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Immunity for International Crimes?

Developments in the Law on Prosecuting Heads of State in Foreign Courts

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Summary points

- International courts do not have the capacity to prosecute all international crimes committed anywhere in the world.
- Attempts in domestic courts to prosecute high-level foreign state officials for international crimes have generally ended in failure. But there have been some convictions of more junior officials for torture and crimes against humanity.
- State officials are generally entitled to continuing immunity from foreign court proceedings for acts performed in their official capacity.
- The practice of some courts and a substantial amount of commentary suggest that immunity does not apply to criminal prosecution of *former* officials for international crimes committed while they were in office, but the exact limits of this exception to immunity are not clear. There remains a tension between the requirements of justice and the need to conduct international relations smoothly and effectively.
- The International Law Commission of the UN is working on the subject but it is uncertain whether it will help resolve the current uncertainties in a way that reflects the delicate balance of interests in play.

Introduction

The notion that individuals may be criminally responsible for certain acts that constitute international crimes under international law, regardless of the law of their own state, is now well recognized. Furthermore, over the last decade several leaders and former leaders have been charged and, in some cases, prosecuted and convicted, by international courts for international crimes. Charles Taylor, the former president of Liberia, is awaiting judgment before the Special Court for Sierra Leone for war crimes and crimes against humanity committed during the conflict in Sierra Leone; Jean Kambanda, Rwanda's former prime minister, was convicted of international crimes before the International Tribunal for Rwanda; Serbia's former president Slobodan Milosevic was prosecuted before the International Criminal Tribunal for the Former Yugoslavia (ICTY) for war crimes and crimes against humanity; President Omar al-Bashir of Sudan is subject to an arrest warrant by the International Criminal Court (ICC) for war crimes, crimes against humanity and genocide; and most recently the ICC has issued an arrest warrant for Libya's Muammar Gaddafi for crimes against humanity.

These international courts are 'purpose-built' for the prosecution of such crimes that are, by their very nature, often committed by state officials in pursuance of state policy. Most immunities to which such officials are entitled under international law have been set aside in the statutes establishing the international courts concerned so that prosecutions may proceed unconstrained by such obstacles. However, the position with regard to immunities before national courts is less clear.

The judgment of the UK House of Lords in *Pinochet (No. 3)*[1] was hailed by many as a new dawn in the struggle by victims, non-governmental organizations (NGOs), human rights lawyers and others to bring former leaders to account for international crimes[2] committed while in office, and was seen as signalling an end to the impunity they formerly enjoyed. The decision spawned an extensive literature (mainly within Europe). Generally speaking, the writers concerned, although often differing in their view as to the underlying rationale for an exception to immunity, were certain that it is now well accepted that such an exception has emerged.[3] More recently, however, the International Law Commission (ILC), which included the topic 'Immunity of state officials from foreign criminal jurisdiction' in its work programme in 2007, has struck a more cautious note.[4]

The International Law Commission

The ILC is composed of 34 international law experts from numerous jurisdictions who sit in a personal capacity and not as representatives of governments. The purpose of the ILC is to promote the progressive development of international law and its codification. A distinction is made between the former as meaning 'the preparation of draft conventions on subjects which have not yet been regulated by international law or in regard to which the law has not been sufficiently developed in the practice of states' and codification, which consists of the more 'precise formulation and systematization of rules of international law where there has already been extensive state practice, precedent and doctrine.' In practice, the work of the ILC usually involves aspects of both development and codification.

1 *R v Bow Street Magistrates' Court ex parte Pinochet (No. 3)* [2000] AC 147.

2 The term 'international crimes' is used here to refer to crimes recognized by international law itself, which impose criminal responsibility directly on individuals. In most cases they are the subject of specific conventions that define the offence and create a framework of extra-territorial jurisdiction over those crimes for states parties. Where such conventions have been widely ratified they may have contributed to a system of universal jurisdiction available to all states. Prime examples are the so-called core crimes covered by the Rome Statute of the International Criminal Court, which include genocide, war crimes and crimes against humanity together with torture and enforced disappearance as separately defined in the relevant UN conventions.

3 See e.g. *Advisory Report on the Immunity of Foreign State Officials* (No. 20, The Hague, May 2011) produced by the Advisory Committee on Issues of Public International Law (*Commissie van advies inzake volkenrechtelijke vraagstukken*, CAVV) at the request of the Netherlands Minister for Foreign Affairs.

4 It appointed Roman Kolodkin as Special Rapporteur and asked the secretariat to prepare a memorandum on the topic. Since then the Special Rapporteur has published a preliminary report and two further reports, with the topic being debated in plenary session in May 2011.

Questions regarding the immunities of foreign leaders and other high officials arise more frequently now than they once did because of the development of universal jurisdiction for international crimes.[5] What then has been the position before national courts in the years following the *Pinochet* judgment? A number of attempts have been made in the United Kingdom to prosecute serving and former foreign heads of state and other high-level officials for international crimes. Similar attempts have occurred in other (mostly European) jurisdictions and, despite very limited success, such cases continue to be brought. In February 2011 it was widely reported that former US president George W. Bush had cancelled a visit to Switzerland following moves by human rights activists to submit a complaint against him to Swiss prosecutors for allegedly ordering the torture of terrorist suspects. In March, in London, during a visit by the former president of the Soviet Union Mikhail Gorbachev, an *ex parte* application for his arrest was made for alleged torture. The court dismissed the application on the grounds that he was entitled to immunity as a member of a special mission and that the elements of the alleged offence had not been made out. In 2009, an Italian court convicted the US Central Intelligence Agency's Milan station chief and 23 other officials of crimes in connection with the extraordinary rendition of a terrorist suspect to Egypt. Spanish courts have issued indictments against a number of former South American heads of state for genocide, torture and related crimes, although so far only a relatively junior official has been convicted of crimes against humanity. In France, a Mauritanian general and a Tunisian official have been convicted *in absentia* for acts of torture carried out abroad. More recently, European arrest warrants were issued in respect of a number of Rwandan government officials, leading to the arrest of the Rwandan chief of protocol in Germany and her extradition to France. Meanwhile the complex saga regarding the proposed prosecution and trial of the former president of Chad, Hissène Habré, rumbles on.

This is a snapshot of some of the proceedings brought in recent years against former heads of state and other officials in foreign domestic courts. In some cases, proceedings have concerned crimes committed outside the forum state without any traditional jurisdictional link to that state, with proceedings brought on the basis of laws establishing extra-territorial jurisdiction in relation to those crimes. The facts in these cases were often very different and the outcomes variable. Not all the cases involved high-level officials, although where functional immunity[6] is concerned the same principles apply. This snapshot does, nevertheless, serve to illustrate the increasing frequency with which such cases are being brought in some jurisdictions and the corresponding need to chart a clear course through what may seem a rather confusing and, on the face of it, inconsistent jumble of actions by national courts and prosecuting authorities.

