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IMMUNITIES ENJOYED BY OFFICIALS OF STATES AND INTERNATIONAL ORGANIZATIONS

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SUMMARY

This chapter seeks to explain the immunities enjoyed by various categories of officials of States and international organizations involved in the conduct of international relations. It sets out the broad rationale underlying these immunities as being to facilitate the processes of communication between States on which international relations and cooperation rely. The law relating to the various categories of officials is then considered in turn, noting in particular the extent of the immunities from jurisdiction which they enjoy.

Finally the question of the inter-relation of the law on immunities (which developed largely as a 'self-contained regime') with recent developments in the field of international criminal law is considered. The discussion focuses on the challenges to immunities which are presented by measures to end the impunity of those who commit the most serious international crimes including, the development of extraterritorial jurisdiction and the establishment of international criminal tribunals. A range of judicial decisions, such as the House of Lords decision in the *Pinochet No 3* case, the judgment of the International Court of Justice in the *Arrest Warrant* case, and most recently the decision of the International Criminal Court relating to the arrest warrant in the *Al Bashir* case are reviewed in order to consider how international law has sought to reconcile these apparently conflicting priorities.

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I. INTRODUCTION

The primary focus of this chapter is on the immunities which officials of States and international organizations enjoy from the jurisdiction of other States, since it is in this area that many of the most difficult problems of diplomatic law lie.[2] For these purposes diplomatic law means the law by which international relations are conducted, and the processes of communication at the public international level are facilitated. Such communication can occur by a variety of means and in a number of settings. It includes both eye-catching, single events such as State visits and summits between Heads of States, as well as the more everyday work of foreign ministries, diplomatic missions, consular posts, and international organizations (James, 1991). The setting for such international communication ranges from simple ad hoc bilateral meetings of State officials, to the permanent institutionalized cooperation in large international organizations such as the UN and its specialized agencies.

Diplomatic law has ancient roots, and today comprises a large and, in many respects, highly developed body of law, from a variety of sources. These include the 1961 Vienna Convention on Diplomatic Relations (VCDR), the 1963 Vienna Convention on Consular Relations (VCCR), and the 1969 UN Convention on Special Missions. Additionally, in relation to international organizations there is a large number of treaties which deal with both the privileges and immunities of representatives of States to international organizations and the privileges and immunities of the officials employed by those organizations. The best known examples are the 1946 Convention on the Privileges and Immunities of the United Nations, and the 1947 Convention on the Privileges and Immunities of the Specialized Agencies. A further important component of diplomatic law is the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents 1973.[3]

However diplomatic law is not fully codified, and certain categories of those engaged in the conduct of international relations therefore enjoy immunity only by virtue of customary international law. For example, as we shall see, the law governing the privileges and immunities of foreign Heads of State and other senior government officials remains largely uncodified at the international level. To the body of treaties and custom which comprise diplomatic law, we can also add a number of important judicial decisions of both international and national courts and tribunals in which its rules have been interpreted and applied.

In earlier eras, when the range of diplomatic communication was less developed, its governing law was less sophisticated and the rationales on which that law rested were broad approximations. In the modern era, however, the legal fiction of extraterritoriality of foreign missions has now been discredited (Brownlie, 2008, p 343) and

[2] Whilst the primary focus will be on diplomatic law, its interaction with other more recent developments in international law, including in human rights law and international criminal law will be considered in a number of the subsequent sections of this chapter.

[3] For text see (1974) 13 ILM 41. This Convention comprises an important aspect of the duty of protection States owe to officials of States and international organizations engaged on international business, providing for broad extraterritorial jurisdiction in respect of crimes relating to attacks on these persons. For a commentary on its drafting and negotiation see Wood, 1974.

the identification of representatives of a State with the State itself (the 'representative theory') has been subjected to more rigorous rationalization.[4] Accordingly it is now the 'functional necessity' theory which provides the most convincing explanation of the modern law of diplomacy.[5] This theory recognizes that international cooperation between States, from which political, economic, social, and cultural benefits flow, is entirely dependent on effective processes of communication. It is therefore essential that international law should protect and facilitate those processes of communication, and it is to that end that modern diplomatic law seeks to ensure an appropriate balance between the interests of the sending and receiving States. Professor Denza (2008, p 2) observes:

> Diplomatic law in a sense constitutes the procedural framework for the construction of international law and international relations. It guarantees the efficacy and security of the machinery through which States conduct diplomacy, and without this machinery States cannot construct law whether by custom or by agreement on matters of substance.

The primary aspect of diplomatic law on which this chapter will concentrate is the grant of immunity from local jurisdiction. In this respect it is important to note that international law recognizes two basic types of immunity from jurisdiction in relation to officials of States and international organizations.

The first is immunity *ratione personae*, ie, immunities enjoyed by certain categories of State officials by virtue of their office. The functions of certain key offices of State are so important to the maintenance of international relations that they require immunity for their protection and facilitation.[6] These immunities are often wide enough to cover both the official and the private acts of such office-holders, since interference with the performance of the official functions of such a person can result from the subjection of either type of act to the jurisdiction of the receiving State (eg, if a diplomat is arrested it will interfere with his ability to perform his official functions whatever the reason for his arrest). This often means that these categories of official enjoy complete personal inviolability (including freedom from arrest and/or detention) and absolute immunity from criminal jurisdiction. Immunity from civil jurisdiction may also be recognized (though given the less coercive nature of civil jurisdiction, this immunity may be limited in respect of certain purely private actions of members of certain categories of official).[7] However because immunities *ratione personae* attach only to enable the proper functioning of particular offices of State, rather than to benefit the office-holder individually, they lapse when he leaves office.

[4] The representative theory suggests that diplomats, as representatives of the sending State should enjoy the same immunities as the State does itself. The preamble of the VCDR states that: '... the purpose of such privileges and immunities is not to benefit individuals but to ensure the efficient performance of the functions of diplomatic missions as representing States...' In any event it might also be noted that the immunities of States themselves are now more limited and are increasingly based on function rather than simply on status.

[5] See introductory comments to Section II, of the ILC Commentary on its final draft Articles, 1958 *YBILC* vol II, pp 94–95; see also comments of Sir Gerald Fitzmaurice, *YBILC* (1957), vol I (part two), at para 10.

[6] See, eg, the preamble to the VCDR and the judgment of the ICJ in *Arrest Warrant of 11 April 2000 (Democratic Republic of Congo* v *Belgium), Preliminary Objections and Merits, Judgment, ICJ Reports 2002*, p 3.

[7] Denza, 2008, pp 280–283 notes how, historically, the immunities of diplomats from civil jurisdiction were less readily accepted than immunities from criminal jurisdiction.

The second type of immunity is immunity *ratione materiae*—these immunities attach to the official acts of State officials. They are determined by reference to the nature of the acts in question rather than by reference to the particular office of the official who performed them. As such they cover a narrower range of acts than immunities *ratione personae*, but cover a wider range of actors—indeed they potentially apply to the official acts of all State officials. Furthermore because they relate to the nature of the act in question, a former State official can claim the benefit of such immunity for his official acts performed whilst in office, even after he has left office.

It might be noted that both of these types of immunity operate simply as procedural bars to jurisdiction, and can be waived by appropriate authorities of the sending State, thus enabling the courts of the receiving State to assert jurisdiction.

The related, but conceptually distinct, doctrines of non-justiciability and/or act of State are not dealt with here. Non-justiciability is sometimes confusingly described as 'subject-matter immunity', but is in fact distinct from procedural immunity, since it essentially asserts that the subject matter of the claim is in fact governed by international law (or, in some cases, foreign public law) and therefore falls outside the competence of national courts of other States to determine.[8] The plea of non-justiciability requires the court to give closer examination to the basis of the proceedings than when it deals with a procedural immunity. However further confusion may arise from the fact that these various forms of objection to jurisdiction are not mutually exclusive, but can in fact exist simultaneously (see Barker, 1998). Cases where different grounds for objection to jurisdiction coexist will usually be dismissed on the basis of a procedural immunity, since that question must be decided at the outset of proceedings, and will often be the simplest means of bringing the proceedings to an end.[9]

Despite the considerable constraint which procedural immunities (and other privileges of foreign diplomatic missions) place on the territorial jurisdiction of the receiving State, States generally observe them scrupulously. Perhaps more surprisingly, despite certain notorious cases of their abuse, there is no substantial body of opinion which advocates their abolition or restriction. For example, in response to the *St James's Square Incident* of 1984 (in which a police officer was killed by a shot fired from within the Libyan People's Bureau in London, whilst she was patrolling a political demonstration outside the Bureau), both the Foreign Affairs Committee of the UK Parliament and the UK government considered whether amendment of the VCDR should be sought, but rejected this on the grounds that it was neither practicable nor desirable.[10]

The generally high level of compliance with diplomatic law is usually ascribed to the reciprocal nature of diplomatic exchange (see, eg, Higgins, 1985). Since each State is both a sending State and a receiving State, each State has an interest in maintaining the proper

[8] See *Buttes Gas and Oil Co* v *Hammer* [1982] AC 888 (HL). For the limits of this doctrine see the recent case of *Kuwait Airways Corp* v *Iraqi Airways Co (No 2)* [2002] UKHL 19, 16 May 2002. For the application of the doctrine of non-justiciability alongside questions of the immunity of a former State official see the dissenting speech of Lord Lloyd in the *Pinochet (No 1)* case [1998] 3 WLR 1456 at pp 194–196 and discussed by Denza, 1999, pp 956–958.

[9] Procedurally non-justiciability/act of State is considered more as a substantive defence rather than simply a procedural bar to the jurisdiction of the court, and is therefore considered at a later stage of proceedings—eg, the judgment of Lord Goff in *Kuwait Airways Corp* v *Iraqi Airways Co (No 1)* [1995] 1 WLR 1147 (HL).

[10] See *Abuse of Diplomatic Privileges and Immunities*, FAC First Report 1984–5 (HC 127), at paras 53–57, and the Government's Reply (Misc No 5 (1985), Cmnd 9497), at paras 9–11.

equilibrium between the rights of sending and receiving States. This explains the restraint shown both by receiving States in respecting the privileges and immunities of foreign missions, and by members of diplomatic missions in their conduct while abroad.

