://www1.umn.edu/humanrts/instree/princeton.html.

F. Other

Siracusa Draft Statute for an International Criminal Court, prepared by a Committee of Experts, organized by the International Association of Penal Law, the International Institute of Higher Studies in Criminal Sciences and the Max Planck Institute for Foreign and International Criminal Law, Siracusa/Freiburg/Chicago, 31 July 1995.

VII. Non-governmental organizations

Amnesty International, "United Kingdom: The Pinochet Case. Universal Jurisdiction and the Absence of Immunity for Crimes Against Humanity" (1 January 1999), pp. 16-25.

VIII. Literature

A. Monographs

Abi-Saab, Georges, *Les exceptions préliminaires dans la procédure de la Cour internationale* (Paris, Pedone, 1967).

Ascensio, Hervé, Decaux, Emmanuel and Pellet, Alain (eds.), *Droit international pénal* (Paris, Pedone, 2000).

Bankas, Ernest K., *The State Immunity Controversy in International Law: Private Suits Against Sovereign States in Domestic Courts* (Heidelberg/Berlin, Springer, 2005).

Bassiouni, Cherif, *Introduction to International Criminal Law* (Ardsley, New York, Transnational Publishers, Inc., 2003).

Bynkershoek Cornelius van, *De Foro Legatorum Liber Singularis*, edited by James Brown Scott (containing an introduction by Jan de Louter, a photographic reproduction of the text of 1744, with a translation by Gordon J. Laing, a list of errata and indexes) (London Oxford University Press, 1946).

Borghi, Alvaro, *L'immunité des dirigeants politiques en droit international* (Geneva, Helbing & Lichtenhahn, 2003).

Brohmer, J., *State Immunity and the Violation of Human Rights* (The Hague, Kluwer Law International, 1997).

Bojic, Mirella, "Immunity of High State Representatives with regard to International Crimes: are Heads of State, Heads of Government and Foreign Ministers still Untouchable?", Master thesis, Faculty of Law, University of Lund, 2005.

Brownlie, Ian, *Principles of Public International Law* (6th edition) (Oxford and New York, Oxford University Press, 2003).

Burlamaqui, Jean-Jacques, *The Principles of natural and politic law* (in two volumes (1747, 1752)), translated into English by Thomas Nugent, (Electronic edition, Lonang Institute, copyright 2003, 2005).

Buzzini, Gionata P., *Le droit international général au travers et au-delà de la coutume. Essai de conceptualisation d'une réalité aux contours fluctuants*, Doctoral Dissertation, No. 741, University of Geneva (Graduate Institute of International Studies), 2007.

Cahier, Philippe, *Le droit diplomatique contemporain* (Paris, Droz, 1962).

Cassese, Antonio and Delmas-Marty, Mireille, *Juridictions nationales et crimes internationaux* (Paris, Presses Universitaires de France, 2002).

Cassese, Antonio, *International Criminal Law* (Oxford, Oxford University Press, 2003).

Conforti, Benedetto, *Diritto internazionale* (3rd edition) (Naples, Editoriale Scientifica, 1987).

David, Eric, *Eléments de Droit pénal international* (Brussels, Presses Universitaires de Bruxelles), 1997-1998.

Giuliano Mario, Scovazzi, Tullio and Treves, Tullio, *Diritto internazionale*, vol. II, 2nd edition (Milan, Giuffrè, 1983).

Green, N. A. Maryan, *International Law* (Bath Press, Avon, Pitman Publishing, 1987).

Grotius, *De jure belli ac pacis*. Book II, Chap. XXI. sect. 4, Translated by A. C. Campbell London, 1814.

Hall, William Edward, *A Treatise on International Law*, edited by A. Pearce Higgins, 8th edition (Clarendon, Oxford University Press, Humphrey Milford Publisher to the University, 1924).

Harris, D. J., *Cases and Materials on International Law*, 5th Edition (London, Sweet and Maxwell, 1998).

Jennings, Robert and Watts, Arthur (eds.), *Oppenheim's International Law*, 9th edition (London and New York, Longman, 1992).

Kelsen, Hans, *Principles of International Law* (New York, Holt, Rinehart and Winston, 1952).

Kittichaisaree, Kriangsak, *International Criminal Law* (New York, Oxford University Press, 2001).

Knoops, Geert-Jan Alexander, *Defences in Contemporary International Criminal Law* (Ardsley, New York, Transnational Publishers, 2001).

Kofele-Kale, Ndiva, *International Law of Responsibility for Economic Crimes: Holding Heads of State and Other High Ranking State Officials Individually Liable for Acts of Fraudulent Enrichment* (The Hague/Boston, Mass., Kluwer Law International, 1995).

