BALANCING STATE SOVEREIGNTY AND HUMAN RIGHTS: ARE THERE EXCEPTIONS IN INTERNATIONAL LAW TO THE IMMUNITY RULES FOR STATE OFFICIALS?

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ABSTRACT

To what extent are state officials held accountable for their actions? This essay will examine a specific aspect of this question, namely whether there is an exception to the general rule that the Head of State, Head of Government and Foreign Minister are immune from prosecution in another country's national courts for serious international crimes. It will begin with a brief review of the relevant treaty provisions relating to immunity of state officials. Second, it will examine some pre-Arrest Warrant case law specifically on the issue of potential exceptions to the immunity rule for state officials. Third, it will review the Arrest Warrant Case, an ICJ decision that halted this trend and discuss some of the issues left unresolved by the decision. Fourth, it will review the ICJ's discussion of immunity post-Arrest Warrant in Djibouti v. France. Finally, it will explore the concept of jus cogens *and whether this could help reconcile the competing interests (state sovereignty and accountability for serious international crimes) at play in this issue. This essay will conclude that while the* jus cogens *nature of serious international crimes does not equate to an automatic carte blanche for removing immunity, it does strongly support the developing norm of limited exceptions to the general rule of immunity.*

INTRODUCTION

Almost 70 years ago, the international community embarked on a bold attempt to bring to justice the officials responsible for the death and destruction of WWII. For the first time in history, legal mechanisms were invoked to hold the perpetrators of war crimes and crimes against humanity accountable for their actions using international tribunals specifically established for that purpose.[1]

Aside from their sheer novelty at the time, the Nuremberg and Tokyo International Military Tribunals were particularly astonishing for two reasons.

First, the allies nearly succumbed to the temptation for retribution and almost refused to let the tribunals happen. Second, although many of the accused were convicted, some were acquitted, much to the shock of those who assumed the tribunals were "mere formalities preceding declarations of predetermined guilt".[2] Thus, despite their flaws, these tribunals helped to quell the urge for vigilantism against suspected war criminals, and paved the way for the establishment of the International Criminal Court (ICC). Most importantly, the Tribunals represented the first concrete attempts to prosecute individuals responsible for war crimes.

How has international law evolved since these first bold attempts? To what extent are state officials held accountable for such serious crimes today? This essay will examine a specific aspect of this question, namely whether there is an exception to the general rule that the Head of State, Head of Government, and Foreign Minister, often called the troika, are immune from prosecution in another country's national courts for serious international crimes (genocide, war crimes, and crimes against humanity).[3] This essay will begin with a brief review of the relevant treaty provisions relating to immunity of state officials as they apply to serious international crimes. This section will conclude (as does both the International Court of Justice (ICJ) in the *Arrest Warrant* case[4] and the International Law Commission (ILC) draft report) that while these provisions are helpful with respect to certain aspects of the question of immunity of state officials, they do not provide a definitive answer to the question of whether there is a 'war crimes' exception to the rule of immunity for state officials from a foreign state's *domestic* courts. Second, this essay will examine some pre-*Arrest Warrant* case law. Specifically, it will examine the issue of potential exceptions to the immunity rule for state officials and argue that this case law (in addition to the treaty law examined) provides evidence of an emerging norm in customary international law (CIL) of certain exceptions to the immunities generally accorded to Heads of State, Heads of Government, and Foreign Ministers. Third, this essay will review the *Arrest Warrant Case*, an ICJ decision that halted this trend, and discuss some of the issues left unresolved by the decision. Fourth, it will review the ICJ's discussion of immunity post-*Arrest Warrant* in *Djibouti v. France*.[5]

Finally, this essay will explore the concept of *jus cogens* and whether this could help reconcile the competing interests (state sovereignty and accountability for serious international crimes) at play in this issue.

This essay will conclude that while the *jus cogens* nature of serious international crimes does not equate to an automatic *carte blanche* for removing immunity, it does strongly support the developing norm of *limited* exceptions to the general rule of immunity.

