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Chapter 15

Immunities and International Crimes: Comments and Recent Perspectives

Kenneth I. Ajibo*

INTRODUCTION

The age-long controversy confronting the protection of the norms of international human rights and the greater need to safeguard the state sovereignty is clearly evinced in the lingering tension on whether government officials should be held liable outside their countries for international crimes committed while in office. On one hand, this unending debate is typified by the interaction between the well-known principles in international law that accords immunities to state and its diplomats from the jurisdiction of other states. This protection is premised on the recognition of the sovereign equality of states, and is based on the notion that state should not unduly meddle with the affairs of other states and their officials, as well as the need to facilitate a smooth conduct of international relations.[1] On the other hand, there are other recent principles of international law that are deeply ingrained in humanitarian values which define certain types of conduct as crimes in international law.[2] This evolving international norm under international criminal law appears to argue for prosecutions of serious international crimes even against the retired Head of States.[3]

Since the evolution of substantive norms of international human rights, it is evident that international crimes have not been matched by the

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1 For survey of this body of law see generally Akande Dapo and Shah Sangeeta, 'Immunities of State Official, International Crimes, and Foreign Domestic Courts' (2010) 21 *Eur. J. Int'l L.* 815, 816; Eileen Denze, *Diplomatic Law* (2nd edn, Oxford , Oxford University Press 1998); James Crawford, 'International Law and Foreign Sovereigns: Distinguishing Immune Transaction' (1983) 54 *Brit. Y. Int'l L.* 75.

2 See Antonio Cassese, *International Criminal Law* (2nd edn, Oxford, Oxford University Press 2008).

3 Christian Tomuschat, 'International Law Immunities and The International Criminal Court (2004) *98 American Journal of International Law 408.*

development of mechanism and procedure for prosecutions.[4] In retrospect, the main apparatus for judicial enforcement envisaged by the international law has always been the domestic courts of the state where human rights violations or international crimes occurred and the local courts of the state responsible for such violations.[5] Connectedly, international law obliges the states to prosecute those who have committed international crimes within their jurisdictions.[6] Sadly enough, the procedures for enforcement of such international crimes often fail, given that domestic laws may not incorporate the relevant norms in their national laws for prosecutions.[7] Similarly, international crimes are very often perpetrated by the very state officials as part of the state policy. In other words, the government may not be willing to prosecute its own agents engaged in such duties.[8]

This chapter is divided into five sections. Beyond the introduction, Part II briefly reviews the decision of the *Arrest Warrant (Yarodia)*[9] in order to unveil issue for discussion in the context. Part III considers the different forms of immunities that international law accords to state official, the reason for the conferment of these immunities and other practical issues dealing with diplomatic cases. Part IV reviews the unfolding realities in state practices where state officials appeared to have been convicted for perpetration of serious international crimes. The conclusion both summarises and provides further suggestions.

BACKGROUND ANALYSIS OF ICJ DECISION IN ARREST WARRANT: *CONGO* V. *BELGIUM*

The persistent controversy facing state immunity in comparison with international crimes is among the catalogue of issues challenging the current world community. In other words, this protracted issue is exemplified by the need to protect key prerogatives of sovereign states and the demands for unfolding community values which seek to undermine such rights.[10] On one

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[4] Dapo Akande, 'International Law Immunities and The International Criminal Court' (2004) 98 *American Journal of International Law* 408.

[5] Ibid.

[6] Stephens Beth, 'The Modern Common Law of Foreign Official Immunity' (2011) 79 *Fordham L. Rev.* 2669, 2670, 2673

[7] CA Whomersley, 'Some Reflections on the Immunity of Individuals for Officials Acts' (1992) 41 *ICLQ* 848.

[8] Ibid.

[9] [2000] ICJ 1 14 February 2002.

[10] Stephens Beth, 'Abusing the Authority of the State: Denying Foreign Official Immunity for Egregious Human Rights Abuses' (2011) 44 *Vand. J. Transnat'l L.* 1163, 1178; Arthur Watt, 'The Legal Position in International Law of Head of States, Head of Governments and Foreign Ministers' (1994-III) 237 *Recueil des Cours* 13.

hand, states stick to the argument that when it comes to the exercise of criminal jurisdiction, the territorial or national state should solely exercise the right to prosecute and punish its officials for major international crimes.[11] On the other hand, disillusioned by the increasing lack of prosecution by the national or territorial states of these major international crimes, states other than territorial or national states claim the right to exercise extraterritorial criminal jurisdiction over those crimes.[12]

At this juncture, a brief analysis of the ICJ decision in the *Arrest Warrant* (*Congo* v. *Belgium*)[13] handed down on 14 February 2002, is apposite to illustrate the discussions of these issues. In the case, the Congo DRC had argued before the World Court that Belgium violated international law by issuing an arrest warrant against the Former Congolese Foreign Affairs Minister (Mr Yerodi) for serious violation of the Geneva Convention of 1949 and for crimes against humanity allegedly committed before Yerodia took office.[14] The acts charged were perpetrated in 1998 before Mr. Yerodia became the Minister of Foreign Affairs, and included hate speeches allegedly inciting attacks on the Tutsi population in Congo DRC.[15]