Morelli, Gaetano, *Nozioni di diritto internazionale* (7th edition) (Padova, CEDAM, 1967).

Oliver, Covey T., Firmage, Edwin B., Blakesley, Christopher L. Scott, Richard F. and Williams, Sharon A., *The International Legal System: Cases and Materials* (Westbury, New York, Foundation Press, 1995).

Phillimore, Robert, *Commentaries upon International Law*, 2nd edition (Philadelphia, T & J.W. Johnson, 1871).

Przetacznik, Franciszek, *Protection of Officials of Foreign States According to International Law* (The Hague/Boston/London, Martinus Nijhoff Publishers, 1983).

Robertson, Geoffrey, *Crimes against Humanity: The Struggle for Global Justice* (London, Allen Lane, The Penguin Press, 1999).

Rousseau, Charles, *Droit international public*. Tome IV: *Les relations internationales* (Paris, Sirey, 1980).

Salmon, Jean, *Manuel de droit diplomatique* (Brussels, Bruylant, 1994).

Satow, Ernest M., *Satow's Guide to Diplomatic Practice*, Lord Gore-Booth (ed.), 5th edition (London, Longmans Green, 1979).

Shelton, Dinah, *Remedies in International Human Rights Law* (New York, Oxford University Press, 1999).

Simbeye, Yitiya, *Immunity and International Criminal Law* (Aldershot, Ashgate, 2004).

Shaw, Malcolm N., *International Law*, 5th edition (Cambridge, Cambridge University Press, 2003).

Société française pour le droit international, *Colloque de Clermont-Ferrand: le Chef d'Etat et le droit international* (Paris, Pedone, 2002).

Talmon, Stefan, *Recognition of Governments in International Law: With Particular Reference to Governments in Exile* (Oxford, Clarendon Press, 1998).

Triffterer, Otto (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observer's Notes, Article by Article* (Baden-Baden, Nomos, 1999).

Van Alebeek, Rosanne, *The Immunity of States and Their Officials in International Criminal Law and International Human Rights Law* (Oxford, Oxford University Press, 2008).

Vattel, Emmerich de, *Droit des Gens* (in four books, 1758), translated into English by Joseph Chitty (1833) (Electronic edition, Lonang Institute, copyright 2003, 2005).

Verdross, Alfred, and Simma, Bruno, *Universelles Völkerrecht*, 3rd edition (Berlin, Duncker und Humblot, 1984).

Westlake, John, *International Law* (Cambridge, Cambridge University Press, 1904).

Wheaton, Henry, *Elements of International Law* (the Literal reproduction of the edition of 1866 by Richard Henry Dana, Jr. edited with Notes by George Grafton Wilson), Oxford, The Clarendon Press; London, Humphrey Milford, 1936.

B. Articles

Akande, Dapo, "International law immunities and the International Criminal Court", *The American Journal of International Law*, vol. 98 (2004), pp. 407-433.

Akehurst, Michael, "Jurisdiction in International Law", *British Year Book of International Law*, vol. 46 (1972-1973), pp. 145-217.

Allott, Philip, "The Courts and the Executive: Four House of Lords Decisions", *Cambridge Law Journal*, vol. 36 (1977), pp. 255-283.

Ambos, Kai, "Impunity and International Criminal Law: A Case Study on Colombia, Peru, Bolivia, Chile and Argentina", *Human Rights Law Journal*, vol. 18 (1997), pp. 1-15.

Baker, Bruce, "Twilight of Impunity for Africa's Presidential Criminals", *Third World Quarterly*, vol. 25 (2004), pp. 1487-1499.

Barker, J. Craig, "State immunity, Diplomatic Immunity and Act of State: A Triple Protection Against Legal Action?", *International and Comparative Law Quarterly*, vol. 47 (1998), pp. 950-958.

Bass, Peter Evan, "Note: Ex-Head of State Immunity: A Proposed Statutory Tool of Foreign Policy", *Yale Law Journal*, vol. 97 (1987), pp. 299-319.

Bianchi, Andrea, "Denying State Immunity to Violators of Human Rights", *Austrian Journal of Public and International Law*, vol. 46 (1994), pp. 195-229.

Bianchi, Andrea, "Immunity versus Human Rights: The Pinochet Case", *European Journal of International Law*, vol. 10 (1999), pp. 237-277.