RELEVANT TREATY LAW

A) Immunity

Immunity is usually defined as "the exception or exclusion of the entity, individual, or property enjoying it from the jurisdiction of the State; an obstacle to the exercise of jurisdiction; limitation of jurisdiction; a defence used to prevent the exercise of jurisdiction over the entity, individual or property."[6] The granting of immunity, and the type of immunity granted, depends on whether one is speaking of foreign diplomats, Heads of State, or other high-ranking officials. With respect to the former, Article 31 of the *Vienna Convention on Diplomatic Relations* grants diplomatic agents immunity from the criminal jurisdiction of the receiving state; and Article 32 stipulates that this immunity may be waived by the sending state, but that such waiver must always be expressed.[7] Thus, immunity for diplomats and their entourage is largely governed by treaty law, is specific to the host country, and can be removed if the host state declares the diplomat and/or members of their entourage to be *persona non grata*.[8]

With respect to Heads of State, or other high-ranking officials, immunity *ratione materiae*, or functional immunity (immunity for official acts committed as part of one's duties while in office), is traditionally granted to state officials. When the official leaves office, he or she continues to enjoy immunity *ratione materiae* with regard to acts performed while he or she was serving in an official capacity.[9] In addition to immunity *ratione materiae*, high-ranking officials (traditionally, the "troika")[10] are also granted immunity *rationae personae*, immunity for personal acts committed during the official's time in office. Since the immunity is connected with the post occupied by the official in government service it is of temporary character and becomes effective when the official takes up the post and ceases when he or she leaves that post.[11]

Finally, the immunities attached to the Head of State are often considered qualitatively from those attached to the other two positions. This is because the Head of State is considered the "personification" of that state, someone whose sovereignty is inviolable. For example, Article 21 of the 1969 Convention on Special Missions clearly distinguishes between Heads of State in paragraph 1 and Heads of Government/Foreign Ministers in paragraph 2.[12]

B) Jurisdiction

As discussed above, the various sources and types of immunity assume that there is jurisdiction from which the state official requires this immunity. The starting point for a discussion of jurisdiction is the Permanent Court of International Justice decision in the famous *Lotus* case.[13] In this case, Turkey initiated a criminal proceeding against a French national accused of involuntary manslaughter resulting in Turkish casualties on the high seas. The Court held there was no rule of CIL prohibiting Turkey from asserting jurisdiction over events committed outside Turkey. The Court stated that, as a matter of principle, jurisdiction is territorial and that a state cannot exercise jurisdiction outside its territory without authorization derived from either CIL or treaty law. However, it then proceeded to qualify this statement:

> *It does not, however, follow that international law prohibits a State from exercising jurisdiction in its own territory, in respect of any case which relates to acts which have taken place abroad. . . it leaves them in this respect a wide measure of discretion which is only limited in certain cases by prohibitive rules.*[14]

It must be noted that the court was speaking here of *prescriptive*, not *enforcement*, jurisdiction. In other words, it was referring to what a state can do in its own territory when investigating or prosecuting crimes committed abroad, not what that state can do in the territory of another state with respect to that crime. Although the decision leaves many unanswered questions[15] and has been followed by 80 years of international law development, it is an important and early recognition of the principle of universal jurisdiction.[16]

Turning to treaty law, the most important legal basis in the case of universal jurisdiction for war crimes is Article 146 of the IV *Geneva Convention* of 1949, which lays down the principle *aut dedere aut judicare* (extradite or prosecute):

> *Each High Contracting Party shall be under the obligation to search for persons alleged to have committed… such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts. It may also…hand such persons over for trial to another High Contracting Party...*[17]

As mentioned, attempts to ensure that war criminals (even former Heads of State) did not escape accountability for their actions based on their official position go back as far as WWII.

The Charter establishing the Nuremberg Tribunals states, "The official position of the defendants, whether as Heads of State/Government, or responsible officials in government departments, shall not be considered as relieving them from responsibility or mitigating punishment."[18] Article IV of the *Genocide Convention* states that "Persons committing genocide or any of the other acts enumerated in article III shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals."[19] Similarly, the Statutes of both the ICTR and the ICTY state "the official position of any accused person, whether as Head of State or Government or as a responsible Government official, shall not relieve such person of criminal responsibility nor mitigate punishment."[20]

Most recently, Article 27 of the Rome Statute of the International Criminal Court states:

1. *This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility...*
2. *Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person.*[21]

The ICC is arguably the widest-reaching attempt thus far to hold officials accountable for international crimes. However, Article 27 must be read in conjunction with Article 98, which prevents the Court from proceeding with a request for surrender or assistance that would require the requested state to act inconsistently with its obligations under international law.[22] In addition, the major roadblock to making use of these provisions to prosecute war criminals shielded by immunity is that a state must accept the ICC's jurisdiction by ratifying the Rome statute; many states have not done so.

Although none of the treaty provisions mentioned above specifically remove the immunities accorded to the troika with respect to national court jurisdiction, they illustrate a clear trend in international law to hold state officials accountable for serious international crimes. In this respect, the provisions may provide for national court jurisdiction where a Head of State, Head of Government, or Foreign Minister is accused of a serious international crime.