Specifically, in its memorial before the ICJ, Congo argued that Belgium breached the 'principle that a state may not exercise its authority on the territory of another state; the principle of sovereign equality of member states of the United Nations, along with the diplomatic immunity of the Minister for Foreign Affairs of sovereign state.[16] In her counter memorial, Belgium contended, however, that there had been no violation of international law given that the Foreign Affairs Minister involved, enjoyed absolute immunity from prosecution while in official visits to Belgium. In other words, such state official may only be liable for criminal prosecution during such visits in a private capacity to Belgium. The ICJ held that such immunity very well existed and mandated Belgium to cancel the arrest warrant and Belgium carried out the order. Strangely enough, the World Court went further in an *obiter dictum* to state that 'not only would an incumbent Minister of Foreign

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[11] Ibid.
[12] Ibid.
[13] [2000] ICJ 1 14 February 2002.
[14] Dapo Akande and Sangeeta Shah, 'Immunities of State Officials, International Crimes, and Foreign Domestic Courts' (2011) 21 *EJIL* 4.
[15] Kenneth Ajibo, 'Immunities and International Crimes: The Emerging Reality in International Law' (2014) 1(2) *Ife Journal of International and Comparative Law* 532-546.
[16] Ibid.

Affairs be protected by state immunity but also a Former such Minister with regard to his or her official acts.'[17]

Following this strange decision by the ICJ in 2002, there has been an avalanche of academic writings regarding the extent of the prosecution of international crimes in relation to both the serving and former such state officials.[18] Agreed that both the former and incumbent state officials are immune from prosecutions in certain circumstances from the possible jurisdiction of foreign states, however, it is argued that the precise contours of the relevant customary international law rules on immunities remains inconclusive in respect of international crimes perpetrated by such former state officials. This is further complicated given the recent state practices under the international law.

DEFINING IMMUNITY IN INTERNATIONAL LAW: STATE AND DIPLOMATIC IMMUNITIES

It is trite law that state agents are immune in certain circumstances from the jurisdiction of foreign states and these immunities are derived from the customary international law of state immunity. In the first place, the purpose of this protection is to prevent states from exercising control over the public acts of other states. Second, under customary international law and applicable treaties, diplomats are entitled to immunity from criminal and civil jurisdiction of the foreign states to which they are accredited.[19] While some agents enjoy wider immunity given their status or office (immunity *ratione personae*), the immunity of others are merely on acts carried out in their official positions (immunity *ratione materiae*).[20]

Immunity *ratione personae* - Immunity Attaching to an Office or Status

The first type of immunity applicable to certain state agents is immunity *ratione personae* which attaches to a particular office and are possessed only as long as the official is in the office.[21] These immunities are limited to fewer

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[17] Anthony J Colangelo, 'Jurisdiction, Immunity, Legality, and Jus Cogens' (2013-2014)14 *Chi. J. Int'l L* 53.

[18] Salvatore Zappala, 'Do Heads of State in Office Enjoy Immunity from Jurisdiction for International Crimes? The Ghaddafi Case Before the French Cour de Cassation' (2001) 12(3) *EJIL* 595-612; Wirth Steffen, 'Immunity for Core Crimes? The ICJ's Judgement in the Congo v Belgium Case' (2002) 13 (4) *European Journal of International Law* 877-893; Antonio Casses, 'When May Senior State Official Be Tried for International Crimes? Some Comments on the *Congo* v. *Belgium* case' (2002) 13(4) *European Journal of International Law* 853-875.

[19] Vienna Convention of Diplomatic Relations April 18, 1961, 29, 31, 23 UST 3227, 500 UNTS 95 [hereinafter VCDR) in the article.

[20] Ibid.

[21] This is known as 'personal' or immunity *ratione personae*

numbers of officials, including Heads of State, Heads of Government, and Foreign Ministers.[22] Similarly, treaties may accord similar protection on diplomats, representatives of states on international organisation and other official on special foreign missions on foreign states.[23] It is a settled law that the predominant justification for such immunities is that such protection enables the state official for smooth conduct of international relations and global co-operation in the comity of nations and as such, they are attached to these state agents who represent the state at the world arenas.[24] The efficacy of this process of communication and co-operation in turn demands that the state officials charged with the conduct of international diplomacy be able to travel freely so as to carry out their duties without the fear or possibility of harassment by other states.[25] In other words, these immunities are essential for the maintenance of a system of peaceful co-operation and co-existence among states.[26] Increased global co-operation entails that this protection is especially needed as the ICJ has stated that there is: 'no more fundamental prerequisite for the conduct of relations between States than the inviolability of diplomatic envoys and embassies.'[27]

