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Head of State, Head of Goverment and Foreign Ministers Immunity in International Law

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Abstract
In international law, a head of state has state immunity and diplomatic immunity that prevented him tried by national courts of other states. The obtained immunity to heads of state, heads of government and foreign ministers because of the positions they occupied before and after officially taking office.
Keywords: Immunity, International Law

A. Introduction

International law confers on *certain* state officials immunities that attach to the office or status of the official. These immunities, which are conferred only as long as the official remains in office, are usually described as 'personal immunity' or 'immunity *ratione personae*'. It has long been clear that under customary international law the Head of State and diplomats accredited to a foreign state possess such immunities from the jurisdiction of foreign states. In addition, treaties confer similar immunities on diplomats, representatives of states to international organizations, and other officials on special mission in foreign states. The predominant justification for such immunities is that they ensure the smooth conduct of international relations and, as such, they are accorded to those state officials who represent the state at the international level. International relations and international cooperation between states require an effective process of communication between states. It is important that states are able to negotiate with each other freely and that those state agents charged with the conduct of such activities should be able to perform their functions without harassment by other states. As the International Court of Justice (ICJ) has pointed out, there is 'no more fundamental prerequisite for the conduct of relations between States than the inviolability of diplomatic envoys and embassies'. In short, these immunities are necessary for the maintenance of a system of peaceful cooperation and co-existence among states. Increased global cooperation means that this immunity is especially important.[1]

This immunity appears under customary international law as respect for state sovereignty with each other and the state is absolutely owned by each country.[2]This principle was then invented the doctrine of absolute immunity (absolute immunity) in which this principle in accordance with the legal principle "par in parem non habet imperium" which means that the sovereignty of a country's sovereignty should not prevail over the other countries.[3]

Diplomatic immunity is the immunity given for the head of diplomatic mission during its obligation in the receiving state.[4] Those immunities given for the state representative which is considered as act of state docrtine.[5] As the principle applies the immunity is based on the principle of reciprocity.[6] The purpose by the immunity given is to create the harmony relationship between the countries, the sending state and the receiving state, also as the recognation for the sending state's beilefes to the receiving state.[7] The given immunity is abosolutely needed for ensuring the efficiency of the duty of the diplomatic representative.[8]

The immunity of head of state is the immunity given and its function as the head of state.[9] The head of state has the state immunity and the diplomatic immunity. As the result, the head of state will have a chance to visit the other countries, this diplomatic immunity needed for ensuring the duty implementation process and its responsibility in the visited countries without the fear of arresting, detention, or the other bias action which is

[1] Dapo Akande and Sangeeta Shah, 2011, *Immunity of State Officials, International Crimes, and Foreign Domestic Courts,* The European Journal of International Law Vol. 21 no. 4 EJIL 2011, p. 818.
[2] Advisory Comite on Issue of Public International Law, 2011, *Advisory Report on the Immunity of Foreign States Officials*, Avdisory Report No. 20. The Hague
[3] Ian Brownlie, 2003, *Principle of Public International Law, 6th Edition,* Oxford University Press, New York, p. 321.
[4] Article 31, The Vienna Convention on Diplomatic Relations 1961. "*The person of a diplomatic agent shall be inviolable; that he shall not be liable to any form of arrest or detention; and that the receiving State shall take alpropriate steps to prevent any attack on his person, freedom or dignity.*"
[5] Van Panhuys, 1964, *In the Borderland Between the Act of State Doctrine and Question of Jurisdictional Immunities,* dalam Dapo Akande and Sangeeta Shah, 2011, *Immunity of State Officials, International Crimes, and Foreign Domestic Courts,* The European Journal of International Law Vol. 21 no. 4 EJIL 2011.
[6] Sumaryo Suryokusumo, 1997, *Hukum Diplomatik Teori & Kasus*, Alumni, Bandung, hlm. 50.
[7] Dapo Akande and Sangeeta Shah, 2011, *Immunity of State Officials, International Crimes, and Foreign Domestic Court, Op.Cit.*
[8] Sumaryo Suryokusumo, *Loc. Cit,* hlm. 55.
[9] Sir Arthur Whats, *The Legal Position in International Law of Head of Sate, Head of Giverment and Foreign Ministers, Receucil des Cours de I'Academie de droit international de la Haye, Vol 247.* p. 102-103.

unmatched with the head of state.[1] The state immunity given for the head of state because the head of state is the lenghthen of the country. Head of state becomes the symbol of the country's sovereignity where the head of state leads or it assumes as the state itself.[2] The absolute immunity principle and *par in parem non habet imperium* principle are applied for the head of state. None of the country can apply its legal enforcement to the head of state. Yet it will be assumed as the irrespectful action for the head of state sovereignity.[3]

Overall, the head of state, the head of government, and the foreign affairs of the state's immunity in implementing their duties based on International Law will be discussed in this article.