RECENT CASE LAW AND CUSTOMARY INTERNATIONAL LAW (CIL)

In its 2008 preliminary report on immunity of state officials from foreign criminal jurisdiction, the ILC recognized that "the group of persons enjoying immunity from foreign criminal jurisdiction is not limited to Heads of State."[23] It also reached the conclusions with respect to treaty law (outlined above) that "these treaties do not regulate questions of immunity of State officials from foreign criminal jurisdiction in general or as regards many specific situations or as regards the precise definition of the group of officials enjoying immunity"; and "there is no universal international treaty fully regulating all these issues and related issues of immunity of current and former State officials from foreign criminal jurisdiction."[24] The report also correctly remarks, "not all the international treaties regulating this subject have entered into force, and those which have entered into force are not noted for the broad participation in them of States."[25]

Finally, the report observes that "the question of immunity of State officials from foreign criminal jurisdiction, as well as the question of jurisdictional immunity of States, are matters concerning inter-State relations" and that, for this reason, "the basic primary source of law in this matter is international law."[26] Ideally, the report states, domestic law should in this sphere play a subsidiary role, allowing implementation of the provisions of international law to regulate the question of immunity.[27]

That said, some domestic courts have carefully considered international law in addressing the question of immunity of state officials with respect to serious international crimes, and these decisions have contributed to the development of CIL. For example, in the *Pinochet* case,[28] the UK House of Lords had to consider whether immunity applied to Chile's former Head of State, Augusto Pinochet, in order to respond to the Spanish government's request to extradite Pinochet to Spain in order to try him for crimes prohibited by the *Convention Against Torture* (CAT). Lord Browne-Wilkinson aptly stated the issue as:

> *…whether international law grants state immunity in relation to the international crime of torture and, if so, whether the Republic of Chile is entitled to claim such immunity even though Chile, Spain and the United Kingdom are all parties to the Torture Convention…*[29]

Lord Browne-Wilkinson found that, once out of office, Heads of State retain immunity for official acts performed while in office (*ratione materiae*) but lose immunity *ratione personae*.

He then concluded that there is a "strong ground for saying that the implementation of torture as defined by the Torture Convention cannot be a state function" because acts which are criminal under the local law can still have been done officially, therefore giving rise to immunity *ratione materiae*. By ratifying the CAT, member states (including the parties to the *Pinochet* dispute) agreed to ban and outlaw torture. Moreover, because the international crime of torture must be committed "by or with the acquiescence of a public official", all defendants in torture cases will be state officials. Lord Browne-Wilkinson finds it impossible to accept that the Convention drafters intended to allow those most responsible to escape liability while their inferiors are held accountable.

While Lord Browne-Wilkinson's arguments could be logically extended to support removing immunity for high-ranking officials with respect to other serious international crimes (war crimes and crimes against humanity), it is clear that he reached his conclusions in the specific context of three states that have ratified the CAT. In fact, he explicitly expresses doubts as to whether, "before the coming into force of the Torture Convention, the existence of the international crime of torture as *jus cogens* was enough to justify the conclusion that the organization of state torture could not rank for immunity purposes as performance of an official function."[30]

In a separate opinion, Lord Goff of Chieveley strongly disagrees with Lord Browne-Wilkinson's argument, which he sees as premised upon the idea that ratification of the CAT implies a waiver of the principle of immunity *ratione materiae*. He finds no evidence that such a waiver was ever intended, or even discussed, by the parties in preparing the treaty and argues that a more explicit waiver is needed to override immunity.[31] Lord Hope of Craighead, who agreed with Lord Browne-Wilkinson's majority position, counters this position by re-framing the issue not as one of implied waiver, but one in which "the obligations which were recognized by customary international law in the case of such serious international crimes by the date when Chile ratified the Convention are so strong as to override any objection by it on the ground of immunity *ratione materiae.*"[32]

As Writh notes, four of the seven law lords denied immunity for core crimes in general – not just torture under the CAT. This denial of immunity is thus *opinio juris* and when viewed in conjunction with state practice suggests that immunity *rationae materiae* does not exist for core crimes.[33]

In a case similar to the *Pinochet* case, the *Quadaffi* case,[34] a *juge d'instruction* of the *Tribunal de Grande Instance* in Paris brought charges against Libyan leader Muoammar Quadaffi for complicity in the bombing of a DC-10 aircraft on 9 September 1989, which killed 156 passengers and 15 crew members, including some French citizens.[35] The Court declined jurisdiction based on the argument that Heads of State enjoy immunity from international crimes. However, the court remarks that, "at this stage in customary international law, the crime charged [terrorism], no matter how serious, does not fall within the exceptions to immunity from jurisdiction of foreign Heads of State in office."[36] The logical inference from this statement is that there are exceptions to the immunity rule.