It should be noted that diplomatic law has grown up largely as a 'self-contained regime', setting out the rights and obligations of receiving States and sending States, and with its own remedies available in cases of abuse. This has been observed by the ICJ[11] and is also reflected in the ILC Articles on State Responsibility, Article 50 of which provides that States are not permitted to infringe the inviolability of diplomatic and consular agents, premises, archives, and documents when taking countermeasures (Crawford, 2002, pp 50 and 288–293). However, as shall be seen in Section VII below, the interaction of diplomatic law with recent developments in other areas of international law, and particularly in international criminal law, has raised difficult problems which have yet to be fully answered.

II. DIPLOMATIC RELATIONS

The primary, though not exclusive, means of communication between governments is through the establishment of diplomatic relations, usually involving the exchange of permanent diplomatic missions. A diplomatic mission is of course in a position of considerable vulnerability, being located in territory over which another State exercises jurisdiction, and thus having limited means available to it for ensuring its own security. From the earliest times international society has therefore recognized the need to protect diplomatic agents so as to enable diplomatic exchange (Young, 1964; Barker, 1996, pp 32–55). The rules of international law which govern the establishment and maintenance of such diplomatic relations are now codified in the 1961 Vienna Convention on Diplomatic Relations (VCDR). With over 180 parties, the VCDR is amongst the most widely ratified of all international conventions, and it is probable that even those of its aspects which were originally progressive development of the law are now considered to reflect customary international law.[12] The VCDR has thus been extraordinarily successful in its aim to create a comprehensive legal framework for the conduct of diplomatic relations.[13]

A. THE SCHEME OF THE VIENNA CONVENTION ON DIPLOMATIC RELATIONS

The VCDR seeks to establish a proper balance of the rights of sending and receiving States. The founding principle set out in Article 2 is that diplomatic relations take place by mutual consent. Article 3 then sets out the primary functions of a diplomatic mission:

(a) to represent the sending State;

(b) to protect the interests of the sending State and its nationals;

[11] See *United States Diplomatic and Consular Staff in Tehran, Judgment, ICJ Reports 1980*, p 3, at paras 86–87.

[12] Ibid, paras 45 and 62. For a summary of the main issues on which the VCDR represented progressive development of the law at the time of its negotiation, see Denza, 2008, pp 3–6.

[13] Denza, 2008, pp 2–3 suggests three reasons to explain the success of the VCDR. First, that the law in this area is both long-established and has been relatively stable for a considerable time. Secondly, the important role played by reciprocity in the maintenance of the rules. Thirdly, the careful attention paid in the drafting processes of the ILC and in the Vienna Conference itself to producing a text which could command the general approval of States.

(c) to negotiate with the government of the receiving State;

(d) to ascertain and report to the government of the sending State the conditions and developments within the receiving State;

(e) to promote friendly relations between the sending State and the receiving State, and to develop their relations in economic, cultural and scientific fields.

The next part of the Convention (Articles 4–19) deals with various procedural questions in relation to the establishment of diplomatic relations, and in particular the appointment and accreditation of diplomatic agents. The consent of the receiving State is required in the form of a prior *agrément* for the appointment of the head of mission. Denza (2008) observes:

> The justification for the requirement lies in the particular sensitivity of the appointment of a head of mission and the need, if a head of mission is effectively to conduct diplomacy between two States, for him to be personally acceptable to both of them.

In relation to other diplomatic agents (except defence attachés) the sending State does not have to obtain the prior consent of the receiving State (Article 7). Nevertheless the sending State must provide notification (and as far as possible prior notification) to the receiving State of the arrival and final departure (or termination of the functions) of all members of missions (Article 10).[14] Furthermore the receiving State is at any time (including before their arrival in the receiving State), entitled to inform the sending State that the head of the mission or any other member of a mission is *persona non grata*, or unacceptable, without giving reasons for doing so (Article 9).[15] In such cases the sending State must recall the person or terminate his functions. If the sending State fails to respond the receiving State may after a 'reasonable period' treat the person as no longer enjoying diplomatic privileges and immunities.

Articles 20–28 concern the privileges and facilities which the sending State must grant to the mission itself. Thus under Article 22 the premises of the mission are inviolable, and agents of the receiving State are not entitled to enter them without the consent of the head of the mission. During the drafting work of the ILC and also during the negotiation of the VCDR, it was considered whether there should be any exceptions to this rule in times of extreme emergency. However such proposals were overwhelmingly rejected on the grounds that the power of appreciation as to whether one of the exceptions was applicable to a given situation would belong to the receiving State, and that this might lead to abuse. In 1984 during the *St James's Square Incident* the UK Government scrupulously respected the inviolability of the Libyan Mission throughout, notwithstanding the outrage that had

[14] It now appears that the UK courts will not consider that notification is a prerequisite to the entitlement of diplomatic status, *R* v *Home Secretary, ex parte Bagga* (1990), 88 ILR 404: but see also the earlier cases of *R* v *Governor of Pentonville Prison, ex parte Teja* (1971), 52 ILR 368, *R* v *Lambeth Justices, ex parte Yusufu* (1985), 88 ILR 323, and *R* v *Governor of Pentonville Prison, ex parte Osman (No 2)* (1988), 88 ILR 378—in relation to the latter see also the certificate of the Foreign and Commonwealth Office in (1988) 59 *BYIL* 479.

[15] In its Reply to the Foreign Affairs Committee (above, n 10, at paras 689–690), the Government set out its policy in respect of the kinds of behaviour which would lead to a declaration of *persona non grata*, which included matters such as espionage and incitement to violence, as well as other criminal offences. In addition a serious view would be taken of reliance on diplomatic immunity to evade civil liabilities. Finally the Government also stated a new policy in relation to parking offences, under which persistent failure to pay parking fines would lead to a review of a person's acceptability as a member of a mission. Denza, 2008, p 86 notes how the numbers of parking tickets cancelled on grounds of diplomatic immunity fell from over 100,000 in 1984, to just over 2,300 in 1993.

been perpetrated from there, and the premises were not entered until after the severance of diplomatic relations and the vacation of the premises.[16]

Furthermore under Article 22(2) the receiving State is under a special duty to take all appropriate steps to protect the premises of the mission against all intrusion, and to prevent disturbances to the peace of the mission or impairment of its dignity. Thus in the *Tehran Hostages* case, although those who attacked the US Embassy and Consulates were not acting on behalf of Iran in the initial phase, Iran was nonetheless responsible for having failed to take appropriate steps to protect the premises and their occupants.[17]

In relation to the duty to prevent any disturbance of the peace of the mission or impairment of its dignity in normal times, the question of whether to allow peaceful political demonstrations outside diplomatic missions may require the receiving State to strike a balance between rights of political expression and the maintenance of its obligations towards the sending State.[18]

Similarly under Article 24 the archives of the mission are inviolable.[19] Article 27 provides for the free communication of the mission, including the inviolability of official correspondence, free use of diplomatic bags for diplomatic documents and articles for official use, and the protection from interference of diplomatic couriers.

Articles 29–39 deal with the immunities enjoyed by members of the mission. As well as jurisdictional immunities (considered below), these include other matters such as the inviolability of the private residence of a diplomatic agent, immunity from taxes and customs, and exemption from national service requirements in the receiving State. Thus

[16] During the inquiry into the incident by the Foreign Affairs Committee two possible grounds of entry into the mission were examined. First, whether there had been a material breach of treaty by Libya entitling the UK to repudiate it and enter the premises. This was rejected on the basis that the VCDR is a self-contained regime, with its own remedies in case of breach. The second question was whether the UK would have had a right to enter the premises under the doctrine of self-defence. The Legal Adviser to the Foreign and Commonwealth Office told the Committee that self-defence would in principle be available in respect of both action directed against the State and action directed against its nationals. However he believed the circumstances of this case did not justify forcible entry on the grounds of self-defence, as the criteria specified in the *Caroline* case were not met. The Committee accepted the latter conclusion but made no comment on the general point as to the applicability of self-defence as a ground for entering diplomatic premises (n 10, above, at paras 94–95). Mann, 1990, pp 333–337, argued that the inviolability of premises is conditioned by the lawfulness of their use, and so the Government had the right, and the duty, to enter the premises, to search for and remove any weapons held there.

[17] *United States Diplomatic and Consular Staff in Tehran, Judgment, ICJ Reports 1980*, p 3, paras 62–68. During the second period when the Court found that through its support of the hostage-takers, Iran was directly responsible for their actions, it violated, *inter alia*, paras (1) and (3) of Article 22 VCDR (ibid, para 77).

[18] In its Reply to the Foreign Affairs Committee, (above, n 10, para 39(e)) the Government explained that in most cases this was left to the police who tended to manage such situations by, for example, keeping demonstrators on the opposite side of the road to the mission premises.

[19] A violation of Article 24 was found in *United States Diplomatic and Consular Staff in Tehran, Judgment, ICJ Reports 1980*, p 3. For the question of whether inviolability extends to documents which have been removed from the mission and are subsequently used in legal proceedings see *Shearson Lehman Brothers Inc* v *Maclaine Watson and Co, International Tin Council Intervening* [1988] 1 WLR 16 and Mann, 1990, pp 328–329. See also the Canadian case of *Rose* v *The King* (1947) 3 DLR 710 in which documentary evidence of espionage against accused persons in criminal proceedings was held to be admissible notwithstanding that it had been stolen from the Russian Embassy and inviolability had not been waived. In the case of *Fayed* v *Al-Tajir* (CA [1987] 3 WLR 102) an internal memorandum of an Embassy in London was found to be protected by absolute privilege as a diplomatic document, leading to a dismissal of a libel action based on the contents of the document.

members of diplomatic missions enjoy wide protections from interference by the receiving State, which must be given effect in national law, this being done in the UK by the Diplomatic Privileges Act 1964. However it is important to emphasize that the rights and privileges are not granted for the personal benefit of the individuals concerned, but to ensure the efficient performance of the functions of the diplomatic mission.

By way of *quid pro quo* for the enjoyment of privileges and immunities, members of diplomatic missions owe certain duties towards the receiving State. These are:

(a) the duty to respect the laws and regulations of the receiving State (Article 41(1));

(b) the duty not to interfere in the internal affairs of the receiving State (Article 41(1));

(c) all official business of the communication by the mission with the receiving State should be through the Ministry of Foreign Affairs of the receiving State, or with such other ministries as may be agreed (Article 41(2));

(d) the premises of the mission must be not be used in any manner incompatible with the functions of the mission (Article 41(3));

(e) a diplomatic agent must not carry out any professional or commercial activity for personal profit in the receiving State (Article 42).