B. Head of State

The first official to whom immunity ratione personae applies is the person who holds the highest position in a state, the head of state. The head of state is a state official, but a very special one. He is the prime representative of the state, the personification of the state. A head of state holds that position wherever he is, and at all times. The immunity which a head of state enjoys attaches to him as a 'symbol' of the sovereignty of the state. As Oppenheim says he is *"The highest organ of the state, representing it, within and without its borders, in the totality of its relations, is the Head of State*"[4]. At one time heads of state interacted with each other on the international plane, and international relations were the relationships which heads of state had with each other as individuals. Now international relations are conducted by foreign ministries as well as heads of state and heads of government, and many heads of state have only a formal constitutional role.

A head of state can be either a monarch or a president. The head of state may be called by different titles, such as Chairman of the Council of State, and President of the Command Council of the Revolution. It is not the title which confers immunity, but the position which is held. The head of state may be an individual or a group of people, and he may or may not have political power. International law does not prescribe what sort of head a state should have, but howsoever constituted, that entity represents the state itself. He is the embodiment of the state, and if he were to be prosecuted the state would be insulted.

> *"It would be an affront to the dignity and sovereignty of the state which he personifies and a denial of the equality of sovereign states to subject him to the jurisdiction of the municipal courts of another state, whether in respect of his public acts or private affairs. His person is inviolable; he is not liable to be arrested or detained on any ground whatever."*[5]

The head of state is one of the persons who require no further accreditation to represent a state. He is one of the persons who hold full powers. Article 7 of the Vienna Convention of the Law of Treaties 1969 describes 'full powers' in relation to treaties and the persons who have those powers and says:

1. A person is considered as representing a state for the purpose of adopting or authenticating the text of a treaty or for the purpose of expressing the consent of the state to be bound by a treaty if: (a) he produces appropriate full powers; or (b) it appears from the practice of the states concerned or from other circumstances that their intention was to consider that person as representing the state for such purposes and to dispense with full powers.
2. In virtue of their functions and without having to produce full powers, the following are considered as representing their state: (a) Heads of state, heads of government and ministers for foreign affairs, for the purposes of performing all acts relating to the conclusion of a treaty; (b) Heads of diplomatic missions, for the purpose of adopting the text of a treaty between the accrediting state and the state to which they are accredited.

'Full powers' means a document emanating from the competent authority of a state designating a person or persons to represent the state for negotiating, adopting or authenticating the text of a treaty, for expressing the consent of the state to be bound by a treaty, or for accomplishing any other act with respect to a treaty. A head of state does not need such a document, and represents the state by virtue of his office. A head of state is also an internationally protected person as defined by article 1 of the Convention on Crimes Against Internationally Protected Persons 1973.

There is no international convention regarding the immunity of heads of state, and the immunity to be accorded to heads of state is customary international law. All the major commentators are agreed that heads of state are immune from criminal prosecution in foreign states. Oppenheim says that a head of state who is visiting a foreign state, with the knowledge and consent of its government *"is exempt"* from the criminal jurisdiction of the state.[6] Sir Arthur Watts writes that for criminal proceedings a head of state's immunity *"is generally*

[1] Michel A. Tunks, 2002, *Diplomats or Defendats? Defining the Future of Head-of-State Immunity,* Duke Law Journal Vol. 52: 651, p. 656
[2] Dapo Akande and Sangeeta Shah, *Op. Cit.* p. 824.
[3] *Ibid.* p. 824-825
[4] Oppenheim's International Law. Ninth Edition. Volume 1 PEACE Edited by Sir Robert Jennings and Sir Arthur Watts Introduction p.1033
[5] Pinochet (No. 3) [2000] 1AC 147. Lord Millett at page 269 A – B.
[6] Oppenheim's International Law. p.1038

accepted as being absolute as regards the ordinary domestic criminal law of other States,"[1] and Satow declares " *He is entitled to immunity – probably without exception – from criminal and civil jurisdiction."*[2] All three are writing about a head of state who visits another state. The concept that one state should prosecute high state officials for offences committed in their own or a third state, other than as victorious belligerents, is a very recent idea.

