Zadání pro argumentační seminář ze zvláštní části mezinárodního práva veřejného II
diplomatická imunita
Ak. r. 2005/2006

Situace: Člen katarské královské rodiny přiletěl dne10. října 2004 do České republiky na roční studijní pobyt. Princ Ahmud je přímým nástupcem hlavy státu. Ze své pozice je držitelem diplomatického pasu, jímž se prokázal na letišti Praha-Ruzyně. O jeho příjezdu do země bylo vyrozuměno Ministerstvo zahraničních věcí ČR oficiální nótou katarského ministerstva zahraniční. Během ročního pobytu v České republice se princ účastnil jako zástupce Kataru několika oficiálních akcí. Většinu svého času se však věnoval soukromým, studijním a podnikatelským aktivitám. V ČR se seznámil s Nikolajem. Nikolaj je šestnáctiletý syn ruského velvyslance. Je studentem obchodní akademie a žije společně se svým otcem a matkou v Praze. Na podzim roku 2005 (5. října) byli oba zatčeni Policií ČR a obviněni z trestného činu kuplířství, za který jim hrozí až pětileté odnětí svobody. O jejich zatčení byly oficiální cestou informovány ministerstva zahraničí obou států. Jejich právní zástupci se dovolávají, že se jedná o osoby, které na území České republiky požívají diplomatických výsad a imunit podle mezinárodního práva a jsou tudíž z důvodu jejich trestněprávní imunity na základě norem mezinárodního práva vyňati z pravomoci orgánů činných v trestním řízení ve smyslu § 10 odst. 1 tr. ř. a jejich trestní stíhání je nepřípustné podle § 11 odst. 1 písm. c) tr. ř.

Otázky:

1. Jaký je rozdíl mezi imunitou státu a diplomatickou imunitou. Jaké dvě základní teorie imunity státu znáte? (hlavní náplň semináře. Srov. Arrest warrant case, případ Pinochet)
2. Jaké podmínky podle Vídeňské úmluvy o diplomatických stycích (uveřejněna pod č. 157/1964 Sb.) musí být splněny pro aplikaci institutu diplomatické nedotknutelnosti?
3. Lze jen na základě skutečnosti, že obviněný je držitelem diplomatického pasu, který mu byl vydán příslušnými orgány cizího státu, dovodit existenci podmínek stanovených Vídeňskou úmluvou o diplomatických stycích, při jejichž splnění se jedná o osobu, která na území České republiky požívá diplomatických výsad a imunit podle mezinárodního práva?
4. Na základě jakých norem mezinárodního práva a jak byste argumentovali ve prospěch imunity Ahmuda?
5. Jakými ustanoveními Vídeňské úmluvy o diplomatických stycích a jak byste argumentovali jako právní zástupci Nikolaje?
6. Jak byste argumentovali jako státní zástupce popírající existenci jejich imunity?

Dokumenty:

1. Vídeňská úmluva o diplomatických stycích (157/1964 Sb.)
2. Úmluva o zvláštních misích (40/1987 Sb.)

Povinná literatura:

1. ČEPELKA, Č., ŠTURMA, P., *Mezinárodní právo veřejné*, EUROLEX BOHEMIA, Praha, 2003, str. 425-450
2. POTOČNÝ, M., ONDŘEJ, J.: *Mezinárodní právo veřejné, Zvláštní část*, Praha,

C.H. Beck, 2003, str. 141–153

3. SEIDL-HOHENVELDERN, I., *Mezinárodní právo veřejné*, Praha 1999, str. 176-189, 257-263

Přiložené dokumenty:

Na semináři se bude rozebírat obsah níže uvedeného textu.