CASE CONCERNING THE ARREST WARRANT OF 11 APRIL 2000: DEMOCRATIC REPUBLIC OF THE CONGO V. BELGIUM

A) Facts

On 11 April 2000, the Belgian investigating magistrate issued an "international arrest warrant *in absentia*" against the incumbent Minister for Foreign Affairs of the Democratic Republic of the Congo (DRC), Abdulaye Yerodia Ndombasi.

The warrant alleged grave breaches of 1949 Geneva Conventions based on speeches made inciting racial hatred during August 1998. Article 7 of Belgian Law, under which Mr. Yerodia was charged, provides that "The Belgian courts shall have jurisdiction in respect of the offences provided for in the present Law, wheresoever they have been committed."[37] The complainants were twelve individuals residing in Belgium, five of whom were of Belgian nationality. However the acts to which the warrant relates took place outside of Belgian territory, Mr. Yerodia was not a Belgian national at the time of the acts, and he was not in Belgian territory at the time the arrest warrant was issued and circulated. After Yerodia left office, the DRC brought the case before the ICJ and presented the Court with an opportunity to clarify existing international law on immunity of state officials and universal jurisdiction.

B) MAJORITY JUDGEMENT

Before ruling on the substantive legal issues, the majority judgment in the *Arrest Warrant Case* addressed five technical arguments put forth by Belgium. Belgium's fifth argument, the one with the most direct bearing on the Court's substantive ruling, was that the *non ultra petita* rule[38] limited the Court's jurisdiction to those issues that were subject of the Congo's final submissions.

Originally, the Congo had put forward a twofold argument based on: 1) Belgium's lack of jurisdiction; and 2) the Minister's immunity from jurisdiction, but the former was excluded from its final submissions. Thus, Belgium argued that the Court was precluded from ruling on the issue of universal jurisdiction. The Court said that while it is not entitled to decide upon questions not asked of it, the *non ultra petita* rule did not preclude the Court from addressing certain legal points in its reasoning.[39]

On the merits of the case, the Court said several things. First, it noted that the Conventions cited "provide useful guidance on certain aspects of the question of immunities" but "do not…contain any provision specifically defining the immunities enjoyed by Ministers for Foreign Affairs."[40] Thus it would have to decide the issue based on CIL.[41]

Second, it concluded that the functions of the Minister of Foreign Affairs are such that, "throughout the duration of his or her office, he or she when abroad enjoys full immunity from criminal jurisdiction and inviolability."[42]

Third, the Court ruled that there is no distinction in that respect between acts performed in an official capacity vs. those performed in a private capacity, nor is there a distinction between acts performed before vs. acts performed during the individual's time in office.[43] Fourth, the Court said that even the mere risk that traveling to another state will result in the Minister of Foreign Affairs exposing himself or herself to legal proceedings could deter international travel when the Minister is required to do so in order to perform his or her official functions.[44] Fifth, the court ruled that there is no exception to immunity from criminal jurisdiction and inviolability where the incumbent foreign minister is suspected of having committed war crimes or crimes against humanity.[45] Finally, in one of the more controversial aspects of the decision, the Court drew distinctions between procedural and substantive immunity, and immunity versus impunity, saying that jurisdiction does not imply absence of immunity, and absence of immunity does not imply jurisdiction.[46] The Court went on to note that there is no immunity in a perpetrator's home country; the home state of the accused could waive immunity; the person may lose some immunities upon leaving office; and the person could be subject to criminal proceedings before certain international criminal courts, where they have jurisdiction.[47]

C) SUMMARY OF DISSENTING JUDGEMENTS

Judge Van den Wyngaert's vigorous dissent offers a powerful critique of the majority judgment. First, she argues that while Belgium may have violated international comity, it did not violate international law.[48]

Second, she notes the brevity of the majority judgment, which is due to the fact that it did not address the logically prior issue of universal jurisdiction, and because it did not address other arguments as fully as other decisions from national and international courts addressing similar issues.[49]

Third, she notes that while the case technically concerned the issuance of the arrest warrant and its legality, in broader terms it was about how far states can and must go in implementing international criminal law, given a) the inability of the international criminal courts to prosecute *all* international crimes; and b) the need to balance the competing principles of international accountability for serious crimes, and the sovereign equality of states.[50]

