Rethinking the Compelling Rationale for Personal Immunity of State Officials before Foreign Courts

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> When we neither punish nor reproach evildoers, we are not simply protecting their trivial old age, we are thereby ripping the foundations of justice from beneath new generations.[1]

Abstract

While some States have expressed willingness to lift ratione personae immunity before foreign national courts, most national courts have consistently rejected cases against sitting heads of state, heads of government and foreign ministers. However, the rising call for individual accountability before foreign courts, though desirable, is also a threat to the need for peaceful relations between states. With two contending views, the possibility of exceptions to immunity ratione personae from criminal prosecution in foreign national courts continues to reverberate. Firstly, there is no exception to the personal immunity enjoyed by state officials, before national courts, other than for acts performed in a private capacity. Secondly, there is an exception to immunity ratione personae based on the now established rule that official position is no defence to international crime. That being said, the paper concludes that the categorization of certain international crimes, as violations of jus cogens norms does not undermine the compelling rationale for personal immunity before foreign courts.

Introduction

The need for the prosecution and punishment of grave breaches of international law cannot be over emphasised. The need however raises complex and diverse concerns,[2] ranging from emotionally laden accusations of political insensitivity,[3]

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[1] Alexander Solzhenitsyn, *The Gulag Archipelago*, trans. T. Whitney (London, Fontana 1974) 178

[2] Harmen van der Wilt, "Universal Jurisdiction under Attack: An Assessment of African Misgivings towards International Criminal Justice as Administered by Western States" 9 J Int'l. Criminal Justice 1043 (2011).

[3] Charles C. Jalloh, "Universal Jurisdiction, Universal Prescription? A Preliminary Assessment of the African Union Perspective on Universal Jurisdiction" 21 Criminal Law Forum 25 (2010); (stating that: "In general,

to lack of deference to the need for peace and justice,[4] and the long-evolving struggle between the protection of immunities and the promotion of individual accountability.[5] With what outcome! The rejection of the international order conceived of in spatial terms as established at Westphalia,[6] which notion of sovereignty[7] have been increasingly displaced, by the value placed on the rights and responsibilities of the individual.[8]

In spite of these very general premises, it has also gained currency that a stable, universal peace is achievable by means of a global legal system able to rise above the mantra-like status of state sovereignty,[9] unfettered by the domestic jurisdiction of individual States. The need to have in place a global legal system affirming the ethical and political primacy of the international legal system as *civitas maxima* (supreme State), recognising all members of the human community as its subjects cannot be over emphasised.[10] *Civitas Maxima* expresses the ideals of universalism, community, and solidarity beyond political

African leaders have maintained that powerful Western states are using the permanent penal tribunal to target adversaries in weaker parts of the world such as Africa. Thus, universality is seen as the identical or conjoined evil twin of ICC jurisdiction.")

[4]Dapo Akande, Max Du Plessis and Charles Chernor Jalloh, *An African Expert Study On The African Union Concerns about Article 16 of the Rome Statute of the ICC,* 24-30 (Pretoria: Institute for Security Studies 2010); Assembly of the AU, *Decision on the Meeting of African States Parties to the Rome Statute of the International Criminal Court (ICC*), Assembly/AU/Dec.245 (XIII) Rev.1, AU Doc. Assembly/AU/13(XIII), 1-3 July 2009, 3

[5]Andrea Bianchi, "Immunity Versus Human Rights: The Pinochet Case" 10 Eur. J. Int'l L. 237, 239 (1999); See also, Curtis A. Bradley and Laurence R. Helfer, "International Law and the U.S. Common Law of Foreign Official Immunity" 2010 Sup. Ct. Rev. 213, 238–40 (2011). (Describing the development of immunity in criminal cases and terming *Pinochet* case, a "watershed").

[6]Anthony Clark Arend and Robert J. Beck, *International Law and the Use of Force: Beyond the UN Charter Paradigm,* 16 (London, Routledge 1993).

[7]Robert Cryer, "International Criminal Law vs. State Sovereignty: Another Round?" 16 Eur. J. Int'l L. 980 (2006).

[8]Antonio Cassese, *International Criminal Law*, 307-308 (2ND ed. Oxford University Press 2008)

[9] Anne-Marie Slaughter and William Burke-White, "The Future of International Law is Domestic (or, The European Way of Law)", 47(2) Harv. Int'l L. J 327, 328 (2006); (arguing that though the foundation of international law reflects the principles of Westphalian sovereignty, but that this often seemingly made up of equal parts myth and rhetoric.)

[10] Danilo Zolo, *Victor's Justice From Nuremberg To Baghdad*, Trans. M.W. Weir, 5 (London, Verso, 2009)

divisions, the ideal of humanity united into one. However, the rising call for individual accountability before foreign courts, though desirable, is also a threat to the need for peaceful relations between States. With the progressive evolution of the law, whereby legal scholars and practitioners have continued to debate the inviolability of immunities for former and sitting State officials concerns have heightened.[11] This has been so, particularly, in relation to the prosecution of serving Heads of State, and other State officials for alleged breach of international law. The need for individual accountability no doubt will affect the capacity of State officials to engage other States. The tension this development has stimulated may not be unconnected with the confusion that has plagued the development of the law in relation to the immunity of State officials.

