THE FUNDAMENTAL RULES OF THE INTERNATIONAL LEGAL ORDER

Jus Cogens and Obligations *Erga Omnes*

Edited by

CHRISTIAN TOMUSCHAT AND JEAN-MARC THOUVENIN

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SUMMARY

The jurisdictional immunities of States and their immunities from measures of constraint collide head on with the right to a judge as it has progressively emerged in the course of the 20th century. The present article examines the way in which this conflict is resolved by the courts and in legal literature, focusing on instances where immunity is claimed with regard to an act performed in violation of a basic rule of international law.

CHAPTER XI

Limits of International Law Immunities for Senior State Officials in Criminal Procedure

TORSTEN STEIN

I. CONCEPT AND REALM OF IMMUNITY FOR SENIOR STATE OFFICIALS

Immunity of State officials, which is accorded to Heads of State or Government, Government members and other senior State officials, does not in itself form a part of *jus cogens* and is therefore open to exceptions, which can be found in several international agreements – e.g. in Article 27 of the ICC Statute – which do not violate Article 53 of the Vienna Convention on the Law of Treaties (in the following, "The Vienna Convention"). However, while the immunity of States and their senior officials is undoubtedly one of the major rules of customary international law[1] and is assumed to be applicable *erga omnes*, its content and, what is more, its limits, have been the subject of increasing debate, at least since the House of Lord's final judgment in the *Pinochet* case[2]. Hence, the question is whether senior State officials enjoy immunity even for international crimes, such as genocide, crimes against humanity and war crimes.

When discussing this immunity, one must distinguish between immunity *rationae materiae* and immunity *rationae personae.* While immunity *rationae personae* (personal immunity) is accorded to serving senior State officials for their private actions in order to protect the individual and the office he or she represents from judicial proceedings in another State, immunity *ratione materiae* (functional immunity) is granted for official acts, namely acts of the State which the official represents, and also constitutes a

[1] A good overview of the immunities accorded to Heads of State and other state officials can be found in Hazel Fox, *State Immunity*, Oxford 2004, pp. 421 *et seq.*

[2] R v Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (No. 3) [1999] 2 All ER 97 et seq.

ple of sovereign equality of States, according to which one State cannot exercise its powers over another State (*par in parem non habet imperium).* As a logical consequence, senior State officials, while in office, enjoy both personal and functional immunity for their actions. After cessation of office, however, it has so far been established customary international law that they may be subject to criminal proceedings in foreign States, initiated with regard to their private actions (which were before covered by personal immunity), but not with regard to official actions, that is actions imputed to the State they represented, due to the fact that States cannot be held criminally liable, but only individuals.[3] What is more, in recent years there has been some debate over the issue of whether State officials may be criminally prosecuted in their home State for offences allegedly committed before taking office, kicked off by criminal proceedings initiated against the incumbent Heads of State of Italy (Berlusconi) and France (Chirac).[4] However, since the aforementioned proceedings are mainly a problem of constitutional law, they shall not be scrutinized further at this point.

All this being said, it is obvious that State immunity and immunity of State officials do not necessarily share the same fate. The most prominent example of this is the ruling of the House of Lords in the *Pinochet* case[5], in which the accused could not claim personal immunity from British jurisdiction since he had ceased to be Chilean Head of State at the time of the proceedings. What is more, the Law Lords in this specific case concluded that the accused could not claim immunity *rationae materiae* either for acts of State constituting international crimes during his incumbency.

II. LIMITS OF IMMUNITY OF SENIOR STATE OFFICIALS

The *Pinochet* case leads to the core of this article, namely the issue of the limits of State immunity, a question that has received considerable impetus from both national and international jurisprudence as well as from legal state immunity were decided, both by international and national courts. The central question in this regard is whether those rulings affirm present customary law or if they modify and therefore establish new customary law.

