Head of State Immunity - a Useful Relic?

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Head of State Immunity - A Useful Relic?

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Head of State Immunity, once unchallengeable may now look to be an antiquated theoretical concept rather than living adjunct to the management of international affairs. Heads of state have become exposed to judicial intervention by international tribunals. At the time of delivering this lecture much more will be known than at present of what will happen at the ICC with the prosecution of Kenya's serving President, Kenyatta. In this lecture the theoretical and practical basis for preserving Head of State immunity will be explored, as affected by developments over the last 12 months. Other significant developments since the close of Professor Nice's 2012-2013 series in the world of the international criminal tribunals will also be explored!

1. This is the last of two years of lectures largely concerned with international humanitarian law, its development and shortcomings that may have led to your considering the doings of lawyers and the courts in which they operate with a cautious eye; it may have led you to believe that the law is always ultimately a creature of the system, national or international, that created it and to which it will ultimately be loyal, even at the expense of victims, the writing of history and of the law itself.

2. In my last lecture on this general theme – next year I turn to something different - I sketch in (no more than a sketch is possible) the immunities that Heads of State and other top government leaders and officials may enjoy. Will examination of how such people fare under the law displace my normally skeptical and occasionally subversive messages?

3. At Gresham we pride ourselves on our heterogeneous audiences: tinkers, tailors, soldiers, spies, rich women, poor men, beggar-persons…….

4. But I am unaware of any Head of State attending one of my lectures or even of attending Gresham astronomy lectures about the lives of stars or the big bang which might be more up their street.

5. In the privacy of their palaces surrounded by armed guards they may gather round secure screens and view us on the internet - but even that, I doubt.

6. So why, if Heads of State seem to have so little interest in the sort of things we consider here, should we bother with them and their privileges? Why should I get you all excited about our Queen being free from prosecution over speeding in her Landover on a Scottish lane (were she ever to do that) or about the USA not paying parking fines and the Congestion Charge in London?

7. Because there is an issue to resolve about heads of state and very senior members of governments on which may hang much of how armed conflicts and acts of oppression against citizens may be deterred. At present there is uncertainty about this issue and it is an uncertainty that suits the politicians. Should it? Is it time to take a next step?

8. The HISTORY OF THE PRIVILEGES reveals various strands of power and privilege that may need to be understood.

9. The Royal Prerogative, in countries where it still exists, is derived from Royal powers never ceded to Parliaments or other governing bodies and that remain in a monarch, sometime unlimited by parliamentary or other government control.

10. Sovereign immunity is different and derives from the sovereign being the historical origin of the authority which created the courts for the protection of her / his subjects. The Sovereign could commit no legal wrong and was immune from civil suit or criminal prosecution.

11. This led to the Crown - in our land - never been able to be prosecuted or proceeded against in either criminal or civil cases save by special procedures until the position was drastically altered by the Crown Proceedings Act 1947 which made the Crown generally vulnerable to proceedings for tort and contract. Criminal proceedings can still not be brought against the UK government unless expressly permitted by that Act. As the Act only affected the law in respect of acts carried on by or on behalf of the UK government, the monarch remains personally immune from criminal and civil actions.

12. But this is not the sort of immunity that is troublesome - for the time being there is no appetite to arrest our sovereign here or anywhere else for anything; she exercises limited actual authority and, in any case, attracts no criticism when she does. Different considerations arise when her prime ministers or Foreign Secretaries, or when American Presidents or their Secretaries of State, are concerned in events such as wars in Iraq.

13. I dare say many of us have a very general understanding that along with the general expectation that war crimes may lead to accountability for 'front-line' offenders there is an expectation that those politicians who lead their countries into unlawful wars may, as a minimum, not be free to travel for fear of being arrested if they do. But the legal landscape in which political leaders operate is actually very unsettled. How long will it remain so? Is
this uncertainty what the politicians actually prefer? May it even be a generally good state of affairs?

14. Before seeing where we are and how this affects us, it may be worth identifying two possible extremes: one, the position where Heads of State and their leading Ministers – Prime Ministers, Foreign Ministers, Defence Ministers – have very wide immunity, at least for whatever is done in office. The other extreme where Heads of State, presidents of any and every country and prime ministers etc may be subject to arrest in other countries that claim jurisdiction for offences of which they may be suspect. Neither extreme can be justified and finding a clear line between the two may be impossible.

15. Very generally, 'at the turn of the twentieth century, the international law of state immunity was broader than today. Under an absolute theory of immunity, a state and its property were entitled to immunity from the judicial process of another state.' Some commentators argue that 'around 1900 a new concept of sovereign immunity emerged and that throughout the twentieth century, the immunity of a state and its leaders narrowed under the widely accepted restrictive theory of immunity. Under this restrictive theory, a distinction has been made between public and private acts, with a state entitled to immunity for the prior, but not the latter. In developing this new theory, the formulating courts reasoned that immunity was intended to apply only to acts involving state sovereignty. They described those acts as public acts, political acts, or acts done jure imperii. Such acts were distinguished from private acts or acts jure gestionis, such as commercial acts, where immunity was not intended to extend. 1

16. Manifestations of this change, whether the theory is right or not, include Art. 227 of the Treaty of Versailles 1919, which established a special tribunal to try William II, formerly the German Emperor, for "a supreme offence against international morality and the sanctity of treaties", Art. 7 of the Charter of the Nuremberg International Military Tribunal, which provided that "[t]he official position of defendants, whether heads of state or responsible officials in Government Departments, shall not be considered as freeing them from responsibility or mitigating punishment", Art. 6 of the Statute of the Tokyo International Military Tribunal, which provided that "[n]either the position, at any time, of an accused, nor the fact that an accused acted pursuant to order of his government or a superior shall, of itself, be sufficient to free such accused from responsibility for any crime with which he is charged".

17. Principle III of the Principles of International Law Recognised in the Charter of the Nuremburg Tribunal, in the Judgment of the Tribunal, adopted by the International Law Commission of the United Nations in 1950 and approved by the UN General Assembly, states that: "$[t]he fact that an author of an act which constitutes a crime under international criminal law has acted in his capacity as a head of state or of government does not release him of his responsibility under international law." 2

18. This change has led many to face immunity problems with varied results: Noriega of Panama; Pinochet of Chile; Taylor of Liberia / Sierra Leone; Bashir of Sudan, Kenyatta of Kenya

19. What is the legal position? How did things develop in the last century?

20. Diplomats and government messengers have been free from interference by states they visit for thousands of years. Many aspects of diplomatic immunity were regarded as customary law designed to allow the maintenance of government relations even - or especially - in times of difficulty.