In reality, whether a prosecution proceeds against a high-ranking foreign state representative will depend on many factors, political and legal, not least the particular features of the prosecuting state's laws on jurisdiction and procedures. In some of the cases mentioned above, the issue of the defendant's immunity was raised and considered by the national court concerned. In others, it appears to have been ignored or overlooked, and this factor may be of some significance given the approach taken by the International Court of Justice (ICJ) in the case concerning *Certain Questions of Mutual Judicial Assistance in Criminal Matters (Djibouti v France)*.[7] In it the ICJ suggested that, in the case of functional immunity, it is for the official's home state to notify the state seeking to exercise jurisdiction and that the latter is not obliged to raise or consider the matter of its own accord.[8]

This paper discusses the extent to which prosecutions may be possible in national courts and, in particular, examines whether the existence of immunities still constitutes a significant obstacle in that respect. It deals with the position of foreign leaders and former leaders before the courts of other states and not with their position

5 See Louise Arimatsu, *Universal Jurisdiction for International Crimes: Africa's Hope for Justice*, Chatham House Briefing Paper, IL BP2010/01, April 2010.

6 This is defined below.

7 *Certain Questions of Mutual Judicial Assistance in Criminal Matters (Djibouti v France)*, Judgment, ICJ Reports 2008, p. 177 at paras 194–97.

8 Contrast the position in the United Kingdom under the State Immunity Act 1978: where a foreign state itself is being sued, this requires the courts to respect any immunity it may have of their own motion.

before their own domestic courts, which is not a matter of international law.[9] The paper considers whether there are recommendations to be made for the work of the ILC and whether the latter will be able to help to point the way ahead to a resolution of what is often perceived as the competing interests of justice and international relations.

Types of immunity

Under international law there are two broad types of immunity. The first is immunity *ratione personae*, also known as 'personal' immunity. This is an extensive immunity that can be wide enough to cover both public and private acts, and includes inviolability and immunity from criminal jurisdiction. It is derived from the office of the individual concerned and, according to the ICJ, is enjoyed by heads of state, heads of government, foreign ministers and, possibly, a limited category of other very high-ranking state representatives. Although broad in its substantive application, this type of immunity is limited both temporally and as to the category of office-holders to whom it may apply. Once the individual has left office, he or she ceases to be entitled to such immunity. The second is immunity *ratione materiae*, also known as 'functional' immunity. This covers the official acts of all state officials and is determined by reference to the nature of the acts in question rather than the particular office of the official who performed them. As such, a former state official, including a former head of state or head of government, can claim the benefit of such immunity even after leaving office.

A number of theories have been advanced in support of the grant of such immunities. Both types are based on notions as to the independence and equality of states and the resulting view that no state should claim jurisdiction over another. Both belong to the state, not the individual, and can be waived by the state should it choose to do so. Broadly speaking, both have developed to enable officials to carry out their public business free from interference by the exercise of jurisdiction by another state, and thereby to secure the effective and peaceful conduct of international relations. Over time this has been further elaborated into a theory of functional necessity by which the immunities are justified as necessary in order for the official to perform his or her functions.[10]

There are, however, some significant historical differences between the two immunities. Personal immunity, which is restricted to a limited category of high state officials, is also linked in its origin with notions as to the inherent dignity and majesty of sovereigns and their close identification with the state itself, both as 'organs' of the state and as their representatives in external relations. This 'representative' theory is founded on the premise that the office-holder concerned personifies the state itself. By contrast, functional immunity, which may apply to all serving and former officials of whatever rank, rests on the more practical rationale that an individual official should not be held responsible for acts that are, in reality, those of the state. It also prevents the circumvention of the immunity of the state through proceedings brought against the official who acted on behalf of that state.[11]

Personal immunity

The decision by the ICJ in the *Yerodia/Arrest Warrant* case held that serving heads of state, heads of government and foreign ministers enjoy a broad personal immunity from the jurisdiction of foreign domestic courts, including immunity from prosecution for international crimes.[12] Following this judgment, a number of national courts have dismissed cases alleging the commission of international crimes by incumbent heads of state and heads of government on the ground that immunity *ratione personae* bars proceedings.[13]

9 Domestic courts are often not in a position to take any effective action for political reasons and/or because prosecution is barred by extensive immunities conferred by local laws.

10 The ILC has noted that this is a theory that appears to be 'gaining ground in modern times'. See International Law Commission, Report covering its 10th Session, 1958, pp. 16–17.

11 See e.g. *Zoernsch v Waldock* [1964] 1 WLR 675, 692 (CA per Diplock LJ): 'A foreign sovereign government, apart from personal sovereigns, can only act through agents, and the immunity to which it is entitled in respect of its acts would be illusory unless it extended also to its agents in respect of acts done by them on its behalf.'

12 *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium)*, Judgment, ICJ Reports 2002, p. 3; 128 ILR 1. The ICJ made it clear that such immunity subsists even where it is alleged that an international crime has been committed. It subsequently reaffirmed its judgment as regards heads of state in *Certain Questions of Mutual Judicial Assistance in Criminal Matters (Djibouti v France)*.

13 See e.g. *Re Sharon & Yaron*, 42 ILM (2003) 596 (Belgium, *Cour de Cassation*); *Mugabe* (2004) 53 *International and Comparative Law Quarterly* (ICLQ) 769 (UK Judgment of Senior District Judge, Bow St, 14 January 2004); and *Kagame, Auto del Juzgado Central Instruccion* No. 4 (Spain, Audiencia Nacional 2008).

Heads of state

The personal immunity of incumbent heads of state had been widely recognized prior to the ICJ ruling.[14] In the *Pinochet* case, the UK House of Lords reaffirmed the absolute inviolability and immunity from criminal jurisdiction of a foreign serving head of state[15] and recognized that an extensive personal immunity for such persons had been reflected in earlier decisions of a significant number of national courts in both civil and criminal proceedings.[16]

Heads of government and foreign ministers

The position of heads of government and foreign ministers was less well developed and this aspect of the ICJ ruling has attracted some criticism. Traditionally the two offices have been linked in international law with that of head of state.[17] There appears to have been a general acceptance that a head of government enjoys immunities similar to a head of state[18] and the little state practice that exists supports that conclusion.[19]

The position of foreign ministers was less well defined and the absence of any clear decisions by national courts based upon a foreign minister's personal immunity has prompted some commentators to argue that there is simply no support in state practice for the ICJ's application of such immunity to foreign ministers.[20] On the other hand, there is no doubt that foreign ministers have been treated as a special case in the literature.[21] It is notable that, on the rare occasions where such ministers have faced proceedings in foreign courts, the latter have generally found a reason to dismiss them, albeit on minimally reasoned grounds of 'diplomatic immunity' or 'special missions immunity'.[22]

Other high officials entitled to personal immunity?

The judgment of the ICJ left open the question as to what other categories of high-ranking state representative may benefit from a similar wide-ranging personal immunity. The court made it clear that, for the purposes of the case, it was only considering the immunity from criminal jurisdiction and inviolability of an incumbent minister for foreign affairs. However, the language used in paragraph 51 of the judgment, with its reference to 'certain holders of high-ranking office in a state, such as the head of state, head of government and minister for foreign affairs', suggested that there may be other holders of high office who also enjoy such immunities.[23]

The ICJ stated that such immunity is not for the personal benefit of the individual concerned and that the rationale for it was that foreign ministers needed such immunity in order effectively to fulfil their functions, which include frequent travel on diplomatic missions on behalf of their state. The court placed considerable emphasis on the fact

14 See Sir Arthur Watts, 'The Legal Position in International Law of Heads of State, Heads of Governments and Foreign Ministers', *Recueil des Cours*, Vol. 247 (1994-III).

15 See Section 20 UK State Immunity Act 1978.

16 See also ILC, *Immunity of State Officials from Foreign Criminal Jurisdiction: Memorandum by the Secretariat UN Doc A/CN.4/596*, 2008, pp. 62–63.