1) *PROCEEDINGS BEFORE INTERNATIONAL COURTS AND TRIBUNALS*

Up to the Nuremberg Military Tribunal – IMT – , which stipulates in its Article 7 (the meaning of which can also be found in Article 7 (2) of the Statute of the International Tribunal for the Former Yugoslavia – ICTY –, in Article 6 (2) of the Statute of the International Tribunal for Rwanda – ICTR – and in Article 27 (1) of the Statute of the International Criminal Court – ICC -) that

> The official position of defendants, whether as Heads of State or responsible officials in Government Departments, shall not be considered as freeing them from responsibility or mitigating punishment,

it had been unthinkable to indict a senior State official, especially a Head of Government, before an international or foreign national court, due to his or her absolute immunity.[6] Napoleon, for example, was never criminally indicted, although the Vienna Conference declared on 13 March 1815 that he had placed himself outside the boundaries of law. It needs to be taken into account, however, that, at the time, the sovereign ruler of a State impersonated the State, and, based on the sovereign equality of States, could not be indicted by a foreign State. Although the principle of State equality was softened after the Russian Revolution in 1917, with the people officially becoming the sovereign ruler of the State, and by Article 227 of the Treaty of Versailles, which provided for the establishment of an allied tribunal to try the German Emperor Wilhelm II for "a supreme offence against international morality and the sanctity of treaties", no Head of State or other senior State officials were tried by a foreign or international court. In the case of Emperor Wilhelm II, the Netherlands refused to extradite him on the grounds of his immunity.

The most remarkable aspect of the preclusion of immunity for certain international crimes in the said provisions of the IMT, ICTY, ICTR and ICC is that they do not differentiate between incumbent and former State offi-

[3] Antonio Cassese, *International Law*, Oxford 2001, p. 90; Karl Doehring, *Völkerrecht*, Heidelberg 2003, p. 291.

[4] Karin Oellers-Frahm, "Italy and France: Immunity for the prime minister of Italy and the president of the French Republic", *International Journal of Constitutional Law* 53 (2005), 107 et seq., has elaborated on the constitutional aspects of this topic.

[5] See *supra* note 2.

[6] For a comprehensive analysis of the doctrines of absolute and restrictive immunity see Jürgen Bröhmer, *State Immunity and the Violation of Human Rights*, The Hague 1997, pp. 14 *et seq.*

cials, so that even incumbent State officials cannot claim personal or functional immunity before these courts. This can be deduced from the consideration that all States have conveyed their power to deny immunity to the UN under Chapter VII of the UN Charter (this applies for the ICTY and the ICTR). Likewise, the States' parties to the Rome Statute have transferred said power to the ICC, although the latter's jurisdiction is only complementary to that of national courts. However, the question of jurisdiction is one that needs to be considered separately from that of immunity, as we shall see later. It is a logical conclusion that, by establishing international bodies in the form of courts or tribunals, the principle of "*par in parem non habet imperium*" no longer applies.

A recent case, however, in which this was not so clear was the indictment of then President of Liberia, Charles Taylor.[7] In contrast to the ICTR and the ICTY, which were established under Chapter VII of the UN-Charter as subsidiary organs of the UN, the Special Court for Sierra Leone (SCSL) was set up by agreement between the UN and the Government of Sierra Leone. This led to the defence in this case arguing that the SCSL was comparable to a Sierra Leonean court lacking Chapter VII powers and therefore not permitted to exercise jurisdiction over the then incumbent Head of State, Taylor, due to his personal immunity. While the defence may have mixed questions of jurisdiction with immunity issues, the claim of Head-of-State immunity was a substantive argument taking the "hybrid" nature of the SCSL into account. The Court, in its Decision on Immunity from Jurisdiction,[8] addressed this argument and denied immunity to Charles Taylor on two grounds. First, the SCSL was a "truly international court", since SC Resolution 1315 (2000)[9] permitted the Security Council to participate in the creation of the SCSL, and the Security Council's powers under Articles 39 and 41 of the UN Charter were sufficiently broad to establish the Court in agreement with Sierra Leone. Second, Article 6 (2) of the Statute of the SCSL[10] was to be interpreted in line with the corresponding provisions of the statute of the IMT, ICTY and ICTR, which in the meantime, in the view of the Court, could be identified as customary international law, to exclude immunity also for incumbent senior State officials.