There has been very little litigation regarding the immunity from criminal prosecution of heads of state and other high state officials. The matter was not much considered until the 1990s, and there is much that remains uncertain.

One of the old cases often cited supporting the principle of the absolute immunity of heads of state is the Duke of Brunswick v King of Hanover,128 in which Charles Lord Cottenham the then Lord Chancellor said:

> *"The whole question seems to me to turn upon this, ... That a foreign Sovereign, coming into this country, cannot be made responsible here for an act done in his sovereign character in his own country; whether it be an act right or wrong, whether according to the constitution of that country or not".*

Viewed from the perspective of the twenty-first century the facts of this case are very strange. This is a case which demonstrates the changes in international society over the last 150 years, and therefore has to be treated with care as to any principles enunciated. One of the very odd aspects of this case is that both parties have two characters or roles; they are both British subjects, as well as being foreign sovereigns.

After the breakdown of the Holy Roman Empire, Germany split into a number of small principalities, including Hanover and Brunswick. In 1830 the appellant Charles, was the reigning Duke of Brunswick, and he owned estates of considerable value in Brunswick, Hanover, France and elsewhere. He was very rich, but he was squandering his fortune. On 6 September 1830 his government was overthrown. Charles was not in Brunswick and he was prevented from returning. In 1830 Charles went to Hanover *"with a small retinue, with the intention of making a peaceable entry into his own dominions,"* and he was attacked by a party of armed men, and had to flee into Prussia to escape. He left behind him 24,000 crowns, or £4,500, which was a fortune at the time.

On 2 December 1830 the Germanic Diet of Confederation, which included William the Fourth, the then King of both Hanover and the UK, passed a decree, whereby Charles' brother William was invited to be the Duke of Brunswick. In February 1831, William the Fourth, and William Charles' brother published a declaration deposing Charles from the throne of the Duchy of Brunswick, and declaring William to be the Duke of Brunswick.

In 1833 His Majesty William the Fourth of Hanover, and William, Duke of Brunswick, deprived Charles of his property and appointed a guardian over him, they signed an instrument stating *"Certain facts, either notorious or sufficiently proved, have caused us to arrive at the conviction that his Highness Duke Charles is at this time wasting the fortune which he possesses ... we have consequently considered that the only method of preserving the fortune of his Highness Duke Charles from total ruin, is to appoint a guardian over him."* A member of the English aristocracy, The Duke of Cambridge, who was also the Viceroy of Hanover, was appointed as guardian. After the death of William the Fourth, in June 1837, his brother, Ernest Augustus, who was an English peer, the Duke of Cumberland, became King of Hanover and was appointed Charles's guardian in place of the Duke of Cambridge. The Duke of Cambridge paid all the receipts from Charles's estates to him, including the money left in Hanover. As King Ernest Augustus continued to take all the receipts from the rents from what had been Charles' property.

The court was asked to declare that instruments declaring Charles, then Duke of Brunswick, as incompetent, and appointing the Duke of Cambridge, who became King Ernest I, as guardian of his fortune and property were absolutely void and of no effect. Charles wanted to regain control of his fortune.

The court decided that the English courts did not have jurisdiction over actions of a sovereign character, by foreign sovereign, in his own country. The court held that the King of Hanover, who was also a British subject, and was in England exercising his rights as such subject, could not be made to account in the English courts for acts of state done by him in Hanover and elsewhere abroad, in virtue of his authority as a sovereign, and not as a British subject.

This is a very old case, and the facts are odd in that both parties were British citizens as well as being European royalty, and they were both England. The German States at that time were fragmented and small, and the European royals had many family ties. The fact that the head of one state was also a citizen of another state was not seen as a source of possible conflict of loyalty, rather that it created close relationships. The case is not considering a criminal prosecution, and certainly not a criminal prosecution for conduct on English territory. Now if a foreign sovereign were to be also a British citizen, and were to commit an offence in England, whilst here in a private capacity, it would be hard to argue that there would not be jurisdiction to prosecute him. If he committed an offence in his role as head of state the first question to be asked would be in what capacity was he

[1] See Sir Arthur Watts, "The Legal Position in International Law of Heads of State, Heads of Government and Foreign Ministers", Receuil des Cours de l'Academie de droit international de la Haye, vol. 247. P.55
[2] Satow, Guide to Diplomatic Practice (5th. edn, 1979) para. 2.1.

in England? This case is important in that it enunciated neatly a principle that has been quoted with approval many times since, but the facts do not assist when considering modern cases.