Diplomatic Imunity

I. General Principles

a. There are certain categories of persons and bodies under international law immune from the jurisdiction of municipal courts. The two principle categories are 1) foreign states (sovereign or state immunity) and 2) their diplomatic agents (diplomatic immunity).
b. The person of a diplomatic agent is inviolable under article 29 of the Vienna Convention and he may not be detained or arrested.
c. In exceptional cases, a diplomat may be arrested or detained on the basis of self-defense or in the interest of protecting human life.
d. Criminal Jurisdiction
    i. Diplomatic agents enjoy complete immunity from the legal system of the receiving state. Art. 31(1). This provision notes in article 31(1) reflects the accepted position under customary law.
    ii. However, there is no immunity from the jurisdiction of the sending state. Art. 31(4)
e. States recognize that the protection of diplomats is a mutual interest founded on functional requirements and reciprocity.
f. Diplomatic privileges and immunities are regarded as indispensable to the diplomat's performance of duties.
g. All states are both "sending states" (states which send diplomatic missions to foreign countries) and receiving states.
h. Therefore, the rules on diplomatic immunity work much more smoothly that the rules on expropriation, for instance, which are sometimes regarded as favoring the rich states at the expense of the poor states.
i. The rules of diplomatic immunity are "essential for the maintenance of relations between states and are accepted throughout the world by nations of all creeds, cultures and political complexions."
j. Major breeches of these rules, such as Iran's behavior toward the United States diplomats who were held as hostages in 1979-81, are extremely rare.

II. Vienna Convention on Diplomatic Relations (1961)

a. Accession to the Convention by states is almost universal, which shows the importance attached to the subject manner
b. Most of the provisions of the Convention seek to codify customary law
c. Does not grant full immunity to all the staff of a diplomatic mission
d. Several categories of person who may enjoy some or all of the immunities specified therein (Art. 1)
    i. Head of mission (the ambassador or chargé d'affairs)
    ii. members of the diplomatic staff (diplomats proper)
    iii. Members of the administrative staff (secretaries, etc.)
    iv. Members of the technical staff (kitchen staff, butlers)

v. Private servants (personal valet)

e. Generally, the most extensive immunities are accorded to the head of mission and his diplomatic staff, with a descending scale in respect of the other categories.

III. Specific protections and limitations under the Vienna Convention on Diplomatic Relations:

a. Diplomats are:
   i. Not required to give evidence. Art. 31(2)
   ii. Immune from personal service. Art. 35
   iii. Excused from paying most taxes and social security provisions. Art. 33-34
   iv. Excused from customs duties and inspections. Art. 36

b. Diplomats do not enjoy immunity with respect to:
   i. Actions involving purely personal property
   ii. Estate administration in the host state in which the diplomat is involved in a non-official capacity
   iii. Any other commercial or professional conduct in which the diplomat is functioning outside his official duties. Art. 31(a-c).

c. Status of embassies and consulates:
   i. Diplomatic mission and consular post properties are not considered an extension of the foreign state's territory.
   ii. Although such diplomatic premises are within the territory of the receiving state they do enjoy special protection, related to the issue of sovereign immunity. Diplomatic and consulate premises are "inviolable, and are immune from any exercise of jurisdiction by the receiving state that would interfere with their official use."
   iii. The host state is to refrain from search, seizure, and attachment or any other form of enforcement jurisdiction which interferes with the official use of the premises. Art. 22.
   iv. The host state is obliged to protect the diplomatic premises from interference by private parties. Art. 22.
   v. Authorities of the territorial state are not permitted tp enter the building and other premises of a diplomatic mission unless they have gained the permission of the head of the mission. In fact, the territorial state is further obliged to prevent any unlawful entry by others. Art. 22.
   vi. Diplomatic missions are generally exempt from all taxes of the host country. Art. 23, 28.
   vii. Correspondence, records, and documents of the mission are inviolable. Art. 24. Diplomatic mail may not be opened or detained by the host country. Art. 27.
   viii. The host country is obliged to make all necessary facilities available for the proper functioning of a diplomatic mission. Art. 25.
   ix. Diplomatic agents enjoy freedom of travel within their host country, but may be barred from designated zones related to national security interests. Art. 26.
   x. Diplomatic missions have the right to use all suitable means of communications, with the exception of radio transmitters for which they must seek special permission. Art. 27.

xi. Diplomatic agents may not be arrested or subject to coercive measures. Diplomats' dwellings, correspondence and other property are likewise inviolable. Art. 30.