Finally in Articles 43–46 the convention deals with arrangements on the termination of diplomatic functions and on severance of diplomatic relations.

B. JURISDICTIONAL IMMUNITIES

The VCDR recognizes various categories of staff members of diplomatic missions, each enjoying immunity from jurisdiction to a different extent:

(a) diplomatic agents (ie the head of the mission and other members of the diplomatic staff) and their families (provided that they are not nationals of the receiving State (Article 37(1)) enjoy immunities *ratione personae*, ie by virtue of their office. Thus they are granted personal inviolability, including freedom from arrest and detention (Article 29),[20] and absolute immunity from criminal jurisdiction (Article 31). A diplomatic agent is also immune from civil and administrative jurisdiction,[21] except in three types of case:

(i) a real action relating to immovable property situated in the territory of the receiving State, unless he holds it on behalf of the sending State for the purposes of the mission;[22]

[20] A further aspect of inviolability is the duty to protect diplomatic agents, on which see also the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons—see n 3, above. For clear breaches of both limbs of Article 29 see *United States Diplomatic and Consular Staff in Tehran, Judgment, ICJ Reports 1980*, p 3, paras 62–63 and 77. Self-defence or an overriding duty to protect human life appears to provide a limited exception. See ibid, para 86 and Denza, 2008, pp 265–269.

[21] This includes civil proceedings concerning private matters. See, eg, the Australian case of *De Andrade* v *De Andrade* (1984), 118 ILR 299, in which the immunity of a diplomat was upheld in relation to divorce and custody proceedings.

[22] See Denza, 2008, at pp 289–299. On the difficult issue of whether the private residence of a diplomat is included within the exception, see *Intpro Properties* v *Sauvel* [1983] 2 WLR 908. The private residence of a diplomat is, however, inviolable by virtue of Article 30.

(ii) an action relating to succession in which the diplomatic agent is involved as executor, administrator, heir, or legatee as a private person and not on behalf of the sending State;

(iii) an action relating to any professional or commercial activity exercised by the diplomatic agent in the receiving State outside his official functions.

(b) Administrative and technical staff and their families, who are not nationals or permanent residents of the receiving State, enjoy similar personal inviolability and immunity from criminal jurisdiction to diplomatic agents. However they only enjoy immunity from civil jurisdiction in relation to acts performed in the course of their duties (Article 37(2)).

(c) Service staff who are not nationals or permanent residents of the receiving State enjoy immunity *ratione materiae*, in respect of acts performed in the course of their duties (Article 37(3)).

(d) Diplomatic agents representing the sending State but who are in fact nationals or permanent residents of the receiving State, also enjoy immunity *ratione materiae* in respect of their official acts (Article 38(1)).

(e) All members of diplomatic missions who enjoy immunities whilst in office enjoy a subsisting immunity *ratione materiae* in respect of their official acts even after they have left office (Article 39(2)).[23]

It might be noted that generally immunities under the VCDR operate only in respect of the jurisdiction of the receiving State. However the provisions of Article 40 can be distinguished in that third States must accord diplomatic agents (and their family members) inviolability and such immunities as may be required to ensure their transit or return whilst en route to and from post.[24]

C. REMEDIES IN CASES OF ABUSE

Whilst the immunities set out above impose a considerable derogation from the jurisdiction of receiving States, the VCDR seeks to redress the balance, at least partially, by providing for certain remedies in cases of abuse. Jurisdictional immunities operate purely at the procedural level, by barring the adjudicative powers of the local courts in respect of the holder, but they do not in themselves amount to substantive exemptions from the law itself. Indeed as we have seen members of diplomatic missions are under a duty to respect the law of the receiving State. Therefore where such immunity is waived, the local courts may enjoy jurisdiction within the usual bounds set by international law. Article 32 of the VCDR deals with the question of waiver setting out: (a) that waiver is a prerogative of the sending State (not the diplomatic agent in question) (Article 32(1)); (b) that waiver must always be express (Article 33(2)); and (c) that waiver from jurisdiction in respect of civil or administrative proceedings does not, in itself, imply waiver from execution of the judgment (Article 33(4)).[25]

[23] See the German Constitutional Court case of the *Former Syrian Ambassador to the GDR* (1997), 115 ILR 596, see also the *Pinochet* case discussed below. For further explanation see Dinstein, 1966.

[24] See the Netherlands case, *Public Prosecutor* v *JBC* (1984), 94 ILR 339.

[25] By way of an exception to Article 32(1) and (2), Article 32(3) provides that a waiver will be implied in respect of counterclaims which are directly related to the principal claim in proceedings commenced by the holder of the immunity.

However waivers remain in the discretion of the sending State,[26] and in the event that it refuses, the receiving State must rely on the broader remedy of withdrawing its consent, either in respect of a particular member of the mission by declaring him or her *persona non grata* or, in a particularly egregious case, by breaking off diplomatic relations.

III. CONSULAR RELATIONS

The role of consuls is to represent the sending State, and to promote and/or protect its interests in the receiving State, but with the emphasis of that role on technical and administrative matters rather than political matters (in which diplomatic staff specialize). Consuls often deal with private interests, such as assistance to nationals of the sending State in the receiving State and the promotion of trade, rather than the public interests of the sending State. Nevertheless, generalizations about consular relations must be treated cautiously since the range of consular functions, as set out in VCCR, Article 5, is very broad. It can include:

(a) protecting in the receiving State the interests of the sending State and its nationals;[27]

(b) assisting nationals of the sending State in need of help in the receiving State;

(c) obtaining appropriate legal assistance for nationals of the sending State before tribunals and other authorities of the receiving State;

(d) assistance to vessels and aircraft of the sending State and their crews, as well as exercising rights of supervision and inspection thereof;

(e) promoting trade between the two States;

(f) issuing passports and/or visas and other notarial functions;

(g) promoting cultural exchange.

Though international law on consular relations has ancient roots, the modern law first developed in a vast web of bilateral consular treaties in the nineteenth and twentieth centuries. Yet so varied were these treaty provisions, that it was believed that (unlike the law of diplomatic relations prior to 1961) customary international law played only a very limited role in the establishment and maintenance of consular relations. However, following work by the ILC in the late 1950s and early 1960s, the 1963 Vienna Convention on Consular Relations (VCCR) sought to consolidate and codify a basic body of rules. Whilst the VCCR does establish a widely accepted benchmark for consular relations[28] it expressly states that it shall not affect existing agreements between States, or prevent States from varying its provisions in their future agreements (Article 73).[29]

[26] A relatively recent example was the waiver by Colombia to enable the questioning by police of an Embassy official and one of his family members in connection with a murder inquiry—FCO Press Release, 26 September 2002. For this and other examples of practice see also Denza, 2008, p 345–347.

[27] On the VCCR system of consular protection of nationals of the sending State, see *LaGrand (Germany* v *USA), Merits, Judgment, ICJ Reports 2001*, p 466 at para 74.

[28] For example in *United States Diplomatic and Consular Staff in Tehran, Judgment, ICJ Reports 1980*, p 3, para 62 the ICJ found the protection of consular staff and property under the VCCR also reflected rules of customary international law.

[29] Similarly under the UK implementing legislation, the Consular Relations Act 1968, the relevant provisions of the VCCR are implemented by and scheduled to the Act, but by virtue of s 3 any international

The scheme of the VCCR is not unlike the VCDR, dealing with: the establishment and conduct of consular relations (Articles 2–24); the end of consular functions (Articles 25–27); facilities, privileges, and immunities relating to a consular post (Articles 28–39); facilities, privileges, and immunities relating to consular officers and other members of a consular post (Articles 40–57); the regime relating to honorary consuls (Articles 58–68); and general provisions (Articles 69–73).

The differences in the functions of consuls as compared to diplomats explain the differences in the extent of immunities from jurisdiction that are generally granted to consuls.[30] Consular officers enjoy a more limited personal inviolability—they may not be arrested or detained pending trial, except in the case of a grave crime[31] and pursuant to a decision by the competent judicial authority (Article 41). In relation to immunity from jurisdiction, consular officers enjoy only immunity *ratione materiae*, ie, in respect of acts performed in the exercise of their consular functions (Article 43).[32]

IV. SPECIAL MISSIONS

In addition to the communication between governments that is enabled through the establishment of permanent diplomatic missions, an important means of carrying out particular items of inter-governmental business is through the dispatch of special missions (sometimes called ad hoc diplomacy). Such missions can vary considerably—ranging from missions involving the Head of State in person on matters of great political moment, to missions consisting of relatively junior officials concerned with a purely technical matter between the sending and receiving State.

Similarly the legal status of such missions has been treated somewhat unevenly. There are relatively few decisions from national courts on the point but there is authority for the proposition that some special missions, and in particular high-level missions, enjoy immunities as a matter of customary international law. Thus for example in the 1983 *Tabatabai* case[33] the German Federal Supreme Court found that there was a rule of customary international law that an ad hoc envoy charged with a special political mission by the sending State could be granted immunity with the agreement of the sending State. The court found that given the importance of ad hoc diplomacy, there were functional grounds for granting immunity *ratione personae* to members of special missions. Similarly some

agreement of the UK, under which consular privileges and immunities differ from the VCCR standard, may be given effect by Order in Council.

30 Though in its practice with certain States, the UK has been willing to agree that the diplomatic standard of privileges and immunities should be extended to consular officers—see, eg, Consular Relations (Privileges and Immunities) (People's Republic of Bulgaria) Order 1970 (SI 1970/1923); Consular Relations (Privileges and Immunities) (People's Republic of China) Order 1984 (SI 1984/1978); Consular Relations (Privileges and Immunities) (Polish People's Republic) Order 1978 (SI 1978/1028); and Consular Relations (Privileges and Immunities) (USSR) Order 1970 (SI 1970/1938). For comparable US practice see Lee and Quigley, 2008, pp 463–469

31 The term 'grave crime' is not defined under the VCCR. However the UK Consular Relations Act 1968 defines it as any crime punishable by up to a term of five years' imprisonment (s 1(2)).