On the substantive issues, she disagreed with the majority's pronouncements that a) there is a rule of CIL granting full immunity to Foreign Ministers; and b) no exception exists for serious international crimes. She argues that there are virtually no examples of one state granting immunity to another's Foreign Minister.[51] To the extent that this could be construed as evidence of "negative practice" (states *refraining* from prosecuting another's Minister for Foreign Affairs), she argues that a) this could be attributed to other political or practical considerations; and b) "negative practice" is not sufficient to constitute the requisite *opinio juris* of a rule of CIL: "Only if this abstention was based on a conscious decision of the States in question can this practice generate customary international law."[52] Finally, she rejects the analogies made between the Minister for Foreign Affairs on the one hand, and Heads of State or diplomatic agents on the other. The former, she says, is granted immunities based on his or her personification of the state; the latter is clearly governed by treaty law and concepts such as reception by the host state and *persona non grata*.

In sum, she finds evidence in international law of the Foreign Minister being treated differently than the Head of State with respect to immunities, and argues that if Foreign Ministers were accorded the same immunities as Heads of State, "*Male fide* governments could appoint suspects of serious human rights violations to cabinet posts in order to shelter them from prosecution in third States."[53] Implicit in this statement is the argument, not raised in the majority judgment, that if Foreign Ministers are elevated to the level of Heads of State with respect to immunities granted, why shouldn't other ministers be granted the same privilege? Particularly as the world becomes increasingly globalized and states are forced to work more closely together on a myriad of issues, there are few (if any) cabinet ministers who would not be required at some time to travel to other states throughout the course of their duties.

With respect to the majority's rejection of a possible war crimes exception, Judge ad hoc Van den Wyngaert argues that because the majority mistakenly classified the immunities accorded to Foreign Ministers as CIL, it fails to analyze fully whether there may be a hierarchical distinction between the rules concerning immunities and those concerning accountability for serious international crimes. She seems to argue that even if full immunity of Foreign Ministers were a rule of CIL, the *jus cogens* nature of the prohibitions against war crimes and crimes against humanity would override these. Finally, she is very critical of the majority's immunity/impunity distinction, particularly the fact that the Court does not qualify its distinction between official and private acts.[54]

THE ICJ AFTER THE ARREST WARRANT CASE

More recently, the ICJ considered immunity of state officials as a secondary issue in *Questions of Mutual Assistance in Certain Criminal Matters (Djibouti v. France)*.[55] This case concerned France's investigation into the 1995 death of Judge Bernard Borrel, a French national. The *procureur de la République* of Djibouti opened a judicial investigation into Borrel's death on 28 February 1996. The investigation concluded that the cause of death was suicide, and the case was closed on 7 December 2003.[56] In France, a judicial investigation into the cause of death eventually joined with a civil action commenced by Borrel's widow and children and then transferred to the Paris *Tribunal de grande instance* on 29 October 1997.[57] By this time, French authorities suspected the cause of death not to be suicide, but murder.

As the investigation proceeded, France issued a summons on two separate occasions for Djibouti's Head of State to testify in respect of subornation of perjury in the '*Case against X for the murder of Bernard Borrel*'.[58] The first summons was withdrawn because it did not comply with certain procedural requirements of French law; the second was issued while the Djiboutian Head of State was in France attending a conference and news of the summons was widely publicized by the French media. Djibouti argued that the summons violated France's obligation under customary and general international law "to prevent attacks on the person, freedom or dignity of an internationally protected person, whether a Head of State or any representative or official of a State" and asked the Court to adjudge and declare that "the French Republic is under an international obligation to ensure that the Head of State of the Republic of Djibouti, as a foreign Head of State, is not subjected to any insults or attacks on his dignity on French territory."[59]

Based on its decision in the *Arrest Warrant Case*, the Court held that the determinative factor in assessing whether or not there was an attack on the immunity of the Djiboutian Head of State was whether that person was subject "to a constraining act of authority."[60] The Court went on to find that the first summons was "merely an invitation to testify which the Head of State could freely accept or decline" and that, consequently, "there was no attack by France on the immunities… enjoyed by the Head of State, since no obligation was placed upon him…"[61] However, the Court did find that the issuing judge "failed to act in accordance with the courtesies due to a foreign Head of State."[62]

With respect to the second summons, the Court said that there was no attack on the honour or dignity of the President merely because this invitation was sent to him while he was in France to attend an international conference. However, the Court observed that if Djibouti had proven that such confidential information (news of the summons) was passed from the French judiciary to the media, "such an act could, in the context…have constituted not only a violation of French law, but also a violation by France of its international obligations."[63] Although the issue of immunities accorded to state officials was secondary in this case, the ICJ established that merely being asked to testify in a perjury investigation was not so constraining on the Head of State's authority as to constitute an interference with his or her ability to perform necessary duties, and thus was not an attack on his or her immunity.