Scope of immunity *ratione personae* in international law

Given that the Head of states, diplomats and other agents with these immunities will be impeded in the exercise of their functions if they are detained while in global arenas, these officials are immune from criminal jurisdiction on foreign states.[28] In *Arrest Warrant*, the ICJ held that this type of immunity applies not only in relations to the official acts of this limited group of senior officials, but also in relation to their private acts. Similarly, the

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[22] See Ajibo (n 15) 539

[23] See Arts 29 and 31 of UN Convention on Diplomatic Relations 1961 (VCDR) 500 UNTS 95; Arts IV, Sec 11, Conventions on the Privileges and Immunities of the United Nations 1946, 1 UNTS 15 and 90 UNTS 327.

[24] Arts 21, 31 and 39 of UN Convention on Special Missions 1969, 1400 UNTS 231.

[25] Tunk stated that: 'Head-of-state immunity allows a nation's leader to engage in his official duties, including travel to foreign countries, without fearing arrest, detention or other treatment inconsistent with his role as the head of sovereign state…Without the guarantee that they will not be subjected to trial in foreign courts heads of state may simply choose to stay at home rather than assume the risks of engaging in international diplomacy abroad'. See Michael Tunks, 'Diplomatic or Defendants? Defining the Future of Head-of-State Immunity' (2002) 52 *Duke L.J* 651-656.

[26] *Arrest Warrant* - Joint Separate Opinion of Judges Higgins, Kooijmans & Buergenthal, para. 75 (stating that 'Immunities are granted to high state officials to guarantee the proper functioning of the network of mutual inter-State relations, which is paramount importance for well-ordered and harmonious international system'.

[27] *United States Diplomatic and Consular Staff in Tehran case* (*United States* v. *Iran*) [1980] ICJ ReP 3, para 91.

[28] Anthony J Colangelo, 'Jurisdiction, Immunity, Legality, and Jus Cogens' (2013-2014)14 *Chi. J. Int'l L.* 53. Hazel Fox, 'The Resolution of the Institute of International Law on the Immunities of Heads of State and Government' (2002) 51 *Int'l L & Comp. L.Q* 119.

immunity applies whether or not the act in question was done at a time when the official was in office or before entry into office.[29] Moreover, what is essential in not necessarily the nature of the alleged activity or when it was performed, but rather whether the legal process invoked by the foreign state aims to subject the agent to a constraining act of authority at the time when the official was entitled to the immunity.[30]

Indeed, even attempts to arrest or issuance including circulation of arrest warrant of the senior official would be a breach of international law.[31]But the invitation of such an official by the foreign state to testify or provide information voluntarily may not.[32] However, since this type of immunity is accorded at least in part, in order to allow unimpeded exercise by the state official for his or her international diplomacy, it is argued that such immunity should exist for only as long as the person is in office. After the person has ceased to hold office, he or she is no longer protected by immunity *ratione personae*. In other words, once retired, such person, like any other state official enjoys only immunity *ratione persone* regarding his or her official duties. The principle that immunity *ratione personae* extends even to cases involving allegation of core crimes such as crime against humanity and war crimes must be taken to be applying to all those serving state officials and diplomats possessing this type of immunity.[33]In *Arrest Warrant*, the ICJ succinctly stated that:

> It has been unable to deduce...that there exist under customary international law any form of exception to the rule according immunity from criminal jurisdiction and inviolability to incumbent Minister for Foreign Affairs, where they are suspected of having committed war crimes or crimes against humanity.[34]

This has been largely applied by national courts in relevant cases including being upheld in state practice.[35] While it may be construed that

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[29] Ibid.
[30] Ibid. para 55, 70-71
[31] Ibid.; *Case Concerning Certain Question of Mutual Assistance in Criminal Matters* (*Djibouti* v. *France*), ICJ judgement of June 4, 2008 para 170 available at <http://www.icj.icj.org/docket /files/136/1455.pdf> (Last accessed January 2019
[32] Robert Jennings and Arthur Watts (eds), *Oppenheim's International Law* (1992) 1043 -1044.
[33] Paola Gaeta, 'Official Capacities and Immunities' in A. Casses *et al.* (eds), *Commentary on International Criminal Court* (2002) 975, 989-990.
[34] See *Arrest Warrant*, para 58
[35] See *Ghaddafi* Arreet No 1414 (2001), 125 ILR 456 (France: *Cour de Cassation*); Castro (Spain: *Audiencia Nacional* 1999), cited by Cassess note 3, 272; *R* v. *Bow Street Stipendiary Magistrate and Others, Ex parte Pinochet* (No 3) [1999] 2 All ER 97, 126-127, 149 (see the views of per Lord Goff, Hope, Millet and Philips); *Tachiona* v. *Mugabe* 169 F. Supp 2d 259 (SDNY 2001). The US government has issued a suggestion of immunity in a case brought against the then President of China alleging torture, genocide

immunity of the Head of State was denied in *United State* v. *Noriega*.[36] However, in that case, it remained doubtful whether immunity was ever attached given that the US government had never recognised General Noriega (the *de facto* ruler of Panama) as the Head of State.[37]