32 Determining what constitutes an 'official act' for these purposes can raise difficult questions of characterization. See Lee and Quigley, 2008, pp 440–461.

33 *Tabatabai* case (1983) 80 ILR 388.

US courts have found there to be a category of special diplomatic envoy which benefit from jurisdictional immunities.[34] However in a recent case a US District Court rejected a plea of immunity from criminal jurisdiction by a visiting government official claiming to be on a special mission and found that the Special Missions Convention does not represent customary international law,[35] though it is perhaps noteworthy that the individual in this case does appear to have been part of a high-level mission. In the UK there have been two recent cases in which a court of first instance has found that visiting Ministers enjoy immunity under customary international law as part of a special mission. The first concerned a visiting Minister of Commerce and International Trade who was a member of a visiting delegation on a State Visit led by the Head of State, and the second concerned a visiting Defence Minister attending high-level meetings with members of the UK Government.[36] Elsewhere, the question of whether immunity can extend to other senior figures in the retinue of a Head of State has also been discussed in the case concerning the arrest in Germany of Rose Kabuye, the Rwandan President's Chief of Protocol, under a European Arrest Warrant issued in connection with proceedings in France.[37]

On other hand the 1969 UN Convention on Special Missions sets out in some detail norms for the conduct of ad hoc diplomacy and the privileges and immunities which attach to special missions. The Convention has not been widely taken up[38] and there is some dispute as to whether all of its provisions reflect customary international law. Whilst the basic principles are not in doubt, Sir Arthur Watts has suggested that the main reason for the limited success of the Convention appears to be its inflexibility, in that it seeks to apply a single standard of treatment to all kinds of missions (see Watts, 1999, pp 344–345). There may also be some concerns arising from the fact that the definition of a special mission is not entirely clear, as well as some practical difficulties arising from the temporary nature of such missions.

34 See, eg, *Kilroy* v *Windsor, Prince of Wales* (1978), 81 ILR 605 and *HRH Prince Turki Bin Abdulaziz* v *Metropolitan Dade County* (1984), 99 ILR 113.

35 *USA* v *Sissoko* (US District Court, Florida Southern District, 1997), 121 ILR 599.

36 See judgment of the Bow Street Magistrates' Court in the case of *Bo Xilai*, 8 November 2005 (128 ILR 713), and that of the Westminster Magistrates' Court in *Re: Ehud Barak*, 29 September 2009, (not yet reported). Other references to special missions in the English courts have been in obiter dicta, where the case has been decided on other grounds; see, eg, *Fenton Textiles Association* v *Krassin et al* (1921) 6 BILC 247; *R* v *Governor of Pentonville Prison, ex parte Teja* [1971] 2 QB 274; and *R* v *Governor of Pentonville Prison, ex parte Osman (No 2)* (1988), 88 ILR 378. See also the contrasting dicta of Lord Millett and Lord Phillips in *R* v *Bow Street Metropolitan Stipendiary, ex parte Pinochet Ugarte (Amnesty International Intervening) (No 3)* (hereafter *Pinochet No 3*) [1999] 2 WLR 827 at 905E and 918E respectively. In France, it is understood that the *Chambre d'Instruction* of the Paris Court of Appeal accepted the plea of immunity by Jean-François N'Dengue in the so-called 'Congo Beach' case, on the ground that he was on a special mission and therefore entitled to immunity in customary international law. The decision was made on 22 November 2004, but is unpublished—see Ryngaert, 2005. It might be noted that the International Court of Justice did not advert to rules of customary international law on special missions when dismissing claims to personal immunities in respect of certain Djiboutian officials, but simply observed that the UN Convention on Special Missions was not applicable to the case (see *Case concerning Certain Questions of Mutual Assistance in Criminal Matters (Djibouti* v *France)* judgment of 4 June 2008, at para 194). However this might be explained by the fact that it was not clear that the officials in question were on a special mission, particularly at the time the alleged breaches of immunity occurred. For discussion see Buzzini, 2009.

37 See statement of the Rwandan Ministry of Foreign Affairs at **http://www.minaffet.gov.rw/index2.php?option=com_content&do_pdf=1&id=148**. For discussion see Akande, 2008.

38 There are currently 38 parties. The UK signed the Convention on 17 December 1970, but has not ratified it.

The Convention broadly follows the familiar scheme of the VCDR and VCCR. It sets out firmly the principle of mutual consent as underlying ad hoc diplomacy (Articles 2 and 3), and then deals with questions of the procedural questions for the sending and conduct of special missions (Articles 2–19). It sets out the facilities, privileges, and immunities of missions (Articles 22–28) and of their staff (Articles 29–48).

Substantive aspects of the Convention also resemble the VCDR; hence for the purposes of jurisdictional immunities the staff are divided into broadly similar categories enjoying immunities to a similar extent.[39] Members of special missions are under an obligation to respect local law (Article 47). Also in cases of abuse the remedies of the receiving States are similar to those under the VCDR, including seeking waiver (Article 41), declaration of *persona non grata* (Article 12), or bringing the mission to an end (Article 20(1)(e)). Finally it might be noted that the Convention provides that such additional privileges and immunities as may be required under international law may be accorded where the mission includes the Head of the sending State, the Head of its Government, its Minister for Foreign Affairs, or other persons of high rank (Article 21).[40]

V. HOLDERS OF HIGH-RANKING OFFICES, SUCH AS HEADS OF STATE, HEADS OF GOVERNMENT, AND MINISTERS FOR FOREIGN AFFAIRS

A. HEADS OF STATE

In previous eras when most States were governed by personal sovereigns such as monarchs or emperors, there was a close identity in international law between such persons and their States. However modern international law tends to consider the rights and competences of Heads of State as attaching to them in their capacity as the highest representatives of their States, rather than inherently in their own right (Watts, 1994, pp 35–37). That said, international law recognizes that the Head of State may exercise a number of important powers in international relations *ex officio*, including the sending and receiving of diplomats and consuls, and the conclusion of treaties.[41]

The immunity from jurisdiction of Heads of State when travelling abroad remains largely uncodified at the international level, but it has undergone some important changes in modern times. During earlier times when international law closely identified a Head

[39] Under Articles 29 and 31 'representatives of the sending State in the special mission and members of its diplomatic staff' enjoy personal inviolability and jurisdictional immunities equivalent to those of diplomatic agents under the VCDR (save that in respect of immunity from civil jurisdiction a further exception is made in relation to road traffic accidents outside the official functions of the person concerned). Family members, administrative and technical staff, service staff, and members of the mission who are nationals of the receiving State, all enjoy equivalent immunities to those under the VCDR (see Articles 39, 36, 37, and 40 respectively). Temporally immunities are limited to the duration of the mission, save that immunity *ratione materiae* in relation to official acts continues to subsist even after the mission has come to an end (Article 44(2)).

[40] However it is not clear what additional privileges and immunities this might entail. See *Satow's Diplomatic Practice*, 6th edn, (Roberts, ed) 2009, p 190.

[41] See, eg, 1969 VCLT, Article 7 and *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v *Nigeria: Equitorial Guinea Intervening), ICJ Reports 2002*, paras 263–268.

of State with his or her State, the absolute doctrine of 'sovereign immunity' prevailed. However more recently, as the restrictive doctrine of immunity in relation to States has developed, more distinct rules in relation to Heads of State have also developed (Watts, 1994, pp 52–66).[42]

The International Court of Justice has recently reaffirmed aspects of the law as regards personal inviolability and immunity from criminal jurisdiction, in the following terms:

> ... A Head of State enjoys in particular 'full immunity from criminal jurisdiction and inviolability' which protects him or her 'against any act of authority of another State which would hinder him or her in the performance of his or her duties'. Thus the determining factor in assessing whether or not there has been an attack on the immunity of the Head of State lies in the subjection of the latter to a constraining act of authority... The Court recalls that the rule of customary international law reflected in Article 29 of the Vienna Convention on Diplomatic Relations, while addressed to diplomatic agents, is necessarily applicable to Heads of State. This provision reads as follows:
>
> '[t]he person of a diplomatic agent shall be inviolable. He shall not be liable to any form of arrest or detention. The receiving State shall treat him with due respect and shall take all appropriate steps to prevent any attack on his person, freedom or dignity.'
>
> This provision translates into positive obligations for the receiving State as regards the actions of its own authorities, and into obligations of prevention as regards possible acts by individuals. In particular, it imposes on receiving States the obligation to protect the honour and dignity of Heads of State, in connection with their inviolability.[43]

Further evidence of the relevant principles of customary international law can also be found in the practice of national courts, as well as in relevant national legislative provisions.

In the UK, s 20 of the State Immunity Act 1978 essentially equates the position of a foreign Head of State with the head of a diplomatic mission. Thus a foreign Head of State (whether on an official or a private visit) will enjoy complete personal inviolability and absolute immunity from criminal jurisdiction *ratione personae*.[44] Immunity from civil jurisdiction is more complex in that it involves determining whether the act in question was performed by the Head of State in his official capacity as an organ of the State, or whether it was performed in his personal capacity. In relation to the acts of a Head of State performed in his public capacity, the provisions in Part I of the Act (relating to the

[42] For a US perspective on this development see *Tachiona and others* v *Mugabe and others* 169 F.Supp. 2d 259 (2001) (although the Court of Appeals (2nd Circuit) did not follow the same line of reasoning in its decision of 6 October 2004, 386F.3d 205). See also *Wei Ye* v *Jiang Zemin* 383F.3d 620.

[43] *Case concerning Certain Questions of Mutual Assistance in Criminal Matters (Djibouti* v *France)* judgment of 4 June 2008, at paras 170 and 174. On the facts of the case the Court found that an invitation to a Head of State to testify in the course of criminal proceedings (without any suspicion attaching to him) did not violate his inviolability. However the Court also found that had the French authorities passed confidential information regarding the witness summons to the Press, in the context of an official visit by the Djiboutian Head of State, this could constitute a failure in its obligation to protect his honour and dignity. On the other hand see *Aziz* v *Aziz and others* [2007] EWCA Civ 712 in which the English Court of Appeal rejected an application by a Head of State for parts of a judgment to which he was not a party to be kept secret, in order to avoid the revelation of personal information about him. In similar vein see *Harb* v *King Fahd* [2005] EWCA Civ 632, discussed in n 45 below.