There is no denying the fact that the reaction of States in some cases cannot be justified having regard to the express provisions of the Statutes of international[12] and hybrid courts,[13] charged with the prosecution and

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[11] Beth Stephens, "Abusing the Authority of the State: Denying Foreign Official Immunity for Egregious Human Rights Abuses" 44 Vand. J. Transnat'l L.1163, 1178, (2011); Dapo Akande and Sangeeta Shah, "Immunities of State Officials, International Crimes, and Foreign Domestic Courts" 21 Eur. J. Int'l L. 815, 816 (2011); Jane Wright, "Retribution But No Recompense: A Critique of the Torturer's Immunity from Civil Suit", 30 Oxford J. Legal Stud. 143,144, (2010); Andre´ Nollkaemper, "Internationally Wrongful Acts in Domestic Courts" 101 Am. J. Int'l L, 760, (2007) (emphasizing the importance of foreign national courts for enforcing international law).

[12]See Principle III, Principles of International Law Recognised in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal, adopted by the International Law Commission of the United Nations (Principles of the Nuremberg Tribunal), 1950, No. 82; Yearbook of the International Law Commission, 1950, Vol. II, 374-378; *Report of the International Law Commission Covering its Second Session,* 5 June 29 July 1950, Document A/1316, 11-14.

[13] The United Nations was instrumental in establishing the five hybrid tribunals dealing with international crimes, namely the Special Panel for Serious Crimes of the Dili District Court in East Timor (and its Court Of Appeal), SC Res 1272, UN Doc S/RES/1272 (25 October 1999); UN Transitional Administration Mission in East Timor, on the Organisation of Courts in East Timor, UN Doc UNTAET/REG/REG/2000/11 (6 March 2000); the Special Court for Sierra Leone (with Trial Chambers and an Appeal Chamber), see the Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, 16 January 2002. The Special Court was endorsed by the UN Security Council in SC Res 1400, UN Doc S/RES/1400 (28 March, 2002); Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea, Royal Decree NS/RKM/1004/006 (2004) (Cambodia); the War Crimes Chamber of the state court of Bosnia Herzegovina and the courts in Kosovo The War Crimes Chambers was

punishment of international crimes,[14] and the import of treaties since the Peace Treaty of Versailles of 1919.[15] But the anxiety of States was exacerbated when some national jurisdictions, including some African jurisdictions,[16] denied State officials immunity in respect of international crimes. It should however be emphasised that international law is still unsettled whether State officials enjoy immunity from prosecution for international crimes before foreign jurisdictions.[17] It would appear that state practice in this regard may not translate into this threshold in the near future. Not surprising, in a bid to achieve certainty, this has been on the programme of work of the International Law Commission (ILC)

created in 2003 at the Peace Implementation Council Steering Board Meeting and underwent extensive negotiations until its adoption on 6 January 2005. These courts have a mixed membership of local and international judges.

[14]*Arrest Warrant of 11 April 2000 (The Democratic Republic of Congo v Belgium),* ICJ Rep, 2002, p. 3. para 61; *The Princeton Principles on Universal Jurisdiction* (Princeton: Princeton University Press, 2001), 16. Here it was mentioned that:

> International crimes are not precisely defined. There are offences recognized by international law as punishable by any country. Traditionally, piracy on the high seas is regarded as one of the first international crimes, grounded on the violation of international customary law. After the Second World War, the London Agreement of 8 August 1945 establishing the International Military Tribunal at Nuremberg set out international crimes issuing from both treaty law and customary law (crimes against peace, war crimes and crimes against humanity). Later, treaties and international conventions specified various forms of prohibited behaviour recognized as international crimes.

Principle 2 of The Princeton Principles on Universal Jurisdiction reads:

> 1. For purposes of these Principles, serious crimes under international law include (1) piracy; (2) slavery; (3) war crimes; (4) crimes against peace; (5) crimes against humanity; (6) genocide; and (7) torture.
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> 2. The application of universal jurisdiction to the crimes listed in paragraph 1 is without prejudice to the application of universal jurisdiction to other crimes under international law'

[15]Cherif M. Bassiouni, *Crimes against Humanity in International Criminal Law,* 505 (The Hague, Kluwer Law International 1999)

[16] See s. 27, International Crimes Act, 2009 (Kenya); article 4, Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002 (South Africa); s. 18, Law No, 33 Bis/2003 Repressing the Crime of Genocide, Crimes against Humanity and War Crimes (Rwanda); art 28, Constitution of Ethiopia, 1995; art. 4 of the Criminal Code of Ethiopia, 2005; art. 7, Law No.052-2009/AN of 3 December 2009 relating to the Determination of the Competence and Procedure of Implementing the Rome Statute of the International Criminal Court by Courts of Burkina Faso, Promulgated on 31 December 2009, at Ouagadougou, by Decree No. 2009-894/PRES; art. 208.7 of the Law No. 2003-025 of 13 June 2003, amending the Penal Code, Law No.61-27 of 15 July 1961 (Niger).