21. When receiving diplomats—who formally represent their sovereign—the receiving head of state grants certain privileges and immunities to ensure they may effectively carry out their duties, on the understanding that these are provided on a reciprocal basis. The Vienna Conventions codified the rules and agreements, providing standards and privileges to all states but which, having been drafted by diplomats, gave diplomats arguably extreme rights

22. It is possible for the official's home country to waive immunity; this tends to happen only when the individual has committed a serious crime, unconnected with her / his diplomatic role (as opposed to, say, allegations of spying), or has witnessed such a crime. For instance, in 2002, a Colombian diplomat in London was prosecuted for manslaughter, once diplomatic immunity was waived by the Colombian government.

23. A FEW INDICATIVE EVENTS. Demonstrations culminating in a 'siege' of the London Libyan Embassy in 1984 led to Yvonne Fletcher shot being on 17th April 1984 by someone from inside the Embassy. Diplomatic immunity - the same immunity that allows the USA and other embassies not to pay parking fines for the cars driving diplomats' wives on shopping trips - meant the people in the embassy had to be escorted out having been declared persona non grata. Weapons in Diplomatic bags? – inviolable.

24. 8 years later Manuel Antonio Noriega a former Panamanian politician and soldier argued for another aspect of this immunity, this time in the Americas. He was military dictator of Panama from 1983 to 1989. In the 1989
invasion of Panama by the United States he was removed from power, later captured, detained as a prisoner of war, and flown to the United States. Noriega was tried on eight counts of drug trafficking, racketeering, and money laundering in April 1992, convicted and sentenced to 40 years imprisonment.

25. Head of State Immunity was invoked on Noriega's behalf, unsuccessfully. Recognition was considered a discretionary function. The General was merely the commander of the PDF, and was never recognised by the Panamanian Constitution or the United States as Panama's head of state. Panama had not sought immunity on behalf of Noriega through the State Department. Even if recognized as the de facto leader of Panama, the court decided the grant of immunity was a privilege that could be freely withheld by the United States.

26. Noriega's 40 year U.S. prison sentence ended in September 2007 pending the outcome of extradition requests by both Panama and France, for convictions in absentia for murder in 1995 and money laundering in 1999. France succeeded first and after a trial in Paris where he was sentenced to seven years in jail in July 2010. Conditional release was granted on September 23, 2011 for Noriega to be extradited to serve 20 years in Panama where he arrived in Panama on December 11, 2011. So much for any immunity he might have enjoyed.

27. In 1993 Art. 7(2) of the Statute of the International Criminal Tribunal for the Former Yugoslavia ("ICTY"), which establishes that

"[t]he official position of any accused person, whether as Head of State or Government or as a responsibility Government official, shall not relieve such person of criminal responsibility nor mitigate punishment."

Art 6(2) of the Statute of the International Criminal Tribunal for Rwanda ("ICTR"), which is identical to Art. 7(2) of the ICTY above.

28. In 1994, two years after Noriega's arrest and one year after the founding statutes of the ICTY and ICTR Sir Arthur Watts, Chief Legal Adviser to the FCO until 1991, observed that dramatically changing attitudes toward the immunity of Heads of State have led to

"the emergence of a body of rules which is in many respects still unsettled, and on which limited State practice sheds an uneven light."

It may be that things have not changed that much since then.

29. 1996 saw the start of a series of cases concerning General Pinochet of Chile. The courts approached him in ways similar to the approach to Noriega. The Pinochet case was about whether Pinochet continued to enjoy immunity for acts committed during his tenure as head of state and whether customary international law granted the English courts jurisdiction to extradite Pinochet to Spain.

30. On July 1, 1996, a Spanish prosecutor filed a criminal complaint against Pinochet, alleging that he caused the detention, torture, and execution of thousands of Chilean citizens and citizens of other nations, including citizens of the United States and Spain, as part of an international conspiracy, named Operation Condor, to track down and dispose of political opponents.

31. The complaint further asserted that Spanish courts could properly exercise jurisdiction over Pinochet under the universal principle.


33. The Divisional Court initially determined that Pinochet continued to enjoy immunity for acts he had committed. The issue of immunity immediately certified as fit for decision by the House of Lords. In the last of three decisions, on March 24, 1999, the House' ruled that Pinochet was not entitled to enjoy immunity for his alleged crimes, since such allegations could not be considered official acts under international principles of immunity.

34. Nevertheless, Pinochet would once again escape extradition to face trial in Spain; he was released due to failing health and permitted to return to Chile.

35. Despite this escape, Pinochet was stripped of his immunity upon his return to Chile by the Chilean Supreme Court on August 8, 2000, indicted, and placed on house arrest for his alleged crimes.

36. In Chile successive court actions appeared as setbacks for international proponents of sovereign accountability when, on March 8, 2001, the Court of Appeals dismissed the homicide and kidnapping charges against Pinochet, leaving only the charges relating to his alleged cover-up of such atrocities for possible trial. Further, on March 13, 2001, a Chilean judge ruled that Pinochet could be released from house arrest by posting payment of two million pesos, equivalent to $3,400.

37. 'Despite the initial willingness of the Chilean judicial system to attempt to bring Pinochet to justice, the reality is that such attempts have proven less effective than desired by international activists.' Rather than pursuing the most serious charges, critics alleged, the Chilean courts apparently sought to protect Pinochet in a manner
inconsistent with international pressure. Human rights activists became further outraged when, in July, 2001, a
Chilean appeals court ruled that the former dictator was not well enough to stand trial, thereby reducing
momentum in a case many believed was facing a slow procedural death.

38. While Pinochet was wending its way from court to court, in 1997 at the ICTY in Prosecutor v Blaskic the
Appeals Chamber dismissed the possibility of the International Tribunal addressing subpoenas to State officials
acting in their official capacity saying that such officials were 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, said the court, was a well-established rule of customary international law going back to the eighteenth and
nineteenth centuries, restated many times since.

39. In contrast, said the court

"… 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). The few exceptions relate to one particular consequence
of the rule. These exceptions 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.

40. In Prosecutor v Furundzija the same court held:

"What is even more important is that perpetrators of torture acting upon or benefiting from those national
measures may nevertheless be held criminally responsible for torture, whether in a foreign State, or in their own
State under a subsequent regime. In short, in spite of possible national authorisation by legislative or judicial
bodies to violate the principle banning torture, individuals remain bound to comply with that principle.