[44] See, eg, judgment of the Bow Street Magistrates' Court in *Mugabe* of 14 January 2004 (2004) 53 *ICLQ* 770.

immunity of State itself, and considered in the previous chapter) will be applicable. For all other acts Heads of State will enjoy immunity from civil jurisdiction subject to the three exceptions noted in respect of Article 31(1) VCDR.[45] Finally it should be noted that the immunities of a Head of State can be waived, either by the Head of State himself, or by his State.

On the other hand when a Head of State leaves office, the House of Lords has found that he will enjoy immunities on the same basis as a former diplomat, and in particular subsisting immunity *ratione materiae* for his official acts (as per Article 39(2) VCDR). The extent of this immunity was of course the subject of detailed scrutiny in the *Pinochet* case (examined below).

B. HEADS OF GOVERNMENT AND MINISTERS FOR FOREIGN AFFAIRS

Heads of Government and Ministers for Foreign Affairs enjoy immunity from jurisdiction *ratione personae* under international law to the same extent as Heads of State, since they perform comparable functions in representing their States in international relations.[46] The position in relation to the personal inviolability and immunity from criminal jurisdiction of serving Foreign Ministers was clarified by the International Court of Justice in the *Arrest Warrant* case.[47]

The case concerned the issue by a Belgian magistrate of an international warrant for the arrest of the incumbent Congolese Foreign Minister[48] for his alleged involvement in grave breaches of the Geneva Conventions and the Additional Protocols thereto, and crimes against humanity. The relevant Belgian statute provided for universal jurisdiction in the Belgian courts over these crimes (ie, wherever and by whomsoever they were committed) and provided that 'the immunity attaching to the official capacity of a person shall not prevent the application of the present law'.[49]

[45] See, eg, Laddie J in *BCCI* v *Price Waterhouse* [1997] 4 All ER 108, in which certain acts of Sheikh Zayed of Abu Dhabi were immune from suit under s 20 as he was Head of State of the UAE, notwithstanding that the acts in question were not performed in that capacity. This was so even though Shiekh Zayed was simultaneously head of one of the constituent units of the UAE, and his acts may have been performed in a public capacity in that respect. In the case of *Harb* v *HM King Fahd bin Abdul Aziz*, [2005] EWCA Civ 632 the President of the Family Division of the High Court upheld a Head of State's assertion of immunity in relation to proceedings for ancillary relief in matrimonial proceedings. The applicant appealed, but King Fahd died before the Court of Appeal could hear the appeal, thus bringing the proceedings to an end (see [2005] EWCA Civ 1324). However the Court of Appeal had already by that stage ruled that the duty of the forum State to protect a Head of State from 'any attack on his person, freedom or dignity' (Article 29 VCDR) did not entail that the proceedings in which King Fahd was asserting immunity must be held in private.

[46] In principle their official acts, like those of other State officials, will also be protected by immunity *ratione materiae* which subsists even after they have left office: see Sections VI and VIII B below.

[47] *Arrest Warrant of 11 April 2000 (Democratic Republic of Congo* v *Belgium), Preliminary Objections and Merits, Judgment, ICJ Reports 2002*, p 3. For comments see Cassese, 2002; Wirth, 2002; Spinedi, 2002; Sir Robert Jennings, 2002; Stern, 2002; Schreuer and Wittich, 2002; McLachlan, 2002.

[48] In fact whilst he was the incumbent Foreign Minister at the material time, ie at the point the arrest warrant was issued, he subsequently left that office to become the Minister of Education and by the time of the judgment he held no ministerial portfolio at all.

[49] *Act concerning the Punishment of Grave Breaches of International Humanitarian Law* of 10 February 1999 (1999) 38 ILM 921. The Act has since been substantially amended and this provision removing immunity has been repealed.

The ICJ upheld Congo's complaint that the issue of the arrest warrant was a violation of the immunity from criminal jurisdiction and the personal inviolability which an incumbent foreign Minister enjoys under international law. The Court based this conclusion on the functions exercised by a Foreign Minister in international relations. The Court noted that he is in charge of his government's diplomatic activities, and represents it in international negotiations and meetings, as well as his powers under international law to act on behalf of and to bind the State in for example treaty relations, simply by virtue of his office. Such functions required that a Foreign Minister should be able to travel internationally freely and to be able to be in constant communication with his government and its diplomatic missions around the world. Such considerations led the Court to consider that Foreign Ministers enjoy complete personal inviolability and absolute immunity from criminal jurisdiction *ratione personae*, throughout the duration of their office. In that respect it is irrelevant that the acts in question were private or official, or that they were performed prior or subsequently to a Foreign Minister assuming office, or indeed whether that Foreign Minister was in the forum State on a private or an official visit.

Three further points should be noted about the extent of the immunity from jurisdiction of an incumbent Foreign Minster under the judgment.[50] First, it might be noted that Foreign Ministers may rely upon their immunities in any State, whereas for example diplomatic immunity is largely limited to immunity from the courts of the receiving State. Secondly, attention might be drawn to the fact that the Court found specifically that there was no exception to the immunity of a serving Foreign Minister from the criminal jurisdiction of national courts in respect of war crimes or crimes against humanity. Thirdly, the immunity of a Foreign Minister can be waived by his own State.

Though the Court's findings are strictly confined to the immunities enjoyed by Foreign Ministers, it seems clear that similar immunities apply, perhaps *a fortiori*, to Heads of Government.[51] How far such immunities can also be extended to other Ministers or officials may depend on analogous reasoning, based on the involvement of such persons in international relations. Thus, for example in the UK, decisions at first instance have recognized that such immunities extend to a visiting Defence Minister,[52] and to a visiting Minister of Commerce (whose portfolio included responsibility for international trade).[53] Nevertheless it is not yet clear where the lines should properly be drawn, and the task is not made easier by the different ways in which different governments organize themselves internally. In any event it may be that other ministers or senior officials enjoy immunities when on official visits as members of special missions.

[50] The Court's comments, strictly speaking obiter dictum, on the extent of the subsisting immunity *ratione materiae* of a Foreign Minister after he has left office are considered below in Section VIII.

[51] See, eg, the US case of *Saltany* v *Reagan and others* (1988), 80 ILR 19, affirmed (1989), 87 ILR 680.

[52] See judgment of the Bow Street Magistrates' Court in the case of *Mofaz*, 12 February 2004 (2004) 53 *ICLQ* 771–773. See also *Re: Ehud Barak*, 29 September 2009, (not yet reported).

[53] See judgment of the Bow Street Magistrates' Court in the case of *Bo Xilai*, 8 November 2005 (128 ILR 713).

VI. THE IMMUNITIES OF OTHER STATE OFFICIALS

The above appear to be the principal regimes of immunities which international law requires should be granted in respect of particular categories of State official.[54] However under the doctrine of State immunity, all State officials (and, in principle, former State officials[55]) enjoy immunity *ratione materiae* for their official acts from at least the civil jurisdiction of the courts of other States, where the effect of proceedings would be to undermine or render nugatory the immunity of the employer State.[56] In other words it prevents an applicant from seeking to circumvent the impediment of State immunity by adopting the tactic of suing the individual carrying out the business of State. This is reflected in the recently adopted 2004 UN Convention on the Jurisdictional Immunities of States and their Property.[57]

In the UK this proposition finds support in both the common law[58] and in some recent cases under the State Immunity Act 1978. Thus in *Propend Finance* v *Sing* the Commissioner of the Australian Federal Police (AFP) was permitted to claim State immunity, in connection with contempt proceedings for an alleged breach of an undertaking committed by an AFP officer accredited as a diplomatic agent to the Australian High Commission in London. The Court of Appeal held:

> The protection afforded by the Act of 1978 [ie the State Immunity Act 1978] to States would be undermined if employees, officers or (as one authority puts it) 'functionaries' could be sued as individuals for matters of State conduct in respect of which the State they were serving had immunity. Section 14(1) must be read as affording individual employees or officers of a foreign State protection under the same cloak as protects the State itself.[59]

The House of Lords approved this formulation of the principle in the case of *Jones* v *Ministry of the Interior of the Kingdom of Saudi Arabia*, in the context of civil proceedings relating to allegations of torture against Saudi Arabia and certain of

[54] Additional categories would be State officials who staff permanent representations to international organizations. Their status, privileges and immunities will depend on the particular arrangements made under relevant treaties on privileges and immunities as well as the Headquarters Agreement of the organization in question, see for example El-Erian and Scobbie, 1998, pp 857–867.

[55] See for example Article 39(2) VCDR in relation to former members of diplomatic missions, and the treatment of the immunities of former Heads of State in *Pinochet No 3* [1999] 2 WLR 827, discussed below at Section VIII B.

[56] See Lord Browne-Wilkinson in *Pinochet No 3* [1999] 2 WLR 827 at 847F.

[57] Thus in defining the 'State' (the beneficiary of immunity under the convention) it includes in Article 1(b)(iv) 'representatives of the State acting in that capacity'.

[58] See, eg, *Twycross* v *Dreyfus* (1877) 5 Ch D 605; *Rahimtoola* v *Nizam of Hyderabad* [1958] AC 379; also *Zoernsch* v *Waldock* [1964] 2 QB 352. See Whomersley, 1992.