17 Article 7.2 of the Vienna Convention on the Law of Treaties recognizes that all three are 'in virtue of their functions and without having to produce full powers considered as representing their state … for the purposes of performing all acts relating to a treaty.' Article 21(2) of the 1969 Convention on Special Missions refers to both heads of government and foreign ministers and suggests that both, like heads of state, are entitled to privileges and immunities under international law in addition to those conferred by the convention itself. See also Watts, 'Legal Position'.

18 See Lady Hazel Fox, 'Privileges and immunities of the head of a foreign state and ministers', in Ivor Roberts (ed.), *Satow's Diplomatic Practice* (Oxford University Press, 6th edn, 2009) 12.17, p. 184; and *Institut de Droit International,* Resolution on Immunities from Jurisdiction and Execution of Heads of State and of Government in International Law, 26 August 2001.

19 In *Saltany and others v Reagan and others* (1988) 80 ILR 19, affirmed (1989) 87 ILR 679, for example, a civil case, a number of Libyan nationals brought a complaint in a US court against the United States and numerous additional defendants, including Ronald Reagan, Margaret Thatcher and the United Kingdom. They alleged that the defendants were involved in the commission of war crimes resulting in deaths and injuries to the plaintiffs. The court dismissed the complaint against the head of government, Margaret Thatcher, accepting the State Department's 'suggestion' that she was immune from the jurisdiction as 'the sitting head of government of a friendly foreign state'.

20 See Dapo Akande and Sangeeta Shah, 'Immunities of State Officials, International Crimes, and Foreign Domestic Courts', 2010 EJIL 21(4), pp. 815–52.

21 See Arimatsu, *Universal Jurisdiction for International Crimes.*

22 See *Chong Boon Kim v Kim Yong Shik and David Kim,* Circuit Court (First Circuit, State of Hawaii 1963) (1964) *American Journal of International Law* (AJIL) 58, p. 186, where a US court dismissed proceedings brought against the Korean foreign minister who was on an official visit to the United States. See also *Ali Ali Reza v Grimpel* (1961) 47 ILR 275 where a French court in dismissing a claim to immunity by a minister of state of Saudi Arabia did so in terms which, although *obiter*, suggested that had he been foreign minister he would have been entitled to immunity.

23 It appears that opinions within the ILC vary on this point with some members arguing that such personal immunity should be restricted to the so called 'troika' of head of state, head of government and foreign minister. See International Law Commission, *Provisional Summary Record of 3115th Meeting UN Doc A/CN.4/SR.3115* (21 September 2011).

that a foreign minister has full powers to act on behalf of a state, observing that this is a position similar to that of a head of state or head of government in that 'he or she is recognized under international law as representative of the state solely by virtue of his or her office'. It went on to note that a foreign minister is 'frequently required to travel internationally and must be in a position freely to do so whenever the need should arise' and must be 'capable at any time of communicating with representatives of other states'.

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There is, as yet, little guidance in state practice or in the jurisprudence of the ICJ itself as to which other offices of state may be covered.[24] The difficulty with applying an immunity based largely upon the fact that a particular office is charged with international functions is that, in modern times, such functions have been extended to a much wider range of officials than before. Many government ministers, both senior and junior, and even officials exercise such functions and are required to travel in order to do so. It is now common for ministers other than those designated as responsible for foreign affairs to represent their state internationally.[25] It seems clear, however, that the ICJ had in mind holders of office of a similar rank and political significance to those of the three high officials mentioned in its judgment. In practice, such immunity is therefore likely to be confined to senior ministers at 'cabinet level' (including, presumably, a vice-president or deputy prime minister) who frequently represent their state internationally and where arrest or detention could reasonably be construed as a serious interference with the government of the foreign state concerned.[26] This is consistent with the view of the ILC's Special Rapporteur, who has stated that such immunity is confined to 'a narrow circle of high-ranking state officials'.[27]

In the United Kingdom there is no specific legal provision conferring immunity on heads of government, foreign ministers or other senior officials, and the matter is governed by customary international law.[28] The English courts (albeit at magistrates' level only) have accorded personal immunity to defence ministers (*Re Mofaz*[29] and *Re Ehud Barak*[30]) and to a minister of commerce and

24 In its judgment of 4 June 2008 in the *Case Concerning Certain Questions of Mutual Judicial Assistance in Criminal Matters (Djibouti v France)*, the ICJ did not suggest that the Djiboutian head of national security or its *Procureur de la République* would enjoy personal immunity as high-ranking officers of state. France had stated earlier that, in its view, they did not, 'given the essentially internal nature of their functions'. See *Certain Questions of Mutual Judicial Assistance in Criminal Matters (Djibouti v France)*, pp. 241–42, para 186.

25 See *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of Congo v Rwanda)*, Judgment, ICJ Reports 2006, p. 6, where the court noted that in modern international relations ministers, other than the head of state, head of government and foreign minister, may represent their state internationally in specific fields and may bind it by their statements on those matters. It stated that 'the possibility cannot be ruled out in principle that a Minister of Justice may, under certain circumstances, bind the state he or she represents by his or her statements'.

26 There is also a question as to whether in a monarchy, the heir apparent, who occupies a specific constitutional role and may at times deputize for the head of state in the discharge of the latter's international functions, should also be regarded as benefiting from personal immunity. See *Kilroy v Windsor, Civil Action No. C-78-291* (1978) 81 ILR 605, which was decided on the basis of special-missions immunity. There is, therefore, no clear authority on the point. See Watts, 'Legal Position', pp. 75–81.

27 Roman Kolodkin, *Second Report on Immunity of State Officials from Foreign Criminal Jurisdiction, UN Doc A/CN.4/631*, 10 June 2010, para 94(i).

28 For contrast with the position on heads of state see fn 15. In the United Kingdom, customary international law forms part of the common law. In the *Pinochet* case, the House of Lords, although deciding the case on the basis of section 20 of the State Immunity Act 1978, accepted the principle that UK law would give effect to immunities under customary international law in the absence of a statutory requirement not to do so.

29 *Re Mofaz*, 12 February 2004, England, Bow St Magistrate's Court, 128 ILR 709 where it was stated 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 Minister would automatically acquire a label of state immunity. However, I do believe that the Defence Minister may be a different matter.'

30 Unreported but see E. Franey, *Immunity, Individuals and International Law* (Lambert Academic Publishing, 2011), pp. 146–47.

international trade (*Re Bo Xilai*[31]). Recently, however, the Divisional Court held that the secretary of the executive office of the National Security Council of Mongolia fell clearly outside the circle of high officials entitled to such immunity,[32] describing him as an administrator far removed from the narrow circle of those who hold the high-ranking office to be equated with the state they personify and with those identified by the ICJ.

Recognition of individual as relevant office-holder

Where personal immunity is accorded, it is a necessary prerequisite for the forum state to accept the individual concerned as the head of a recognized state, the head of government of that state, its foreign minister or the holder of some other high office of state to which personal immunity should be accorded. There is no internationally prescribed procedure for satisfying a domestic court on this matter and, in practice, courts tend to rely heavily upon the opinion of the government. It is a matter for each state to decide for itself its constitutional structure and, in particular, the kind of head of state it will have and the various powers and functions attaching to that office and to the office of its head of government and foreign minister. In practice, the forms and titles of such offices can be as varied as the means by which individuals ascend to and depart from such office. Such matters do not usually raise issues of international law and are essentially matters of domestic concern for each state.