Bianchi, Andrea, "Serious Violations of Human Rights and Foreign States' Accountability Before Municipal Courts", in *Man's Inhumanity to Man. Essays on International Law in Honour of Antonio Cassese* (The Hague/London/NewYork, Kluwer Law International, 2003), pp. 149-181.

Bianchi, Andrea, "Ferrini c. Repubblica federale di Germania (Italian Court of Cassation; Judgment of 11 March 2004); a Comment", *American Journal of International Law*, vol. 99 (2005), pp. 242-248.

Boister, N. and Burchill R., "The Implications of the Pinochet Decisions for the Extradition or Prosecution of Former South African Heads of State for Crimes Committed Under Apartheid", *Revue Africaine de droit international et compare/African Journal of International and Comparative Law*, vol. 11 (1999), pp. 619-637.

Bothe, Michael, "Die Straftrechtliche Immunität fremder Staatsorgane", *Zeitschrift für Auslandiches Öffentliches Recht und Völkerecht*, vol. 31 (1971), pp. 246-269.

Boutruche, Théo, "L'affaire Pinochet ou l'internationalisation balbutiante de la justice", *L'Observateur des Nations Unies*, vol. 6 (1999), pp. 77-103.

Bowett, D. W., "Jurisdiction: Changing Patterns of authority over activities and resources", in Charlotte Ku and Paul F. Diehl (eds.), *International Law: Classic and Contemporary Readings* (Colorado and London, Lynne Rienner Publishers Inc., 1998), pp. 210-217.

Brown, Jonathan, "Diplomatic Immunity: State Practice under the Vienna Convention on Diplomatic Relations", *International and Comparative Law Quarterly*, 1988 (vol. 37), pp. 53-88.

Bullier, Antoine J., "Y a-t-il encore une immunité pour les chefs d'Etat et chefs de guerre en Afrique?", *Afrique contemporaine*, vol. 194 (2000), pp. 47-51.

Caflisch, Lucius, "Immunité de juridiction et respect des droits de l'homme", in Boisson de Chazournes Laurence and Gowlland-Debbas Vera (eds.), *The International Legal System in Quest of Equity and Universality, Liber Amicorum Georges Abi-Saab* (The Hague/London/Boston, Kluwer, 2001), pp. 651-676.

Callan, E., "In re Mr. and Mrs. Doe: witnesses before the grand jury and the head of state immunity doctrine", *New York University Journal of International Law and Politics*, vol. 22 (1989), pp. 117-139.

Caplan, Lee M., "State Immunity, Human Rights, and Jus cogens: A Critique of the Normative Hierarchy Theory", *The American Journal of International Law*, vol. 97 (2003), pp. 741-781.

Cara, Jean-Yves de, "L'affaire Pinochet devant la Chambre des Lords", *Annuaire français de droit international*, vol. 45 (1999), pp. 72-100.

Casey, L. A. and Rivkin, D. B., "The New York University-University of Virginia Conference on Exploring the Limits of International Law: The Limits of Legitimacy: The Rome Statute's Unlawful Application to Non-State Parties", *Virginia Journal of International Law*, vol. 44 (2003-2004), pp. 63-89.

Cassese, Antonio, "Immunities", in *International Criminal Law* (Oxford, Oxford University Press, 2003), pp. 264-274.

Cassese, Antonio, "When May Senior State Officials be Tried for International Crimes? Some Comments on *The Congo v. Belgium Case*", *European Journal of International Law*, vol. 13 (2002), pp. 853-875.

Cassese, Antonio, "Peut-on poursuivre des hauts dirigeants des Etats pour des crimes internationaux? A propos de l'affaire Congo c/Belgique (C.I.J.)", *Revue de science criminelle et de droit pénal comparé*, vol. 3 (2002), pp. 479-500.

Carrasco, Márquez, del Carmen, Maria and Alcaide Fernández, Joaquín, "In *Re* Pinochet", *The American Journal of International Law*, vol. 93 (1999), pp. 690-696.

Cosnard, Michel, "Les immunités du chef d'Etat," in *Le chef d'Etat et le droit international Société francaise pour le droit international*, *Colloque de Clermont-Ferrand* (Paris, Pedone, 2002), pp. 189-268.

Cosnard, Michel, "Quelques observations sur les décisions de la Chambre des Lords du 25 novembre 1998 et du 24 mars 1999 dans l'affaire Pinochet", *Revue générale de droit international public*, vol. 104 (1999), pp. 309-328.

Cot, Jean-Pierre, "Éloge de l'indécision, la Cour et la compétence universelle", *Revue belge de droit international*, vol. 35 (2002), pp. 546-553.