As the International Military Tribunal at Nuremberg put it:

'individuals have international duties which transcend the national obligations of obedience imposed by the
individual State.'"

41. In 1998 the UK Parliament passed the State Immunity Act to implement the European Convention on State
Immunity of 1972 into British law. It expressly limited state immunity for certain activities, usually of a
commercial or associated nature.

42. 2001 – 2001 saw the extremely important 'Arrest Warrant case' being pursued and determined in the World
Court, the ICJ Formally 'Democratic Republic of Congo vs Belgium' started with a Belgium Judge issuing and
circulating, internationally, an arrest warrant against the incumbent Foreign Minister of Congo, Mr Yerodia, based
on universal jurisdiction in Belgium. Did this violate international law because it did not respect the inviolability and
immunities of the foreign minister from criminal process before Belgian courts? It accused Yerodia of inciting
racial hatred inciting the population to attack Tutsi residents in Rwanda, which resulted in many deaths. The
warrant alleged Yerodia committed grave breaches of the Geneva Conventions of 1949 and its Additional
Protocols and crimes against humanity. After Belgium issued the warrant, in November 2000, Yerodia became
the Education Minister.

43. The Court held:

• The issuance and circulation of the arrest warrant failed to respect, and infringed, Yerodia's immunity and the
inviability enjoyed by him under international law.

• Further, that it is an established principle of international law that Heads of States and Governments, Foreign
Ministers and Diplomatic and Consular agents enjoys immunities from civil and criminal jurisdictions of other
States; and that

• The functions of the Foreign Minister require frequent travel to other countries. International law recognizes
him as a representative of the State solely by virtue of his office. The functions of a Foreign Minister are such
that - during his tenure - he enjoys absolute immunity from criminal jurisdiction and inviability when he is
abroad.

44. As the incumbent Foreign Minister, Yerodia enjoyed immunity (during his tenure) for acts performed, both, in
an official capacity and in a private capacity. The immunity applied regardless of whether the Minister was on
foreign territory in an official visit or private visit. This immunity extended not only to his actions during his
tenure; but, also to his actions before he became Foreign Minister'
"Thus, if a Minister for Foreign Affairs is arrested in another State on a criminal charge, he or she is 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. 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."

45. The Court rejected Belgium's argument that the Minister did not enjoy immunity because he was accused of having committed war crimes or crimes against humanity. (Belgium relied on the Pinochet Case (decided by the House of Lords, UK), the Qaddafi Case (decided by the French Court of Cassation) and Statutes of International Criminal Court and Tribunals.) The Court held that there was no exception in customary international law to the absolute immunity of an incumbent Foreign Minister.

"It (the Court) 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 of Foreign Affairs, when they are suspected of having committed war crimes or crimes against humanity... The Court has also examined the rules concerning the immunity or criminal responsibility of persons having an official capacity contained in the legal instruments creating international criminal tribunals, and which are specifically applicable... It finds that these rules likewise do not enable it to conclude that any such an exception exists in customary international law in regard to national courts."

46. The Court held that International Conventions give jurisdiction to national Courts over various crimes and, at times, requiring them to exercise this jurisdiction [for example, the Torture Convention]. This requirement does not affect the immunities given to Foreign Ministers under international law. Despite international conventions establishing domestic jurisdiction, Foreign Ministers are immune before foreign courts.

47. Immunity, said the court, did not mean impunity. The person continues to be individually responsible for the crime he committed.

"While jurisdictional immunity is procedural in nature, criminal responsibility is a question of substantive law. Jurisdictional immunity may well bar prosecution for a certain period or for certain offences; it cannot exonerate the person to whom it applies from all criminal responsibility..."

48. The Court set out four situations where an incumbent or former Foreign Minister could be prosecuted:

• Prosecution in his own country according to the domestic law (the international law of immunity is not recognized before a person's national courts);

• If his country waives his immunity, prosecution before a foreign court;

• Once he ceases to be the Foreign Minister, he no longer enjoys immunity before foreign courts for private acts committed during his tenure as Foreign Minister; and for all acts committed before or after his tenure in office; and

• Prosecution before an international criminal body, with the necessary jurisdiction (for example the ICC).

49. The ICJ concluded that the issuance and circulation of the arrest warrant violated Belgium's obligations towards Congo,

"in that it failed to respect the immunity of that Minister and, more particularly infringed the immunity from criminal jurisdiction and the inviolability enjoyed by him under international law."

It did not matter that Yerodia was never arrested.

50. The Court explained that

"Since Mr. Yerodia was called upon in that capacity to undertake travel in the performance of his duties, the mere international circulation of the warrant... could have resulted, in particular, in his arrest while abroad......

Mr. Yerodia, "on applying for a visa to go to two countries, [apparently] learned that he ran the risk of being arrested as a result of the arrest warrant issued against him by Belgium"... the arrest warrant 'sometimes forced Minister Yerodia to travel by roundabout routes""

51. Congo asked the Court to rule that the unlawfulness of the arrest warrant precluded States who received the warrant from exercising it. The Court refused to indicate what the judgment's implications might be for third States. Its determination is limited to Congo and Belgium. [NB: the Statute of the ICJ requires that its rulings should not create binding obligations on States who are not parties to the dispute.]

52. Since the Arrest Warrant Case, there have been at least two instances of claims to immunity being rejected by international criminal tribunals. In Prosecutor v Krstic, the Appeals Chamber of the ICTY held that, with respect to functional immunity ratione materiae, "it would be incorrect to suggest that such an immunity exists in
international criminal courts.

53. Subsequently, the Appeals Chamber of the Special Court for Sierra Leone ("SCSL") also rejected the invocation of head of state immunity by Charles Taylor, in response to his challenge to the validity of his indictment by the tribunal, finding that "the principle seems now established that the sovereign equality of states does not prevent a Head of State from being prosecuted before an international criminal tribunal or court."

54. In the UK, Re Mofaz, Bow Street Magistrates' Court, 12 February 2004 concerned an application for an arrest warrant against Israeli General Mofaz and whether he has State immunity in his capacity as Israeli Defence Minister. The case determined by a district Judge decided that there is immunity for holders of high ranking office under customary international law. The arrest warrant was declined.

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

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

56. Re Bo Xilia, Bow Street Magistrate's Court, 8 November 2005 concerned an application for an arrest warrant against Bo Xilia, Chinese Minister of Commerce and International Trade. The arrest warrant was declined by the District Judge because it was found that Bo Xilia was entitled to immunity as a matter of customary international law.