d. Article 31(1) - specifies that diplomats are immune from the civil and administrative jurisdiction of the state in which they are serving except in three cases: (top of page 683 in Shaw)
    i. First, where the action relates to private immovable property situated within the host state (unless held for mission purposes)
    ii. Secondly, in litigation relating to succession matters in which the diplomat is involved as a private person (for example as an executor or heir)
    iii. Thirdly, with respect to unofficial professional or commercial activity engaged in by the agent
e. Article 37(1) - provides that Members of the family of a diplomatic agent forming part of his household.
    i. Shall enjoy the privileges and immunities specified in articles 29 to 36 if not nationals of the receiving state
f. Article 37(2) - Members of the administrative and technical staff (and their households)
    i. The members of the staff of the mission employed in the administrative and technical service of the mission. Art. 1(f).
    ii. Example: Clerical assistants, archivist and radio technicians
    iii. If not national or permanent residents of the receiving state, may similarly benefit from article 29-35
    iv. *Except* that the article 31(1) immunities do not extend beyond acts performed in the course of their duties
    v. Administrative and technical staff and their families enjoy similar immunities to the diplomat; save that the immunity from civil jurisdiction extends only to acts done in the course of their official functions. These immunities are lost if they are nationals of, or permanently resident in, the receiving state
    vi. Thinking behind broader inclusion of immunities for administrative and technical staff:
        1. Many of the persons belonging to the services in question perform confidential tasks which, for the purposes of the mission's function, may be even more important than the tasks entrusted to some members of the diplomatic staff.
        2. An ambassador's secretary or an archivist may be as much the repository of secret or confidential knowledge as members of the diplomatic staff.
        3. Such persons equally need protection of the same order against possible pressure by the receiving State.
g. Article 37(3) - Members of the service staff
    i. The members of the staff of the mission in the domestic service of the mission. Art. 1(g)
    ii. Example: Drivers and receptionists
    iii. If not national or permanent residents of the receiving state, benefit from immunity regarding acts performed in the course of official duties
    iv. Immunity will be restricted to matters arising in the performance of his official functions or, for the lesser categories of the staff, lost altogether.

v. This demonstrates the character of immunities; since the functions of subordinate staff are less important than those of diplomats, there is less need for the interests of private litigants in the receiving state to be sacrificed in order to enable the subordinate staff of the diplomatic mission to carry out their duties efficiently.

h. Article 37(4) – Private Servants of members of the mission
   i. A private servant' is a person who is in the domestic service of a member of the mission and who is not an employee of the sending state. Art. 1(h)
   ii. If they are not nationals or permanently reside in the receiving state, they will be exempt from dues and taxes.
   iii. They may enjoy privileges and immunities only ot the extent admitted by the receiving state.
   iv. The receiving state must exercise its jurisdiction in such a way so not to interfere unduly with the performance of the functions of the mission.

IV. When does immunity begin?

a. Immunities and privileges start from the moment the person enters the territory of the receiving state on proceeding to take up his post OR,
b. if already in the territory, from the moment of official notification under Article 39 of Vienna Convention on Diplomatic Relations.
c. It is fundament to the claiming of diplomatic immunity that the diplomatic agent should have been in some form accepted or received by the receiving country.
   i. If a person is employed at an embassy, nothing more than notification is required before that person would be entitled to immunities.
   ii. There is also thought to be some temporary immunity between entry and notification to a person who is without a diplomat.
   iii. Immunity did not depend upon notification and acceptance, but under article 39 commenced upon entry.
d. Article 39:
   i. Part 1:
      1. Every person entitled to such privileges and immunities shall enjoy them from the moment he enters the territory of the receiving State on proceeding to take up his post OR,
      2. if already in its territory, from the moment when his appointment is notified to the Ministry of Foreign Affairs or such other ministry as may be agreed.
   ii. Part 2:
      1. When functions of a person enjoying privileges and immunities come to an end, such privileges and immunities shall normally cease at the moment when he leaves the country, OR on expiry of a reasonably short period in which to do so, but shall subsist until that time, even in case of armed conflict.
      2. However, with respect to acts performed by such a person in the exercise of his functions as a member of the mission, immunity shall continue to subsist.

V. 3rd State Immunity

a. Article 40 Vienna Convention on Diplomatic Relations provides for immunity where the person is in the territory in transit between his home state and a third state to which he has been posted.

b. Where, however, a diplomat is in a state which is neither the receiving state nor a state of transit between his state and the receiving state, there will be no immunity.
c. Immunities and privileges normally cease when the person leaves the country or on expiry of a reasonable period in which to do so.
d. However, by article 39(2) there would be continuing immunity with regard to those acts that were performed in the exercise of his functions as a member of the mission.
e. Immunity would not continue for a person leaving the receiving for any act which was performed outside the exercise of his functions as a member of a diplomatic mission even though he was immune from prosecution at the time.