CATEGORIES OF OFFICIALS PROTECTED UNDER IMMUNITY *RATIONAE PERSONAE*

As argued previously, the Head of State, Head of Government and Diplomats possess immunity *ratione personae*.[38] Nevertheless, it remains doubtful whether this category of immunity applies to other senior government officials since in the *Arrest Warrant* the court without any reference to supporting state practice stated that it applies to 'diplomatic and consular agents [and] certain holders of high ranking office in a State including the Head of State, Head of Government and Minister for Foreign Affairs.'[39]

It is argued that the above statement of the World Court appears to mean that the category of senior officials included for protection is not closed. For example, Foreign Ministers were held to be immune because they are responsible for the international relations of the state and 'in performance of these functions' he or she is frequently required to travel internationally, and thus must be in a position to do so unhindered at any time the need arises. However, it is posited that relying on this kind of protection by reference to the international duties of the agents involved would make it difficult to confine the immunity to a limited group of officials. This is because, a large number of state agents both senior and junior are charged with the conduct of international relations and would need to travel in the exercise of their functions. Ministers (both senior and junior) other than those particularly assigned for the job of foreign affairs often represent their state internationally. Sometimes, they may have to conduct bilateral negotiations with the governments or may represent their government at international organisation or global summits. Currently, it is difficult to think of any

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and other human rights violations See generally Christopher Totten, 'Head-of-State and Foreign Official Immunity in the United States after Samantar: A Suggested Approach' (2010) 34 *Fordham Int'l L.J.* 332 Sean Murphy, 'Head-of-State Immunity for Former Chinese President Jiang Zemin' in Contemporary Practice of the United States Relating to International Law' (2003) 97 *AJIL* 962-77

[36] 117 F 3d 1206 (11th Cir 1997).

[37] Ibid.

[38] See *Djibouti* v. *France* [2008] ICJ Judgement of 4th June 2008 Para 170; VCDR, arts 29 and 31

[39] See *Arrest Warrant*, para 53.

ministerial position whether in Africa or beyond that would not demand at least some level of international involvement at some point.[40]

This paper posits that the limits of the protection should be drawn down and officials included be specified. Undoubtedly, this would not only benefit both the courts and litigants. Equally, the clarification has salutary effect to international law practitioners vis-à-vis their clients when such issue arises.

DIPLOMATIC OFFICIALS ON SPECIAL MISSIONS

The officials on diplomatic and special missions for their state at international organisations are accorded immunity via treaties.[41] Similarly, Articles 29 and 31 of the UN Convention of Special Missions 1969, provides that any official abroad on a special mission on behalf of his or her state is inviolable, with the result that he or she may not be arrested or detained. Furthermore, Articles 31 of that Convention provides that 'representatives of the sending State in special mission and the members of its diplomatic staff are immune from criminal jurisdiction of the receiving state.'[42] While these treaty-based conferrals of immunity *ratione personae* extend the category of protection beyond the Head of State, Head of Government, and Foreign Minister, they further ensure the smooth conduct of global relations and diplomacy.

However, the issue remains as to whether the immunity described above represents the current rules of customary international law. While the International Law Commission (ILC) was of the view that immunity of special mission was set up as a matter of international law, nevertheless, the US Federal District Court doubted that these provisions represented the rule of customary international law.[43] In fact, the US Executive Branch has maintained that foreign agents only temporarily in the United States on 'special diplomatic mission' are entitled to immunity from the jurisdiction - criminal or civil in the US courts.[44] In other words, what is particularly important is the acceptance that the claims of this immunity have gone

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[40] In *Djibouti* v. *France* [2008] ICJ Judgement of 4th June 2008, the ICJ confirmed that official holding the (non-ministerial) posts of Public Prosecutor and Chief of National Security did not enjoy immunity *ratione personae*.

[41] See Art IV, Para.11 of Convention on the Privileges and Immunities of the Organization of African Unity (1965) now (AU) <http://www.dfa.gov.za/foreign/multilateral/Africa/treaties/oaupriv.htm> (last accessed on 10th June, 2019)

[42] See the UN Convention on Special Mission 1969, Articles 29 and 31

[43] *USA* v. *Sissoko* (1997) 121 ILR 599(SD Fla 1997) 358. However, it is now generally recognised that States are under an obligation to accord the facilities, privileges, and immunities in questions to special missions and the members.