[17] *Arrest Warrant of 11 April 2000,* above, (n 14), para. 58.

to date.[18] As it were, it is not surprising that immunity of State officials is still one of the controversial topics in international criminal law. It continues to attract the attention of international lawyers.[19] In analysing the immunity of State officials, consideration must of necessity be given to international treaties, national laws and the jurisprudence of international courts.[20] Even then, immunity of State official before foreign courts is "a development with a parameter that is still unclear."[21]According to Akande and Shah,[22] the precise contours of the relevant rules are yet to be conclusively determined. It is therefore not clear the extent of the immunity of State officials.[23]

This paper assesses personal immunity before foreign courts as it relates to Heads of States, heads of governments, foreign ministers. To this end, the paper is divided into the following sections; the first is some developments in the

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[18] See, ILC, 'Provisional Agenda for the Sixty-first Session', Geneva, 4 May- 5 June, and 6 July – 7 August 2009, UN General Assembly, UN Doc. A/AN.4/605, Agenda item No. 8 'Immunity of State Officials from Foreign Criminal Jurisdiction'; ILC, Report on the Work of its 60th Session (5 May to 6 June and 7 July to 8 August 2008), General Assembly, Official Records, Sixty-Third Session, Supplement No. 10 (2008), (A/63/10), Ch. X, paras 265-311; Second Report on Immunity of State Officials from Foreign Criminal Jurisdiction, Roman Anatolevich Kolodkin (Special Rapporteur), Jurisdiction, para. 90, UN Doc. A/CN.4/631 (June 10, 2010); Roman Anatolevich Kolodkin (Special Rapporteur), Third Report on Immunity of State Officials from Foreign Criminal Jurisdiction, UN Doc. A/CN.4/646 (May 24, 2011) ILC, Report on the Work of its 64th Session (7 May to 1 June and 2 July to 3 August 2012), General Assembly, UN Doc. A/CN.4/654.

[19] Roman Anatolevich Kolodkin, "Immunity of State Officials from Foreign Criminal Jurisdiction" Annex A to the Report of the International Law Commission, 2006, 436, para 1; available at, <http://untreaty.un.org/ilc/reports/2006/English/annexes.pdf.> accessed 28 August 2008; see also, Report of the Planning group of the International Law Commission, ILC in its fifty-eighth session, Geneva, 2 august 2006, UNGA, 9 Doc. A/AN.4L.704.

[20] B. E. Carter, "Immunity for Foreign Officials: Possibly too much and Confusing as Well" 99 American Society of International Law Proceedings, 230 (2005).

[21]Joseph W. Dellapenna, "Head-of-state Immunity Foreign sovereign Immunities Act-Suggestion by the Department of State" 88 American International Law Journal, 528, 531, (1994); David J. Bederman, "International Law Advocacy and Its Discontents" 2 Chi. J. Int'l. L., 475, 479, (2001); Ved P. Nanda, "Human Rights and Sovereign Individual Immunities (Sovereign Immunity, Act of State and Diplomatic Immunity) Some Reflections" 5 ILSA Journal of International and Comparative Law, 467, 475-476, (1995); Shobha Varughese George, "Head-of-State Immunity in the United States Courts: Still Confused After All These Years" 64 Fordham Law Review, 1051, 1061, (1995); Sarah Williams and Lena Sherif, "The Arrest Warrant For President Al-Bashir: Immunities of Incumbent Heads of State and the International Criminal Court", 14 Journal of Conflict and Security Law, 71, 74 (2009).

[22]Akande and Shah (n.11) 816-817.

[23]Jerrold L. Mallory, "Resolving the Confusion Over Head of State Immunity: The Defined Rights of Kings" 86 Colum. L. Rev., 169, 170, (1986).

immunity of State officials, while in the second, the nature of immunity *ratione personae*, the International Criminal Tribunal will be considered in the third section, whether there are exceptions to this immunity today or the possibility of an exception or exceptions developing will be addressed in the fourth section.

Some Developments in the Immunity of State Officials

Immunity of State officials of some sort is important to States. However, the scope of the immunity needs clarification. The following cases will be distilled to exemplify the grey areas: the *Pinochet* cases,[24] *Arrest Warrant* case[25] and *Djibouti v. France* case.[26]

In the *Pinochet* case, Pinochet, a former Chilean Head of State, was arrested in 1998 in London on a warrant issued by a Spanish Judge. The judge had a comprehensive report on Pinochet, who was accused of authorising and in some cases permitting the torture and disappearance of thousands of persons, including Chilean and Spanish citizens. Pinochet got to power in Chile in 1973 after the violent overthrow of democratically elected President Salvador Allende. The Divisional Court in London quashed the warrant on the ground that Pinochet was entitled to absolute immunity from the jurisdiction of the British courts.[27] It is noteworthy, that the then British Secretary of State did not intervene on the immunity issue, instead deferred the resolution of the issue to

[24] *R v Bow Street Metropolitan Stipendiary Magistrate and others, ex p Ugarte* (Amnesty International and ors. intervening) [1999] 2 ALL ER 97; House of Lords, *Regina v. Bartle and the Commissioner of Police for the Metropolis and Others Ex Parte Pinochet*, 24 March 1999, reproduced in *International Legal Materials*, vol. 38, 1999, 581-663 (hereinafter "Pinochet No. 3").
[25] *Arrest Warrant of 11 April 2000,* (n.14)
[26] *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti. v. France),* 2008 ICJ Rep, 177
[27] *Regina v. Bartle & Commissioner of Police, ex parte Augusto Pinochet* [1998] Q.B. Div'l Ct. (Eng.), 38 ILM 68 (1999).

the courts.[28] On appeal, the House of Lords reversed the Divisional Court in a 3-2 decision, reasoning that immunity is available only for official conduct, which did not include international crimes.[29] However, the House of Lords reversed its decision because, Lord Hoffmann, who sat on the original panel, failed to disclose his relationship with Amnesty International, one of a coalition of human rights organisations that was granted leave to present arguments in the case.[30] The case was revisited by the House of Lords again. This time the court held that Pinochet was not entitled to immunity from prosecution for offences of torture committed after 8 December 1988, the date when Spain, Chile and the UK had all ratified the Torture Convention.[31] Six of the seven Judges concluded that Pinochet, as a former Head of State, was entitled to immunity from prosecution for offences of murder, and conspiracy to murder, even where the allegation was that the conduct had taken place in Spain. Interestingly, the court justified Pinochet's right to immunity, on the basis of the immunity of the State of Chile from the jurisdiction of the courts of other States. This immunity is generally acknowledged by States. Clearly, this is State or sovereign immunity restricting the essential competence of national courts. It should be emphasised that this immunity is usually from civil jurisdiction, immunity from being sued. But this immunity has also enabled State officials to leverage immunity from