57. The District Judge explained "The real issue in this case is whether the proposed defendant is immune from prosecution. I am told that Mr. Bo is the Minister for Commerce including International Trade for the People's Republic of China. As such, I have concluded his functions are equivalent to those exercised by a Minister for Foreign Affairs and, adopting the reasoning of the International Court of Justice in the case of Democratic Republic of Congo v. Belgium [above, p. 1], I reach the conclusion that under the customary international law rules Mr. Bo has immunity from prosecution as he would not be able to perform his functions under less is able to travel freely."

"Although Mr. Bo has been here for a number of days performing official duties as Minister for International Trade, he today forms part of the official delegation for the State visit of the President of the People's Republic of China. As such, I am satisfied that he is a member of a Special Mission and as such has immunity under customary international law.

58. In 2006 the House of Lords dealt with the case of Jones v Ministry of Interior Saudi Arabia Al-Mamlaka etc. The issue was whether the Courts of the United Kingdom had jurisdiction to entertain claims of alleged torture against the Kingdom of Saudi Arabia (the "Kingdom") and its officials. The claimants alleged to have suffered systematic torture in Saudi Arabia and brought suit in the courts of the United Kingdom against the Ministry of Interior of Saudi Arabia and various state officials. Lord Bingham of Cornhill noted that on a plain reading of the United Kingdom State Immunity Act 1978 (the "Act"), the Kingdom would be able to plead immunity and the plaintiffs' claims would therefore have to be dismissed, as no exception of the Act applied. The plaintiffs argued that this "plain reading" would contravene their well-established right under Article 6 I of the European Convention on Human Rights (right to a fair trial). Also, they submitted that granting the Kingdom immunity would violate a jus cogens norm, according to which "the practice of torture should be suppressed and the victims of torture compensated." Lord Bingham of Cornhill discussed the decision of the Grand Chamber of the European Court of Human Rights in Al-Adsani, in which the Grand Chamber ruled by a slim majority that it was not contrary to the Convention to grant sovereign immunity to a state and its officials where damages are sought in civil proceedings for torture. Granting sovereign immunity was justified by the legitimate aim of pursuing "comity and good relations between states."

59. In criticism and correction of the Court of Appeal Lord Bingham observed: Mance LJ thought it correct to ignore the description of Colonel Abdul Aziz as a "servant or agent" (para 28). The Master of the Rolls considered this description "irrelevant and, arguably, embarrassing" (para 103). But there was no principled reason for this departure. A state can only act through servants and agents; their official acts
are the acts of the state; and the state's immunity in respect of them is fundamental to the principle of state immunity. This error had the effect that while the Kingdom was held to be immune, and the Ministry of Interior, as a department of the government, was held to be immune, the Minister of Interior (the fourth defendant in the second action) was not, a very striking anomaly.

60. Later he explained

"A state is not criminally responsible in international or English law, and therefore cannot be directly impleaded in criminal proceedings. The prosecution of a servant or agent for an act of torture within article 1 of the Torture Convention is founded on an express exception from the general rule of immunity. It is, however, clear that a civil action against individual torturers based on acts of official torture does indirectly implead the state since their acts are attributable to it. Were these claims against the individual defendants to proceed and be upheld, the interests of the Kingdom would be obviously affected, even though it is not a named party."

61. Lord Bingham of Cornhill then reiterated the four main arguments advanced by the Kingdom, with which he agreed. The Kingdom claimed that the appeals had to be dismissed because:

- a serving foreign minister is immune from suit rationae personae,
- the Torture Convention does not grant universal civil jurisdiction,
- the UN Immunity Convention of 2004 does not provide for an exception of immunity in cases of civil claims for torture, and
- there is no evidence that states have agreed to pursue violations of peremptory norms of international law.

62. The Lords dismissed the claimants' appeals by a unanimous decision.

63. The case went to the European Court of Human Rights where

"The applicants alleged, in particular, that the grant of immunity in civil proceedings to the Kingdom of Saudi Arabia in the case of Mr Jones and to the individual defendants in both cases amounted to a disproportionate interference with their right of access to court under Article 6 of the Convention."

64. But held

Having regard to the foregoing, while there is in the Court's view some emerging support in favour of a special rule or exception in public international law in cases concerning civil claims for torture lodged against foreign State officials, the bulk of the authority is, as Lord Bingham put it in the House of Lords in the present case, to the effect that the State's right to immunity may not be circumvented by suing its servants or agents instead. However,

State practice on the question is in a state of flux, with evidence of both the grant and the refusal of immunity ratione materiae in such cases. At least two cases on the question are pending before national Supreme Courts: one in the United States and the other in Canada (see paragraphs 125 and 134 above). International opinion on the question may be said to be beginning to evolve, as demonstrated recently by the discussions around the work of the International Law Commission in the criminal sphere. This work is ongoing and further developments can be expected.

65. In the present case, the Court held, it was clear that the House of Lords fully engaged with all of the relevant arguments concerning the existence, in relation to civil claims of infliction of torture, of a possible exception to the general rule of State immunity (compare and contrast Sabeh El Leil, cited above, §§ 63-67; Wallshausser, cited above, § 70; and Oleynikov, cited above, §§ 69-72). In a lengthy and comprehensive judgment (see paragraphs 24-38 above) and concluded that

"customary international law did not admit of any exception – regarding allegations of conduct amounting to torture – to the general rule of immunity ratione materiae for State officials in the sphere of civil claims where immunity is enjoyed by the State itself. The findings of the House of Lords were neither manifestly erroneous nor arbitrary but were based on extensive references to international law materials and consideration of the applicant's legal arguments and the judgment of the Court of Appeal, which had found in the applicants' favour. Other national courts have examined in detail the findings of the House of Lords in the present case and have considered those findings to be highly persuasive (see paragraphs 131-133 and 135 above).

66. In these circumstances, the Court was satisfied that the grant of immunity to the State officials in the present case reflected generally recognised rules of public international law. The application of the provisions of the 1978 Act to grant immunity to the State officials in the applicants' civil cases did not therefore amount to an unjustified restriction on the applicant's access to a court. There has accordingly been no violation of Article 6 § 1 of the Convention in this case. However, in light of the developments currently underway in this area of public international law, this is a matter which needs to be kept under review by Contracting States.