There a number of cases in which criminal courts have accepted as customary international law the principle that a serving head of state is entitled to immunity from prosecution in other states. In the Pinochet case one matter that all the Judges were agreed upon is that a serving head of state is entitled, under customary international law, to complete immunity from criminal prosecution before the domestic courts of foreign states. If Pinochet has still been head of the state of Chile in 1988, when he visited London he could not have been arrested. As Lord Browne-Wilkinson said *"this immunity enjoyed by a head of state in power and an ambassador in post is a complete immunity attached to the person of the head of state or ambassador and rendering him immune from all actions or prosecutions,"*

This was also confirmed by the ICJ in the Arrest Warrant Case,130 at paragraph 51 of the judgment the court said, *"the Court would observe at the outset that in international law it is firmly established that, as also diplomatic and consular agents, certain holders of high-ranking office in a State, such as the Head of State, Head of Government and Minister for Foreign Affairs, enjoy immunities from jurisdiction in other States, both civil and criminal."*

C. The Head of Government

Not all heads of state are also head of government, although some, such as the President of the USA are both head of state and head of government. In the UK, the Queen is the head of state, and as such she has a constitutional role; and the Prime Minister is the head of government. Other states use other titles for their head of government; it is the role that matters, not the title.

The head of government is a person who has full powers as defined by article 7 of the Vienna Convention on Treaties, and he does not have to furnish any evidence of his authority to legally bind his state. He is also an internationally protected person, as defined by the Convention on Crimes Against Internationally Protected persons 1973. These conventions recognise the importance of the head of government in the international arena.

In paragraph 51 of the Arrest Warrant case judgment the ICJ observed that the head of government is one of the holders of high ranking office in a state who enjoy immunity from both criminal and civil jurisdiction in other states, and that the purpose of such immunity is to enable them to perform their function.

In 2002 the Belgian Courts had to consider the immunity of a serving head of government in the case of Re Sharon and Yaron. Between the sixteenth and eighteenth of September 1982 massacres took place in Palestinian refugee camps in Lebanon. These massacres were attributed to Lebanese Phalangist[1] militias, and occurred during an international armed conflict, when Israeli armed forces invaded part of Lebanon. Ariel Sharon was Minister of Defence of Israel at the time, and Amos Yaron was divisional commander of forces operating at the entrance to the camps.

In 2001 twenty-four non residents of Palestinian and Lebanese origin, brought an action before the Belgian courts, on the basis of personal injuries suffered, or loss of close family members or property, in the attacks on the refugee camps. The allegation was that Ariel Sharon and Amos Yaron were complicit in the massacres, and that they failed to intervene to stop them, and therefore they were guilty of serious violations of international humanitarian law. Section 7 of the Belgian Law 1993, granted Belgian courts universal jurisdiction over a series of violations of international humanitarian law, in particular war crimes, genocide and crimes against humanity, irrespective of the place where the crimes were committed. This law gave Belgian courts jurisdiction over foreigners alleged to have committed such crimes abroad.

At the time of the proceedings Ariel Sharon was the Prime Minister of the State of Israel, and AmosYaron was the Director General at the Ministry for National Defence of the State of Israel.

On 26 June 2002 the Court of Appeal in Brussels held that the proceedings were inadmissible under the Belgian criminal procedure rules, as the alleged perpetrators were not in Belgium, and there was no evidence they were on the point of arriving in Belgium. The applicants appealed to the Court of Cassation, and that court found that the accused did not have to be present in Belgium for the proceedings to be instigated. That court also found that customary international law prohibited heads of state and government from being the subject of proceedings before the criminal courts of foreign states, in the absence of contrary international treaty provisions binding upon the states concerned. The court considered the Genocide Convention, article 27(2) Of the Rome Statute of the International Criminal Court, the Geneva Conventions and Additional protocols thereto, and decided that non of these treaties had affected the customary international law immunity of heads of state or government from the jurisdiction of other states. The court said:

> *"if this provision of Belgian municipal law were to be interpreted as setting aside the principle of immunity under customary international criminal law, it would thereby violate that principle. The rule of municipal law cannot therefore have that objective and must instead be understood as only excluding the*

[1] A Lebanese Christian paramilitary group

possibility that the official capacity of a person should provide a basis for criminal non-accountability for the international crimes enumerated in that Law."