[28]The British government appears to have favoured immunity but believed that the courts would rule in favour of Chile and Pinochet, making it unnecessary to take a position. See Michael Byers, "The Law and Politics of the Pinochet Case" 10 Duke Journal of Comparative & International Law, 415, 416- 426, (2000). Pinochet died in Chile in 2006. This case also provides an excellent window into the complicated relationship between international law and politics.

[29] *Regina v. Bow St. Metro. Stipendiary Magistrate, ex parte Pinochet Ugarte* (No. 1), [2000] 1 A.C. 61 (H.L. Nov. 25, 1998) (hereinafter Pinochet I).

[30] *Ibid.*

[31] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, S. TREATY DOC. NO. 100-20 (1988), 1465 UNTS 113 (hereinafter Convention against Torture).

prosecution on account of State immunity. Roughly stated, it means that, if the conduct is attributable to the State for purposes of state responsibility, then the official should be entitled to conduct-based immunity. It therefore means that the officials and the state are equated one with another.[32]

In a 6-1 decision, the Law Lords decided that Pinochet had no immunity for the offences of torture. Thus, the decision as it were, narrowed the immunity issue to only conduct that clearly violates the Convention against Torture.[33] Alebeek is of the opinion that the decision suffers "from internal inconsistencies"[34] because the six Law Lords in the majority each employed different reasoning, making it impossible to discern a common *ratio decidendi.*[35] The allegations of murder and conspiracy to murder were alleged to have occurred not only in Chile, but also on Spanish territory. The House of Lords did not fully consider whether this criminality within the territorial jurisdiction of another State negated his immunity. Jack Straw, the then British Home Secretary, eventually ordered that the 84-year-old Pinochet be released on the ground of poor health, and he returned to Chile. The cases have been hailed as path-breaking, breath-taking[36] and a watershed,[37] in part because they triggered

[32] *See Regina v. Bow St. Metro. Stipendiary Magistrate, ex parte Pinochet Ugarte* (No. 3), [2000] 1 A.C. 147 (H.L. Mar. 24, 1999) (hereinafter Pinochet III), 224–40 (Lord Hope of Craighead). This limitation excluded most of the allegations against Pinochet, which arose from his conduct in the 1970s.
[33] *Ibid,* Pinochet III.
[34] Rosanne Van Alebeek, *The Immunity of States and their Officials in International Criminal Law And International Human Rights Law,* 226 (Oxford University Press 2008)
[35] *Ibid*
[36] Richard A. Falk, "Assessing The Pinochet Litigation: Whither Universal Jurisdiction?" in Stephen Macedo ed. UNIVERSAL JURISDICTION: NATIONAL COURTS AND THE PROSECUTION OF SERIOUS CRIMES UNDER INTERNATIONAL LAW, 97 (2004)
[37] Curtis A. Bradley and Laurence R. Helfer, "International Law and the U.S. Common Law of Foreign Official Immunity" 2010 SUP. CT. REV., 213, 238–40 (2011), (describing the development of immunity in criminal cases and terming *Pinochet* a "watershed").

both a wave of important cases against Pinochet in Chile and suits against many other defendants in Latin American and European domestic courts.[38]

In the *Arrest Warrant* case,[39] a warrant of arrest was issued by a Belgian Court for the arrest of Abdoulaye Yerodia Ndombasi who was Minister of Foreign Affairs. At the time the case was heard by the International Court of Justice (ICJ), Ndombasi had left that office. As a result of that development, Belgium argued that the case should be dismissed because it no longer presented any controversy. The ICJ disagreed and affirmed that there is personal immunity before foreign national courts. In other words, a sitting Congolese Minister of Foreign Affairs is immune from suit in Belgium national courts on charges of crimes against humanity and grave breaches of the Geneva Conventions.[40]

With that said, the *Arrest Warrant* case appear to represent a setback for expansive readings of *Pinochet*,[41] particularly for being at odds with the idea of a customary international law exception to status or personal immunity for those accused of international crimes before foreign national courts.[42] In addition, the judgment also appears to undermine the argument that *jus cogens* norms are hierarchically superior to immunity norms, given that immunity will not be available to a former Minister of Foreign Affairs or current State officials for acts clearly contravening *jus cogens* rule.[43] In addition, in the *Arrest Warrant* case, the ICJ said in a dictum that former State officials would lack immunity in

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[38] See, Naomi Roht-Arriaza, *The Pinochet Effect: Transnational Justice in the Age of Human Rights* (2005)
[39] *Arrest Warrant of 11 April 2000,* (n.14)
[40]Ingrid Wuerth, "Pinochet's Legacy Reassessed" 106 Am. J. Int'l L , 731, 741 (2012)
[41] *Ibid*, 736
[42] *Ibid*
[43] *Arrest Warrant of 11 April 2000* (n. 14), paras. 59-60

domestic courts for "acts committed during that period of office in a private capacity."[44] The disquisition just mentioned suggests that immunity should persist for non-private acts, so that lifting immunity for international crimes depends on characterizing the conduct in question as "private." Although this position finds some support in the *Pinochet* opinions, scholars have increasingly rejected it, and even the British courts themselves reasoned to the contrary in *Jones v. Ministry of Interior*.[45]

The point is, the ICJ reasoned in *Arrest Warrant* that, treaty-based extensions of jurisdiction and obligations to prosecute or extradite individuals should not affect immunities under customary international law.[46] This reasoning at any rate is at odds with even the narrowest reading of the *Pinochet* case. Such reasoning does not take into consideration the effect of the Convention against Torture which removes immunity by imposing an obligation to prosecute or extradite.[47] However, when viewed from the prism of the *Arrest Warrant case*, it would appear that the ICJ was concerned in the main with the personal immunity of a serving foreign minister that is historically rooted in customary international law.