[44] See the suggestion of the immunity issued by the US Executive Branch in *Li Weixwn* v. *Bo Xilai* - DCC Civ No 040649 (RJL) <http://www.state.gov/documents/organisation/98832.pdf> (last accessed on June, 2019).

beyond the traditional Head of States, Head of Government and Foreign Minister. For example, the US government mentioned the existence of immunity in a case brought against the Chinese Minister of Trade and Commerce.[45]

Furthermore, a plethora of decisions can be found in other jurisdictions in support of this owing to the fact that a number of foreign governments and courts are willing to accept the customary law position of the rule granting immunity to members of special missions. For example, Djibouti relied on the Special Mission Conventions in her written pleadings although neither it nor France was a party to the Convention.[46] Similarly, in *Re Bo Xilai*,[47] a magistrates' court in the UK was willing to grant immunity to the same Chinese Minister of Commerce on the basis that this was required by the customary international law since he was part of special mission.[48] In the same vein, the Federal Republic of German refused to arrest the then Chief Protocol Officer to the President of Rwanda (Rose Kabuye) when she was on an official visit to the country in April 2008.[49] Similar decision was reached in *Tabatabai*[50] by the Criminal Chamber of the German Federal Supreme Court. It has been accepted that this type of special mission immunity applies even in cases concerning international crimes. For instance, immunity was recognised in *Re Bo Xilai* even though the case dealt with allegation of torture.

However, a further issue at the front burner is how to determine the precise contours of the special mission immunity. In particular, it is pertinent to ascertain what constitutes a special mission? A special mission is 'temporary mission, representing the State that is sent by one State to another State with the consent of the latter for the purpose of dealing with it on specific questions or of performing in relation to it in a specific task.[51] This indicates that the receiving State is not only aware that the foreign official is on its territory, it must also consent to that presence and to the performance of the specific task. Arguably, it is this sort of agreement that gives rise to the immunity. While this special mission immunity is largely wide, however, it is argued that its applicability does not extend to state official especially a foreign minister

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[45] Ibid.

[46] *Mutual Assistance in Criminal Matters* (*Djibouti* v. *France*) [2008] Memorial of the Republic of Djibouti.

[47] (2005) 128 *ILR* 713

[48] See also the proceeding in England regarding Israel Minister Ehud Barak HC Deb 13 Dec 2010 vol 520 72WS.

[49] However, the German government arrested her on a subsequent visit in the same year arguing that she was in Germany on private capacity- a view disputed by Rwandan Government. See Vanessa Thalman, 'French Justice's Endeavour to Substitute for the ICTR' (2008) 6 *J Int'l. Criminal Justice* 995.

[50] Decision of 27 Feb 1984 Case No 4 Str 396/83, 80 ILR (German: Federal Supreme Ct).

[51] Art 1 of the UN Convention on Special Mission 1969

abroad on private capacity. Arguably, this is what differentiates it from the type of immunity *ratione personae* discussed by the ICJ in *Arrest Warrant*. In *Congo* v. *Belgium* the ICJ justified the conferment of this broad immunity to serving Foreign Minister on the basis that it was necessary for the conduct of international relations even on personal visit.

This paper posits that the above argument from the World Court is untenable and unconvincing. In other words, it is hard to follow given that it was not supported with any known state practice under customary international law. In the same vein, it is difficult to see why a Foreign Minister should require immunity from jurisdiction when on a private visit. Such visits are not necessary for the international relation of states.[52] This could be the reason why the German government arrested Chief Protocol Officer to the President of Rwanda (Rose Kabuye) on a subsequent visit in the same year arguing that she was not immune in Germany on private capacity - a view disputed by Rwandan Government till date.[53] To the extent that a Foreign Minister or other official is immune whilst abroad on official visits then the conduct of international relations should not be largely hindered as the Minister is free to travel to conduct such diplomacy. It is further argued that the basis for immunity of senior officials when abroad on a private visit must be sought elsewhere and not covered under the protection.

IMMUNITY OF STATE OFFICIALS – IMMUNITY ATTACHING TO OFFICIAL ACTS

State agents are immune from the jurisdiction of other states in relation to acts carried out in their official capacity. This type of immunity attaches to the official act rather than the status of the official.[54] It may be relied on by all who have acted on behalf of the state with respect to their official acts.[55] Both the former and the serving agents may rely on this immunity in relation to official acts carried out while in office. It may also be relied on by persons or bodies that are not state officials but acted on behalf of the state.[56] The application of immunity *ratione materiae* to state official has been more common in civil issues rather than in criminal cases. However, there are two

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[52] Ibid., arts 1, 29, 31, 32 and 35; R v. Alebeek, 'The Immunity of State and Their Official in International Criminal Law and International Human Rights Law' (2008) 179-180.

[53] See Vanessa Thalman, 'French Justice's Endeavour to Substitute for the ICTR' (2008) 6 *Int'l. Criminal Justice* 995.

[54] This is known as 'functional immunity' or immunity *rationemateriae* – immunity attaching to official acts.

[55] Andrea Bianchi, 'Immunity Versus Human Rights: The Pinochet Case' (1999) 10 *EJIL* 237.