Problems can arise, however, where there is uncertainty as to the existence of the state concerned or in a situation where a leader has seized power and removed from office a previous head of state who may still lay claim to that title.[33] Alternatively he or she may refuse to relinquish office when another has been elected or appointed to that office, as in Côte d'Ivoire. In *United States v Noriega,* General Manuel Noriega, the *de facto* ruler of Panama, was arrested in Panama by US forces, and brought to trial in the United States on various criminal charges. He claimed immunity as head of state but this was rejected by the court on the ground that Noriega 'has never been recognized as Panama's head of state either under the Panamanian constitution or by the United States'.[34] Circumstances where a leader has deliberately refrained from formally assuming the office of head of state or head of government, or has renounced such office (even formally conferring it on others) while retaining power, may also be problematic.[35]

There is a further consideration relating to the position of so-called presidents or prime ministers elect. These are persons who have been designated or elected as successor to the incumbent head of state or head of government but have yet formally to assume office. The question of what treatment such persons may be entitled to under international law is not without practical significance as the transition period concerned may last several months, during which the designated successor may undertake a round of visits to other states. Matters may become even more difficult if the incumbent head of state or government refuses to accept his or her successor and seeks to remain in power. Again there is no clear authority on the point although in practice it would appear that such officials, designate or elect, are usually afforded the same

31 *Re Bo Xilai* 8 November 2005 Bow Street Magistrates Court, 129 ILR 713. The court also recognized that the minister was entitled to immunity as a member of a special mission.

32 *Khurts Bat v Investigating Judge of the German Federal Court and others* [2011] EWHC 2029 (Admin).

33 See *Lafontant v Aristide* 844 F Supp. 128, 132-3 (EDNY 1994); 103 ILR 581 where civil proceedings were brought against the exiled president of Haiti in the United States. The court held he was entitled to immunity as he was still recognized by the US government as head of state.

34 See *United States v. Noriega,* 121 ILR 591. The Panamanian constitution provided for an executive branch composed of a president and ministers of state, neither of which applied to Noriega who was officially designated Commandante of the armed forces. More importantly, the US government had never accorded Noriega head-of-state status and had continued to recognize another individual as legitimate leader.

35 The former Libyan leader Muammar Gaddafi adopted the title 'Guide of the Revolution' in 1979, conferring all the formal functions of head of state and government on the secretary general of the General People's Congress and a prime minister. However, this did not deter the French *Cour de Cassation* from deciding that he was entitled to head-of-state immunity with regard to criminal charges alleging his complicity in acts of terrorism resulting in the destruction of a French civil aircraft (*Gaddafi* 125 ILR 490). More recently Al Jazeera reported a statement from the Libyan government issued in response to the ICC arrest warrants, stating that 'the leader of the revolution and his son do not hold any official position in the Libyan government and, therefore, they have no connection to the claims of the ICC against them'. See also the North Korean leader Kim Jong-Il who has the office of chairman of the National Defence Commission while the functions of head of state/government are formally assigned to the chairman of the Praesidium of the Supreme People's Assembly and a premier. To add further ambiguity to the situation, the deceased former leader Kim-Il Sung has been designated 'Eternal President'.

protection, privileges and courtesies as an incumbent and that their statements may, in certain circumstances, be relied upon as evidence of their state's position on matters of international law and policy.[36]

Functional immunity

All state officials, including those who do not enjoy personal immunity while in office, are entitled to immunity from the jurisdiction of other states in relation to acts performed in their official capacity. Such immunity attaches to the official act, not to the office of the individual concerned, and can therefore be relied upon by former officials as well as incumbent officials. It may also be relied upon by non-state individuals or entities who have acted on behalf of a state. The main effect of such immunity is to prevent litigants from seeking to circumvent the rules on state immunity by taking action against the individuals carrying out the business of the state.

What is an official act?

It is clear that functional immunity can only cover acts performed by officials and former officials in the exercise of their official functions and does not extend to private acts. In practice, it is not always easy to draw a clear line between acts performed in an official capacity and those performed in a personal capacity, particularly where the conduct in question contains an element of unlawfulness or even criminality. The orthodox view is that such conduct will qualify as 'official' provided it is engaged in under colour of or in ostensible exercise of the state's public authority.[37] If it is, then it must be treated as official conduct and thus as not subject to the jurisdiction of other states unless it falls within one of the recognized exceptions to state immunity.

Is there an exception in respect of international crimes?

So, looking at the practice of national courts and prosecuting authorities since the *Pinochet* case, can we see the emergence of a coherent and generally accepted exception to the functional immunity of officials with regard to international crimes? One of the problems in trying to do so is that there are relatively few criminal cases in which state officials have invoked such immunity. There is also a political reluctance on the part of many states to prosecute former officials, particularly senior ones, of other states. This means that in practice the rules relating to the functional immunity of state officials have developed mainly in the context of civil proceedings. However, there are important differences between the two types of action, and it would be a mistake to assume that the position on functional immunity is necessarily the same in both cases.

Criminal proceedings

The fact that it is well settled that a criminal act may be attributed not only to the state but also to the official who performed it has prompted some to question whether it is appropriate for immunity to apply at all in such cases.[38] Nevertheless, the principle has long been accepted, albeit infrequently applied.[39] In a recent case involving the prosecution of a US soldier for acts performed in the exercise of his duties in Iraq that resulted in the death of an Italian citizen, the Italian Court of Cassation held that the defendant was entitled to functional immunity. However, the court went on to observe that the crimes of which he was accused were not war crimes or crimes against humanity, and noted that a rule of customary international law was emerging that appeared to limit such immunity in cases of serious international crimes.[40]

36 See *Case Concerning Application of the Convention on the Elimination of all Forms of Racial Discrimination (Georgia v. Russian Federation) (CERD case)* ICJ 1991 where Georgia sought to rely on a statement made by president-elect Mikhail Saakashvili in a radio interview as evidence that it had made a claim of racial discrimination against the Russian Federation. The court ruled that the statement did not, in substance, amount to such a claim but the fact that it had been made by a president-elect did not seem to be a problem.

37 See *Jaffe v Miller and Others (No 1)* (1993 Canada Ontario Court of Appeal), 95 ILR 446 at p. 460; also Watts, 'Legal Position', p. 56 and Article 7 of the ILC's Articles on State Responsibility, which provides that '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.'

38 See *Bouzari and Others v Islamic Republic of Iran* 124 ILR 427, a civil case where it was suggested that this fact means that criminal proceedings, unlike civil actions, do not, therefore, constitute a direct interference by one state in the actions of another sovereign state.

39 See the *Macleod Case* in Robert Jennings, 'The *Caroline* and *Macleod* Cases' (1938) *American Journal of International Law* 32.

40 *Lozano (Mario Luiz) v Italy*, Case No 31171/2008; ILDC 1085 (IT 2008) 24 July 2008, Cass (Italy), 1st Crim.