Danilenko, G. M., "The Statute of the International Criminal Court and Third States", *Michigan Journal of International Law*, vol. 21 (2000), pp. 445-494.

Day, Adam, "Crimes against Humanity as a Nexus of Individual and State Responsibility: Why the ICJ Got *Belgium v. Congo* wrong", *Berkeley Journal of International Law*, vol. 22 (2004), pp. 489-512.

De Kerchove d'Exaedre, François, "Quelques questions en droit international public relatives à la présence et à l'activité du Gouvernement belge en exil à Londres (Octobre 1940-Septembre 1944)", *Revue belge de droit international*, vol. 23 (1990), pp. 93-151.

De Sena, Pasquale, "Immunity of State Organs and Defence of Superior Orders as an Obstacle to the Domestic Enforcement of International Human Rights", in: Conforti Benedetto and Francioni Francesco (eds.), *Enforcing International Human Rights in Domestic Courts* (The Hague, Martinus Nijhoff Publishers, 1997), pp. 367-403.

De Sena, Pasquale, "Italian practice relating to International Law. Judicial decisions", *Italian Yearbook of International Law*, vol. VIII (1988-1992), pp. 43-57.

De Smet, Leen and Naert, Frederik, "Making or breaking international law? An international law analysis of Belgium's act concerning the punishment of grave breaches of international humanitarian law", *Revue belge de droit international*, vol. 35 (2002), pp. 471-511.

De Smet, S., "The Immunity of Heads of States in US Courts after the Decision of the International Court of Justice", *Nordic Journal of International Law*, vol. 72 (2003), pp. 313-339.

Defarges, Ph.M., "Punir les tyrans", *Défense nationale*, vol. 55 (1999), pp. 46-54.

Dellapenna, J.W., "Head-of-state immunity — Foreign Sovereign Immunities Act — suggestion by the Department of State", *The American Journal of International Law*, vol. 88 (1994), pp. 528-532.

Dinstein, Yoram, "Diplomatic Immunity from Jurisdiction *Ratione Materiae*", *The International and Comparative Law Quarterly*, vol. 15 (1966), pp. 76-89.

Dominicé, Christian, "Quelques observations sur l'immunité de juridiction pénale de l'ancien chef d'Etat", *Revue générale de droit international public*, vol. 103 (1999), pp. 297-308.

Du Plessis, Max and Bosch Shannon, "Immunities and Universal Jurisdiction — The World Court Steps In (or On?)", *South African Yearbook of International Law*, vol. 28 (2003), pp. 246-262.

Dubber, Markus Dirk, "Comparative Criminal Law", in Mathias Reimann and Reinhard Zimmermann, *The Oxford Handbook of Comparative Law* (New York: Oxford University Press, 2006), pp. 1287-1325.

Dupuy, Pierre-Marie, "Crimes et immunités, ou dans quelle mesure la nature des premiers empêche l'exercice des secondes", *Revue générale de droit international public*, vol. 103 (1999), pp. 289-295.

Fenet, Alain, "La responsabilité pénale internationale du chef d'Etat", *Revue générale de droit*, vol. 32 (2002), pp. 585-615.

Fitzgerald, Amber, "The Pinochet case: Head of State Immunity Within the United States", *Whittier Law Review*, vol. 22 (2001), pp. 987-1028.

Flauss, Jean-François, “Droit des immunités et protection internationale des droits de l’homme”, *Revue suisse de droit international et de droit européen*, 2000, pp. 299-324.

Focarelli, Carlo, “I limiti dello jus cogens nella giurisprudenza più recente”, *Rivista di diritto internazionale*, vol. 90 (2007), pp. 637-656.

Fox, Hazel, “International Law and Restraints on the exercise of jurisdiction by national courts of States”, in Malcolm D. Evans (ed.), *International Law*, Oxford, University Press, 2006, 2nd edition, pp. 361-394.

Fox, Hazel, “Shorter Articles, Comments and Notes — The Resolution of the Institute of International Law on the Immunities of Heads of State and Government”, *International and Comparative Law Quarterly*, vol. 51 (2002), pp. 119-125.

Fox, Hazel, “Some Aspects of Immunity from Criminal Jurisdiction of the State and its Officials: The Blaskic case”, in L. C. Vohrah, F. Pocar et al., *Man’s Inhumanity to Man: Essays in International Law in Honour of Antonio Cassese* (The Hague, Kluwer International Law, 2003), pp. 297-307.

Fox, Hazel, “The First Pinochet Case: Immunity of a Former Head of State”, *International and Comparative Law Quarterly*, vol. 48 (1999), pp. 207-216.