The court held that Ariel Sharon as Prime Minister of Israel was entitled to immunity and the proceedings against him were inadmissible. That court found that the proceedings against Amos Yaron were admissible, as he was not head of state or government.[1] The question of whether he was entitled to immunity ratione personae as Director General at the Israeli Ministry of Defence was not addressed by the Belgian Court of Cassation. Whether a defence minister is entitled to state immunity will be examined later in this chapter.

Another attempt was made to issue proceedings against Ariel Sharon in a foreign jurisdiction, in England, on 15 July 2003 at Bow Street Magistrates' Court (unreported). David Anthony Hurndall, the father of Tom Hurndall made an application for a warrant for the arrest of Ariel Sharon, who was still the Israeli Prime Minister at that time. Mr Sharon was on a official visit to London the purpose of which was *"to impress on Mr. Sharon the need for concessions on the "road map" to peace, while Mr Sharon will be seeking to rebuild Israel's relationship"* with the UK. Tom Hurndall, a young photographer, was shot in Rafah, Gaza on 11 April 2003 by Israeli soldiers. He later died of his injuries. Mr David Hurndall was asking for a warrant of arrest for Mr Sharon under the Geneva Conventions Act 1957 for grave breaches of Geneva Convention IV. The application was made on the basis that Israeli soldiers were being protected from prosecution, and that this culture of impunity was the responsibility of the Israeli Prime Minister who was thereby implicated in the incident.

Senior District Judge Tim Workman declined to issue a warrant and said in his reasons.

"While I have great sympathy for Mr Hurndall and his family, I am unable to link the tragic events of 22 April with Mr Sharon himself or identify an offence which the Prime Minister, in person, might have committed. I am also satisfied that Mr Sharon is a Head of State and is entitled to immunity from prosecution. I am satisfied that the issue of a warrant is part of the prosecution process whether with or without bail, and even if I had been persuaded that there was sufficient evidence linking Mr Sharon with an offence I would have declined to have issued an arrest warrant on the ground that Mr Sharon is Head of State and entitled to customary international law immunity."

The applicant tried to distinguish this case from that of the Arrest Warrant case by saying that if a warrant with bail were issued, then Mr Sharon could still perform his functions, and it would not interfere with his official duties. The applicant also argued that the court should commence proceedings first, and then Mr. Sharon should claim immunity. Neither argument was successful. At paragraph 70 of the judgment in the Arrest Warrant case the ICJ said that the mere issuance of the warrant was a breach of the international obligation owed by Belgium to the Congo, and the Congo was required to cancel the warrant. Judge Workman considered that issuing a warrant was part of the prosecution process, and that under customary international law Mr Sharon was entitled to complete immunity. If a warrant had been issued, even if Mr Sharon had immediately claimed immunity, the time and effort required for him to do that would have been an interference with the official duties he was undertaking. The head of government is entitled to state immunity ratione personae as well as the head of state.

D. The Foreign Minister

The foreign minister can act internationally on behalf of his state. He is the head of the Ministry for Foreign Affairs, the department of a state which communicates with other states, and he is in charge of his state's ambassadors and consuls. Under article 10 of the Vienna Convention on Diplomatic Relations the Ministry of Foreign Affairs has to be notified of the appointment of members of diplomatic missions, their arrival and departure, and by article 41.2, unless states agree otherwise, all official diplomatic business is conducted with the foreign ministry of the receiving state. A foreign minister is one of the persons who hold full powers, and needs no further accreditation to represent a state for the purposes of adopting or authenticating the text of a treaty.[2] Statements made by a foreign minister on behalf of his government are binding upon his state.[3] A foreign minister is an internationally protected person within the meaning of the Convention on Crimes Against Internationally Protected Persons. If a crime were committed against him it would constitute a threat to the maintenance of normal international relations.

Despite the fact that the foreign minister is obviously at the heart of diplomatic and international relations, there was doubt about his immunity ratione personae, which was resolved by the ICJ in the Arrest Warrant Case.

[1] In April 2003 the Belgian Parliament amended section 5(3) of the Law of 1993 so as to provide that "the international immunity attached to the official capacity of a person shall not prevent the application of this Law, within the limits laid down by international law," thereby requiring the Belgian courts to respect the rules of customary international law on jurisdictional immunity.