The *Pinochet* case, in which the UK House of Lords allowed an extradition application by Spain in respect of the former Chilean president to proceed, remains the leading case on such an exception. The case concerned allegations of widespread and systematic torture carried out in Chile and various ordinary crimes of murder and conspiracy to murder, including conspiracy to murder in Spain. The court confirmed that, if he had been a serving head of state, Augusto Pinochet would have been entitled to an absolute personal immunity on all the charges and, as a former head of state, he would as a general rule continue to enjoy functional immunity in respect of acts carried out in his official capacity as head of state. All but two of the judges took the view that Pinochet enjoyed immunity for the 'ordinary' crimes on the ground that the acts alleged, although criminal, had been governmental and must therefore give rise to functional immunity.[41] The court broke new ground, however, in considering whether there could be an exception to functional immunity where the international crime of torture was involved.

The UN Convention against Torture, to which Chile, the United Kingdom and Spain were all parties at the material time, lies at the heart of the judgment. The Convention sets up a system of extra-territorial criminal jurisdiction for torture, as defined in Article 1, but makes no mention of state immunity. But by definition, the international crime of torture must be committed by or with the acquiescence of a public official or other person acting in a public capacity. All defendants will therefore be state officials or former state officials or agents and will have carried out the torture as an official act for which they could claim immunity. In reality, it appears to have been the tension between this fact and the object and purpose of the Convention that prompted the majority to conclude that there could be no immunity for the international crimes of torture and conspiracy to torture.

The detailed reasoning provided by the judges in reaching this conclusion varied considerably, with two of them referring, among other grounds, to the theory that an act that constitutes an international crime cannot, of itself, be an official act.[42] This is a theory that has been taken up by various commentators and in some courts where it has been argued that international crimes can never be regarded as sovereign or official acts. In 2000, the Amsterdam Court of Appeal noted in the *Bouterse*[43] case (where the former military leader of Suriname was accused of the torture and murder of a number of individuals) 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'.[44] However, this analysis has been criticized as far too broad and has been specifically rejected by several courts, including the European Court of Human Rights.[45]

Other judges referred to the *ius cogens*[46] status of the prohibition against torture, arguing that such a prohibition, by reason of its peremptory and supreme nature, must override any immunity. This theory was espoused by many commentators and has been applied in a number of cases. In *Ferrini v Germany*[47] the Italian Supreme Court of Cassation held that Germany was not entitled to immunity for serious violations of human rights carried out by German occupying forces during the Second World War. In doing so, it relied heavily on the principle of the primacy of *ius cogens* norms. But this approach has also attracted strong criticism. It has been pointed out, in particular, that the rules on state immunity,

41 *R v Bow Street Magistrates' Court ex parte Pinochet (No. 3)* [2000] AC 147. See Lord Browne-Wilkinson's comment at p. 205: 'No-one has advanced any reason why the ordinary rules of immunity should not apply and Senator Pinochet is entitled to such immunity.'

42 *R v Bow Street Magistrates' Court ex parte Pinochet (No. 3)* [2000] AC 147. See Lords Browne-Wilkinson and Hutton.

43 For analysis of the judgment see Liesbeth Zegveld, 'The Bouterse Case' (2001) *Netherlands Yearbook of International Law* 32, pp. 97–118.

44 See *Prefecture of Voiotia v Federal Republic of Germany* (Case No 11/2000) (unreported) 4 May 2000 (the *Distomo* case), where the Greek courts awarded damages against Germany on the ground that atrocities committed by German forces in Greece during the Second World War violated *ius cogens* rules and could not therefore qualify as sovereign acts covered by immunity.

45 See *Federal Republic of Germany v Miltiadis Margellos* (Case 6/17-9-2002, Greece); *Aikaterini Kalogeropoulou et al. v Greece and Germany* (ECHR, Decision on admissibility of individual complaint no. 59021/00, 12 December 2002); *The Distomo Massacre* case (2003) 42 ILM 1030 (Germany Supreme Court); and *Jones v Ministry of the Interior of the Kingdom of Saudi Arabia* [2006] UKHL 26 (UK House of Lords). See also Akande and Shah, 'Immunities of State Officials', which argues that such an approach is 'riddled with problems'; and Eileen Denza, '*Ex parte* Pinochet: Lacuna or Leap?' (1999) 48 ICLQ 949.

46 See Article 53 of the Vienna Convention on the Law of Treaties, which defines such a rule as 'a norm accepted and recognised by the international community as a whole as a norm from which no derogation is permitted'.

47 See *Ferrini v Federal Republic of Germany*, Italian Court of Cassation, 11 March 2004, 128 ILR 659.

which are only procedural in character, cannot conflict with substantive *ius cogens* norms prohibiting international crimes.[48] Moreover, following the *Ferrini* case, Germany has instituted proceedings before the ICJ against Italy for failing to respect its jurisdictional immunity as a sovereign state.[49]

However, the common theme underlying the judgments of the majority in the *Pinochet* case was that it would be absurd and inconsistent with the UN Convention against Torture to allow an immunity that was virtually coextensive with the offence created by that Convention.[50] Exactly the same argument would apply in relation to enforced disappearance, which, like torture, is committed by or with the acquiescence of a public official.[51] In the *Pinochet* case, Lord Phillips went a little further in stating that functional immunity cannot coexist with international crimes where a system of extra-territorial jurisdiction applies as the latter must necessarily override the principle that one state should not interfere with the internal affairs of another. On this basis, it has been suggested that the true rationale for an exception to immunity in the case of certain international crimes lies in the development of international conventions providing for the exercise by states parties of extra-territorial jurisdiction over such crimes, and demonstrating that international law now accepts that states may exercise jurisdiction over certain official acts of foreign states in the context of assigning individual criminal responsibility for such acts.[52] On this basis, it has been argued that the exception identified by the Law Lords in the *Pinochet* case with regard to torture should also extend to other international crimes. It has been pointed out that while genocide, war crimes and crimes against humanity may be committed by private individuals, their primary focus is still state conduct.[53]

May former leaders be prosecuted in foreign courts?

Following the *Pinochet* case, what has been the position in practice? There have been relatively few cases, but Spain has continued to lead the way with the issue of arrest warrants in respect of several former heads of state, including two former presidents of Guatemala, Rios Montt and Oscar Mejia Victores, for genocide, torture and other related crimes.[54] Elsewhere in Europe, there has also been some significant activity involving prosecutions of foreign officials for international crimes.[55] Admittedly most prosecutions have tended to feature relatively junior officials, but the fact that such prosecutions have been launched suggests an initial assumption, explicit or implicit, that functional immunity should not bar the prosecution of such crimes.[56] Such an assumption is as relevant to former high-level officials as it is to more junior officials.

From the prosecutions that have been brought in various countries, it is difficult, however, to draw any clear rules regarding an exception to immunity. The facts in

48 See Lady Fox: '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 *ius cogens* norm but merely diverts any breach of it to a different method of settlement.' See also *Jones v Ministry of the Interior of the Kingdom of Saudi Arabia* where this passage was cited with approval.

49 See *Germany v Italy*, pending before the ICJ.

50 See in particular Lord Millett at 227A-278B. The case was also thus explained in the subsequent case of *Jones v Ministry of the Interior of the Kingdom of Saudi Arabia*: 'The essential ratio of the decision, as I understand it, was that international law could not without absurdity require criminal jurisdiction to be assumed and exercised where the Torture Convention conditions were satisfied and, at the same time, require immunity to be granted to those properly charged. The Torture Convention was the mainspring of the decision.'