In *Djibouti v. France*,[48] the court declared that the Djibouti's Head of National Security was not entitled to functional immunity before French courts,

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[44] *Ibid,* para 61

[45] (2007) 1 A.C. 270. (The court stated that the reason Pinochet did not enjoy immunity *ratione materiae* was not because he was deemed not to have acted in an official capacity, but because by necessary implication international law had removed the immunity by virtue of Convention against Torture).

[46] *Arrest Warrant of 11 April 2000,* (n. 14), paras. 59-60, para 59 (reasoning that "jurisdiction does not imply absence of immunity, while absence of immunity does not imply jurisdiction").

[47] See E. D. Bates, "State Immunity for Torture" 7 Human Rights Law Review, 651, 672-673, (2007); (discussing the tension between Arrest Warrant and Pinochet cases); S. Wirth, "Immunity for Core Crimes? The ICJ's Judgment in the Congo v. Belgium case" 13 Eur. J. Int'l L, 882-885, (2002)

[48] *Certain Questions of Mutual Assistance in Criminal Matters*, (n.26) 244, para. 196

on account of failure of Djibouti to raise the immunity defence on his behalf. The ICJ also declared that "the state notifying a foreign court that judicial process should not proceed, for reasons of immunity, against its state organs, is assuming responsibility for any international wrongful act in issue committed by such organs".[49] This would put the court of the foreign State on notice and ensure the sanctity of the immunity of State officials and at the same time engage the responsibility of that State. These cases illustrate the expectations and the confusion that has been the lot of the development of the law, relating to the immunity of State officials in international law.

Nature of immunity *Ratione Personae*

According to Cassese, immunity is a procedural defence.[50] He explained and rightly so that personal immunity raises fewer doubts than functional immunity, and that this procedural defence, protects senior State officials from prosecution by foreign States whilst they are exercising their public functions. Thus, he concluded that it can be said to be in harmony with the doctrine that promotes diplomatic activities of States. Clearly, the immunity is largely analogous to the one provided in the Vienna Convention on Diplomatic Relations (VCDR).

Gaeta, in a similar vein, opined that immunity enables those covered to carry out official duties abroad without the threat of criminal proceedings by the foreign State's apparatus.[51]However, it differs as far as the range of States that may be affected. Whilst appointed diplomats are protected only by so-called *ius*

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[49] *Ibid*
[50]A. Cassese, *When may Senior State Officials be tried for International Crimes*? 863-864 (2002).
[51]Paola Gaeta, "Official Capacity and Immunities" in A. Cassese, P. Gaeta and J. Jones Ed. *The Rome Statute of the International Criminal Court A Commentary,* 976 (Vol. 1, Oxford University Press, 2002).

in transitusinnoxii (i.e. the exemption from prosecution is valid in the host State of destination of the foreign official while on an official visit and only on a foreign territory, as well as States which he passes through on the way to his destination);[52] there seems to be an agreement amongst scholars nowadays that the immunity of Head of State is significantly broader and encompasses all States that may be affected. Thus, it is believed to be *erga omnes* and absolute, especially in relation to a possible foreign criminal jurisdiction.[53]

Fox[54] and Watts[55] have argued that the Head of State immunity applies not only when a Head of State is present on a foreign territory or only when a Head of State is present on foreign territory while on an official visit, and that the immunity is today commonly accepted to apply without restrictions. It must be noted that this immunity constitutes a bar from both criminal and civil jurisdictions. However, only the former is relevant for the purposes of this paper.

In other words, personal immunity covers acts that are both official and private in their nature,[56] as long as they are committed prior to, or during the exercise of the office. What stems from this is that the protection ends with the cessation of the office – when this happens a person who has previously been accorded immunity can be prosecuted for acts committed in their private capacity, but official capacity will be operational as long as they meet certain

[52]Cassese, "International Crimes", (n 50) 864. He described the issue by enumerating situations in which such protection applies and stated that "it is only applicable with regard to acts performed as between the receiving and the sending state, plus third states whose territory the diplomat may pass through while proceeding to take up, or to return to, his post, or when returning to his own country".
[53]Alebeek (n 34) 169.
[54] Hazel Fox, *The Law of State Immunity*, 675 2ND ED. (New York: Oxford University Press, 2008)
[55] Arthur Watts, "The Legal Position in International Law of Heads of State, Heads of Government an Foreign Minsters" 111 RdC 247, 13, 54, (1994)
[56] *Arrest Warrant of 11 April 2000,* (n.14), 3

requirements for the attribution of the act for purposes of state responsibility. The fact is, personal immunity ends and it somewhat transforms into functional immunity. This is not however the only situation enabling an official to be brought to court by a foreign state. Another possibility is that the immunity is waived by the home State.[57]