[2] Article 7 Vienna Convention of the Law of Treaties 1969

[3] PCIJ The case concerning the Legal Status of Eastern Greenland. A recorded and minuted declaration made by Mr Ihlen, the Norwegian Foreign Minister on 22 July 1919 informing the Danish Minister that the Norwegian Government would not make any difficulties in the settlement of the recognition of Danish sovereignty over Eastern Greenland was binding upon Norway.

This case was brought by the Congo against Belgium "*concerning the arrest warrant of 11 April 2000."*

This warrant was issued by an investigating judge of the Brussels tribunal de premiere instance for the arrest of Mr. Yerodia who was then the serving minister for foreign affairs in the Congo. Belgian nationals and residents made complaints alleging that Mr Yerodia had perpetrated international crimes in the Congo. They asked the investigating judge to initiate proceedings against Mr Yerodia. On 11 April 2002 the investigating judge issued a warrant for the arrest Mr Yerodia. The warrant was described as *"an international arrest warrant in absentia"* as Mr Yerodia was not in Belgium. The warrant charged Mr Yerodia with grave breaches of the Geneva Conventions by making speeches inciting racial hatred and racially motivated attacks. The speeches were alleged to have resulted in several hundred deaths, the internment of Tutsi's, summary executions, arbitrary arrests and unfair trials.

It was agreed by the parties before the ICJ that the alleged acts were committed outside Belgian territory, that Mr Yerodia was not a Belgian national, and that Mr Yerodia was not on Belgian territory at the time that the arrest warrant was issued and circulated, and no Belgian nationals were victims of the violence that was said to have resulted from Mr Yerodia's alleged offences.

On 7 June 2000 the arrest warrant was transmitted to Interpol, the International Criminal Police Organisation. The function of Interpol is to enhance and facilitate cross-border criminal police co-operation worldwide. Interpol circulated the warrant internationally by way of a 'Green Notice', which is a notice which asks for States to locate suspects, not to arrest them. A 'Red Notice' which requests the arrest of an individual with a view to extradition was not issued. The warrant was transmitted to the Congo on 7 June 2000, and was received by the Congolese authorities on 12 July 2000. On 17 October 2000 the Congo instituted proceedings in the ICJ requesting the court to declare that Belgium shall annul the international arrest warrant issued on 11 April 2000.

In November 2000 the court was informed that, following a ministerial reshuffle in the Congo, Mr Yerodia was no longer foreign minister, and that he was minister for education. A new government was formed in the Congo in mid-April 2001 and Mr Yerodia was not appointed as a minister. On 12 September 2001 Belgium requested Interpol to issue a Red Notice in respect of Mr Yerodia. That was after Mr Yerodia ceased to be a minister, but whilst the proceedings were still pending before the ICJ. On 19 October 2001 Belgium informed the court that Interpol had requested additional information, and no Red Notice had been circulated. When the ICJ gave judgment on 14 February 2002 Mr Yerodia did not hold ministerial office in the Congo.

The Congo initially made the claim against Belgium on two grounds. First that universal jurisdiction breached the principle that a state should not exercise its authority on another state, and the principle of sovereign authority; and secondly that non recognition of the immunity of the foreign minster was a breach of diplomatic immunity.

These submissions were refined as the proceedings continued, the Congo no longer claimed that Belgium wrongly conferred upon itself universal jurisdiction in absentia, and confined itself to arguing that the arrest warrant was unlawful because it violated the immunity from jurisdiction of its minister for foreign affairs. In its written and oral submission to the court the Congo contended that the issue of the warrant was a breach of customary international law, rather then a breach of diplomatic immunity.

The Congo requested the ICJ to find that by issuing and internationally circulating the arrest warrant, Belgium committed a violation of the rule of customary international law concerning the absolute inviolability and immunity from criminal process of incumbent foreign ministers and that Belgium thereby violated the principle of sovereign immunity among states. The Congo said that a formal finding by the court of the unlawfulness of the act would constitute an appropriate form of satisfaction, which would provide reparation for the moral injury caused to the Congo. The Congo also requested the ICJ to declare that any state, including Belgium, was precluded from executing the warrant, because both the issue of the warrant and its international circulation were violations of international law. The Congo asked the court to require Belgium to recall and cancel the arrest warrant, and to inform the foreign authorities to whom the warrant was circulated, that Belgium renounced its request for their co-operation in executing the unlawful warrant.