The SCSL rightly brought up the question whether exemption of even incumbent senior State officials from immunity in the case of an indictment for international crimes before an international court had become a rule of customary international law, since neither the provisions of the statute of the SCSL, nor those of the IMT, ICTY and ICTR explicitly declared that the rule of personal immunity for incumbent senior state officials was inapplicable. All the same, it cannot be denied that respecting the immunity of serving heads of State in cases of severe international crimes as laid down in the said statutes, especially in the Rome Statute of the ICC, and in the ILC draft of a Code of Crimes against the Peace and Security of Mankind[11], would contradict the purpose of international courts created to prosecute exactly these crimes, since most international crimes – due to their dimension and the organization and logistics necessary to commit them – are somewhat linked to the State, that is, its officials. What has been favoured in legal literature for the past decade, namely to deny immunity, both functional and personal, also to serving senior State officials in proceedings before international courts, seems to have therefore become the constant practice of international courts and tribunals.[12] What is more, the ICJ, in its ruling in Republic of the *Congo v. Belgium* (*Arrest Warrant* case)[13] found in an obiter dictum that "...an incumbent or former Minister for Foreign Affairs may be subject to criminal proceedings before certain international criminal courts, where they have jurisdiction."[14] Whether an international court has jurisdiction over senior State officials is determined by the respective court's statute and the factual background of its creation. Therefore, it may reasonably be argued that especially the SCSL as a court being set up by a treaty between the UN and Sierra Leone, is not a completely international court and for this reason was not entitled to exercise its jurisdiction over then Liberian Presi

[7] The indictment can be found at http://www.specialcourt.org/documents/WhatHappening/Indictments.html.

[8] The decision can be found at http://www.sc-sl.org/SCSL-03-01-I-059.pdf.

[9] Security Council Resolution 1315 (2000), 14 August 2000, to be found at http://www.un.org/Docs/scres/2000/sc2000.htm.

[10] http://www.specialcourt.org/documents/Statute.html.

[11] http://www.un.org/law/ilc/texts/dcodefra.htm.

[12] See the decisions of the ICTY against several officials of the former Yugoslav state, which can be found at http://www.un.org/icty/.

[13] http://www.icj-cij.org/icjwww/idocket/iCOBE/icobejudgment/icobe_ijudgment_20020214.PDF.

[14] *Ibid.*, para. 60.

dent Taylor.[15] Also, the question of whether immunity is denied by an international court always depends on the scope of the immunity concerned. In its judgment in *Al-Adsani v. the United Kingdom*[16], the ECHR failed to adjudicate civil damages to the applicant, who had allegedly been tortured, *inter alia*, in a Kuwaiti prison and was denied damages he claimed against the Kuwaiti State before the UK High Court and Court of Appeal, based on the immunity *rationae personae* accorded to the State of Kuwait itself.[17] In contrast to the denial of immunity by international courts and tribunals in criminal proceedings, the ECHR did

> "...not accordingly find it established that there is yet acceptance in international law of the proposition that States are not entitled to immunity in respect of personal injury for damages for alleged torture committed outside the forum State."[18]

It is therefore not only necessary to differentiate between personal and functional immunity, but also, as has been clearly shown by this judgment, to clearly define which immunity – that of the State or that of State officials – is concerned and in which kind of proceedings – civil or criminal – it is argued. For the purposes of this contribution, however, the focus shall be solely on criminal proceedings, and in that respect, as already mentioned, senior State officials can, currently as a rule of customary international law, generally not claim any immunity before international courts or tribunals, provided that they have jurisdiction.