[56] Van Panhuys, 'In the Borderland. Between the Act of State Doctrine and Questions of Jurisdictional Immunities' (1964) 13 *ICLQ* 1193, 1201.

similar policies underlying the conferment of immunity *ratione materiae*.[57] First, this kind of immunity gives effect to a substantive defence, in that it indicates that the individual official is not to be held legally responsible for acts that are, in effect, those of the state. Such acts are attributable only to the state and immunity *ratione materiae* is a mechanism for shifting responsibility to the state.[58] The rationale for this is that state official cannot be subject of penal sanctions or penalties for conduct that is not private but carried out on behalf of the state. In essence, this is a well-established principle of customary international law dating back to the eighteenth and nineteenth centuries.[59]

Second, immunity of state official in foreign courts prevents the circumvention of the immunity of the state through proceedings brought against those who act on behalf of the state. A foreign sovereign government is often represented by agents and the immunity to which it is entitled with, including its acts would be illusory except it is extended also to officials in respect of the acts carried out by them on their behalf.[60] In this sense, the immunity operates as jurisdictional or better still procedural. It also bars and prevents courts from indirectly exercising control over the acts of the foreign state through proceedings against the official who performed the acts.[61]

Thus, the two types of state immunities which safeguard individual are namely: immunity *ratione personae* which protect the official from criminal prosecution, but only temporarily, during his or her term of office. Also, immunity *ratione materiae* which protect every serving or former state official, but only in respect of his or her official conduct.

On the whole, the explanation above has shown that within the realm of state immunities and diplomatic agents, there cannot be a category termed 'immunity of former Minister of Foreign Affairs' as stated by the ICJ in *Arrest warrant*. Rather, the immunity available to former Ministers of Foreign Affairs is the same as for every other Former state official, namely, immunity *ratione materiae*. Similarly, it should be noted that diplomatic or consular immunity must not be confused with state immunity. Diplomats and consular agents are state officials and therefore are protected not only by diplomatic immunity but also by state immunity. This protection is essential in respect of third

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[57] See *Kuwait Airways* v. *Iraq Airways Co* [1995] 3 All ER 694 (HL). See also S. 14(2) of the UK Immunity Act 1978 Ch 33.

[58] Ibid.

[59] Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia in *Prosecutor* v. *Blaskic* (objection to the issue of Subpoena Duces Tecum) 1997 IT-95-14-AR108, 110 ILR (1997) 607, 707 para 38

[60] See the Court of Appeal decision in *Zoernsch* v. *Waldock* [1964] 1 WLR 692 (England: CA per Diplock L).

[61] Ibid.

states which are not bound by the regulations of diplomatic or consular immunity.[62]

IMMUNITIES AND INTERNATIONAL CRIMES: EMERGING REALITY IN STATE PRACTICE

This section examines the exceptions to the immunities set out above with respect to criminal prosecution for alleged commission of international crimes.[63] It seems that an exception to functional immunity exists in relation to where an individual is responsible for core crimes under customary international law.[64] The consequence of this is that the state official, including the former Head of State, is personally responsible for his or her crimes. The French Court (*Cour de Cassation*) indirectly confirmed the existence of this exception.[65] Similarly, in *Pinochet* (1),[66] an Appellate Committee of the House of Lords held by a margin of three to two that the former Chilean President Augusto Pinochet was not immune with respect to crime under international law.[67]

Similarly, in construing the scope of the UK Criminal Justice Act of 1988, the House of Lords in *Pinochet III*[68] ruled that a Head of State cannot claim immunity for torture given that it cannot constitute an official act.[69] The analysis of the individual votes of the decision suggested that four of the seven Law Lords denied immunity for core crimes in general not just for torture under the Convention Against Torture.[70] Therefore, the decision could be viewed as state practice and *opinion juris* that immunity *ratione materiae* does not exist for international crimes such as torture, genocide, crimes against humanity and war crimes. However, the Law Lords decision upheld that the immunity *ratione personae* of incumbent Head of State are an

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[62] See Vienna Convention on Diplomatic Relations of 1961, 500 UNTS 95; See Vienna Conventions on Consular Relations of 1963, 596 UNTS 262.

[63] Core crimes are crimes against the rule of international law which included but not limited to: torture, war crimes and crime against humanity.

[64] See *Gaddafi* in Cour de Cassation [2001] 13 March No 1414

[65] Ibid.