The issue of waiver is however farfetched. There are no examples of a State waiving the immunity of its Head of State.[58] The waiver of immunity of a Head of State or other State officials may happen especially in the event of an arrest warrant against a State official issued by another State or by an international tribunal. However, this is not a legal obligation and the waiver remains within the sovereign powers of the home State – the executive in particular. As Alebeek states, the government ordinarily should be legitimate according to the internal law of the State concerned to exercise waiver if it chooses.[59]The ICJ has said, albeit in the different context of:

> no post-judgment measures of constraint, such as attachment, arrest or execution, against property of a State may be taken in connection with a proceeding before a court of another State unless and except to the extent that: (a) the State has expressly consented to the taking of such measures….[60]

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[57] *Yousuf & Ors v. Samantar* 669 F. 3d 763, (4th Cir. 2012), 765, 767 (The United States submitted to the court a Statement of interest (SOI), to the effect that Samantar was not entitled to immunity in the absence of a recognised government to assert or waive his immunity. The government reasoned that immunity belongs to the sovereign rather than the official.)

[58] See Alebeek (n 34) 180-182.

[59] *Ibid*

[60] *Jurisdictional Immunities of the State* (*Germany v. Italy: Greece intervening*), 2012, ICJ. 99, 147, para. 116

What is clear, is that an explicit decision on the waiver of immunity needs to be taken.[61] Nevertheless, it appears that in the case of the collapse of a State, the immunity regime stops functioning.[62]

Back to the Pinochet case; the broad potential impact of the *Pinochet* judgment has also not been realized in immunity *ratione personae* cases. This immunity as already noted applies only as long as the official is in office. The rationale: it allows a small group of very high-level officials to perform their functions free of disturbance from the courts of another State, thus facilitating interstate communication and cooperation.

The above rationale was alluded to by Fox, who said that at a given time these officials may not be more than 500 individuals.[63] His position is no doubt telling, having regard to the fact that after leaving office, these officials enjoy functional immunity, or immunity *ratione materiae*, which protects only the acts performed in an official capacity.[64] However, with *ratione personae* immunity historically close to absolute, today, the issue is somewhat more complicated because some States view personal immunity as a function of State immunity itself. Accordingly, Heads of State (like States themselves) are perhaps not entitled to immunity from civil proceedings for certain private acts.[65] But even then, civil proceedings in national courts against foreign sitting Heads of State remain rare.

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[61] See Alebeek, (n.34) 181-182.
[62] *Ibid*
[63] Fox (n 54) 666-67.
[64] *Ibid*
[65] See Institut de droit international, Resolution on Immunities from Jurisdiction and Execution of Heads of State and of Government in International Law (Aug. 26, 2001), reprinted in Andrew Dickinson, Rae Lindsay & James P. Loonam eds., *State Immunity: Selected Materials and Commentary* (2004), 212.

International Criminal Tribunals

The most significant change to *ratione personae* immunity has taken place in the context of international criminal tribunals. For example, sitting Heads of States, Slobodan Milosevic, Charles Taylor, and Omar Al Bashir have all been indicted by international or hybrid criminal tribunals.[66] The Rome Statute of the International Criminal Court unequivocally states in article 27 that "Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person."[67]

Akande and Shah,[68] and Rojo[69] explained that the willingness of some States to lift *ratione personae* immunity before certain international criminal tribunals cannot be said to have extended to foreign national courts. National courts and prosecutors have consistently rejected cases against sitting Heads of State. The 2002 ICJ decision in the *Arrest Warrant* case clearly affirms that personal immunity applies before foreign national courts. In that case, it was held that a sitting Congolese minister of foreign affairs was immune from legal

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[66] Noah B. Novogrodsky, "Speaking to Africa-the Early Success of the Special Court for Sierra Leone" 5 Santa Clara J. Int'l L. 194,203–07, (2006); ICC Press Release, 'ICC Issues a Warrant of Arrest for Omar Al Bashir, President of Sudan' (Mar. 4, 2009), retrieved from, <http://www.icc-cpi.int/Menus/ICC/Press_and_Media/Press_Releases/Press_Releases_%282009%29>

[67] Art. 27(2). Rome Statute of the International Criminal Court, July 17, 1998, 2187 UNTS 90 (hereinafter Rome Statute)

[68] Akande and Shah, (n 11) 819–20.

[69] *Ibid*

[69] Enrique Carnero Rojo, "National Legislation Providing for the Prosecution and Punishment of International Crimes in Spain" 9 J. Int'l Crim. Just. 699, 723–24, (2011); (collecting and discussing cases from Spain); See also. *United States v. Noriega*, 746 F. Supp. 1506, 1519–20 (S.D. Fla. 1990) (denying head-of-state immunity to Noriega because the United States did not recognize him as a Head of State).

proceedings emanating from Belgium national courts on charges of crimes against humanity and grave breaches of the Geneva Conventions.[70]

Possible Exceptions

In considering the possibility and to what extent an exception may exists for immunity *ratione personae* from criminal prosecution in national courts, two contending views will be examined. The first view is that there is no exception to the personal immunity enjoyed by State officials in international criminal law, before a national court, other than for acts performed in a private capacity.[71] The second view is that there is an exception to immunity *ratione personae* ostensibly to allow recent developments in general international law, in particular the now established rule that official position as Head of State is no defence to allegation of international crime.[72] Fox stated that there is uncertainty as to the scope of this exception. The first has to do with the category of violations of international law that will qualify as an exception and its applicability to criminal proceedings. The second has to do with the possibility of finding support in state practice for the removal of this immunity since some state officials no longer enjoy functional immunity for international crimes.[73]