67. THE LAW; IMMUNITY OF STATE OFFICIALS GENERALLY.
Heads of State and other Government officials are immune from the criminal and civil jurisdiction of other States by right of the State, not of the individual Immunity exists in order to ensure that States through their chosen officials can conduct effective and uninhibited international relations throughout the world. Some of these immunities are articulated in treaties others from customary international law.

68. International law distinguishes between personal immunity and functional immunity which may coexist and overlap while a state official is in office.

69. For any prosecution under international criminal law against an individual the prosecuting court must have jurisdiction over the acts committed by the individual in a nation state court - “horizontal jurisdiction” - if the state asserts universal jurisdiction for the particular crime wherever and by whomsoever committed or treaty-based jurisdiction ‘vertical jurisdiction’, as at international criminal courts, and the individual must not be protected by the international law immunities available to state officials, personal or functional.

70. Personal immunity is enjoyed by a state official only for the duration of her/his office. It is accorded to the offices of heads of state, heads of government, and foreign ministers, as well as diplomats and other officials on special mission in a foreign state. It entitles such officials to absolute immunity from the criminal and civil jurisdiction of foreign states and renders the state official immune from civil or criminal jurisdiction. It may not be universal (erga omnes) for diplomats as it only applies as between the receiving and the sending states, plus third states whose territory the diplomat may pass through to and from a posting.

71. Personal immunity stops foreign states from infringing upon sovereign prerogatives of States or interfering with the official functions of a State official under the pretext of addressing an exclusively private act. The ICJ has found that there is "no more fundamental prerequisite for the conduct of relations between States" than the immunity of state officials while in office.

72. Functional immunity, "a well-established rule of customary international law going back to the eighteenth and nineteenth centuries and has been restated many times since. It gives State officials immunity from the jurisdiction of other states in relation to acts performed in their official capacity. This can be relied upon both by serving State officials and former officials with respect to official acts performed while in office. Immunity does not cease at the end of the discharge of official functions by the state agent because the act is legally attributed to the state, hence any legal liability for it may only be incurred by the state). The immunity is universal (erga omnes) and may be invoked towards any other state. But it may not exist for ever in relation to prosecution for international crimes.

73. An individual official is not to be held legally responsible for acts that are, in effect, those of the State; the immunity of the State itself is fortified by courts being prevented from indirectly exercising control over acts of the foreign state through proceedings against the official who carried out the act.

74. IMMUNITIES UNDER INTERNATIONAL LAW. In the Arrest Warrant Case, the ICJ declared that no exception exists under international law to the rule according immunity to serving state officials with regard to prosecution for international crimes. State officials cannot be prosecuted in foreign state courts for international crimes. Judicial opinion and State practice on this point are unanimous; personal immunity for international crimes has been invoked and recognised in recent years by several national courts including: Fidel Castro, with respect to criminal proceedings against Fidel Castro; H.S.A. et. al v S.A, with respect to criminal proceedings against Ariel Sharon in relation to alleged crimes against humanity and war crimes; Plaintiffs A, B, C, D, E, F v Jiang Zemin, with respect to civil proceedings against Chinese president Jiang Zemin in relation to allegations of torture, genocide and other human rights violations; Tachiona v Mugabe with respect to civil proceedings against Robert Mugabe in relation to allegations of torture; and, Application for Arrest Warrant Against General Shaul Mofaz.

75. With the exception of United States v Noriega, which is otherwise distinguishable, no case has been identified in which it was held that a serving State official exercising personal immunity has been subject to the criminal jurisdiction of a foreign state when it is alleged that he or she has committed an international crime.

76. However once a Head of State or State official leaves office, s/he may no longer enjoy personal immunities and can become liable to prosecution for any international crime they may have perpetrated while in office. "[j]urisdictional immunity may well bar prosecution for a certain period or for certain offences; it cannot exonerate the person to whom it applies from all criminal responsibility."
77. It has been held before certain national courts that State officials exercising functional immunity *ratione materiae* can be subjected to prosecution before foreign state courts for international crimes (once they leave office). 34

The following cases are on point: *Eichmann* in Israel, 35
*Barbie* in France, 36
*Kappler and Priebke* in Italy, 37
*Rauter, Albrecht and Bouterse* in the Netherlands, 38
*Pinochet (No. 3)* in the United Kingdom, *Buhler* in Poland, 39
*Pinochet* and *Scilingo* in Spain, 40
and *Miguel Cavallo* in Mexico. 41

78. The erosion of functional immunity reflects that acts amounting to international crimes are not to be considered as official acts to which functional immunity might apply. The decision of the House of Lords in *Regina v Bow Street Metropolitan Stipendiary Magistrate And Others, Ex Parte Pinochet Ugarte (No. 1)* ("*Pinochet (No. 1)*") centred upon this construction of immunity *ratione materiae*. 42

Although there is little consensus to be found amongst the reasoning of the Lords in that case, the effect of *Pinochet No. 3* can be summarised as follows: "[w]hatever the restrictions in the reasoning used by the Lords, it seemed that what emerged is that 'international crimes in the highest sense' cannot per se be considered as official acts. 43"

79. Some commentators 44 have contended that international crimes constitute violations of higher law (*jus cogens*) norms and that such norms must prevail over international immunities. However, this argument has been rejected by the International Court of Justice 45 and the European Court of Human Rights, 46 as well as by most national courts to have considered the issue, 47 including *Pinochet (No. 3)*, as per Lord Hope:

"... 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. 49"

80. Others argue that Functional immunity is inconsistent with universal jurisdiction. This argument rests upon the recognition that international law has developed rules that extend to domestic courts universal jurisdiction over certain international crimes committed by individuals in an official capacity. This new doctrine is fundamentally incompatible with the continued application of functional immunity with respect to international crimes, and thus the latter must be regarded as being displaced by the former. The Court in *Pinochet (No. 3)* appears to have endorsed this observation. 49

81. The immunities which had developed under international law are premised upon notions of sovereign equality, designed to operate with respect to inter-State (horizontal) relationships. Their application in a vertical framework is not firmly established. The issue of application of immunities before international criminal tribunals is not yet settled under international law

82. In the *Arrest Warrant Case*, the ICJ made clear that its finding that State officials continue to enjoy personal immunity in relation to prosecution for international crimes only applies with respect to horizontal prosecutions. With respect to vertical prosecutions, the Court held:

"the immunities enjoyed under international law... do not represent a bar to criminal prosecution in certain circumstances... [A]n incumbent or former Minister for Foreign Affairs may be subject to criminal proceedings before certain international criminal courts, where they have jurisdiction. Examples include the International Criminal Tribunal for the former Yugoslavia, and the International Criminal Tribunal for Rwanda, established pursuant to Security Council resolutions under Chapter VII of the United Nations Charter, and the future International Criminal Court created by the 1998 Rome Convention." (para. 61) 50