VI. Waiver of Immunity

a. By Article 32 of the Vienna Convention on Diplomatic Relations the sending state may waive the immunity from the jurisdiction of diplomatic agents and other possessing immunity under the Convention.
b. Such a waiver must be express.
c. The waiver of immunity does not 'belong' to the individual concerned, but is for the benefit of the sending state. "Only the sovereign can waive the immunity of its diplomatic representatives. They cannot do it themselves."
d. While waiver of immunity in the face of criminal charges is not common, "it is routinely sought and occasionally granted."
e. A waiver of immunity is unusual, especially in criminal cases

DIPLOMATS OR DEFENDANTS? DEFINING THE FUTURE OF HEAD-OF-STATE IMMUNITY

MICHAEL A. TUNKS

INTRODUCTION

The question of when a country's highest leaders may be haled before a foreign nation's civil or criminal courts to stand trial has long been a murky and unsettled area of law. In the past

year, however, international and American courts have crafted a relatively clear and consistent answer.

In two seminal cases, the International Court of Justice (ICJ) and a U.S. federal district court recognized the immunity of the Congo's Foreign Minister Abdulaye Yerodia Ndombasi[1] and Zimbabwe's President Robert Mugabe. These decisions establish a coherent framework for deciding difficult and politically sensitive questions of immunity that addresses the competing goals of promoting international discourse, respecting the sovereign equality of states, and ensuring accountability for serious international crimes. By establishing clear and predictable rules that define when a state's leaders may travel abroad freely without fear of arrest, this framework promises to improve nations' ability to conduct crucial diplomatic functions. Moreover, it provides states with certain means of bringing to justice world leaders who violate fundamental principles of international law and basic human decency.

Part I of this Note examines the origins of the head-of-state immunity doctrine, a history that proves crucial in analyzing why some aspects of the doctrine have been discarded while others have been retained. Parts II and III discuss the law of head-of-state immunity under international law and U.S. law, respectively, and describe the developments that have affected the head-of-state immunity doctrine in the past year. Part IV identifies the framework of head-of-state immunity law synthesized in these two recent cases, demonstrates that this framework is a responsible balance between the interests of diplomacy and justice, and suggests ways in which this framework allows the United States to seek accountability for international crimes while preserving strong protection for the leaders of the United States and our allies.

I. HEAD-OF-STATE IMMUNITY: ORIGINS AND POLICIES

The principle of head-of-state immunity originally developed from the idea of state sovereign immunity, as the state and its ruler used to be deemed one and the same. Yet the treatment afforded to heads of state and other top state officials[2] has also been strongly influenced by the principle of diplomatic immunity, and the three concepts have by now evolved into doctrines wholly distinct from one another. Nevertheless, to understand the dramatic recent changes in the law of head-of-state immunity, it is essential to examine these closely related doctrines from which the idea of head-of-state immunity descended, and to explore their underlying rationales.

A. State Sovereign Immunity

Rules of sovereign immunity govern the extent to which a state may claim to be free from the jurisdiction of a foreign nation's courts. Historically, international law recognized a principle of absolute immunity for sovereign states, under which no state could be put on trial without

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[1] Arrest Warrant of 11 April 2000 (Congo v. Belg.), 41 I.L.M. 536, 549-50, 551-52 (2002) (recognizing the immunity of Yerodia).

[2] The head-of-state immunity doctrine protects not only heads of state, but also heads of government and certain other top state officials, including foreign ministers. *See* Lafontant v. Aristide, 844 F. Supp. 128, 133 (E.D.N.Y. 1994) (stating that the "determination of who qualifies as a head-of-state is made by the Executive Branch"). The question of precisely which government officials are protected by head-of-state immunity is outside the scope of this Note.

its consent. This rule reflected the fundamental premise that all states are independent and equal under international law, and the notion that subjecting a state to a foreign court's jurisdiction would be inconsistent with the idea of sovereign equality. But as countries became more and more involved in commercial activities, international law shifted toward a concept of restrictive sovereign immunity, under which a state retains immunity from lawsuits based on its official public acts, but may be subject to a foreign state's jurisdiction regarding claims arising out of its private acts, such as commercial behavior. By consenting to these new standards, states adapted the law of sovereign immunity to fit a changing world in which national governments played more expansive roles outside the sphere of what had traditionally been considered public action.. The shift to restrictive sovereign immunity allowed international law to adjust to more extensive state commercial activity without unduly interfering with the goals of state sovereign equality and independence.