I will now turn on the relationship between *jus cogens* and the rule of State officials immunity before foreign courts. Is it possible to derogate from personal

[70] Abdoulaye Yerodia Ndombasi was Minister of Foreign Affairs when the warrant was issued but had left that office by the time the case was heard and resolved by the ICJ. Belgium argued that the case should be dismissed because it no longer presented a live controversy. The Court disagreed. *Arrest Warrant of 11 April 2000*, (n.14), paras. 23–32; *see also Certain Questions of Mutual Assistance in Criminal Matters* (n. 26) 236, para. 170 (reaffirming head-of-state immunity).
[71] Fox (n 54) 695.
[72] *Ibid*
[73] *Ibid*

immunity by the categorization of certain international crimes, as being a violation of a *jus cogens* norm? If that is achieved, it makes the norm violation higher than the immunity norm that protects State officials. Since *jus cogens* rules always triumph over inconsistent rule of international law, Heads of States, Heads of Governments and Ministers for Foreign Affairs, who are facing charges of genocide, war crimes and crimes against humanity or other offences in international law will be held to be individually accountable. This argument, however depends upon the existence of a conflict between *jus cogens* rules suffused in international criminal law, and the rule of customary international law which requires States to accord immunity to Heads of States, Heads of Governments and Ministers for Foreign Affairs.[74] In the opinion of the Court, no such conflict exists. In other words, there is no conflict between the rules of international criminal law and the rules on State officials immunity in customary international law. These are two sets of rules on different matters. The rules of State officials immunity are procedural in character and relates to whether or not a foreign court may exercise jurisdiction in respect of State officials of another State. The rules do not concern itself with whether the conduct is law or unlawful. So, recognizing the personal immunity of State officials in accordance with customary international law does not amount to recognizing as lawful a breach of a *jus cogens* rule.[75]

The other possibility which appears expedient in the quest for a possible exception, is the waiver of the immunity *ratione personae* of State officials by

[74] *Jurisdictional Immunities of the State,* (n.60) p. 140, para. 92-93
[75] *Ibid*

their home State.[76] According to Alebeek, there are no examples so far, of a State waiving the immunity particularly of its Head of State.[77] However, the waiver of the immunity of a Head of State or other State officials may happen especially in the event of an arrest warrant against a State official issued by another State or by an international tribunal. From all indications, there is no legal obligation on State to waive the immunity of its officials as the waiver remains within the sovereign prerogative of the home State and the executive in particular. As noted earlier, the government should be legitimate according to the internal law of the State concerned.[78] However, it appears to have gained currency that in the event of the collapse of a state, the immunity of its State officials is interrupted.[79]

The fact that at a given time, Heads of State, Heads of Government and Foreign Affairs Ministers may not be more than 500 individuals appears salutary.[80] So, why not allow them enjoy immunity, since these officials after leaving office, enjoy only functional immunity, or immunity *ratione materiae*, which protects only the acts performed by them in an official capacity?[81] That may be the reason Heads of State are not entitled to immunity from civil proceedings for certain private acts, as such acts are not covered by State

[76] *Yousuf & Ors. v. Samantar* 669 F. 3d 763, (4th Cir. 2012), 765, 767 (here, the United States submitted a Statement of interest (SOI), to the effect that Samantar was not entitled to immunity in the absence of a recognised government to assert or waive his immunity. The government reasoned that immunity belongs to the sovereign rather than the official.).
[77] Alebeek (n 34) 182.
[78] *Ibid*
[79] *Ibid*
[80] Fox (n 54) 666-67.
[81] *Ibid*

immunity. [82] But even then, civil proceedings in national courts against Heads of States in power in foreign courts are not common place.

The possibility of an exception to immunity *ratione personae* was considered by the ICJ in the *Arrest Warrant* case. In an attempt to justify the issuance and circulation of the arrest warrant of 11th April, 2000, against Mr. Yerodia Ndombasi in international law, Belgium argued that: "immunities accorded to incumbent Ministers for Foreign Affairs can in no case protect them where they are suspected of having committed war crimes or crimes against humanity." This position, they supported by alluding to various legal instruments creating international criminal tribunals, and also national legislation and the jurisprudence of national and international courts.[83] The court however rejected this argument and declared:

> The Court has carefully examined State practice, including national legislation and those few decisions of national higher courts, such as the House of Lords or the French Court of Cassation. It has been unable to deduce from this practice that there exists under customary international law any form of exception to the rule according immunity from criminal jurisdiction and inviolability to incumbent Ministers for Foreign Affairs, where they are suspected of having committed war crimes or crimes against humanity.[84]

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[82] *See* Institut de droit international, Resolution on Immunities from Jurisdiction and Execution of Heads of State and of Government in International Law (Aug. 26, 2001), reprinted in Andrew Dickinson, Rae Lindsay & James P. Loonam (eds.), *State Immunity: Selected Materials and Commentary* (2004), 212, available at <http://www.idi-iil.org/idiE/resolutionsE/2001_van_ 02_en.PDF>

[83] *Arrest Warrant of 11 April 2000,* (n.14) para. 56.

[84] *Ibid*, para. 58.