JUS COGENS NORMS

The *Pinochet* case in particular illustrates two of the prominent approaches to balancing the competing principles, accountability of state officials for serious international crimes vs. sovereign inviolability of foreign states, at play in this essay. They are the implied waiver and the *jus cogens* approach.

First, Lord Browne-Wilkinson explicitly acknowledged that ratification of the CAT played an important part in his finding that Pinochet could be held accountable for (official) acts of torture committed while in office. This is known as the "implied waiver" approach. If a state has ratified an international treaty prohibiting a particular international crime (torture, war crimes, crimes against humanity), in doing so it has contributed to formally criminalizing those acts in international criminal law, and can therefore be said to have waived immunity from foreign prosecution for state officials accused of that crime.

Lord Browne-Wilkinson thought that it did not make sense for a state to ratify a treaty condemning a particular crime and then still be permitted under international law to do nothing about it. Lord Goff did not agree, he felt that a waiver of immunity for state officials should not be taken lightly and that there must be crystal clear evidence of that waiver before immunity can actually be removed. Also, as Zappalà argues, if there was no exception to the immunity rule before a state ratified the treaty, all crimes committed by officials of that state before enactment of relevant treaties would be protected by immunity, and this could not have been the drafters' intent.[64]

Another approach, used by Lord Hope of Craighead is that the norms in question (prohibition of serious international crimes) trump the usual rules of immunity of state officials. In other words, prohibitions against torture, war crimes, genocide and crimes against humanity are *jus cogens* norms, which give rise to obligations *erga omnes* from which states may not derogate. As we saw in Judge ad hoc Van den Wyngaert's dissent in the *Arrest Warrant* case, the failure of the court to seriously consider the hierarchy of these norms and the potential implications flowing from that lack of analysis was one of the major criticisms of the majority judgment.

As Cassese argues, if states are permitted under international law to use the protective principle to take proceedings for extraterritorial acts whose link with the forum state lies exclusively in the infringement of a national interest of that state, it would seem appropriate that states could do the same for acts that violate *universal* values held by the world community.[65] Moreover, state officials should not be immune from this principle:

> *To allow these agents to go scot-free only because they acted in an official capacity, except in the few cases where an international criminal tribunal has been established, or where a treaty is applicable, would mean to bow to and indeed strengthen traditional concerns of the international community (chiefly, respect for state sovereignty), which in the current international community should instead be reconciled with new values, such as respect for human dignity and human rights.*[66]

Although powerful, the main problem with this argument is that *jus cogens* norms are not a "blank cheque" for foreign states to unilaterally assert jurisdiction over whomever they choose. No one argues that immunity of state officials, as a concept, is a bad thing; indeed, there are many compelling reasons why it is necessary, including facilitating smooth relations between states and allowing state officials to do their jobs unimpeded.

The question is whether, and to what extent, exceptions exist to acknowledge other critically important principles of international law such as fundamental human rights and human dignity. Overall, *jus cogens* norms provide a strong argument, not for an indiscriminate removal of immunities, but for a balancing of these principles. The argument could include a "war crimes" exception to the CIL rule of immunity of state officials from national court jurisdiction. While granting states ability to arrest such officials *while in office* would seriously impede this, retired high-ranking officials need not be replaced.

CONCLUSION

The ICJ decision in the *Arrest Warrant* case halted a clear emerging trend in CIL toward recognizing certain exceptions to the rules of immunity for state officials. By not addressing the jurisdiction issue as fully as it could have, the ICJ failed to truly weigh the competing principles at issue and missed an excellent opportunity to clarify the developing law in this area.

Moreover, the idea of removing immunity in a situation such as that which arose in the *Arrest Warrant* case is implicitly premised on the ethnocentric idea that western justice systems are better able to dispense justice. It is easy to forget that many in the developing world do not perceive western justice systems as "fair" at all and may have the same feeling that arose before the Nuremberg tribunals, that trials of their former officials in a foreign court system would merely serve to disguise predetermined findings of guilt. Finally, many developed countries such as Belgium are certainly not innocent of complicity in developing country human rights transgressions.