[66] *R* v. *Bow St Metropolitan Stipendiary Magistrate and Others ex parte Pinochet Ugarte* (No 1) 3 WLR 1456 (HL) 1998

[67] Ingrid Wuerth, 'Pinochet's Legacy Reassessed' (2012) 106(4) *American Journal of International Law* 731-768CM Chinkin, 'United House of Lords: *Regina* v. *Bow Street Stipendiary Magistrate ex parte Pinochet Ugarte* (No 3) (1999) 3 *AM. J.INT'L.L* 70, 704

[68] *R* v. *Bow St Metropolitan Stipendiary ex parte Pinochet Ugarte* (1999) No 3, 2 WLR 872 (HL)

[69] UK Criminal Justice Act 1988, s.134

[70] Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment Res/39/46/1984.

effective protection against prosecution for the alleged commission of international crimes.[71]

Moreover, apart from *Pinochet*, other state practice exists that support the view that there are exceptions to state immunity for state officials.[72] For example, countries which requested the extradition of Pinochet including Spain, Belgium, Switzerland and France must have concluded that there are no immunity against a former head of state. In particular, Spanish courts denied immunity to Pinochet on several occasions.[73] In the same vein, in *Bouterse*[74] in the Netherlands, the Gerechtshof (the Dutch Court) Amsterdam held that 'the commission of very serious offences – as are concerned here (crimes against humanity) cannot be regarded to be one of the official duties of a Head of State.[75] Thus, the court denied immunity to Bouterse for crimes allegedly committed by him while in office. On appeal to the HogeRaad (Dutch Supreme Court), the Gerechtshof's finding on immunity remained unchallenged (though the decision as whole was set aside, *inter alia,* for reasons regarding the principle of legality).[76]

While the few exceptions cited above may not universally represent an acceptance of general practice, however, it is argued that these notable exceptions are indication to the emerging reality in international law from state practice supported with *opinio juris.*

ACCOUNTABILITY IN INTERNATIONAL CRIMES

Leading on from the above, the accountability of state official is grounded on the emergence in customary international law of provision based on the consciousness that certain international crimes of individuals should not be viewed as legitimate acts of official functions. These acts give rise to the responsibility of the state along with the culpability of individual perpetrators.[77] This principle was first enshrined in the Versailles Treaty where Allied Power publicly tried the former German Emperor for a supreme offence against international morality and the sanctity of treaties.[78] Moreover, the same line of rule was advocated in the Charter of the Nuremberg Tribunal

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[71] UK Criminal Justice Act 1988, s.134

[72] See generally Philippe Sands, 'International Law Transformed? From Pinochet to Congo' (2003) 16(1) *Leiden Journal of International Law* 37-53.

[73] Ibid.

[74] Gerechtshof Amsterdam (2000) Nederlandse Jurisprudentie (2001) No. 51, 302, 303

[75] Ibid.

[76] Hoge Raad 18 Sept 2001, Case NO. 00749/01 CW 2323 <http://www.rechtspraak.nl> accessed on 20th January 2019.

[77] Decision of the ICTY Trial Chamber in the *Furundzija* (10 December 1998)

[78] Versailles Treaty 1919, art 227.

and subsequently approved by the UN General Assembly with its resolution affirming the principle of Nuremberg.[79] In addition, a principle in the very same direction was approved in Genocide Convention of 1984.[80] Similarly, the rule was included in ICTY Statute,[81] ICTR Statute,[82] ICC Statute,[83] and Special Court for Sierra Leone.[84] The inclusion of these rules in the statutes of UN ad hoc Tribunals ICTY, ICTR and particularly the Special Court for Sierra Leone cannot be taken as solely a treaty stipulation.[85] If before the adoption of these Statutes, the irrelevance of official capacity had not already been a principle in customary international law, Heads of State and other senior officials accused of international crimes under the statutes might not be considered responsible for acts perpetrated at any time prior to the adoption of the Statutes themselves.

JUS COGEN VERSUS INTERNATIONAL CRIMES

Jus cogen - a peremptory norm - refers to certain fundamental, overriding principles of international law, from which no derogation is ever permitted.[86] There is no universal agreement regarding precisely which norms are *jus cogens* nor how a norm reaches that status, but it is generally accepted that *jus cogen* includes the prohibition of genocide, maritime piracy, slaving in general (to include slavery as well as the slave trade), torture, refoulement and wars of aggression and territorial aggrandizement.[87] Under the Vienna Convention on

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[79] International Military Tribunal (IMT Charter), art 7; UN General Assembly Res.1/95 (1946)

[80] UN General Assembly Res.1/96 (1946)

[81] UN Security Council Res 827, art 7 ICTY Statute

[82] UN Security Council Res 955, art 61 ICTR Statute

[83] Art 27 of the ICC Statute. See UN website <http://www.un.org/icc> accessed on 20th June 2019.

[84] ILC Draft Statute, UN Conference, art 6 para 2, Statute for the Special Court of Sierra Leone UNSC S/2009/915, 4 Oct 2000.