The Court was in effect, of the view that the existence of such an exception in regard to national courts could not be inferred from international law rules relating to the immunity or criminal responsibility of State officials contained in legal instruments creating international criminal tribunals, nor in the decisions of international criminal tribunals.[85] The Court consequently had no difficulty concluding that the issuance and circulation of the arrest warrant was in utter disregard of the immunity from criminal jurisdiction which Mr. Yerodia Ndombasi, as a serving Congolese Minister for Foreign Affairs was entitled to.[86] The Court, in an *obiter dictum*,[87] stated, that such individual is criminally accountable subject to the following exceptions: (a) where a case is brought in the individual's own domestic Courts; (b) where the State concerned decides to waive immunity; (c) once the individual ceases to hold office; and (d) where a person is brought before an international criminal tribunal "in respect of acts committed prior or subsequent to his or her period of office as well as in a private capacity."[88]

This solution suggested above appears potent and finds support in state practice, national judicial decisions, and has been further confirmed in some national legislations. For example in the United Kingdom and Australian Acts,[89] the immunity accorded Heads of States, is not subject to any exception. This is

[85] *Ibid*
[86] *Ibid*, para. 78
[87] *Ibid*, para. 61
[88] See the separate and dissenting opinions on the criticisms of the Court's reasoning, in particular the separate opinion of judges, Kooijmans and Buergenthal and the dissenting opinion of judge Van Den Wyngaert
[89] See section 20 of the State Immunity Act of the United Kingdom 1978 and Section 36 of the Australian Foreign States Immunities Act of 1985

however in marked contrast with the 1993 Belgian Act, concerning the punishment of grave breaches of international humanitarian law, as amended in 1999, which recognised an exception to immunities for the offences covered under that Act.[90] The Act provides in article 5(3), until it was amended, that "the immunity attributed to the official capacity of a person, does not prevent the application of the present Act."[91] In 2003, however, the Belgian Act was amended to reflect the decision of the ICJ in the *Arrest Warrant case*. As a result of the amendment, the Legislation now states as follows: "in accordance with international law, there shall be no prosecution with regard to … heads of state, heads of government and ministers for foreign affairs, during their terms of office, and any other person whose immunity is recognized by international law".[92]This position is in harmony with the draft protocol on the Statute of the African Court of Justice and Human Rights. Its article 46A on immunities provides as follows:

> No charges shall be commenced or continued before the Court against any serving AU head of state or government, or anybody acting or entitled to act in such capacity, or other senior state officials based on their functions, during their tenure of office.[93]

The rationale for the operation of immunity *ratione personae* before foreign courts with respect to international crimes can be justified on the need to ensure

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

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

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

[93] Draft Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights as at Thursday 15 May 2014.

the effective performance of the functions expected of such State officials on behalf of their State.[94] This is the sum total of the reasoning of the ICJ in the *Arrest Warrant* case, but can also be found in the pronouncements of national courts[95] and in the opinion expressed by learned publicist.

Conclusion

The troika, Heads of State, Heads of Government, Foreign Ministers, enjoy *immunity ratione* personae. It is no less so for diplomats and members of special missions who also enjoy immunity from prosecution before the criminal courts of other States. The reason why these State officials enjoy immunity *ratione personae* can be traced to the importance attached to the position they occupy. In the case of members of special missions, they are immune if accepted in advance by the receiving State. There is no doubt that these immunities are not for the personal aggrandizement of these State officials but to enable the State officials perform their functions on behalf of their States effectively. There is therefore a coherent reason for the immunity they enjoy.

However, there are indications that immunity *ratione personae* may extend to other ministers or and by extension other state officials when they represent their State. This is all the more so, when their functions have the trappings of international relations on behalf of their State. It is also clear that the immunity

[94] *Arrest Warrant*, (n.14) Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal, para. 75. As noted by these Judges, the issue of a possible exception to immunity puts into play a balancing of interests: on the one scale, there is "the interest of the community of mankind to prevent and stop impunity for perpetrators of grave crimes against its members" and, on the other, "the interest of the community of States to allow them to act freely on the inter-State level without unwarranted interference" (ibid.).

[95] See *Pinochet* (No. 3) particularly Lord Philips of Worth Matravers, 657. Also Lord Hope of Craighead who proposed a different explanation, based on the alleged *jus cogens* character of the rule granting immunity *ratione personae* to incumbent head of State (ibid, 624).

ratione personae is the immunity of the State, and can be waived by the State, and is a separate entitlement to immunity from that of the State, and has nothing to do with whether the state itself is immune.

As noted, there is the possibility that the immunity may be waived by the home state.[96] However, there are no examples of a state having waived the immunity of its head of state.[97] It is not clear whether a head of state could waive his immunity. In this regard, there has been no state practice, but it seems permissible as long as the government of the home state is not in opposition. Sometimes an explicit decision on that matter also needs to be taken.[98] In *Yousuf & Ors v. Samantar*,[99] the Court opined that in the event of the collapse of a state, the immunity stops functioning.

Finally, it must be admitted that immunity *ratione personae* is all encompassing and still compelling today for the troika for peaceful relations between states. The domain remains all conduct before or after they assume office, and since they are few and far between their complete immunity from criminal prosecution in foreign courts is far from too much.

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[96] *Yousuf & Ors v. Samantar* 669 F. 3d 763, (4th Cir. 2012), 765, 767 (The United States submitted to the court a Statement of interest (SOI), to the effect that Samantar was not entitled to immunity in the absence of a recognised government to assert or waive his immunity. The government reasoned that immunity belongs to the sovereign rather than the official.).
[97] Alebeek (n 34) 182.
[98] *Ibid*
[99] 669 F. 3d 763, (4th Cir. 2012), 765.