Unfortunately, history provides us with countless examples that demonstrate why a state cannot always be trusted to hold former officials accountable for serious international crimes. Moreover, the debate presumes that prosecutions for serious international crimes would gravely impact the state official's ability to conduct his or her official duties, and this is not necessarily the case, particularly if *rationae materiae* were removed *after* the official leaves office.[67] As Writh notes, state officials are obliged to contribute to the international community's shared set of values; "the highest of these values is the maintenance of peace; and immunity *rationae personae*, protecting the most important representatives and decision-makers of a state, helps safeguard the ability of a state to contribute to the maintenance of international and internal peace."[68]

In other words, while granting states the ability to arrest such officials *while in office* would seriously impede this, retired officials, even though high-ranking, need not be replaced. Most importantly, the trend in international law has been toward creating limited exceptions to the rule of immunity of state officials. The *jus cogens* nature of serious international crimes does not provide a "blank cheque" to remove immunity, but it does provide support for this growing trend.

ABOUT THE AUTHOR

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ENDNOTES

[1] Theodor Meron. "Reflections on the Prosecution of War Crimes by International Tribunals." *American Journal of International Law*, 525 (2006): 551.

[2] *Ibid* at 552.

[3] Due to space limitations, this essay will not address the broader question of immunities accorded to other high-ranking state officials, nor will it focus on other international fora in which the troika do not enjoy complete immunity, except insofar as treaty provisions on these topics can be used as evidence of a developing norm in international law of holding high-ranking state officials accountable for serious international crimes.

[4] *Case Concerning the Arrest Warrant of 11 April 2000: Democratic Republic of the Congo v. Belgium*, ICJ Judgment of 14 February 2002.

[5] *Questions of Mutual Assistance in Certain Criminal Matters (Djibouti v. France)*, ICJ judgment of 4 June 2008.

[6] Preliminary report on immunity of State officials from foreign criminal jurisdiction, A/CN.4/601, by Special Rapporteur Roman Anatolevich Kolodkin. <http://www.un.org/law/ilc/> (*accessed 25 November 2008*) at p.27 [ILC Preliminary Report].

[7] *Vienna Convention on Diplomatic Relations*, 18 April 1961, 500 U.N.T.S. 95-239 at art. 31-32.

[8] Once declared *persona non grata*, an individual is no longer protected by diplomatic immunity and must leave the country in order to avoid being prosecuted under the host country's domestic laws.

[9] ILC Preliminary Report, *supra* note 6 at p.38.

[10] As will be discussed below, the distinctiveness of the Foreign Minister vis-à-vis other Ministers with respect to the need to travel unimpeded in order to perform his or her job functions is less clear today as most, if not all, Ministers deal with issues requiring some level of international cooperation.

[11] ILC Preliminary Report, *supra* note 6 at 37.

[12] *Vienna Convention on Special Missions*. New York, 16 December 1969, Annex to UNGA res. 2530 (XXIV) of 8 December 1969 at art. 21. It should be noted that there are conflicting opinions as to what extent this Convention in particular may be considered a codification of CIL; moreover, it clearly speaks to immunities enjoyed by Foreign Ministers only while on *official visits* (when they take part in a special mission of the sending State), and does not apply as general rule. However, it is one of several examples where the Head of State is treated differently than other high-ranking officials in international law.

[13] *The Case of the S.S. "Lotus"*, Permanent Court of International Justice, Series A, No. 10, 7 September 1927 <http://www.worldcourts.com/pcij/eng/decisions/1927.09.07_lotus/> (*accessed 1 December 2008*).

[14] *Ibid.* at pp.14-15.

[15] For example, the line between issuing an arrest warrant and *enforcing* that warrant abroad, as was disputed in the *Arrest Warrant* case.

[16] For example, in his separate opinion in the *Arrest Warrant* case, discussed below, Judge Guillaume distinguishes between universal jurisdiction (*compétence universelle*) over extraterritorial crimes by foreigners, based on the accused's presence in the forum state, and universal jurisdiction by default (*compétence universelle par defaut*) asserted by a state without any link to the crime or the defendant, not even his presence in the territory, when that jurisdiction is first exercised (*Arrest Warrant Case*, separate opinion of Judge Guillaume, par.13).

[17] *Convention (IV) Relative to the Protection of Civilian Persons in Time of War*. Geneva, 12 August 1949, Article 146. <http://www.icrc.org/ihl.nsf/WebART/380-600168?OpenDocument> (*accessed 11 November 2008*).

[18] *Charter of the International Military Tribunal in Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis*, 8 August 1945, 82 U.N.T.S. 280 at art. 7.

[19] *Convention on the Prevention and Punishment of the Crime of Genocide,* 9 December 1948, 78 U.N.T.S. 278 at art. IV.

[20] *International Criminal Tribunal for Yugoslavia*, SC Res. 808, UN SCOR, 48th Sess., Annex, at 20, UN Doc. S/Res/23274 (1993) at art. 7(2) [*ICTY*]; *International Criminal Tribunal for Rwanda*, SC Res. 955, UN SCOR, 49th Sess., Annex, at 20, UN Doc. S/Res/955 (1994) at art. 6(2) [*ICTR*].