Fox, Hazel, “The Pinochet Case No. 3”, *International and Comparative Law Quarterly*, vol. 48 (1999), pp. 687-702.

Gaeta, Paola, “*Extraordinary renditions* e immunità dalla giurisdizione penale degli agenti di Stati esteri: il caso *Abu Omar*”, *Rivista di diritto internazionale*, vol. 89 (2006), pp. 126-130.

Gaeta, Paola, “Official Capacity and Immunities” in Antonio Cassese, Paola Gaeta and others (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, vol. I (New York, Oxford University Press, 2002), pp. 975-1002.

Gaeta, Paola, “*Ratione Materiae* Immunities of Former Heads of State and International Crimes: the *Hissène Habré* Case”, *Journal of International Criminal Justice*, vol. 1 (2003-1), pp. 186-196.

Garnett, R. L., “State Immunity Triumphs in the European Court of Human Rights”, *Law Quarterly Review*, vol. 118 (2002), pp. 367-373.

George, Shobha Varughese, “Head of State immunity in the United States courts: still confused after all these years”, *Fordham Law Review*, vol. 64 (1995), pp. 1051-1088.

Grosscup, Scott, “The Trial of Slobodan Milosevic: The Demise of Head of State Immunity and The Specter of Victor’s Justice”, *Denver Journal of International Law and Policy*, vol. 32 (2004), pp. 355-381.

Henkin, Louis, “Act of State today: Recollections in Tranquility”, *Columbia Journal of Transnational Law*, vol. 6 (1967), pp. 175-189.

Henzelin, Marc, “L’immunité pénale des chefs d’Etat en matière financière. Vers une exception pour les actes de pillage de ressources et de corruption?”, *Revue suisse de droit international et de droit européen* (2002), pp. 179-212.

Hickey, C., "The dictator, drugs and diplomacy by indictment: head of state immunity in US v. Noriega", *Connecticut Journal of International Law*, vol. 4 (1989), pp. 729-765.

Hopkins, John, "Former Head of Foreign State — Extradition — Immunity", *Cambridge Law Journal*, vol. 58 (1999), pp. 461-465.

Hopkins, John, "Immunity — Head of Foreign State", *Cambridge Law Journal*, vol. 57 (1998), pp. 4-6.

Hopkins, Kevin, "The International Court of Justice and the Question of Sovereign Immunity: Why the Yerodia case is an Unfortunate Ruling for the Development of Public International Law", *South African Yearbook of International Law*, vol. 27 (2002), pp. 256-263.

Jackson, Vicky C., "Suing the Federal Government: sovereignty, immunity, and judicial independence", *George Washington International Law Review*, vol. 35 (2003), pp. 521-609.

Jennings, Robert Y., "The *Caroline* and *McLeod* Cases", *American Journal of International Law*, vol. 32 (1938), pp. 82-99.

Kahale, George and Vega, Matias A., "Immunity and Jurisdiction: Toward a Uniform Body of Law in Actions against Foreign States", *Columbia Journal of Transnational Law*, vol. 18 (1979-1980), pp. 211-258.

Kamto, Maurice, "Une troublante 'Immunité totale' du Ministre des affaires étrangères", *Revue belge de droit international*, vol. 35 (2002), pp. 518-530.

Kelsen, Hans, "Collective and individual responsibility in international law with particular regard to punishment of war criminals", *California Law Review*, vol. 31 (1942-1943), pp. 530-571.

Kerchove d'Exaedre, François de, "Quelques questions en droit international public relatives à la présence et à l'activité du Gouvernement belge en exil à Londres (Octobre 1940-Septembre 1944)", *Revue belge de droit international*, vol. 23 (1990), pp. 93-151.

Kessedjian, Catherine, "Immunités", *Repertoire Dalloz, Droit international*, 2nd edition (1998), No. 46.

Klingberg, Vanessa, "(Former) Heads of State before international(ized) criminal courts: the case of Charles Taylor before the Special Court for Sierra Leone", *German Yearbook of International Law*, vol. 46 (2003), pp. 537-564.

Koivu, Virpi, "Head-of-State Immunity v. Individual Criminal Responsibility under International Law", *Finnish Yearbook of International Law*, vol. XII (2001), pp. 305-330.

Koller, David S., "Immunities of Foreign Ministers: Paragraph 61 of the Yerodia Judgment As It Pertains to the Security Council and the International Criminal Court", *American University International Law Review*, vol. 20 (2004), pp. 7-42.

Labuschagne, J.M.T., "Diplomatic Immunity: A Jurisdictional or Substantive-law Defence?", *South African Yearbook of International Law*, vol. 27 (2002), pp. 291-295.