[85] However, Charles Taylor, the former president of Liberia, was tried and convicted in April 2012 on 11 charges arising from war crimes, crimes against humanity, and other serious violations of international humanitarian law, committed from November 30, 1996 to January 18, 2002 during the course of Sierra Leone's civil war. He was subsequently sentenced to 50 years in jail. However, On February 28, 2013, the appeals chamber of the International Criminal Court for the Former Yugoslavia, by a 4 to 1 majority, reversed the trial chamber's convictions of General Mom ilo Peri i , the former commander of the Yugoslav army during the Bosnian war. The former general was acquitted on all counts. In its decision, the appeals chamber revisited the elements of the *actus reus* for aiding and abetting, finding that an aider or abettor must *specifically direct* his conduct to the crime committed by the perpetrator. This decision not only seeks to settle inconsistent and contradictory case law from the ICTY—it could also affect the jurisprudence of the Special Court for Sierra Leone (SCSL) and the appeal of the conviction of Charles Taylor see <www.charlestaylortrial.org> Accessed on 2nd June 2019.

[86] Anthony J Colangelo, 'Jurisdiction, Immunity, Legality, and Jus Cogens' (2013-2014) *14 Chi. J. Int'l L.* 53; Ian Brownlie, *Principles of Public International Law* (5th ed., Oxford, 1998)

[87] Wright Jane, 'Retribution but No Recompense: A Critique of the Torturer's Immunity from Civil Suit' (2010) 30 *Oxford J. Legal Stud.* 143, 144; Cherif Bassiouni, 'International Crimes: 'Jus Cogens' and 'Obligatio Erga Omnes' (1996) 59 (4) *Law and Contemporary Problems* 68; Cherif Bassiouni, *Crimes Against Humanity: Historical Evolution and Contemporary Application* (New York: Cambridge University Press, 2011) p. 266

the Law of Treaties, any treaty that conflicts with a peremptory norm is void.[88] Unlike ordinary customary law which has traditionally required consent and allows the alteration of its obligations between states through treaties, peremptory norms cannot be violated by any state "through international treaties or local or special customs or even general customary rules not endowed with the same normative force."[89] However, the International Criminal Tribunal for the Former Yugoslavia stated that there is *jus cogen* for the prohibition against torture.[90] It also stated that every state is entitled 'to investigate, prosecute and punish or extradite individuals accused of torture, who are present in a territory under its jurisdiction.'[91] Therefore, there seems to be a universal jurisdiction over torture. The rationale for this is that "the torturer has become, like the pirate and the slave trader before him, *hostis humani generis*, an enemy of all mankind."[92]

Nevertheless, the assertion that the commission of international crimes cannot be legitimately regarded as official acts of a state because it offends the rule of *jus cogens* should be viewed with caution in light of some recent judicial decisions. In *Prefecture of Voiotia* v. *Federal Republic of Germany*[93] concerning the civil claims of reparation for the atrocities committed by German forces, both the Greek Court of the First instance and Supreme Court agreed that an act that offends *jus cogens* rules do not qualify as sovereign acts. This could imply that Germany had waived its immunity having committed such acts.[94] Nonetheless, this same case was dismissed by the German Court on the ground that it was not the international law currently in force.[95] Similar decisions were reached in a long line of cases including *Prinze* v. *Federal Republic of Germany*,[96] *Ferrini* v. *Federal Republic of Germany*,[97] and *Jones* v. *Saudi Arabia*.[98]

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[88] See Vienna Convention on Law of Treaties 1969, Article 53

[89] See *Prosecutor* v. *Furundzija*, International Criminal Tribunal for the Former Yugoslavia, 2002, 121 International Law Reports 213.

[90] Ibid.

[91] Ibid.

[92] A Abashidze, S Shatalova, 'International Crimes Exception to the Immunity of State Officials from Foreign Criminal Jurisdiction: The Russian Perspective on the Work of the International Law' (2017) *Netherlands International Law Review*; M. Janis, and J. Noyes, *International Law: Cases and Commentary - Prosecutor* v. *Furund ija* (3rd ed 2006)148

[93] [1997] 595

[94] *Greek Citizen* v. *Federal Republic of Germany* (the Distomo Massacre) 2003 42 ILM 1030

[95] *Federal Republic of Germany* v. *Miltiadis Margellos* 6/17-9-2002.

[96] 26 F 3d 1166 (DC Cir 1994).

[97] 87 RDI (2004) 539 (Italy) Cassazione).

[98] [2006] UKHL, 26, 68.

CONCLUSION

This chapter has argued that the ICJ's *obiter dictum* in *Congo* v. *Belgium*, that Ministers of Foreign Affairs are immune from official acts even when they are no longer in office is both not well reasoned, unconvincing and hard to reconcile with the existing law of state immunity. The decision seems to have neglected largely the existing state practice including the *opinion juris* in relation to state immunity *ratione materiae* in the context of the prosecution of international crimes. It is argued that a more persuasive theory is suggested upon which removal of immunity *ratione materiae* can be relied on issues involving international crimes. While international crimes may be official acts as advanced in some judicial decisions, it is argued that immunity *ratione materiae* ought to be jettisoned as soon as a rule permitting the exercise of extra-territorial jurisdictions over that crime including the contemplating prosecution of state official emerges.