B. Diplomatic Immunity

Diplomatic immunity, in contrast, gives a form of restrictive immunity to the official agents of a diplomatic staff.[3] Diplomatic agents are considered inviolable and not subject to arrest;[4] they are absolutely immune from criminal prosecution[5] and they are immune from civil suits except when the action relates to their private property or their private commercial activities outside the scope of their official functions. Yet the immunity still belongs to the state, not to the diplomat, and it may be waived if the sending state desires.

The most powerful justification for diplomatic immunity is functional necessity: in the absence of such immunity, diplomats would not be able to effectively represent their countries, and international relations in turn would suffer.[6] The leading treaty in this field, the Vienna Convention on Diplomatic Relations, endorses the idea of functional necessity by explaining that the treaty's goal is to develop friendly relations between nations and stressing that the purpose of diplomatic immunity is "to ensure the efficient performance of the functions of diplomatic missions."

C. Head-of-State Immunity

Head-of-state immunity has sought to achieve the goals of both sovereign and diplomatic immunity by (1) recognizing an appropriate degree of respect for foreign leaders as a symbol of their state's sovereign independence; and (2) ensuring that they are not inhibited in performing their diplomatic functions. Heads of state who travel abroad perform crucial and unique diplomatic tasks, and, therefore, a principal purpose of head-of-state immunity is to

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[3] Vienna Convention on Diplomatic Relations, Apr. 18, 1961, art. 29-38

[4] Vienna Convention on Diplomatic Relations, art. 29

[5] Vienna Convention on Diplomatic Relations, art. 31

[6] *See* Joshua D. Groff, *A Proposal for Diplomatic Accountability Using the Jurisdiction of the International Criminal Court: The Decline of an Absolute Sovereign Right*, 14 TEMP. INT'L & COMP. L.J. 209, 216 (2000) (discussing functional necessity as "the most popular" justification for diplomatic immunity); Lori J. Shapiro, *Foreign Relations Law: Modern Developments in Diplomatic Immunity*, 1989 ANN. SURV. AM. L. 281, 283 (1990) (exploring the theoretical bases for diplomatic immunity). Other theories that have been offered to explain the doctrine of diplomatic immunity include: (1) a vision of a diplomat as a personification of the sending state's sovereign; and (2) extraterritoriality-a legal fiction that a diplomat who travels abroad remains in his home country for legal purposes

allow state leaders freely to conduct diplomacy in foreign countries.[7] Moreover, ensuring that heads of state may travel freely abroad serves the traditional aims of sovereign immunity, because subjecting a state's leader to the jurisdiction of a foreign court infringes to some degree on that state's sovereignty.

Historically, heads of state -- like states themselves -- were absolutely immune for acts committed either in a public or a private capacity, and therefore many countries felt no practical need to distinguish between head-of-state immunity and state sovereign immunity. But as the international community moved toward a restrictive form of sovereign immunity, stripping away a state's immunity for private or commercial acts, it became unclear whether the doctrine of head-of-state immunity would follow that course as well, or whether international law would preserve a greater degree of personal inviolability for world leaders. The shift to restrictive sovereign immunity demonstrated that the policies justifying that doctrine could in some instances be outweighed by other important state interests. Granting immunity to heads of state was justified in part by these very same policies, but also by functional diplomatic considerations. Consequently, nations began thinking about head-of-state immunity as a distinct legal concept, and recognized the need to reconsider the extent to which the goals of sovereign equality and functional necessity together could justify exempting heads of state from judicial process abroad.

A strong head-of-state immunity doctrine would prevent states from bringing some violators of the most serious international crimes to justice, a consequence that seemed at odds with the international community's ever-increasing focus on protecting fundamental human rights. As the international legal system at the close of the twentieth century concentrated increasingly on safeguarding human rights, states consented to accept some limitations on their sovereignty to ensure more accountability for violations of these basic norms. In addition, bestowing immunity upon heads of state can give human rights violators an incentive to keep power at all costs to retain the cloak of immunity that runs with the office, particularly if former heads of state are not entitled to the same benefits. Motivated by the desire for accountability, many state policymakers weighing the benefits of immunity against the interests of justice, decided it would be best to whittle away at the shield of immunity historically enjoyed by heads of state.