[59] *Propend Finance* v *Sing* 111 ILR 611 at 669. For criticism see Barker, 1998. But see also the US cases of *Chuidian* v *Philippine National Bank* (1990), 92 ILR 480 and *Herbage* v *Meese* (1990), 98 ILR 101. Also the Canadian cases of *Jaffe* v *Miller* (1993), 95 ILR 446 and *Walker* v *Baird* (1994) 16 OR (3d) 504. Other cases from the UK include *Re P (No 2)* (1998), 114 ILR 485, and under the common law of State immunity *Holland* v *Lampen-Wolfe* [2000] 1 WLR 1548.

its officials.[60] Lord Bingham drew the following conclusions as relevant: (1) that the individual defendants were at the material times acting or purporting to act as servants or agents of the State; (2) that their acts were accordingly attributable to the State; (3) that no distinction could be made between the claim against the State and the claim against the individual defendants; and (4) none of the claims fell within any exception to immunity under the State Immunity Act 1978.[61] The Court went on to find that the *jus cogens* nature of the prohibition of torture, did not of itself operate to enable a third State to assert civil jurisdiction in the face of State immunity, and that there was currently no generally accepted exception to State immunity from civil jurisdiction in relation to breaches of international law. Similarly in *Belhas* v *Ya'alon* a US Court of Appeals upheld the immunity of a senior member of the Israeli Defence Force in civil proceedings relating to alleged war crimes.[62]

There have been fewer cases where State officials have invoked State immunity in relation to criminal proceedings. However a recent example is the case of *Italy* v *Lozano*,[63] where the Italian Court of Cassation accepted that a US soldier enjoyed immunity *ratione materiae* in relation to a prosecution brought against him for acts performed in the discharge of his functions. The Court noted that a rule of customary international law was emerging which purported to limit such immunity in relation to serious international crimes. However as the conduct in question did not amount to a war crime, immunity obtained to preclude the jurisdiction of the Italian court. In similar vein, to the extent that the immunities *ratione materiae* of a former Head of State are a manifestation of this more general immunity, it might be noted that in *Pinochet No 3* it was suggested that such immunity could be asserted successfully to bar proceedings in respect of most crimes (with the important exception of certain serious international crimes, such as torture) where these are committed in the performance of the functions of government.[64]

[60] *Jones* v *Ministry of Interior for the of Kingdom of Saudi Arabia and Ors* [2006] UKHL 26, [2007] 1 AC 270. The plaintiff has a complaint against the UK pending in the European Court of Human Rights that in upholding the claims to immunity the House of Lords' decision contravened his right of access to a court under Article 6 of the European Convention on Human Rights.

[61] Ibid at para 13.

[62] *Belhas* v *Ya'alon*, US Court of Appeals (DC Circuit), 515 F.3d1279,15 February 2008, However see also the recent decision of *Yousuf* v *Samantar* (552 F.3d 371) in which the Court of Appeals for the Fourth Circuit held that an individual (in this case a former Prime Minister of Somalia) could not benefit from immunity under the Foreign Sovereign Immunities Act. The Supreme Court has subsequently agreed to review the case. However it might be noted that the Court of Appeals for the Fourth Circuit did not address the availability of immunity of State officials under the common law. On this point see the decision of the Court of Appeals for the Second Circuit in *Matar* v *Dichter* (16 April 2009, 563 F.3d 9) and in particular see the *amicus* brief submitted by the Executive Branch available on the website of the Center for Constitutional Rights (**http://ccrjustice.org/ourcases/current-cases/matar-v.-dichter**).

[63] *Italy* v *Lozano*, Case No 31171/2008; ILDC 1085 (IT 2008), 24 July 2008. For comment see Cassese, 2008 and also Palchetti, 2008.

[64] Thus Lord Hope found that immunity *ratione materiae* of a former Head of State could be relied upon in relation to charges of conspiracy to murder—see [1999] 2 WLR 827 at 881 and 887. See also the speeches of Lords Browne-Wilkinson and Hutton, ibid at 848 and 888 respectively. On the other hand Lord Millett expressly found that immunity *ratione materiae* is not available in respect of an offence committed in the forum State (ibid, at 913). See also *Wei Ye* v *Jiang Zemin* 383F.3d 620.

VII. OFFICIALS OF INTERNATIONAL ORGANIZATIONS

Whilst the immunities of international organizations have been inspired by the immunities granted to State officials, they differ in some respects, reflecting the important differences between international organizations and States. In the normal course of events an international organization will not have its own territory, but rather be based on territory over which a State exercises jurisdiction (special cases of international administration as, for example, the UN administration of Kosovo or in East Timor are not considered here). An international organization will not have its own population, from which its officials are chosen, but instead will employ persons who hold the nationality (with its attendant rights and obligations) of a State. Finally an international organization will not generally perform all the functions of government, with a full legal system of its own. Rather it will have its own institutional law, but will have to rely upon the local law in respect of other matters such as, for example, the maintenance of public order through the exercise of criminal jurisdiction.

Both diplomatic immunities and the immunities of international organizations arise from considerations of functional necessity, and as we shall see the former have inspired the latter in some respects. However it does not follow that they should be identical in extent. Jenks suggests that there are three major differences between diplomatic immunities and those of international officials (Jenks, 1961, p xxxvii). First, it is unusual for a diplomatic agent to have the nationality of the receiving State and in such situations as we have seen the scope of the immunities he enjoys can be restricted by the receiving State to his official activities only. On the other hand for officials of international organizations[65] it may be especially important that they enjoy immunities against their own States of nationality.[66] Secondly, whereas a diplomatic agent may be immune from legal process in the receiving State, he will remain subject to legal process in the sending State. In relation to officials of international organizations there is no sending State as such, and thus appropriate procedures may have to be adopted, either through some international disciplinary procedure established by the organization, or through waiver of immunity. Thirdly, the principle of reciprocity, which plays such an important role in the maintenance of diplomatic law between States, cannot operate in the same way in respect of international organizations. Thus Jenks rejects a simple assimilation of the immunities of international organizations with diplomatic immunities, in favour of looking at the former on their own merits as based upon their particular functional needs.

[65] Under relevant instruments additional categories of persons may benefit from similar immunities (though not identical in every respect) see for example the position of 'experts on mission' under the 1946 Convention on the Privileges and Immunities of the United Nations.

[66] Not all States accept that their own nationals when employed by international organizations enjoy the full range of immunities enjoyed by the officials who hold other nationalities. However such limitations often concern fiscal immunities or exemptions from national service rather than immunity from legal process. For examples of the general rule see the ICJ Advisory Opinions in the *Applicability of Article VI, Section 22 of the Convention on the Privileges and Immunities of the United Nations, Advisory Opinion, ICJ Reports 1989*, p 177 ('*Mazilu*') and *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights, Advisory Opinion, ICJ Reports 1999*, p 62 ('*Cumaraswamy*').

It is of course impossible to survey the range of international organizations, and the immunities of each will be governed by their own treaty provisions.[67] Only the immunities of personnel of the United Nations are considered here, as illustrative rather than generally applicable (see further, Michaels, 1971). In broad terms the Convention on the Privileges and Immunities of the United Nations 1946 divides staff members of the UN into three categories:

(a) the Secretary-General and the Assistant Secretaries-General shall be accorded ambassadorial status, and enjoy equivalent immunities *ratione personae* (Article V, s 19);

(b) all other officials of the Organization enjoy immunity from legal process in respect of their official acts, ie immunity *ratione materiae* (Article V, s 18(a)); and

(c) experts on mission (ie, persons who undertake temporary missions for the UN) who enjoy immunity from suit for their official acts (*ratione materiae*), as well as—in view of their need to travel freely in performance of their mission—a specific grant of personal inviolability (Article VI, s 22).

The Convention makes clear that the immunities of officials and experts are granted not for their personal benefit, but for the benefit of the Organization. The Secretary-General thus has the right *and the duty* to waive immunity of any official where the immunity would in his opinion impede the course of justice and can be waived without prejudice to interests of the Organization (Article V, s 20).

However given that most officials and experts of the UN only enjoy immunity *ratione materiae* in respect of their official acts, an interesting question arises as to who should determine whether any particular act is an 'official act'. In many of the cases which might concern the exercise of ordinary criminal jurisdiction it will be possible to say that the offence is not an official act, and so the question of immunity does not arise. Thus for example during the Cold War there were a number of cases in which international officials were accused of espionage in the US, they were unable to claim immunity as the activities in question were not official activities.[68] However in other cases, where there may be some dispute as to the nature of an act, it is necessary to ask whether that issue should be determined by the Secretary-General on behalf of the Organization, or the relevant national court as part of its task in applying the immunity. In the *Cumaraswamy* case, the ICJ gave a rather nuanced answer to the question, stating that:

When national courts are seised of a case in which the immunity of a United Nations agent is in issue, they should immediately be notified of any finding by the Secretary-General concerning that immunity. That finding and its documentary expression creates a presumption

[67] Though in relation to most officials of international organizations there is considerable uniformity in the relevant treaty provisions, that they enjoy immunity from jurisdiction *ratione materiae*, ie in relation to their official acts, whilst provision is often made for certain high officials to be granted a wider immunity *ratione personae* whilst in office. In relation to international organizations of which the UK is a member their immunities may be given effect in the UK by Order in Council made under the International Organizations Act 1968.

[68] See, eg, *US* v *Coplon* 84 F.Supp 472 (1949); *US* v *Melekh* 190 F.Supp 67 (1960); and *US* v *Egorov* 222 F.Supp 106 (1963). In another context see also the case of *Westchester County* v *Ranollo* (1946), 13 ILR 168.

which can only be set aside for the most compelling reasons and is thus to be given the greatest weight by the national courts.[69]

The Court thus sought to balance interests of the organization and the local jurisdiction, though, in the final analysis, it is the local court which must decide whether there are compelling reasons to rebut the presumption established by the Secretary-General's finding.

VIII. THE SCOPE OF IMMUNITIES FOR SERIOUS CRIMES UNDER INTERNATIONAL LAW—IMMUNITY AND IMPUNITY DISTINGUISHED

None of the immunities which have been considered are for the benefit of any particular individual or group of individuals, but rather are for the benefit of the State/international organization which they represent. Thus the sending State/employer international organization can waive any of these immunities, thereby consenting to the jurisdiction of the courts of another State over the official in question. This applies whether the immunity in question is granted *ratione personae* or *ratione materiae*.

However in a parallel development, the scope of international law has now broadened from an almost exclusive concern with the rights and duties of States, so that it now also imposes a considerable body of obligations in respect of individuals. Of particular interest for present purposes is the evolution of individual criminal responsibility under international law for a number of serious international crimes which offend international public order. As Sir Arthur Watts (1994, p 82) points out:

For international conduct which is so serious as to be tainted with criminality to be regarded as attributable only to the impersonal State and not to the individuals who order or perpetrated it is both unrealistic and offensive to common notions of justice.

Furthermore recent years have seen a determination within international society to put an end to the impunity of the perpetrators of such crimes, through the development of extraterritorial jurisdiction and the establishment of international criminal tribunals. In a further development, and in line with the general trend to seek to rationalize all regimes of privilege or immunity (which is observable in other areas of international and national law), the immunities of State officials in respect of international crimes have been subject to particularly keen scrutiny in recent years.[70]

Exactly how these apparently conflicting priorities in the law should be integrated is still being worked out. Simple attempts at seeking to choose between them on the basis of hierarchy by means of the *jus cogens* or *erga omnes* nature of the primary prohibitions of

[69] *Advisory Opinion concerning Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights, ICJ Reports 1999*, p 62, para 61. For comment see Wickremasinghe, 2000.