2) *Proceedings before national courts*

Opposed to and by far more controversial than the issue of immunity before international courts and tribunals is the matter of immunity of senior State officials from foreign national jurisdiction. Actually, this constellation addresses two issues, first, the extensive topic of universal jurisdiction for international crimes, and second, the question of immunity and its exceptions in cases of such crimes. This separation is only logical, considering the

[15] Dapo Akande, "International Law Immunities and the International Criminal Court", *AJIL* 98 (2004), 407, at 415 *et seq.*, points in this direction.

[16] To be found at http://www.echr.coe.int/Eng/Judgments.htm.

[17] *Ibid.*, para. 61.

[18] *Ibid.*, para. 66.

fact that a court will only look into the question of immunity if it has already asserted its jurisdiction.[19] As the ICJ stated in the *Arrest Warrant* case

> "It should further be noted that the rules governing the jurisdiction of national courts must be carefully distinguished from those governing jurisdictional immunities: jurisdiction does not imply absence of immunity, while absence of immunity does not imply jurisdiction."[20]

Consequently, the two topics will be addressed separately in the following.

a) The concept of universal jurisdiction is based on the notion that for certain crimes, which are recognized as being especially heinous, are condemned all over the world and are therefore termed "international" crimes – such as, crimes against humanity, war crimes, genocide –, every State can initiate criminal proceedings against individuals regardless of the territoriality principle. While the proceedings of various United States and British military tribunals after World War II were instead based on the passive personality principle, there has been a rise in prosecutions based on the principle of universal jurisdiction since the 1990s[21] due to the increasing number of armed conflicts all over the world of which Yugoslavia and Rwanda are a – severe – example, and, surely linked to the aforementioned, due to the increasing number of ratifications of the UN Convention against Torture[22] and the Genocide-Convention[23] and their implementation into national law.

While there have been several examples of universal jurisdiction in civil proceedings in United States' courts, and although an increasing number of States, Germany being the State to proceed the furthest[24] in this respect, have

[19] Hazel Fox, *The Law of State Immunity*, Oxford 2004, p. 56.

[20] *Supra* note 13, para. 59.

[21] The "Final Report on the Exercise of Universal Jurisdiction in Respect of Gross Human Rights Offences" by the ILA Committee on International Human Rights Law and Practice, to be found at http://www.ila-hq.org/html/layout_committee.htm, gives a good overview of the recent developments.

[22] http://www.un.org/documents/ga/res/39/a39r046.htm.

[23] General Assembly Resolution 260 (III), 9 December 1948, to be found at http://www.un.org/documents/ga/res/3/ares3.htm.

[24] German criminal law has seen both the introduction of the Code of Crimes against International Law (*Völkerstrafgesetzbuch*) in 2002, see BGBl. I 2002, 2254, and of universal jurisdiction (*Weltrechtsprinzip*) in Article 6(9) of the German Criminal Code (*Strafgesetzbuch*, StGB), the former codifying and thereby establishing jurisdiction for certain international crimes, the latter establishing criminal jurisdiction in cases of crimes codified in international treaties.

codified provisions allowing for universal criminal jurisdiction, it is still more than questionable whether it has become a rule of customary international law.[25] Recognizing that both legal literature[26] and certain international jurisprudence[27] are greatly in favour of the assumption that such a rule already exists and that the ILC has laid it down in Articles 8 and 9 of its draft Code of Crimes against the Peace and Security of Mankind[28], not to mention the *Pinochet* judgment of the House of Lords, there remain doubts about whether there exists sufficient practice in order to count universal jurisdiction among the rules of customary international law. What is more, the ICJ in its decision in the *Arrest Warrant* case refrained from bringing light into the dark of this matter by not addressing the issue in its judgment, although it was mentioned in the Separate Opinions of three judges.

It is also questionable whether the development of such a rule of customary international law is desirable, considering the fact that culpability and sanctions in national criminal codes can vary greatly in manner and scale, thereby possibly undermining the harmonizing effect intended by creating the ICC.[29] However, irrespective of this controversy it can be asserted that universal criminal jurisdiction does exist with respect to certain codified international crimes[30], whether they are assumed to be *jus cogens* or not, both on the basis of international treaties and national criminal law.