On the other hand, immunity from foreign jurisdiction has been recognized throughout human history as an essential tool in conducting foreign affairs. Head-of-state immunity allows a nation's leader to engage in his official duties, including travel to foreign countries, without fearing arrest, detention, or other treatment inconsistent with his role as the head of a sovereign state. Without the guarantee that they will not be subjected to trial in foreign courts, heads of state may simply choose to stay at home rather than assume the risks of engaging in international diplomacy abroad. For example, when Belgium began publicly entertaining the idea of bringing Ariel Sharon to trial, the Israeli Prime Minister was essentially unable to visit the European Union Headquarters in Brussels, and Israeli legal advisors began compiling a list of nations that purported to exercise universal jurisdiction over criminal offenses in such a manner.

Moreover, supporters of head-of-state immunity feared that the decay of the immunity doctrine would lead to the increased use of civil and criminal lawsuits as a weapon against

[7] ("Each state, with the expectation of being accorded similar treatment, grants foreign heads of state at least the degree of immunity necessary for them to perform their duties within that state without being subject to detention or arrest.").

unpopular political figures. Israeli Attorney General Elyakim Rubenstein, without providing details, claims to have many clear indications that lawsuits against Sharon and other top Israeli officials are "conducted in the context of a premeditated campaign involving people with clear political interests." Likewise, former U.S. Secretary of State Henry Kissinger has been very critical of attacks on the traditional head-of-state immunity doctrine, and reports indicate that Kissinger himself is reluctant to travel in several countries. Kissinger argues that the international legal system should not develop into "a way of conducting political battles [where] the various contestants will pursue each other in courts around the world."

II. HEAD-OF-STATE IMMUNITY UNDER INTERNATIONAL LAW

At the close of the twentieth century, international law increasingly began to identify situations in which heads of state would not be entitled to immunity in foreign courts. Correspondingly, it became quite unclear to states and scholars what still remained of the traditional head-of-state immunity doctrine in modern times. In 2002, the ICJ stepped in to resolve the debate, providing a relatively clear and authoritative framework for deciding head-of-state immunity cases under international law.

A. The State of International Law before the Yerodia *Case*

During the past few years, the international law of head-of-state immunity has evolved at an astoundingly rapid pace. No treaty has been signed to clarify or alter head-of-state immunity law; instead, the law has changed through the development of international custom. International customary law consists of two basic elements: objective state practice, and states' subjective belief that their behavior is obligatory under international law, an element known as *opinio juris*. Therefore, to monitor the development of the customary law of head-of-state immunity, one should analyze how national and international courts have addressed recent immunity questions, how states have reacted to these decisions, what actions political branches have taken with respect to immunity issues, and any general statements nations have made about the degree of immunity enjoyed by heads of state.

Recent state practice has drawn a sharp distinction between former heads of state and current heads of state, as courts across the world have been much more willing to subject former leaders to their jurisdiction.After British authorities arrested former Chilean dicta-tor Augusto **Pinochet**, on an international arrest warrant issued by Spain, Pinochet, who had traveled to London for back surgery, attempted to resist extradition based on his status as a former head of state. The British Law Lords denied him immunity for acts of torture committed after 1988, when the Torture Convention came into effect in the United Kingdom. Even though the ruling was decided on narrow grounds, for most scholars it sounded the death knell for head-of-state immunity for international crimes with respect to *former* heads of state, even when the crimes were perpetrated while the leader was in office. While former heads of state still retain immunity for the *official* acts they committed while in power, they enjoy no protection for their international crimes, because such serious abuses cannot fall within the scope of a head of state's legitimate functions. Even though Pinochet served as a head of state at the time, international law deems acts of torture so far outside the bounds of legitimate state action that he must be considered a private actor with respect to such conduct.

The abrogation of immunity for the *private* acts of former heads of state, including international crimes in any context, is in harmony with the twin purposes of the head-of-state

immunity doctrine: respecting state sovereign equality and promoting diplomatic functions. Because crimes against humanity, torture, and other international crimes are outside the scope of what can be considered a state's official public functions, seeking accountability for these acts does not in-fringe on a state's sovereignty, or at least not so much as to outweigh the benefits of stronger human rights enforcement. This is exactly the rationale that led to the adoption of restrictive sovereign immunity for states, and nothing suggests that the goal of protecting state sovereign equality should favor a nation's head of state over the state itself. Furthermore, holding former heads of state accountable for their international crimes does not interfere with the goal of promoting diplomatic functions, because exercising jurisdiction over a former leader would not prevent current diplomats from traveling abroad and would not otherwise unduly disrupt international relations.