Lansing, Paul and Perry, Julie King, "Should Former Government Leaders Be Subject to Prosecution After Their Term in Office? The Case of South African President P.W. Botha", *California Western International Law Journal*, vol. 30 (1999), pp. 91-115.

Lauterpacht, Hersch, "The problem of jurisdictional immunities of foreign States", *British Year Book of International Law*, vol. 28 (1951), pp. 220-272.

Lloyd Jones, David, "Article 6 ECHR and Immunities Arising in Public International Law", *International and Comparative Law Quarterly*, vol. 52 (2003), pp. 463-472.

Lowe, Vaughan, "Jurisdiction", in Malcolm D. Evans (ed.), *International Law*, 2nd edition (Oxford University Press, 2006), pp. 335-360.

Mallory, Jerrold L., "Resolving the Confusion Over Head of State immunity: The Defined Rights of Kings", *Columbia Law Review*, vol. 86 (1986), pp. 169-197.

Mangu, André M. B., "Immunities of Heads of State and Government: A comment on the Indictment of Liberia's President Charles Taylor by the Special Court for Sierra Leone and the Reaction of the Ghanian Government", *South African Yearbook of International Law*, vol. 28 (2003), pp. 238-245.

Mann, Frederik Alexander, "The Doctrine of Jurisdiction in International Law Revisited after Twenty Years", *Recueil des cours de l'Académie de droit international de la Haye*, vol. 186 (1984-III), pp. 9-116.

Mann, Frederik Alexander, "The Doctrine of Jurisdiction in International Law", *Recueil des cours de l'Académie de droit international de la Haye*, vol. 111 (1964-I), pp. 1-162.

McLachlan, Campbell, "Pinochet Revisited", *International and Comparative Law Quarterly*, vol. 51 (2002), pp. 959-966.

McLachlan, Campbell, "The Influence of International Law on Civil Jurisdiction", *Hague Yearbook of International Law*, vol. 6 (1993), pp. 125-144.

Mitchell, Andrew D., "Leave Your Hat On? Head of State Immunity and Pinochet", *Monash University Law Review*, vol. 25 (1999), pp. 225-256.

Murphy, Sean D. (ed.), "Contemporary Practice of the United States Relating to International Law", *The American Journal of International Law*, vol. 95 (2001), pp. 873-877.

Murphy, Sean D., "Head-of-State Immunity for Former Chinese President Jiang Zemin", *The American Journal of International Law*, vol. 97 (2003), pp. 974-977.

Neier, Aryeh, "Accountability for State Crimes: The Past Twenty Years and the Next Twenty Years", *Case Western Reserve Journal of International Law*, vol. 35 (2003), pp. 351-362.

Nicholls, Clive, "Reflections on Pinochet", *Virginia Journal of International Law*, vol. 41 (2000), pp. 140-151.

O'Neill, Kerry Creque, "A New Customary Law of Head of State Immunity? Hirohito and Pinochet", *Stanford Journal of International Law*, vol. 38 (2002), pp. 289-317.

Orrego Vicuña, Francisco, "Diplomatic and Consular Immunities and Human Rights", *International and Comparative Law Quarterly*, vol. 40 (1991), pp. 34-48.

Penrose, Mary Margaret, "It's Good to Be the King!: Prosecuting Heads of State and Former Heads of State Under International Law", *Columbia Journal of Transnational Law*, vol. 39 (2000), pp. 193-220.

Pierson, Charles, "Pinochet and the End of Immunity: England's House of Lords Holds that a Former Head of State is Not Immune for Torture", *Temple International and Comparative Law Journal*, vol. 14 (2000), pp. 263-326.

Prost, Kimberly and Schlunck, Angelika, "Article 98" in Otto Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court* (Baden-Baden, Germany, Nomos, 1999), pp. 1131-1133.

Prouvèze, Rémy, "L'affaire relative au mandat d'arrêt du 11 avril 2000 (*République démocratique du Congo c. Belgique*): quelle contribution de la Cour internationale de Justice au droit international pénal?", *L'Observateur des Nations Unies*, No. 12 (2002), pp. 285-309.

Prouvèze, Rémy, "Les tribunaux pénaux internationaux à l'aube du XXIème siècle: L'affaire Milosevic ou la difficile recherche d'un véritable rôle de juridiction pénale internationale", *L'Observateur des Nations Unies*, No. 11 (2001), pp. 201-221.