[25] The only clear case in which universal jurisdiction was so far assumed to be customary international law was that of jurisdiction over pirates, due to the territoriality principle not being applicable on the high sea. In the meantime, this rule has been codified in Article 105 of the UN Convention on the Law of the Seas, to be found at http://www.un.org/Depts/los/convention_agreements/convention_overview_convention.htm.

[26] Antonio Cassese, "When may Senior State Officials be Tried for International Crimes? Some Comments on the *Congo v. Belgium* Case", *EJIL* 13 (2002), 853, 859 – 862; Dapo Akande, *loc. cit.* (note 15), p. 415.

[27] As an example, see the ICTY judgment in the Furundzija-case, http://www.un.org/icty/furundzija/trialc2/judgement/fur-tj981210e.pdf, par. 156.

[28] *Supra* note 11; for an analysis of the draft Code see Christian Tomuschat, "Das Strafgesetzbuch der Verbrechen gegen den Frieden und die Sicherheit der Menschheit", *EuGRZ* 25 (1998), 1 *et seq.*

[29] For a good overview of the ICC's jurisdiction see Carsten Stahn, "Zwischen Weltfrieden und materieller Gerechtigkeit: Die Gerichtsbarkeit des Ständigen Internationalen Strafgerichtshofs (IntStGH)", *EuGRZ* (1998), 577 *et seq.*

[30] *Supra* note 24.

b) Provided that a national court has or assumes to have jurisdiction over a former or incumbent senior State official, it will, as a second step, examine whether he or she can claim personal or functional immunity from prosecution. In this respect, it is necessary to differentiate between functional and personal immunity on the one hand, and between incumbent and former senior State officials on the other.

To begin with, regarding the less controversial issue, namely the question of immunity *rationae personae*, there is unanimity in legal literature and jurisprudence that, as a rule of customary international law, senior State officials such as Heads of State or foreign ministers enjoy absolute immunity at least against criminal charges brought against them by foreign jurisdictions while in office.[31] It is equally as undisputed that, as soon as the State official in question ceases to hold the office, he loses his personal immunity and can be subjected to criminal proceedings in foreign national courts in respect of his private actions before, during or after his term of office.[32]

The really controversial issue is the question of limits to immunity *rationae materiae* for incumbent and former senior State officials before national courts in the case of alleged serious international crimes. Generally, senior State officials enjoy immunity for official acts attributable to the State both during and after their term of office.[33] While the indictment of the former Panamanian General Manuel Noriega by a Florida federal court in 1990 for drug trafficking[34] attracted much attention, it is not relevant to discussing the evolvement of a rule of customary international law lifting functional immunity, since Noriega had not been recognized as the Panamanian Head of State by the United States as the forum State. It was actually not until the spectacular final decision of the House of Lords in the *Pinochet* case[35] that several theories on the limitations of functional immunity emerged in legal

[31] Doehring, *op. cit.* (note 3), p. 291; Georg Dahm/Jost Delbrück/Rüdiger Wolfrum, *Völkerrecht*, Berlin 1989, Vol. I/1, p. 254; Fox, *op. cit.* (note 1), p. 438; Cassese, *op. cit* (note 3), p. 96; *id., loc. cit.* (note 26), 864 *et seq.*; explicitly extending this rule to foreign ministers: ICJ, *Arrest Warrant* case, *supra* note 13, para. 54.

[32] Doehring, *ibid*; Dahm/Delbrück/Wolfrum, *ibid.*; Knut Ipsen, *Völkerrecht*, 5th ed. München 2004, p. 383.

[33] See the authorities referred to in note 32.

[34] *International Law Reports* 99, p. 143.