[70] In this respect it is to be welcomed that the International Law Commission have adopted the topic of 'Immunity of State officials from foreign criminal jurisdiction'. The Preliminary report of the Special Rapporteur Amb. Kolodkin (UN Doc. A/CN.4/601), and the Memorandum of the Secretariat (UN Doc. A/CN.4/596) contain a wealth of information and insight.

the criminalized conduct appear not to provide answers, particularly in respect of procedural obligations of States.[71] Nevertheless in recent years the law has undergone, and may still be undergoing, considerable re-examination and some significant revisions. What follows therefore does not attempt to prescribe what the law ought to be, but simply seeks to describe the law as it is in its current stage of development.

A. IMMUNITIES *RATIONE PERSONAE*

In the *Arrest Warrant* case the ICJ was concerned with the immunity *ratione personae* of a serving Foreign Minister, and concluded that under customary international law no exception to that immunity exists in respect of war crimes or crimes against humanity. The Court based this upon its review of national legislation[72] and those few decisions of higher courts in national legal systems on the point.[73] One of these was the decision of the French *Cour de Cassation* in the *Qadaffi* case (Zeppala, 2001), in which the immunity of a serving Head of State was found to operate in respect of allegations of his involvement in international terrorism.[74] The other major case referred to is the decision of the House of Lords in the *Pinochet* case, in which in a number of dicta their Lordships suggested that the immunity *ratione personae* of serving Heads of States and serving Ambassadors (unless waived) could be relied upon in proceedings for international crimes.[75]

Thus it seems that based on general principle the immunity *ratione personae* of certain incumbent high State officials, including Heads of State, Heads of Government, Foreign Ministers, certain other senior Ministers, diplomatic agents, and also the members of high-level special missions, are, in the absence of waiver by the sending State, an absolute bar to the criminal jurisdiction of the national courts for the duration of their office/mission,[76] even in relation to these serious international crimes. The reason for this is that the functions which these officials serve in maintaining international relations are such that they should not be endangered by the subjection of such officials (whilst they are in office) to the criminal jurisdiction of another State.

[71] See, eg, the ECtHR case of *Al-Adsani* v *UK*, [GC], no 35763/97, ECHR 2001-XI, 34 *EHRR* 11, which dealt with the question of the immunity of the State itself from civil jurisdiction. See also Article 98(1) of the Statute of the International Criminal Court at n 87 below.

[72] In this respect the former Belgian Act of 10 February 1999 under which immunities were not admissible in respect of war crimes, crimes against humanity, and genocide, appeared exceptional and so could not be relied upon as sufficient evidence in itself of an emerging rule of general international law. A point underlined by the fact that this provision was repealed and the Act as whole was substantially amended following the Court's judgment and diplomatic pressure from other States.

[73] Subsequent cases which also support the findings of the ICJ are *Tachiona and others* v *Mugabe and others* 169 F.Supp. 2d 259 (2001) and *Wei Ye* v *Jiang Zemin* 383F.3d 620.; similarly the trio of cases from the Bow Street Magistrates' Court, *Mugabe* of 14 January 2004 (2004) 53 *ICLQ* 770, *Mofaz*, 12 February 2004 (2004) 53 *ICLQ* 771–773 and *Bo Xilai*, 8 November 2005 (128 ILR 713) as well as the case of *Re Ehud Barak* from the Westminster Magistrates' Court (*Re Ehud Barak*, 29 September 2009 (not yet reported).

[74] *Qadaffi* case, 125 ILR 490.

[75] See the speeches of Lord Browne-Wilkinson at 844E–G; Lord Hope at 886G–H; Lord Saville at 903F–G; Lord Millett 913 E–G; and Lord Phillips at 924C–D.

[76] Heads of State, Heads of Government, and Foreign Ministers appear to enjoy immunities in respect of all foreign States (ie, *erga omnes*), whereas the immunities under the VCDR and the Special Missions Convention are primarily enjoyed only in the receiving State (though they also provide for privileges and immunities whilst in transit).

However in the *Arrest Warant* case the ICJ also stressed that immunity was not the same as impunity. In this respect it noted four circumstances in which the availability of immunity *ratione personae* of incumbent office-holders would not prevent their prosecution:

(i) where the office-holder in question is prosecuted by the courts of his own State;

(ii) where immunity is waived by the office-holder's State;

(iii) when the office-holder leaves office, he may be prosecuted by the court of another State (provided that in other respects it has jurisdiction in accordance with international law) in respect of his acts prior to or subsequent to his period of office, or for his private acts during his period of office; and

(iv) by certain international criminal courts, provided that they have jurisdiction.

The first two of these circumstances are relatively uncontroversial and are well-established in international law, and need little further comment here.[77] However the latter two circumstances form the basis of the consideration of the following subsections.

B. IMMUNITIES *RATIONE MATERIAE*

The prelude to the re-examination of immunities *ratione materiae* in relation to serious crimes under international law was the arrest of the former President of Chile, General Pinochet in 1998. As is well-known Pinochet was arrested whilst temporarily in London for medical treatment, following a request by Spain for his extradition in connection with charges of *inter alia* the widespread use of torture during his period of office as Head of State of Chile. Eventually the House of Lords had to consider whether Pinochet could resist extradition by relying on his subsisting immunity *ratione materiae*, ie, in respect of official acts he performed whilst he was Head of State, notwithstanding that he was no longer in office.

Trying to distil the *ratio* of the judgment of the House of Lords is complicated not only by the nature of the case, but also by the fact the reasoning in each of the judgments of the six judges in the majority differs. A full treatment is therefore beyond the scope of this chapter.[78] The court was faced on the one hand with allegations of the international crime of torture, which by definition requires official involvement,[79] and on the other with Pinochet's claim to immunity *ratione materiae*. By a majority of six to one the House rejected the plea of immunity in respect of the torture allegations.

Put briefly three of their Lordships relied upon an implied waiver of the immunity *ratione materiae*, which it found States parties to the Torture Convention must have

[77] It might be noted in respect of (i) that the immunities *ratione personae* of certain high officials of international organizations can be opposed to the jurisdiction of the courts of their own State of nationality.

[78] The case is the subject of a considerable literature, including: Warbrick, Salgado, and Goodwin, 1999; Fox, 1999; Barker, 1999; Denza, 1999; Dupuy, 1999; Dominicé, 1999; Cosnard, 1999; Chinkin, 1999; Van Alebeek, 2000.

[79] See Article 1(1) of the UN Convention Against Torture and other Cruel, Inhuman or Degrading Treatment of Punishment 1984, which defines torture as the international infliction of pain or suffering for various purposes, 'when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of public official or other person acting in an official capacity'.

intended.[80] If this were otherwise the international criminalization of torture under the Convention would have been rendered largely purposeless, as anybody charged with torture would (in the absence of waiver) be able to rely on official act immunity.

However the judgments of the other three of their Lordships who made up the majority appear to have been more broadly based. They suggest that individual responsibility for serious crimes in international law cannot be opposed by reliance upon immunity *ratione materiae* of former Heads of State. That form of immunity only covers official acts in order to ensure that the immunities of the State itself are not undermined by proceedings against its former Head. The purpose of the immunity is therefore to ensure that the national courts of one State do not adjudicate on the responsibility of another State without the consent of the latter. However these judges found that as such immunity is concerned with the responsibility of the State, it cannot be invoked in respect of an individual's own criminal responsibility in international law.[81]

For now what can be said with certainty is that the *Pinochet* case is authority in English law for the proposition that there is an exception to immunity from criminal jurisdiction *ratione materiae* enjoyed by former Heads of State in respect of acts of official torture. It might also be noted that their Lordships found that since the development of individual criminal responsibility in respect of torture represents a distinct basis of responsibility to which official act immunity does not extend, Pinochet's immunity *ratione materiae* from civil process was unaffected. Beyond this it is difficult to draw further conclusions at this stage. Whether the exception to immunity found in this case can be extended in respect of other international crimes and/or in respect of other immunities *ratione materiae* enjoyed by officials or former officials has been much debated, but firm conclusions cannot be drawn.

It should also be recalled that the International Court of Justice in its judgment in the *Arrest Warrant* case also commented on this issue, though these comments are strictly speaking *obiter* since this case was concerned with the immunities *ratione personae* of a serving Foreign Minister. The majority of the Court found that a former Foreign Minister would be liable to prosecution in the courts of another State for the acts he performed during his period of office in his private capacity.[82] If this is taken as a broad statement of the principle that a former Foreign Minister enjoys a subsisting immunity *ratione materiae* for his official acts, it may be unsurprising. However this passage of the judgment has been the subject of criticism for the narrowness of its formulation (McLachlan, 2002) and some

[80] See the speeches of Lord Browne-Wilkinson at 847; Lord Hope (who found the exception to immunity *ratione materiae* applied only in respect of a systematic or widespread torture) at 882–887; and Lord Saville at 904.

[81] Lord Hutton accepted the fact that the allegations of torture concerned acts in the performance of public functions, but found that 'certain crimes are so grave and so inhuman that they constitute crimes against international law and that the international community is under a duty to bring to justice a person who commits such crimes'. He then held that individual criminal liability in respect of such crimes was quite distinct from the question of State responsibility which underlay immunities *ratione materiae* (at 887–902). Lord Millett found the existence of immunity *ratione materiae* simply inconsistent with the development of serious crimes of *jus cogens* nature for which extraterritorial jurisdiction was available (at 909–914). Lord Phillips similarly found that the development of international crimes and extraterritorial jurisdiction could not co-exist with immunity *ratione materiae* (at 924).