Belgium requested the court, as a preliminary matter, to declare that the Court lacked jurisdiction and/or that the application was inadmissible; and if the court concluded that it did have jurisdiction to reject the submission of the Congo on the merits of the case, and to dismiss the application.

Although Belgium did not deny that a legal dispute existed between itself and the Congo when the application was filed, Belgium made much of the change in circumstances regarding Mr Yerodia, and made preliminary objections to the proceedings. The ICJ gave short shrift to all of these arguments saying that it had jurisdiction, and that the application was not moot.

The ICJ said that logically the question of immunity should be addressed after a determination of jurisdiction, since it is only where a state has jurisdiction under international law, in relation to a particular matter, that there can be any question of immunities in regard to the exercise of that jurisdiction. As the ICJ is limited to answering the matter in dispute between the parties, the court decided that it would address the

question, *"whether, assuming that it had jurisdiction under international law to issue and circulate the arrest warrant of 11 April 2000, Belgium in so doing violated the immunities of the then Minister for Foreign Affairs of the Congo?"*

The Congo maintained a minister for foreign affairs in office is entitled to an absolute or complete immunity from criminal process, and that this immunity is subject to no exception. The Congo contended that no criminal prosecution may be brought against a minister for foreign affairs in a foreign court so long as he or she remains in office, and that any finding of criminal responsibility by a domestic court in a foreign country, or any act of investigation undertaken with a view to bringing him or her to court, would contravene the principle of immunity from jurisdiction. According to the Congo, the basis of such criminal immunity is purely functional, and immunity is accorded under customary international law simply in order to enable the foreign state representative enjoying such immunity to perform his or her functions freely without hindrance. The Congo added that the immunity accorded to ministers for foreign affairs when in office covers all their acts, including any committed before they took office, and that it is irrelevant whether the acts done whilst in office may be characterised as official acts, or not.

The Congo did not deny the existence of a principle of international criminal law, that the accused's official capacity at the time of the acts cannot, before any court, whether domestic or international, constitute a *"ground of exemption from his criminal responsibility or a ground of mitigation of sentence."* The Congo stressed that the fact that an immunity might bar prosecution before a specific court or over a specific period does not mean that the same prosecution cannot be brought, if appropriate, before another court which is not bound by that immunity, or at another time when the immunity need no longer be taken into account. The Congo concluded that immunity does not mean impunity.

Belgium maintained that while ministers for foreign affairs generally enjoy an immunity from jurisdiction before the courts of a foreign state, such immunity applies only to acts carried out in the course of their official functions, and cannot protect such persons in respect of private acts or when they are acting otherwise than in the performance of their official functions. Belgium said that Mr Yerodia enjoyed no immunity at the time when he was alleged to have committed the alleged crimes, there was no evidence that he was acting in any official capacity, and the warrant was issued against him personally.

The starting point for the ICJ in its judgement was that there is a firmly established rule of customary international law that certain holders of high-ranking office in a state, such as the head of state, the head of government and the minister for foreign affairs, enjoy immunities from jurisdiction in other states, both civil and criminal. The court then went on to examine the immunity from criminal jurisdiction and the inviolability of an incumbent minister for foreign affairs.

The court examined the Vienna Conventions on Diplomatic and Consular Relations and the New York Convention on Special Missions and said that these conventions were useful guidance on certain aspects of the questions of immunities, but as they did not contain any provision specifically defining the immunities enjoyed by ministers of foreign affairs, the court had to decide the questions relating to the immunities of such ministers on the basis of customary international law.

The court considered the preamble to the Vienna Conventions on Diplomatic Privileges and Immunities stating that the purpose of diplomatic privileges and immunities is *"to ensure the efficient performance of the functions of diplomatic missions as representing States"*, and the corresponding provision in the Vienna Convention on Consular Relations. From this the court deduced that the immunities accorded to ministers for foreign affairs are similarly not granted for their personal benefit, but to ensure the effective performance of their functions on behalf of their respective states. The court said that in order to determine the extent of these immunities, the court must therefore first consider the nature of the functions exercised by a minister for foreign affairs.