[35] *Supra* note 2.

literature.[36] However, it is questionable whether this judgment constitutes a precedent on which State and jurisprudential practice can build upon to establish customary international law. The Law Lords basically had to decide two issues: first, whether Pinochet could be extradited to Spain, based on the arrest warrant issued by the Spanish authorities, and second, whether the former Chilean Head of State was entitled to functional immunity against extradition for the crimes he was accused of, namely being responsible in his official capacity for the murder and/or torture of several Spanish citizens.

With regard to the first issue, the House of Lords decided that, according to the UK Extradition Act of 1989, Pinochet could only be extradited for crimes that were punishable at the time of the extradition request. This left only a few extraditable offences since the crime Pinochet was most accused of – torture – was only codified in the UK in 1988 as part of the Criminal Justice Act, which implemented the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment[37] (UNCAT). Regrettably, only one of the Law Lords – Lord Millet – discussed the possibility of torture being a punishable and therefore extraditable crime on the basis of customary international law. The judgment hence failed to contribute to the development of the concept of universal jurisdiction as a source of international law.

In deciding the second issue, the question of immunity, the majority of the Law Lords found that Pinochet did not enjoy functional immunity against extradition, yet regrettably again, all judges presented a different reasoning. Two judges – Lords Wilkinson and Browne – assumed that torture could not be attributed to the State of Chile and therefore also not to its former Head of State after its accession to the UNCAT[38], since acts of a State party in violation of this Convention could from that point onwards not be

[36] Hazel Fox, "The Resolution of the Institute of International Law on the Immunities of Heads of State and Government", *International and Comparative Law Quarterly* 51 (2002), 119 *et seq.*; Salvatore Zappala, "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 (2001), 595 *et seq.*; Andreas Paulus, *Die internationale Gemeinschaft im Völkerrecht*, Munich 2001, pp.271 – 284.

[37] *Supra* note 22.

[38] The UNCAT became effective in Chile with its accession on 30 September 1988.

considered as official[39]. Three judges – Lords Hope, Millet and Salville – held the view that functional immunity had been waived by acceding to the UNCAT. Only two judges denied immunity to Pinochet based on the opinion that torture constituted an international crime according to customary international law, Lord Hutton assuming that torture for that reason could not be considered an official act and Lord Phillips stating that functional immunity was simply incompatible with the crime of torture.

While each opinion of the judges can be criticized in detail[40], the overall approach of the majority of the Lords of denying immunity on the grounds of the obligations laid down in the UNCAT is questionable. While Art. 5 UNCAT imposes on the member States the obligation to either punish or extradite (*dedere aut iudicare*) persons having committed torture according to the UNCAT, several other UN conventions adopted before the UNCAT – e.g. the Convention on the Prevention and Punishment of the Crime of Genocide[41] in Articles 5 and 7, the Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents[42] in Articles 3 and 8 – oblige the States' parties to do so if persons violate the respective Convention. It does not appear that legal literature or jurisprudence, in applying these Conventions, had derived from this obligation a revocation of immunity *rationae materiae* for senior State officials. Also, the approach of denying functional immunity before national foreign courts in cases where *jus cogens* – assuming that international crimes constitute such law – is violated, is not flawless. Which international crimes constitute established *jus cogens*? While Articles 6 to 8 of the ICC Statute could give an indication – genocide, crimes against humanity and war crimes –, it needs to be recognized, especially with reference to Article 8, which codifies war crimes laid down in the Geneva and Hague Conventions, that several States have made reservations in respect of certain pro

[39] Article 1 of the UNCAT reads:„...when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity."

[40] For a detailed and critical analysis, see Roland Bank, "Der Fall Pinochet: Aufbruch zu neuen Ufern bei der Verfolgung von Menschenrechtsverletzungen?", *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 59 (1999), 677, at 668–699.

[41] *Supra* note 23.

[42] General Assembly Resolution 3166 (XXVII) of 14 December 1973, to be found at http://www.un.org/documents/ga/res/28/ares28.htm