83. To the extent that such immunities are conferred to minimise interference with one State's political affairs by another, their relevance is engaged equally when a foreign State seeks to pursue interference through its own national courts, as when a foreign state seeks to pursue interference by delegating part of its jurisdiction to an international court to which the State is not a party. International immunities must endure, at least in part, the transfer from horizontal to vertical prosecutions, in order retain their legal force; otherwise, they are able to be circumvented by foreign states establishing international tribunals which dispense with the protection of immunities. 51

84. This line of reasoning was invoked by Judge Shahbuddeen in his dissenting opinion in *Krstić*, in which he
remarked:

"There is no basis for suggesting that by merely acting together to establish such a court States signify an intention to waive their individual functional immunities. A presumption of continuance of their immunities as these exist under international law is only offset where some element in the decision to establish such a court shows that they agreed otherwise."

85. Rather, the Court's statement that immunities will not apply "before certain international criminal courts, where they have jurisdiction" implies that the applicability or otherwise of international immunities will be dependent upon the terms of the treaty establishing the jurisdiction of the tribunal.

86. Following this argument, serving Heads of State would continue to enjoy the protection of international immunities unless and until their State submits to the jurisdiction of an international tribunal, as a consequence of which the state waives its immunity. In accordance with Art. 32 of the Vienna Convention on Diplomatic Relations waivers of immunity must be explicit; in this regard the remarks of Lord Goff in Pinochet (No. 3) are to be noted:

"In the light of the foregoing it appears to me to be clear that, in accordance both with international law and with the law of this country which on this point reflects international law, a state's waiver of its immunity by treaty must... always be express. Indeed, if this was not so, there could well be international chaos as the courts of different state parties to a treaty reach different conclusions on the question whether a waiver of immunity was to be implied."

87. The ICJ's declaration in the Arrest Warrant case arguably falls short of unequivocally removing the entitlement to immunity in vertical prosecutions, and instead implies such a determination must be made by reference to the instruments conferring jurisdiction to the relevant international tribunal. Thus, a distinction must be made between international tribunals created by UN Security Council resolution (the SCSL) or Security Council resolution under Chapter VII (the ICTY and the ICTR), and those established by treaty, namely the International Criminal Court. Due to the universal membership of the United Nations and provisions within the Charter which stipulate that member states are bound by the decisions of the Security Council, a decision by that body to create a tribunal which removes immunity would be applicable to all States. Treaties establishing an international tribunal, however, can only bind parties to the treaty, and therefore cannot deprive states of their international law immunities if such States are not party to the treaty.

88. So whether international immunities are applicable before a particular international tribunal may depend on the instruments creating the relevant tribunal expressly or implicitly remove the relevant immunity; and whether the state of the individual concerned is bound by the instrument removing the immunity.

89. SOME OTHER CASES President Al Bashir of Sudan – now the northern part of the split Sudan – as indicted by the ICC in for various crimes. Efforts were made in his behalf – unsuccessfully – to keep genocide off the charge sheet. Sudan has never acknowledged the court. President Bashir has not surrendered or engaged in any way with the court. Countries obliged to arrest him should he touch down have refused to do so on the grounds on his Head of State immunity. But he has not sought to bring the Head of State issue before the ICJ for determination

90. The issue was touched on indirectly by the ICC when it dealt with question of whether Malawi and Chad had acted in breach of their obligation to cooperate with the ICC by failing to arrest him when he visited those countries.

91. The finding that there was no Head of State immunity to justify their not arresting him can be criticised on the basis that the ICJ only stated that foreign ministers may be subject to criminal proceeding in certain international courts, where they have jurisdiction. ....... the ICTY in Prosecutor v. Blaskic (supra) recognised that immunities do not disappear simply because the tribunal is international, as did Judge Shahabuddeen in his dissenting opinion in Prosecutor v Krstic (supra). The Pre-Trial Chamber in citing the practice for the rule it comes up with fails to mention the practice of States parties to the ICC Statute. Many of these States have national legislation, implementing the ICC Statute, in which they draw a distinction between the immunity of States parties to the Statute and the immunities of those States not party, recognising the former have waived their immunities via Art. 27 of the Statute but that the latter have not. 57

92. But there has been no effort by President Bashir to establish that he enjoys immunity; he has not sought to argue the point at the ICC or to have it argued on his behalf without thereby recognising of the court (technically possible). He has not gone to the ICJ to test this issue that remains uncertain.

93. Several other cases and events show that uncertainty. For example "full immunity from criminal jurisdiction and inviolability" of an incumbent head of state before the courts of another state was reaffirmed by the ICJ in
Djibouti v. France, after the Arrest Warrant case. And even though the Committee of African Jurists established by
the African Union to examine the question of the prosecution of Hissène Habré, among others, have
considered that state officials do not enjoy immunity from proceedings arising from certain crimes, immunity of
the former U.S. Secretary of Defense Donald Rumsfeld in a criminal procedure involving allegations of acts
amounting to crimes under international law was (unsurprisingly?) recognised by the District Prosecutor of Paris.

94. Why has President Bashir not sought to have a clear answer to a question so important to him?

95. The development I had expected to provide an interesting focus for today's lecture when I drafted the
programme last year is the Kenyatta et al case at the ICC. It has only partly lived up to expectations. When
investigated and charged by the ICC for post election violence committed in 2007/8 Kenyatta and Rutto were
MPS hoping to lead their parties to the presidency. They were successful and became President and Vice
President respectively of Kenya. The Government of Kenya tried unsuccessfully to regain jurisdiction over both
men. Both have surrendered without complaint to the jurisdiction of the ICC in The Hague being given reasonably
generous leave of absence from the court - the equivalent of bail - to run the country. The case against Rutto is
active. That against Kenyatta is stalled and the Prosecution's efforts to obtain witnesses necessary to its
continuing – many witnesses have become unavailable before and during the trial – have had he case adjourned
until the Autumn. Will it continue then?

96. In other settings – the African Union for example – the Kenyan authorities have said much about the
immunity to which its President is entitled. But the issue has not been raised at the ICC let alone at, or through,
the ICJ (and there are arguments in favour of saying that even the jurisdiction of the ICC could bend to immunity
of Heads of State when in office – see Article 98 of the Rome Statute – although such an argument has much
more in its favour for a President of a non –States Party such as Sudan than for the President of a States party
such as Kenya.