[21] *Rome Statute of the International Criminal Court*, 17 July 1998, UN Doc. A/CONF.183/9 at article 27.

[22] *Ibid.* at article 98.

[23] ILC Preliminary Report, *supra* note vi at 15.

[24] *Ibid.* at 15.

[25] *Ibid*.

[26] *Ibid.* at 20.

[27] *Ibid*. at 20-21.

[28] *Regina v. Bartle and the Commissioner of Police for the Metropolis and Others Ex Parte Pinochet* ("Pinochet No. 3"), House of Lords, 24 March 1999, [2000] AC 147. <http://www.parliament.the-stationery-office.co.uk/pa/ld199899/ldjudgmt/jd990324/pino1.htm> (*accessed 28 October 2008*).

[29] *Ibid.*

[30] *Ibid*.

[31] *Ibid*.

[32] *Ibid.*

[33] Steffen Wirth. "Immunity for Core Crimes? The ICJ's Judgment in the *Congo v. Belgium* Case." European Journal of International Law 13/853 (2002): 884.

[34] *Quadaffi* case, Decision of the *Chambe d'accusation* of the *Cour d'Appel* of Paris, 20 October 2000.

[35] Salvatore Zappalà, "Do Heads of State in Office Enjoy Immunity from Jurisdiction for International Crimes? The *Ghaddafi* Case Before the French Cour de Cassation." European Journal of International Law 12/595 (2001): 596.

[36] *Ibid.* at 600-601.

[37] *Supra* note 4 at para. 15.

[38] The *non ultra petita* rule states that the body adjudicating a dispute should only rule on those issues on which it is asked to rule.

[39] *Supra* note 4 at paras. 41-43.

[40] *Ibid.* at para. 52.

[41] *Ibid*.

[42] *Ibid.* at para. 54.

[43] *Ibid.* at para. 55.

[44] *Ibid.* at para 55.

[45] *Ibid.* at para. 58. The Court noted, at par. 58, that none of the decisions of the Nuremberg and Tokyo international military tribunals, nor those of the ICTY, dealt with the specific question before the court.

[46] *Ibid.* at para. 59.

[47] *Ibid.* at para. 61. It should be noted that it was a reduced majority (13-3) that restricted the scope of the case by applying the *non ultra petita* rule so rigidly as to essentially avoid the question of universal jurisdiction. See Boister, N. "The ICJ in the Belgian *Arrest Warrant Case*: Arresting the Development of International Criminal Law" (2002) 7 J. Conflict and Security L. 145 at 297.

[48] *Arrest Warrant Case*, dissenting opinion of Judge ad hoc Van den Wyngaert, at para. 1.

[49] *Ibid.* at para. 4.

[50] *Ibid.* at para. 5.

[51] *Ibid.* at paras. 10-11.

[52] *Ibid.* at para. 13. On this latter argument she cites the *Lotus* case.

[53] *Ibid.* at para. 21.

[54] *Ibid.* at para. 36. The latter may no longer be protected by immunity when the individual leaves office.

[55] *Questions of Mutual Assistance in Certain Criminal Matters (Djibouti v. France)*, ICJ judgment of 4 June 2008.

[56] *Ibid.* at para. 20.

[57] *Ibid.* at para. 21.

[58] *Ibid.* at paras. 32-33.

[59] *Ibid.* at paras. 73-74.

[60] *Ibid.* at para. 170.

[61] *Ibid.* at para. 171.

[62] *Ibid.* at paras. 171-172.

[63] *Ibid.* at para. 180. Interestingly, with respect to two of the other officials summoned to testify – both of whom were found guilty, *in absentia*, of subornation of perjury - the court noted, at par. 194, "that there are no grounds in international law upon which it could be said that the officials concerned were entitled to personal immunities, not being diplomats within the meaning of the Vienna Convention on Diplomatic Relations of 1961, and the Convention on Special Missions of 1969 not being applicable in this case". This goes to the question of whether immunity could be extended to state officials beyond the "troika".

[64] *Supra* note 34 at 603.

[65] Antonio Cassese. "When May Senior State Officials be Tried for International Crimes? Some Comments on *Congo v. Belgium* Case." European Journal of International Law 13/853 (2002): 859.

[66] *Ibid*. at 873-874.

[67] The concern with this approach is that the state could simply appoint an individual to a high-ranking position to which immunity attaches in order to avoid extraterritorial prosecution.

[68] *Supra* note 34 at 888.