51 See International Convention for the Protection of All Persons from Enforced Disappearance.

52 For full explanation of this approach see Akande and Shah, 'Immunities of State Officials'.

53 Ibid. The authors, who put forward a strong case for the application of such an exception to functional immunity in relation to such crimes, admit that the argument is not quite as strong with regard to war crimes in a non-international conflict, genocide and crimes against humanity as it is in relation to torture, enforced disappearance and war crimes in an international armed conflict.

54 A Spanish court has also convicted a former Argentinian naval officer, Adolfo Scilingo, for torture and crimes against humanity committed abroad; a second Argentinian naval officer, Ricardo Cavallo, was also prosecuted, following his extradition from Mexico, although he was ultimately extradited to Argentina to face trial there.

55 These have been mainly in Europe. See e.g. Belgium (case against former Chadian dictator Hissene Habré and the conviction of Rwandan army major Bernard Ntuyahaga for war crimes and crimes against humanity); France (the two convictions *in absentia* of Mauritanian general Ely Ould Dah and Tunisian official Khaled Ben Said for torture committed in their home states); Netherlands (former military leader Dési Bouterse of Suriname investigated for torture but prosecution time barred; conviction of Congolese official Sebastian Nzapali for torture and conviction of two Afghan intelligence officers for torture); Denmark (prosecution of former chief of staff of the Iraqi Army for war crimes, although he fled the country before trial).

56 See conclusion in 2008 by Netherlands prosecutorial authorities that Israeli minister Ami Ayalon, a former director of Shin Bet security service, did not enjoy immunity in relation to charges of torture.

each case have often been very different and the outcomes extremely variable. In many of the cases, proceedings have been abandoned or put on hold because of difficulties concerning the evidence, the death or absence of the accused, or simply because the home state of the defendant has decided to investigate or prosecute the matter on its own account. In some cases, the home state appears to have waived any immunity or simply failed to raise the issue at all; in other cases internal disorder may have meant that the home state was not in a position to assert immunity or to object to the proceedings on those grounds. This could be significant given the approach of the ICJ in the *France v Djibouti* case, referred to above, which suggests that functional immunity has to be claimed actively by the official's home state. It is also notable that the *Third Report* of the ILC special rapporteur on this topic concludes that, in the absence of such a claim, 'the state exercising jurisdiction is not obligated to raise and consider the issue of immunity *proprio motu* and may, therefore, proceed with the criminal prosecution'.[57]

There have also been many cases suggesting a strong reluctance to prosecute foreign state officials, particularly where the foreign state concerned is likely to object to such proceedings.[58] Sometimes immunity is invoked as a justification for such reluctance. Sometimes other reasons are relied upon. The decision of the ICJ in the *Arrest Warrant* case[59] was concerned with the personal immunity of a serving foreign minister, but much has been made of an *obiter dictum* in the case that could be read to imply that functional immunity continues to bar the prosecution of all state officials and former state officials for international crimes committed in their official capacity.[60] However, in their joint separate opinion, Judges Higgins, Kooijmans and Buergenthal indicate that the current trend of state practice is that serious international crimes are not covered by the immunities *ratione materiae* of former state officials.[61]

'There have been many cases suggesting a strong reluctance to prosecute foreign state officials, particularly where the foreign state concerned is likely to object to such proceedings'

In *Ferrini v Germany*, a civil case concerned with the immunity of the state itself, the Italian Court of Cassation stated that, in its view, it was 'undisputed' that state officials do not enjoy functional immunity in respect of crimes under international law. As noted above, the case is currently the subject of an application to the ICJ by Germany alleging that Italy has violated its entitlement to state immunity,[62] and it is possible that the court will consider this aspect of functional immunity in its judgment and provide some further clarification. However, matters may be complicated by the fact that the international crimes alleged in *Ferrini* occurred, at least in part, in the territory of the forum state and many years ago.

A recent development in the United Kingdom is the reliance by courts and the government on the view that

57 Although some members of the ILC have questioned whether such a conclusion might not be too categorical and suggested that further thought needs to be given to the matter.

58 See, for example, Germany where prosecutors have declined to proceed, through the exercise of their prosecutorial discretion, against former Chinese president Jiang Zemin (2003), former Uzbek interior minister Zokirjon Almatov (2005) and former US Secretary of Defense Donald Rumsfeld and others; and France, where in 2007 prosecutors similarly declined to proceed against Rumsfeld on charges of torture. In 2006 the issue by France and Spain of arrest warrants against various high-ranking Rwandan government officials provoked strong protests from Rwanda and the African Union, and prosecutions, most notably against the former chief of protocol, Rose Kabuye, were eventually dropped.

59 *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium),* Judgment, ICJ Reports 2002.

60 The court listed the circumstances in which immunity would not apply to a former foreign minister and included the category '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*' (italics added). The court did not refer to international crimes in this context.

61 See also view of ICTY Appeals Chamber in *Prosecutor v Tihomir Blasckic*, 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, Case No. IT-95-14-A, para 41.

62 See *Germany v Italy*, pending before the ICJ.

immunity for persons engaged on a 'special mission' has become a part of customary international law. On 6 October 2011 the Director of Public Prosecutions (DPP) refused to agree to the issue of an arrest warrant for alleged war crimes against Tzipi Livni, the Israeli opposition leader, who was visiting London. The DPP relied on a certificate issued under the authority of the foreign secretary stating that the Foreign and Commonwealth Office had consented to her visit to the United Kingdom as a 'special mission'. Special mission immunity constitutes full personal immunity and, as discussed above, it accordingly does not allow any exception for prosecutions for international crimes.

Crimes committed in the country of the foreign court (the forum state)

The increasing focus on state practice in the area of criminal prosecution of foreign state officials has highlighted another possible exception to functional immunity.[63] This recalls the circumstances referred to by Lord Millet in the *Pinochet* case, when he dealt with the charge of conspiracy to murder allegedly committed in the territory of the requesting state, Spain, and commented, 'The plea of immunity *ratione materiae* is not available in respect of an offence committed in the forum state.' He did not elaborate further and it is clear that the majority were of the view that Pinochet was entitled to immunity for 'ordinary' crimes carried out in his official capacity, even if committed on Spanish territory. However, a study of state practice has revealed that, in the few cases recorded involving such crimes,[64] states have usually been prepared to arrest and/or prosecute the foreign state officials concerned even where such offences have been committed in an official capacity. Conversely, the home states of the officials concerned tend to refrain from claiming any immunity on their behalf.[65]

In 2009, an Italian court convicted 23 CIA agents on charges of kidnapping for their participation in the extraordinary rendition of a suspected terrorist, Abu Omar, who was abducted in Milan and flown to Cairo where he was allegedly tortured. Among the defendants, who were all tried *in absentia*, was a former head of the CIA station in Milan who had been a US consul. The precise rationale of the decision is unclear, although in the earlier *Blaskic* case, the Appeals Chamber of the ICTY had alluded briefly to its view that spies, although acting as organs of a state, could be held personally accountable for their wrongdoing. In the oral pleadings before the ICJ in *Djibouti v France*, counsel for Djibouti also made the point (which was not directly relevant to the case) that exceptions to the principle of functional immunity existed in the event of war crimes and acts of espionage and sabotage carried out in the territory of a foreign state.