97. Some have thought the two Kenyan Officers of State are so confident of winning on the evidence available in
the case – and people may always be reluctant to give evidence against a serving head of state – that it is better
to face the court and win that to play the uncertain game of contesting jurisdiction and being left with the stain
of an unresolved allegation on them.

98. What will happen if the ICC allows the case against Kenyatta to continue? Will he then – at the very last
minute – play the immunity card? Will he actually carry on to the last, travelling to and from The Hague knowing
that in the end he will have to bring toothbrush and much more than an overnight bag if the case goes full term
and leads to a conviction?

99. Libya was another case where the issue of Head of State immunity might have been raised. The International
community raced to recognise the new Libyan regime way before it could have been justified in doing so and the
ICC cooperated in regime change by indicting Colonel Muammar Gadhafi with far greater speed than it had done
in any other case, as if to join the pressure for regime change. Libya had not signed up to or ratified the Rome
Statute. He could challenge the referral in the ICJ – and he had nothing left to lose but his life. Rodney Dixon and I
were instructed – sadly too late – to appear to do just that. Tripoli fell as did the Colonel. The issue could not be
argued. (And here is the power of attorney we got as one of the last acts of the former regime)

100. CONCLUSIONS are, perhaps, different what I would have expected them to be when I had been hoping to
run an argument at the ICJ about Head of State immunity. What an interesting case that would have been? How
many intricate arguments to advance; how many to defend? And – at the ICJ – all member states of the UN
would be entitled to participate. Would they? In particular would the USA, Russia and China? If so would they be
saying – for example of a non-States Party to the Rome Statute such as Sudan and its President – that he had
no immunity when their Heads of State would be in exactly the same legal position? Of course they might think –
like the late Robin Cook – that these courts were never meant for them and that by might they could resist their
jurisdictions – but would it not be fun see them wriggle? And what would the UK do.

101. To identify the lawyers potential delight points back to my opening observation – subversive,
unreconstructed student rabble rouser that I might once have been (I wasn't – but no matter) - it is actually not
quite so simple as that.

102. As I suggested at the start polarised positions on the scope of these immunities are probably all impossible
because the law does not have the flexibility that is essential to the management of the affairs of men. Political
influence of legal systems and of the law by the bodies that create them may be unavoidable and even if the
influence is not always positive it may at least be capable of avoiding some real harm. Were it possible for some
state visited by Tony Blair or George W Bush in the middle of their terms of office to arrest them for crimes
committed in a conflict, how much good would that do and how much harm? How possible would it be? And if
Henry Kissinger bears responsibility for crimes against humanity in Vietnam will it help to arrest him now given
his role as a state agent rather than to require the USA – if that would be the real objective of such an arrest – to
set up a fair process for investigation of whether they did commit war crimes?

103. The radical within yields to the pragmatist.
104. And as to Heads of State like President Bashir (or Gadhafi had he lived) may it not be preferable to negotiate with them as long as they retain, or may retain, authority, even if in time to come they escape to lives in exile like Idi Amin or have to face trials after they leave office like Taylor or Milosevic?

105. Even though the compliance of Kenyatta may be setting a precedent of weight to all other proposed trials of sitting heads of state it should be remembered that he is, by choice of his nation, someone whose vulnerability to jurisdiction has been specifically provided for. States parties observing his trial and fearing for their own futures could – theoretically – leave the court and return to the position of Bashir where jurisdiction is more arguably limited by the effective shield of an immunity. And, in any case, the ICC may not survive in its present form or at all for that long and any successor courts could articulate with greater care than the Rome Statue did, the precise surrender of immunity to a court of lawyers. The Kenyatta case could, in theory, be an example of regime change achieved in court. If that happens or is threatened politicians may think again about the creature they have constructed as they contemplate how their own conduct that could expose them to such a court.

106. I have sought to show how legal systems may always ultimately respect their masters, for example in deciding who is or is not indicted, in what evidence is presented and (unhappily, sometimes) in being compliant when there are things to cover up. The uncertainty and inevitable flexibility of decision making about Head of State immunity is more of the same. And it supports the proposition that lawyers cannot and should not rule the world.

107. But lawyers have a critical function in how we now deal with armed conflicts. In all the cases about Heads of State and senior government officers, legal processes show the politicians that there are things of which they should be fearful if they disregard the law. Being immune from process for the time being is not to be immune from the law. Facing the uncertainty of the law now and to come mean that if any leaders now think that perhaps what they did or allowed to happen in particular conflicts could be judged unlawful and if this that makes them fearful of losing the freedom to travel then their experience will be understood by the next generation and they may be more cautious. It is a slow process but it may work.

108. Hundreds of years ago it would only be Heads of State to whom the citizen would have looked for decisions about armed conflicts and how they should be fought. As the conduct of the individual soldier and his superiors in battle are more clearly controlled by the law with a developing expectation that criminality in the course of conflict may lead him to a court, he can at least hope that the uncertain pressures on his leaders whose immunity is of uncertain scope will reduce the prospects of his being led into conflict – unlawful or at all.

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1. [The Immunity Question - Boston College International and Comparative Law Review volume 25, Issue 1 Article 6,12-1-2002 Adam Isaac Hassan]

2. [And note Art. 7 of the International Law Commission's Draft Code of Crimes Against the Peace and Security of Mankind, adopted in 1996, which stipulates that "[t]he 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]


4. [The House of Lords first decision to revoke recognition of immunity was set aside after it was discovered that a link existed between a member of the court and a member of Amnesty International, an organization that had intervened in opposition to Pinochet.]

5. [Footnote 1 above]


7. [Prosecutor v Krstic, Decision on Application for Subpoenas, No. IT-98-33-A, para. 26 (July 1, 2003)]

8. [Prosecutor v Charles Taylor, Immunity from Jurisdiction, No. SCSL-03-01-I (May 31, 2004)]

9. [For summary see http://www.judicialmonitor.org/archive_0706/casesofnote.html]

10. [Much of what follows is taken directly from a paper Rodney Dixon QC and I prepared for a client. The paper was designed to be – and was – distributed at an African Union Summit in Kampala and so is a public document from which I, as author, can quote extensively]

11. [Regina v Bow Street Metropolitan Stipendiary Magistrate and Others, Ex Parte Pinochet Ugarte (No. 3) [2000] 1 A.C. 147, 188]

12. [The Vienna Convention on Diplomatic Relations, 1961 grants diplomatic agents of states immunity from the criminal and civil jurisdiction of the foreign state to which they are accredited. See Arts. 29, 31, and 23]

13. [This is not an exhaustive list. The ICJ has stated that these immunities are available to ‘diplomatic and consular agents, [and] certain holders of high-ranking office in a State, such as the Head of State, Head of Government and Minister for Foreign Affairs’; see Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v Belg.) (Feb 14, 2002), 41 ILM 536 (2002), hereinafter ‘Arrest Warrant Case’, para 51.]