Much more controversy has surrounded the law of head-of-state immunity for current leaders, and at least some state practice has emerged that suggests abrogating immunity even for sitting world leaders, at least for the most serious international offenses.[8] A Belgian lawsuit alleging that Israeli head of state Ariel Sharon took part in a 1982 massacre of Palestinian refugees in Lebanon and a suit in response against Palestinian leader Yasser Arafat for a series of murders and bombings in Israel serve as prominent examples. Sensing the possibility of using the Belgian courts as a forum to try state leaders, a group of Cuban exiles followed suit, bringing a civil action against Fidel Castro in Belgium based on allegations of torture, persecution, and false imprisonment.

The Rome Statute of the International Criminal Court (Rome Statute), a multilateral treaty, lent even more force to the argument that sitting head-of-state immunity was eroding under customary international law. The Rome Statute explicitly denies immunity to heads of state, declaring that "official capacity as a Head of State or Government . . . shall in no case exempt a person from criminal responsibility under this Statute."[9] United Nations (UN) Secretary General Kofi Annan echoed that the goal of the International Criminal Court (ICC) is to "ensure that *no ruler*, no State, no junta, and no army anywhere can abuse human rights with impunity." The Rome Statute provides for jurisdiction when the defendant's state is a party to the treaty, or when the crime took place on the territory of a state party. When the defendant head of state is a national of a state party to the treaty, head-of-state immunity is not really abrogated; rather, the state that holds the immunity has merely waived it in advance or delegated its power to try its own leaders. However, when the proposed court's jurisdiction is based simply on a delegation from states with territorial jurisdiction, the ICC, according to the plain text of the Rome Statute, purports to claim jurisdiction over heads of state of nations that have not consented to the court's jurisdiction.

The Statutes of the International Criminal Tribunals for the Former Yugoslavia and Rwanda (ICTY and ICTR) also provide that

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[8] *See Cuban Exiles Act Against Castro*, CNN.com, *at* http://europe.cnn.com/2001/WORLD/europe/10/04/belgium.castro/ (Oct. 4, 2001) (on file with the *Duke Law Journal*) (naming Cuban President Fidel Castro, Israeli Prime Minister Ariel Sharon, and Iraqi dictator Saddam Hussein as heads of state who at the time faced possible trials in Belgium for international crimes).

[9] Rome Statute of the International Criminal Court, July 17, 1998, art. 27, U.N. Doc. A/CONF.183/9 (1998), 37 I.L.M. 999, 1010.

sitting heads of state are not immune before those tribunals.[10] Yet these statutes lend little support to the development of a general international customary rule, since they were authorized by the UN Security Council under its Chapter VII powers to deal with specific threats to international peace and security. The ICTY and ICTR Statutes do not recognize a general change in the international law of head-of-state immunity; on the contrary, the Security Council has authorized a limited abrogation of the customary rule for a specific purpose, namely to restore international peace and security in two unstable regions. Because states consented to give the Security Council this power in the UN Charter, the ICTY and ICTR Statutes do not change the principle that no head of state may be put on trial without the consent of his home country.

Recent state practice also presents a number of examples that suggest that the doctrine of immunity for current heads of state is still alive and well, even with respect to the most serious international crimes. In March, 2001, France's highest court, the Cour de Cassation, held that Libyan head of state Muammar el-Qaddafi was entitled to immunity in a suit alleging that Qaddafi was responsible for bombing a French DC-10 aircraft in an attack that killed 170 people.[11] The decision reversed a lower court ruling that had refused to recognize the sitting Libyan leader's head-of-state immunity. In Spain, the National Court decided in 1999 that it had no authority to prosecute sitting Cuban head of state Fidel Castro. Similarly, the United States has denied immunity to former heads of state,[12] but has never abrogated the immunity of a sitting head of state or head of government.[13] Furthermore, even though some international agreements have called for stripping away head-of-state immunity, and although some countries have considered taking jurisdiction over foreign leaders, it is significant that no nation has yet gone so far as to actually pass judgment against a sitting head of state.