Przetacznik, Franciszek, "Basic principles of international law concerning the protection of officials of foreign States", *Revue de droit international, de sciences diplomatiques et politiques*, vol. 69 (1991), pp. 51-81.

Rau, Markus, "After *Pinochet*: Foreign Sovereign Immunity in Respect of Serious Human Rights Violations — The Decisions of the European Court of Human Rights in *Al-Adsani* Case", *German Law Journal*, vol. 3 (2002).

Rodley, Nigel S., "Breaking the Cycle of Impunity for Gross Violations of Human Rights: The Pinochet Case in Perspective", *Nordic Journal of International Law*, vol. 69 (2000), pp. 11-26.

Saland, Per, "International Criminal Law Principles", in Roy S. Lee (ed.), *The International Criminal Court: The Making of the Rome Statute, Issues, Negotiations, Results* (The Hague/London/Boston, Kluwer Law International, 1999), pp. 189-216.

Salmon, Jean, "Libres propos sur l'arrêt de la C.I.J. du 14 février 2002 dans l'affaire relative au mandat d'arrêt du 11 avril 2000, R.D.C. c. Belgique", *Revue belge de droit international*, vol. 35 (2002), pp. 512-517.

Salmon, Jean and David, Eric, "Chef d'Etat, Chef de Gouvernement, ministre des Affaires étrangères. Pratique du pouvoir exécutif et contrôle des chambres législatives", *Revue belge de droit international*, vol. 35 (2002), pp. 122-126.

Sands, Philippe, "International Law Transformed? From Pinochet to Congo …?", *Leiden Journal of International Law*, vol. 16 (2003), pp. 37-53.

Sands, Philippe, "What is the ICJ for?", *Revue belge de droit international*, vol. 35 (2002), pp. 537-545.

Sands, Philippe, "After Pinochet: The Role of National Courts", in Ph. Sands (ed.), *From Nuremberg to The Hague. The Future of International Criminal Justice* (Cambridge University Press, 2003), pp. 68-108.

Sarkar, Lotika, "The Proper Law of Crime in International Law", *The International and Comparative Law Quarterly*, vol. 11 (1962), pp. 446-470.

Sassòli Marco, "L'arrêt Yerodia: quelques remarques sur une affaire au point de collision entre les deux couches du droit international", *Revue belge de droit international*, vol. 106 (2002), pp. 791-818.

Sears, Jill M., "Confronting the 'Culture of Impunity': Immunity of Heads of State from Nuremberg to *ex parte* Pinochet", *German Yearbook of International Law*, vol. 42 (1999), pp. 125-146.

Shaw, Malcolm N., "The Personality Issue — Immunity for Government Figures", *International Law*, 5th edition (Cambridge University Press, 2003), pp. 655-667.

Shaw, Malcolm N., "The *Yerodia* case: Remedies and Judicial Functions", *Revue belge de droit international* (2002), pp. 554-559.

Sison, Gilbert, "A King No More: The Impact of the Pinochet decision on the Doctrine of Head of State Immunity", *Washington University Law Quarterly*, vol. 78 (2000), pp. 1583-1602.

Sinclair, Ian, "The Law of Sovereign Immunity: Recent Developments", *Recueil des cours de l'Académie de droit international de la Haye*, vol. 167 (1980-II), pp. 113-287.

Stone, C., "Head of State Immunity. New Standard on a Narrow Issue", *Suffolk Transnational Law Journal*, vol. 12 (1989), pp. 491-502.

Summers, Marc A., "The International Court of Justice's Decision in Congo v. Belgium: How Has It Affected the Development of a Principle of Universal Jurisdiction that Would Obligate All States to Prosecute War Criminals?", *Boston University International Law Journal*, vol. 21 (2003), pp. 63-100.

Thomas, Katherine Reece and Small, Joan, "Human Rights and State Immunity: Is There Immunity From Civil Liability For Torture?", *Netherlands International Law Review*, vol. 50 (2003), pp. 1-30.

Tomonori, Mizushima, "The Individual as Beneficiary of State Immunity: Problems of the Attribution of *Ultra Vires* Conduct", *Denver Journal of International Law and Policy*, vol. 29 (2001), pp. 261-287.

Tomuschat, Christian, "Ensuring the Survival of Mankind on the Eve of a New Century", in *General Course on Public International Law*, *Recueil des cours de l'Académie de droit international de la Haye*, vol. 281, 1999, pp. 9-483.

Toner, Paul J., "Competing Concepts of Immunity: The Revolution of the Head of State Immunity Defense", *Penn State Law Review*, vol. 108 (2004), pp. 899-927.