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19. [Chanaka Wickremasinghe, 'Immunities Enjoyed by Officials of States and International Organisations', in Malcolm D. Evans (ed), International Law, 2003, 403]


22. [Attorney General of Israel v Eichmann, 36 ILR 277, 308-09 (Sup. Ct. 1962)]


24. [Arrest Warrant Case, para. 58]

25. [No. 1999/2723, Order (audiencia nacional Mar. 4, 1999) (Spain)]


27. [82 F. Supp.2d 875 (N. D. Ill. 2003)]


30. [27 117 F. 3d 1206 (11th Cir. 1997). Immunity was not accorded in this case on the ground that the US government had never recognised general Noriega (the de facto ruler of Panama) as head of state. Dapo Akande, 'International Law Immunities and the International Criminal Court,' 98 The American Journal of International Law 3 (Jul. 2004), footnote 28.]

31. [Dapo Akande, 'Immunity Immunities and the International Criminal Court,' 98 The American Journal of International Law 3 (Jul. 2004), 411. See Richard Beeston, 'Iran Threatens to Hit Back over Diplomat's Arrest', The Times (London), Aug. 28, 2003 at 17, describing how Iranian diplomat Saied Baghban was detained in Belgium in August 2003 in regards to allegations relating to the bombing of a Jewish center in Argentina, but was released on the grounds of diplomatic immunity; Andrew Osborn, 'Dutch Protests Greet Israeli Envoy...', The Guardian, Aug. 16, 2004 at 19, which provides an account of the United Kingdom's recognition of the immunity of the then Israeli defence minister with respect to allegations of war crimes committed in the West Bank]


33. [Arrest Warrant Case, para. 60]

34. [The ICJ's decision in the Arrest Warrant Case failed explicitly to distinguish between personal and functional immunity. Rather, the court drew a distinction between incumbent and former state officials, a distinction which mirrors the binary relationship of personal and functional immunity. With respect to functional immunity, the Court suggested that a State official would continue to benefit from functional immunity but only with respect to 'official acts', and not those committed in a 'private capacity' (at para. 61). Prof. Cassese argues that the ICJ was unusually concise and unfortunately vague in its analysis of this issue, and the obiter dicta on the application of functional immunity with respect to international crimes failed to take into consideration the wealth of state practice supporting the argument that functional immunity cannot be invoked with respect to international crimes, See Antonio Cassese, 'When May Senior State Officials Be Tried for International Crimes? Some Comments on the Congo v Belgium Case, 13 European Journal of International Law 4 (2002)]

35. [Judgment of the Supreme Court of Israel of 29 May 1962, 36 ILR, 277-342]

36. [78 ILR, 125 and 100 ILR 331]

38. [Rauter, Decision of the Special Court of Cassation of 12 January 1949, in Annual digest 1949, 526-548; Albrecht, Judgment of the Special Court of Cassation of 11 April 1949, in Nederlandse Jurisprudentie 1949, 747-751, summarised in Annual Digest 1949, 397-398; Bouterse, Decision of 20 November 2000 of the Amsterdam Court of Appeal]e

39. [Annual Digest 1948, at 682]e


41. [Decision of 12 January 2001 delivered by Judge Jesus Guadalupe Luna, authorising the extradition of Ricardo Miguel Cavallo to Spain]e

42. [While the decision was later set aside (in Pinochet No.2)) after one of the Law Lords who heard the case was found to have links with one of the interveners in the case, Amnesty International, the final judgment (Pinochet No. 3) was founded upon similar reasoning. Thus, the discussion of the construction of 'official acts' undertaken by the Lords in Pinochet No. 1 retains its relevance]e

43. [Brigitte Stern, 'Immunities for Head of State: Where Do We Stand?', in Lattimer and Sands (Eds), Justice for Crimes Against Humanity (Hart Publishing, 2003), page 103]e


45. [Arrest Warrant Case, para. 58]e


48. [Regina v Bow Street Metropolitan Stipendiary Magistrate and Others, Ex Parte Pinochet Ugarte (No. 3) [2000] 1 A.C. 147 at 243]e

49. [At 205, per Browne Wilkinson LJ, 267 per Hutton LJ, 279 per Millet LJ]e

50. [Phillipe Sands and Alison McDonald, Submissions of the Amicus Curiae on Head of State Immunity to the Special Court for Sierra Leone, p 22; 'Immunities for Head of State: Where Do We Stand?', in Lattimer and Sands (Eds), Justice for Crimes Against Humanity (Hart Publishing 2003) Diane Orentlicher, Submissions of the Amicus Curiae on Head of State Immunity to the Special Court for Sierra Leone, p15: 'Although relevant international jurisprudence for the most part has not provided a reasoned explanation for the distinction drawn between national and international courts for purposes of this rationale, it is reasonable to suppose that states have considered the collective judgement of the international community to provide a vital safeguard against the potentially destabilizing effect of unilateral judgment in this area']e

51. [This argument is made in Dapo Akande, 'International Law Immunities and the International Criminal Court,' 98 The American Journal of International Law 3 (Jul. 2004), 418. It is also recognised by the Submissions of the Amicus Curiae on Head of State Immunity, authored by Philippe Sands and Alison McDonald, which was relied upon by the SCSL in the Immunity from jurisdiction matter with respect to Charles Taylor. The amici curiae noted that if the SCSL had not been established pursuant to Security Council resolution the situation may be materially different; for example, two States may not... establish an international criminal court for the purpose, or with the effect, of circumventing the jurisdictional limitations incumbent on national courts']e

52. [Prosecutor v Krstic, Decision on Application for Subpoenas, Dissenting Opinion of Judge Shahabuddeen, paras. 11-12]e

53. [Regina v Bow Street Metropolitan Stipendiary Magistrate and Others, Ex Parte Pinochet Ugarte (No. 3) [2000] 1 A.C. 147 at 217]e

54. [UN Charter, Article 25]e

55. [Vienna Convention on the Law of Treaties, Art. 34]e