[82] *Arrest Warrant of 11 April 2000 (Democratic Republic of Congo* v *Belgium), Preliminary Objections and Merits, Judgment, ICJ Reports 2002*, p 3, para 61.

have even drawn from it the implication that the subsisting immunity of a former Foreign Minister would be applicable in respect of serious international crimes such as war crimes and crimes against humanity (Wirth, 2002; Spinedi, 2002). If this latter point is what the Court intended then it might suggest that a narrow reading should be given to the decision of the House of Lords in the *Pinochet* case. On other hand, it should be noted that in their Joint Separate Opinion Judges Higgins, Kooijmans, and Buergenthal suggest that the current trend of State practice is that serious international crimes are not covered by the immunities *ratione materiae* of former State officials.[83]

C. IMMUNITIES BEFORE INTERNATIONAL CRIMINAL COURTS

The development of international criminal courts has clearly been a major step in combating impunity for serious international crimes. Whilst a detailed discussion of the question of immunities before such courts is beyond the scope of this chapter, the broad principles will be outlined. As we have noted the ICJ suggested that immunities would not in principle be available before international courts. An apparently similar finding was made by the Appeals Chamber of the Special Court of Sierra Leone.[84] Indeed the Statutes of the Nuremberg and Tokyo Tribunals, the International Criminal Tribunal for the Former Yugoslavia (ICTY), the International Criminal Tribunal for Rwanda (ICTR), the Rome Statute of the International Criminal Court (ICC), and the Statute of the Special Court for Sierra Leone (SCSL) all contain express provisions to the effect that the official capacity of an individual shall in no case exempt him from criminal responsibility.[85] Such provisions would appear to suggest that neither immunity *ratione personae* nor immunity *ratione materiae* would in principle be a bar to the jurisdiction of these international criminal courts.

Nevertheless as Akande has persuasively argued this picture requires some further elaboration in view of the range of different international criminal tribunals which currently exist (Akande, 2004). In particular the question of whether an individual can rely on immunities in international law before an international court will, as a first step, require a consideration of the basis on which the court was established as well as the provisions of its constitutive statute. Moreover, since these international courts will require the assistance of national authorities and national courts in matters such as arresting and transferring suspects, providing evidence and other forms of cooperation, there are also questions as to the availability of immunities before relevant national authorities in these situations.

In this respect the ICTY and ICTR, which were established by the Security Council pursuant to its mandatory powers under Chapter VII of the UN Charter, may be distinguished from tribunals established by treaty. The removal of the immunity of defendants in the Statutes

[83] Ibid, Joint Separate Opinion, para 85. See also Akande (2004, p 415) who concludes that 'immunity *ratione materiae* does not exist with respect to domestic criminal proceedings for any of the international crimes set out in the Statute of the ICC'.

[84] See *The Prosecutor* v *Charles Taylor*, Case No SCSL-2003-01-I (31 May 2004).

[85] See Article 7 of the Charter of the International Criminal Tribunal of Nuremberg and Article 6 of the Charter of the Tokyo Tribunal. See Article 7(2) of the Statute of the ICTY; Article 6(2) of the Statute of the ICTR; Article 27 of the Statute of the ICC; and Article 6(2) of the Statute of the Special Court for Sierra Leone.

of these two Tribunals not only entitles the Tribunals themselves to adjudicate over such individuals, but it also provides a legal basis for all member States of the UN not to afford immunity to such persons when arresting or transferring them pursuant to Orders of the Tribunals. At the same time however it should also be noted that the Appeals Chamber of the ICTY has for example recognized the immunities of State officials *ratione materiae*, exempting them from a requirement to produce documents in evidence which they held by virtue of their official position.[86]

As a body established by treaty, the ICC is in a somewhat different position, since States must consent to be bound by the Rome Statute before they are bound by it. Whilst the Rome Statute appears to limit the immunities available to defendants in proceedings before the ICC itself (Article 27), it is not clear that this provision can restrict the immunities of officials of States that are not parties to the Rome Statute, unless, of course, there is a waiver by the relevant State, or a binding resolution of the Security Council vesting jurisdiction in the ICC. In relation to the availability of immunities to proceedings before national authorities and national courts, relating to requests by the ICC for surrender and assistance, it should be noted that Article 98(1) of the Rome Statute also preserves the State and diplomatic immunities of officials and property of third States.[87] In other words, officials of a State which is not a party to the Rome Statute may be able to claim immunity in respect of their arrest and transfer to the Court, whereas a State party to the Rome Statute has in effect waived such immunities in respect of its own officials both before the ICC itself and in the courts of other States parties in respect of their cooperation with the ICC. However there may be further layer of complexity in cases which are referred to the Court by the Security Council, depending on the terms of such referral.

The first decision of the ICC to deal with these issues, is the recent decision of the Pre-Trial Chamber on the arrest warrant sought by the Prosecutor in the case of *The Prosecutor* v *Omar Hassan Ahmad Al Bashir*.[88] As is well-known the Prosecutor sought the arrest of President Al Bashir, the serving Head of State of Sudan, for war crimes, crimes against humanity and genocide. In the event the Court decided to issue the warrant in respect of war crimes and crimes against humanity, but not genocide.[89] It dealt with the immunity issue in a short passage that found that the position of Al Bashir, as Head of a State which was not a party to the Rome Statute, had no effect on the jurisdiction of the Court over the case. In support of this finding it considered: (i) that putting an end to impunity was a core goal of the Rome Statute; (ii) Article 27 of the Rome Statute sought to give effect to this goal with specific language limiting exemptions and immunities attaching to persons by reason of their office; (iii) on the basis of the clear language of Article 27, there was no need to examine other sources of law; and (iv) in referring the situation in Darfur to the ICC,

[86] See *Prosecutor* v *Blaskić*, Judgment, Case No IT-95–14-T, Trial Chamber (3 March 2000); 110 ILR 609. However see also the case of *Prosecutor* v *Krstić*, Judgment, Case No IT-98-33-A, Appeals Chamber (19 April 2004). For comment see Akande, 2004, p 418.

[87] Thus Article 98(1) states: 'The Court may not proceed with a request for surrender or assistance which would require the requested State to act inconsistently with its obligations under international law with respect to the State or diplomatic immunity of a person or property of a third State, unless the Court can first obtain the cooperation of that third State for the waiver of the immunity.'

[88] *The Prosecutor* v *Omar Hassan Ahmad Al Bashir*, 4 March 2009, Case No ICC-02/05-01/09.

[89] The Prosecutor appealed against the Pre-Trial Chamber's refusal of the warrant in respect of genocide, and that appeal was still pending at the time of writing.

the Security Council accepted that the investigation and any resulting prosecutions would accord with the provisions of the Rome Statute as a whole. Thus it was clear that Al Bashir's position as Head of States was not a bar to the jurisdiction of the Court.

The more complex issue seems to be what steps States may or must take in execution of the warrants.[90] Although the Court did not expressly address the application of Article 98(1), it did consider that Sudan was obliged 'to cooperate fully with and provide any necessary assistance to the Court' by virtue of Security Council resolution 1593(2005), a binding resolution under Chapter VII of the UN Charter and given primacy over other obligations by virtue of Article 103 of the Charter.[91] The Court ordered that the arrest warrant be served on all States parties to the Rome Statute, and all members of the Security Council that are not States parties to the Rome Statute, with a request for the arrest and surrender of Al Bashir. Whilst the reasoning of the Court is concise, it might suggest that the effect of resolution 1593(2005) is to assimilate the position of Sudan with that of a State party, which by virtue of Article 27 cannot assert immunity to oppose arrest proceedings at the national level. If that is the case, then clearly States parties are under an obligation to comply with request for arrest and surrender under Article 89 of the Rome Statute.[92] The effect on non-States parties other than Sudan would depend upon the interpretation of relevant Security Council resolutions.[93]

IX. CONCLUSION

Thus we have seen that in modern diplomatic law there has been considerable movement towards the rationalization of immunities, so that it is now clear that they are not granted for the personal benefit of their holders. Instead they are granted on a functional basis, to facilitate the processes of communication and cooperation in international relations. Carefully considered legal regimes have been created in which the interests of sending and receiving States have been balanced. There is a general acceptance that without these immunities their holders could be impeded from effective performance of these important

[90] Gaeta, 2009 and Akande, 2009.

[91] Paragraph 2 of UNSCR 1593 provides: '*Decides* that the Government of Sudan and all other parties to the conflict in Darfur, shall cooperate fully with and provide any necessary assistance to the Court and the Prosecutor pursuant to this resolution and, while recognizing that States not party to the Rome Statute have no obligation under the Statute, *urges* all States and concerned regional and other international organizations to cooperate fully'.

[92] It might be noted that following the Court's decision, the UK made an Order in Council based on the enabling powers in both s 23(5) of the International Criminal Court Act 2001 and s 1 of the United Nations Act 1946, providing that State or diplomatic immunities will not prevent proceedings in the UK for the arrest and delivery of persons alleged to have committed an ICC Crime as a result of the referral of the situation in Darfur under UNSCR 1593 (see the International Criminal Court (Darfur) Order 2009, SI 699/2009).

[93] A full treatment of all the issues raised (both legal and diplomatic) is beyond the scope of this chapter. It should be noted that the case has resulted in considerable diplomatic activity. President Bashir's ability to travel internationally has been severely curtailed. On the other hand, there is an ongoing process of discussion in the African Union which touches on many of the issues raised here (see most recently 'Recommendations of the Ministerial Meeting on the Rome Statute of the International Criminal Court', 6 November 2009). There have also been calls from some quarters for the Security Council to invoke its powers under Article 16 of the Rome Statute to defer the proceedings, but to date no State has made a formal proposal to the Council in this respect.

functions, the purpose of which serves the international public interest. Following its codification in the 1960s diplomatic law has, for the most part, constituted a well-observed and stable body of rules.

At the same time greater consensus has developed and continues to develop on the standards of governance of those exercising public power, and in particular recently on the criminalization of the gravest excesses in this respect. The wholesale exemption of those who commit such crimes in connection with public purposes would clearly be contradictory. The establishment of the International Criminal Court, in relation to which immunities are not available (except as provided for in Article 98 in respect of non-parties), is clearly a hugely significant step for international law.

However the resolution of these conflicting priorities at the national level is still being worked out, and an authoritative statement of the law is not possible at this point. Nevertheless if the above survey is accepted, international law currently appears to be moving towards compromise. The immunities *ratione personae* attaching to certain offices will render their holders immune from national proceedings, but not necessarily from international proceedings. On the other hand once they have left office, such persons will enjoy a general immunity in respect of their official acts *ratione materiae*, but exceptionally it appears that in respect of certain international crimes they might not be so immune.

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