More recently, Khurts Bat, the secretary of the executive office of the Mongolian National Security Office, was arrested in London pursuant to a European arrest warrant issued by a German federal court. He faced charges relating to the kidnapping of a Mongolian national in France who was then forcibly transported to Berlin, seriously ill-treated, drugged and flown abroad using a diplomatic passport. The acts were alleged to be part of a plan by the Mongolian secret service, and at the time the defendant was working at the Mongolian Embassy in Budapest. His claims of personal immunity as a member of a special mission and as a high-ranking state official were rejected by the district

63 Although the ILC's Special Rapporteur has characterized it as more of an 'absence of immunity' rather than an exception, stating, 'A situation where criminal jurisdiction is exercised by a state in whose territory an alleged crime has taken place, and this state has not given its consent to the exercise in its territory of the activity which led to the crime, and to the presence in its territory of the foreign official who committed this alleged crime stands alone in this regard.' See Roman Kolodkin, *Third Report on Immunity of State Officials from Foreign Criminal Jurisdiction, UN Doc A/CN.4/646*, 24 May 2011.

64 State practice on this point appears to be scant. See ILC, *Immunity of State Officials from Foreign Criminal Jurisdiction*, para 162.

65 See the *Rainbow Warrior* incident where a New Zealand court convicted two French agents of manslaughter and wilful damage for their part in sinking a Greenpeace vessel in New Zealand. The judge noted that the defendants had acted under orders but stated that this was not a matter on which he would place any great weight (*R v Mafart and Prieur* 74 ILR 241). France did not raise any issue of immunity at the trial stage but later argued that the defendants' detention in a New Zealand prison was inappropriate '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 Ruling of UN Secretary General of 6 July 1986 in UN Reports of International Arbitration Awards Vol. XIX, p. 213. Even in the memorandum submitted by France to the UN Secretary General, France did not refer to any immunity but instead emphasized the issue of responsibility. See also *R v Lambeth Justices ex parte Yusufu (Dikko kidnapping)* 88 ILR 323; In the High Court of Justiciary at Camp Zeist Case No: 1475/99 *Her Majesty's Advocate v Abdelbaset Ali Mohmed Al Megrahi and Al Amin Khalifa Fhimah, Prisoners in the Prison of Zeist, Camp Zeist (Kamp van Zeist)*, The Netherlands; and the decision of the German Federal Constitutional Court of 15 May 1995, which denied immunity to spies of the former Democratic Republic of Germany in respect of acts performed in the Federal Republic of Germany before reunification (see ILC, *Immunity of State Officials from Foreign Criminal Jurisdiction*, para 165).

judge, and he then appealed on both points to the divisional court, adding at a late stage a further claim for functional immunity based upon the fact that the acts alleged were official acts of Mongolia. The divisional court affirmed the judgment of the lower court on the first two points and also rejected the additional claim for functional immunity, holding that customary international law does not afford such immunity in relation to official acts performed in the territory of the forum state in circumstances where that state has not given its consent to the presence of the foreign official and his presence is unknown.[66]

The precise parameters of the 'exception' for crimes committed in the territory of the forum state are not entirely clear. There may be an argument, for example, that the exception applies only in the case of spies.[67] The Special Rapporteur's *Second Report* on the 'Immunity of state Officials from Foreign Criminal Jurisdiction' notes the fact that a crucial consideration is 'whether or not the territorial state has consented to the discharge in its territory of official functions by a foreign state organ' and that consent to the presence of the foreign official may also be important. The Special Rapporteur concludes: 'If a state did not give its consent to the presence of a foreign official and his activity, which led to the commission of a criminally punishable act, in its territory, there would appear to be sufficient grounds for assuming that the official does not enjoy immunity r*atione materiae* from the jurisdiction of that state.' The classic examples given are espionage, acts of sabotage and kidnapping, but presumably international crimes such as torture or war crimes could also fall within the exception.

Civil proceedings relating to international crimes

In practice the rules relating to the functional immunity of state officials have developed mainly in the context of civil proceedings and, although this paper is concerned with the criminal prosecution of international crimes, it is worth looking briefly at the position on civil suits in respect of such crimes, if only to distinguish the rather different principles in play. In *Jones v Ministry of the Interior*,[68] civil proceedings relating to allegations of torture were brought in the United Kingdom against Saudi Arabia and certain of its officials, including the interior minister. The House of Lords held that Saudi Arabia was immune and dismissed the claims against the individual defendants on the basis that their acts were clearly attributable to the state and that therefore no distinction could be made between those claims and the barred claim against that state. The latter was barred because it did not fall within any of the recognized exceptions to state immunity. The court emphasized that the *ius cogens* nature of the prohibition against torture and the fact that it constitutes an international crime did not of themselves operate so as to remove a state's entitlement to immunity from the civil jurisdiction of another state.[69] A New Zealand court took the same approach in civil proceedings against the former president of China and other state officials relating to allegations of torture,[70] and in 2008 the US Court of Appeals upheld the immunity of a senior member of the Israeli armed forces in civil proceedings relating to alleged war crimes.[71]

However, it would be wrong to assume that the scope of functional immunity in respect of the acts of state officials is the same for civil proceedings as for criminal prosecutions. Indeed, counsel for Saudi Arabia in the *Jones* case emphasized this point, arguing that a distinction between the two is fundamental to customary international law. The UN Convention on the Jurisdictional Immunities of States and Their Property (2004) and the European Convention on State Immunity (1972) do not apply to criminal proceedings. Moreover, the UN Convention against Torture requires states to recognize universal

66 See *Khurts Bat v Investigating Judge of the German Federal Court and others.* The official was returned to Germany, freed, and apparently re-employed in Mongolia.

67 See for example *McElhinney v Williams and Her Majesty's Secretary of State for Northern Ireland* [1995] 104 ILR 691, although this was a civil case.

68 *Jones v Ministry of the Interior of the Kingdom of Saudi Arabia.*

69 Note that there is a campaign to introduce in United Kingdom law a tort liability for torture, wherever committed, and preclude a person or a state from claiming immunity in respect of such proceedings (see the Torture (Damages) Bill, introduced in the UK House of Lords in February 2008).

70 *Fang and others v Jiang Zemin and others* (High Court) [New Zealand].

71 *Belhas v Moshe Ya'alon* United States Court of Appeals (DC Circuit) 515 F.3d 1279, 15 February 2008.

criminal liability for acts of torture but does not provide for a universal tort liability in that respect.[72] There are also significant practical distinctions between prosecution and civil proceedings: prosecution is usually in the hands of a state, not a private individual,[73] and it usually (although not always) depends upon the physical presence in the forum state of the defendant and the possibility of a proper trial and effective punishment. The standard of evidence required for a prosecution to proceed and the burden of proof that must be satisfied in order to secure a conviction are generally higher than in a civil case. It has been argued that such factors reduce the possibility of mischievous and politically motivated proceedings, and therefore that criminal liability presents far less difficulty in respect of international comity and the maintenance of good relations between states.