Triffterer, Otto, "Article 27, Irrelevance of Official Position", in Otto Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court* (Baden-Baden, Germany, Nomos, 1999), pp. 501-514.

Tunks, Michael A., "Diplomats or Defendants? Defining the Future of Head-of-State Immunity", *Duke Law Journal*, vol. 52 (2002), pp. 651-682.

van Alebeek, Rosanne, "The Pinochet case: International Human Rights Law on Trial", *British Year Book of International Law*, vol. LXXI (2000), pp. 29-70.

van Panhuys, H. F., “In The Borderland Between The Act of State Doctrine and Questions of Jurisdictional Immunities”, *International and Comparative Law Quarterly*, vol. 13 (1964), pp. 1192-1213.

Verhoeven, Joe, “Quelques réflexions sur l’affaire relative au mandat d’arrêt du 11 avril 2000”, *Revue belge de droit international*, vol. 35 (2002), pp. 531-536.

Villalpando, Santiago, “L’affaire Pinochet: beaucoup de bruit pour rien? L’apport au droit international de la décision de la Chambre des Lords du 24 mars 1999”, *Revue générale de droit international public*, vol. 104 (2000), pp. 393-427.

Warbrick, Colin, “Immunity and International Crimes in English Law”, *International and Comparative Law Quarterly*, vol. 53 (2004), pp. 769-764.

Watts, Arthur, “The Legal Position in International Law of Heads of States, of Governments and Foreign Ministers”, *Recueil des cours de l’Académie de droit international de la Haye*, vol. 247 (1994-III), pp. 9-136.

Weller, Marc, “On the Hazards of Foreign Travel for Dictators and Other International Criminals”, *International Affairs*, vol. 75 (1999), pp. 599-617.

Weyembergh, Anne, “Sur l’ordonnance du juge d’instruction Vandermeersch rendue dans l’affaire Pinochet le 6 novembre 1998”, *Revue belge de droit international*, vol. 32 (1999), pp. 178-204.

White, Melinda, “Pinochet, Universal Jurisdiction, and Impunity”, *Southwestern Journal of Law and Trade in the Americas*, vol. 7 (2000), pp. 209-226.

Whomersley, C. A., “Some Reflections on the Immunity of Individuals for Official Acts”, *International and Comparative Law Quarterly*, vol. 41 (1992), pp. 848-858.

Wickremasinghe, Chanaka, “Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights”, *International and Comparative Law Quarterly*, vol. 49 (2000), pp. 724-730.

Wickremasinghe, Chanaka, “Immunities Enjoyed by Officials of States and International Organizations”, in Malcolm D. Evans (ed.), *International Law*, 2nd edition (Oxford, Oxford University Press, 2006), pp. 395-421.

Wilson, Robert A., “Diplomatic Immunity from Criminal Jurisdiction: Essential to Effective International Relations”, *Loyola of Los Angeles International and Comparative Law Journal*, vol. 7 (1984), pp. 113-138.

Wilson, Richard J., “Prosecuting Pinochet: International Crimes in Spanish Domestic Law”, *Human Rights Quarterly*, vol. 21 (1999), pp. 927-979.

Wouters, Jan, “The Judgment of the International Court of Justice in the Arrest Warrant Case: Some Critical Remarks”, *Leiden Journal of International Law*, vol. 16 (2003), pp. 253-267.

Yang, Xiaodong, “Immunity for International Crimes: Reaffirmation of Traditional Doctrine”, *Cambridge Law Journal*, vol. 61 (2002), pp. 242-246.

Yang, Xiaodong, “State Immunity in the European Court of Human Rights: Reaffirmations and Misconceptions”, *British Year Book of International Law*, vol. 74 (2003), pp. 333-408.

Zappalà, Salvatore, “Do Heads of State in Office Enjoy Immunity from Jurisdiction for International Crimes? The Ghaddafi Case Before the French Cour de Cassation”, *European Journal of International Law*, vol. 12 (2001), pp. 595-612.

Zegveld, Liesbeth, “The Bouterse case”, *Netherlands Yearbook of International Law*, vol. XXXII (2001), pp. 97-118.

Ziman, G. Michael, “Holding Foreign Governments Accountable for Their Human Rights Abuses: A proposed Amendment to the Foreign Sovereign Immunities Act of 1976”, *Loyola of Los Angeles International and Comparative Law Journal*, vol. 21 (1999), pp. 185-213.

Zuppi, Alberto Luis, “Immunity v. Universal Jurisdiction: The Yerodia Ndombasi Decision of the International Court of Justice”, *Louisiana Law Review*, vol. 63 (2003), pp. 309-339.