B. The ICJ's Yerodia *Arrest Warrant Decision*

On April 11, 2000, a Belgian investigating judge issued an international arrest warrant *in absentia* against Abdulaye Yerodia Ndombasi, the Democratic Republic of the Congo's Minister of Foreign Affairs. The warrant accused Yerodia of crimes against humanity and grave breaches of the 1949 Geneva Conventions and their Additional Protocols for delivering speeches inciting racial hatred. Belgium asserted that it was exercising its universal jurisdiction to try international crimes, and Belgian law did not recognize any special immunities arising from any person's capacity as a foreign official. The Democratic Republic of the Congo in turn protested the arrest warrant's validity under international law, and consequently brought proceedings against Belgium in the ICJ in the Hague. In addition to the case against

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[10] Statute of the International Criminal Tribunal for the Former Yugoslavia, art. 7, S.C. Res. 827, U.N. SCOR, 48th Sess., 3217th mtg., Annex, U.N. Doc. S/Res/827/Annex (1993), *reprinted in* 32 I.L.M. 1192, 1194 ("The official position of any accused person, whether as Head of State or Government or as a responsible Government official, shall not relieve such person of criminal responsibility . . . ."); Statute of the International Criminal Tribunal for Rwanda, art. 6, S.C. Res. 955, U.N. SCOR 49th Sess., 3453d mtg. at 16, U.N. Doc. S/Res/955 (1994) [hereinafter ICTR Statute] (same). Indeed, the ICTY has exercised its jurisdiction over former Yugoslav President Slobodan Milosevic on war crimes and genocide charges arising out of the conflicts in Croatia, Bosnia, and Kosovo. *See generally* Joseph Lelyveld, *The Defendant: Slobodan Milosevic's Trial, and the Debate Surrounding International Courts*, NEW YORKER, May 27, 2002.

[11] *Gadhafi Will Not Face Bomb Charge*, CNN.com, *at* http://europe.cnn.com/2001/WORLD/europe/france/03/13/crime.france.gaddafi/ (Mar. 14, 2001) (on file with the *Duke Law Journal*).

[12] *In re* Estate of Ferdinand Marcos, 25 F.3d 1467, 1471 (9th Cir. 1994).

[13] *See* Tachiona v. Mugabe, 169 F. Supp. 2d 259, 288, 296-97 (S.D.N.Y. 2001) (recognizing the immunity of Zimbabwe's sitting president, Robert Mugabe); Saltany v. Reagan, 702 F. Supp. 319, 320 (D.D.C. 1988) (finding sitting British Prime Minister Margaret Thatcher immune from suit in the United States).

Yerodia, Belgium was also considering whether to put Israeli Prime Minister Ariel Sharon, Cuban President Fidel Castro, and Iraqi leader Saddam Hussein on trial for crimes against humanity.

Considering the justifications for the head-of-state immunity doctrine and recent state practice, the ICJ in the *Yerodia* case declared that 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." The ICJ emphasized that the nature of a head of state or foreign minister's office requires him to travel to other nations without apprehension that he could be ex posed to legal liability or criminal punishment. Consequently, a sitting head of state's immunity, unlike that of a former head of state, cannot depend on whether the crime alleged involved his actions in a private capacity or an official capacity.

Rather, the ICJ observed that the only exceptions to a head of state's immunity under international law are: (1) that a head of state is not immune under international law from process in his own country; (2) likewise, a head of state's home country may waive his immunity in foreign courts; (3) a former head of state is not immune for acts committed before or after his period in office or for private acts (including international crimes) committed while in office; and (4) a head of state enjoys no immunity when that immunity has been validly abrogated by an international tribunal.

State practice since the ICJ's decision demonstrates that states have accepted the principles explained by the ICJ, substantially resolving years of confusion over the scope of head-of-state immunity under international law. Most prominently, in response to the ICJ's opinion, the Belgian government retreated from any assertion that putting a sitting foreign head of state on trial is justified under international law, and the Belgian judiciary has declared the case against Ariel Sharon inadmissible. "The judgment is clear," said Jan Devadder, a legal advisor in the Belgian Foreign Ministry. "The court has clearly ruled government leaders and heads of state enjoy total immunity from prosecution. The Sharon case, in my opinion, is closed."