Recently, a US district court deferred to the State Department's submission that a former prime minister and defence minister of Somalia did not enjoy immunity from the civil jurisdiction of the US courts where allegations of torture and extra-judicial killings had been made.[74] The decision is likely to be appealed and it is, therefore, difficult to draw any firm conclusions from it at this stage. In any event, the decision appears to rest upon certain unique features of the case, most notably the fact that the US government does not currently recognize a government in Somalia and the fact that the defendant is resident in the United States.[75]

By contrast with personal immunity, which has developed as a distinct immunity and is not dependent upon whether the state itself is immune, functional immunity as enjoyed by individuals is an integral part of the immunity of their state. Where one of the well-recognized exceptions to state immunity applies so that the state itself is not immune, logically such immunity must fall away for the individual also,[76] although in some circumstances there may be a question as to whether the act can properly be attributed to that individual and therefore whether he or she is a proper defendant in the proceedings. However, some have expressed different views on this point.[77]

Conclusion

A near-consensus of Western academic writers and human rights NGOs holds that there is an exception from immunity when former leaders are prosecuted in foreign courts for international crimes. Moreover, the development of international treaties providing for the exercise by states parties of extra-territorial jurisdiction over crimes that are themselves defined as official acts, or that are linked closely with such acts, suggests that international law now contemplates the prosecution in national courts of foreign officials accused of such crimes. Following the *Pinochet* case, it was hoped by many that the principles underlying the refusal of immunity in that case would be further clarified and fully worked out in subsequent cases so that precise rules on the exception would emerge. In

72 See *Jones v Ministry of the Interior of the Kingdom of Saudi Arabia*, and *Bouzari v Islamic Republic of Iran* 2004 CanLII 871 (Ontario Court of Appeal, 30 June 2004) at para 28.

73 Note that the former law in the United Kingdom whereby a private citizen could initiate a prosecution for an international crime by seeking the issue of an arrest warrant in respect of a specific individual known to be in the country has now changed, by virtue of the Police and Social Responsibility Act, which requires the DPP's consent before such a warrant can be issued.

74 *Yousuf v Samantar* United States Court of Appeal (4th Circuit), 8 January 2009.

75 US courts have, in any event, taken a markedly different line in civil cases than courts in other countries based upon the unique character of certain US legislation i.e. the Alien Tort Claims Act and the Torture Victims Protection Act.

76 Note the official may still be entitled to personal immunity by virtue of his or her high-ranking office or some other type of immunity derived from a specialized regime such as the one on diplomatic immunities or special missions.

77 It has been argued that such immunity is distinct from the law of state immunity as state officials may be immune in cases where the state – under the restrictive doctrine – is not. For example, a diplomatic agent who performs a commercial transaction on behalf of his or her state is immune from proceedings in respect of that transaction although the sending state is not. (See Rosanne Van Alebeek, *The Immunity of States and their Officials in International Criminal Law and International Human Rights Law* (Oxford University Press, 2008), pp. 106–07.) However, such an analysis rests upon the specialized regime of the Vienna Convention on Diplomatic Relations, which governs the immunities of diplomats and former diplomats in the state to which they are or were accredited. It is much less clear that the same principle would apply to the general law of state immunity, which covers the immunities of all officials and former officials in all foreign states. However, see ILC, *Immunity of State Officials from Foreign Criminal Jurisdiction*, para 161, and Kolodkin, *Second Report*, para 28, which approves the secretariat's view that a state official performing an act *iure gestionis*, attributable to the state, would enjoy functional immunity even though the state itself was not immune.

practice, this has not happened and the picture has been patchy, often confused and obscured by other jurisdictional factors that have barred or deterred prosecution in individual cases.[78]

It is clear that serving heads of state and other very high-ranking state officials entitled to personal immunity may not be prosecuted for international crimes without the consent of their home state. The picture, once they have left office, is rather more obscure. The paucity of state practice means that precise rules on any exceptions to functional immunity are still to be developed. Even where cases have been brought, the wide variety of jurisdictional factors in play and the often very broad prosecutorial discretion enjoyed by national authorities have made it difficult to identify the precise reason why a particular prosecution has proceeded or been dropped.[79]

> 'The development of rules on state immunity has always been a slow and often tortuous process. The problematic nature of the plea lies in the fact that it is international law that determines what those rules are but national courts that must interpret and apply them'

The fact is that, for whatever reason, many states remain reluctant to prosecute former foreign leaders, and political sensitivities in this area remain high. Not surprisingly, therefore, *Pinochet* has not been followed around the world by many prosecutions of former high state officials, although there has been some activity with regard to junior officials. This area of the law continues to provoke intense debate. Since the *Pinochet* decision, the international law community including states, international courts and tribunals, NGOs, national courts and academic lawyers has been engaged in a fierce debate over the precise content of the relevant rules on the topic. Uncertainties as to the immunities of state officials in relation to acts performed in their official capacity have prompted a renewed focus on the personal immunities of high state officials and on special-missions immunity. It is probable that some of these extensive personal immunities, which in the past were not entirely free from doubt or generally accepted, have been clarified and consolidated in response to uncertainty about the precise extent of functional immunity for international crimes. Such a development is a reasonable response to concerns about the stability of international relations and the need to ensure that very high-ranking serving officials may continue to carry out their functions without interference. It would be ironic, however, if these developments were not to be counterbalanced by the emergence of clear rules on an exception to functional immunity with regard to international crimes.

What role is there for national courts in this process and how likely are they to play an active role in developing such rules? The development of rules on state immunity has always been a slow and often tortuous process. The problematic nature of the plea lies in the fact that it is international law that determines what those rules are but national courts that must interpret and apply them. In the United Kingdom, the *Pinochet* case remains the authority for the proposition that a former foreign head of state may be prosecuted for official acts of torture; if a similar case involving a former foreign high official were to come before the courts, they would surely follow that authority. It is possible that they would draw the line at torture and enforced disappearance and not extend the exception to any other international crimes, but this is doubtful. The same would probably apply to courts in many other European and some Commonwealth jurisdictions. However, given the reluctance of national prosecuting

78 See Kolodkin, *Second Report*, p. 56: 'The judgment in the Pinochet case having given an impetus to discussion on this issue, has not led to the establishment of homogeneous court practice.'

79 See Wolfgang Kaleck, 'From Pinochet to Rumsfeld: Universal Jurisdiction in Europe 1998–2008', 30 *Michigan Journal of International Law* 927.

authorities to take action in such cases and the variety of jurisdictional and evidential factors that make such prosecutions very difficult, the chances of such a case arising in the near future are perhaps slim. In these circumstances, it is probably unrealistic to expect national courts on their own to develop clear and coherent rules on the exception to immunity.

In this context, the work of the ILC is crucial. It appears that internal debate on this topic has been lively and that there has occasionally been some 'sharp criticism' of the somewhat conservative analysis adopted by the Special Rapporteur, whose view is that 'it is difficult to talk of exceptions to immunity as having developed into a norm of customary international law'.[80] There is now an opportunity for the Commission to provide real guidance to national prosecuting authorities and courts in identifying the precise contours of an exception to immunity in respect of international crimes; such guidance would resolve the current tension and properly reflect current trends in international law. The members of the ILC, with their varying legal backgrounds, are well placed to do this. It is to be hoped, therefore, that it will take up the challenge and give a constructive lead to national courts that will properly reflect the move towards ending impunity for international crimes, while respecting the need to maintain international relations. Without such a lead, it is to be feared that the current rather confused picture may continue for some time.

Finally, it is worth noting that the prosecution in a domestic court of a foreign high state official for international crimes committed abroad in his or her official capacity is usually the third-best option. It is almost always preferable for the official to be prosecuted before an international tribunal designed for the purpose, or better still in the courts of his or her home state. However, for various practical and political reasons the two best options are often unavailable and matters are perhaps unlikely to improve in this respect without a degree of pressure from foreign domestic courts.

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80 See Kolodkin, *Second Report*, p. 56. See also *Report of International Law Commission* 2011, Chapter VII, UN Doc A/66/10.