As explained earlier in this article the court then went on to look at the functions expected of a foreign minister, and how he carries out his duties. The court looked at the role and what a foreign minister is required to do. The court then observed that a minister for foreign affairs occupies a similar position to a head of state, or a head of government, as he is responsible for the conduct of his state's relations with all other states, and is recognised under international law as representative of the state solely by virtue of his office. The court noted that a foreign minister does not require letters of credence, that it is generally the minister who determines the authority to be conferred upon diplomatic agents and countersigns their letters of credence, and that it is to the minister for foreign affairs that charges d'affairs are accredited.

Here the ICJ is looking not just at the functions performed by a foreign minister, but also at the position he holds within a state, the power of the state which he wields, and the fact that a foreign minister has a special status in international society and that this is acknowledged in international law.

At paragraph 54 of its judgment the Court concluded that:

> *"the functions of a Minister for 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. That*

immunity and that inviolability protect the individual concerned against any act of authority of another state which would hinder him or her in the performance of his or her duties."

Then in paragraph 55 the court goes on to explain how wide this immunity is:

1. No distinction can be drawn between acts performed by a minister for foreign affairs in an "official" capacity, and those performed in a "private" capacity

2. There is no distinction between acts performed before the person concerned assumed office and acts committed during the period of the office.

This is because if a minister for foreign affairs is arrested in another state on a criminal charge, he or she is clearly prevented from exercising the functions of his or her office. The risk of arrest may prevent a foreign minister from freely travelling internationally when required to do so.

The ICJ then considered whether there is an exception to this immunity for war crimes or crimes against humanity, and decided there is not. The court explained that this immunity does not mean impunity from prosecution, and described the circumstances in which a former foreign minister may be prosecuted for such offences. This aspect of the judgment is considered in a following chapter of this thesis.

The next question for the court was whether the issuance of the arrest warrant, and the international circulation of the warrant, violated the rules governing the immunity from criminal jurisdiction of incumbent foreign ministers. The Congo asserted that the mere issuance of the warrant constituted a coercive measure, even if it was not executed. That the international circulation of the warrant was a fundamental infringement of the Congo's sovereign rights, as it significantly restricted its foreign minister who did not have *"full and free exercise"* of his international negotiation and representation functions.

The court considered the nature of the warrant and noted that it was intended to enable the arrest on Belgian territory of an incumbent foreign minister, and also the purpose of the warrant which was an order to all bailiffs and public authorities to execute the arrest warrant. The court accepted that the warrant did make an exception for the case of an official visit, and that Mr Yerodia never suffered arrest in Belgium, but said that given the nature and purpose of the warrant, its mere issue violated the immunity which Mr Yerodia enjoyed as the Congo's incumbent minister for foreign affairs. The court concluded that the issue of the warrant constituted a violation of an obligation of Belgium towards the Congo, in that it failed to respect the immunity of that minister and, more particularly, infringed the immunity from criminal jurisdiction and the inviolability then enjoyed by him under international law.

Belgium admitted that the purpose of the international circulation of the disputed warrant was to establish a legal basis for the arrest of Mr Yerodia abroad and his subsequent extradition to Belgium, but argued that there were further preliminary steps to be taken, and that no Interpol red notice was requested until Mr Yerodia no longer held ministerial office.

The court did not agree with this view. The court said that given the nature and purpose of the warrant its international circulation by the Belgian authorities:

1. effectively infringed Mr Yerodia's immunity as the Congo's incumbent minister for foreign affairs and

2. was further more liable to affect the Congo's conduct of its international relations.

Since Mr Yerodia, as foreign minister, was required to travel in the performance of his duties, the international circulation of the warrant, even in the absence of further steps by Belgium, could have resulted in his arrest while abroad. The court noted that Mr Yerodia on applying for a visa to go to two countries learned that he ran the risk of being arrested as a result of that arrest warrant issued against him by Belgium, and that the arrest warrant had forced him to travel by roundabout routes. The court concluded that the circulation of the warrant, whether or not it significantly interfered with Mr Yerodia's diplomatic activity, constituted a violation of an obligation of Belgium towards the Congo, in that it failed to respect the immunity of the incumbent minister for foreign affairs of the Congo and, more particularly, infringed the immunity from criminal jurisdiction and the inviolability then enjoyed by him under international law.

In this judgment the court is unequivocal in its finding that an incumbent foreign minister is absolutely inviolable and immune. The justification for the minister having immunity is functional, but does not require there to be an actual interference with his function. The fact that there was a possibility that he could be arrested, and that this was a factor he had to consider, was sufficient to make the issuing and circulating of the warrant a breach of his immunity.

The Congo requested the Court:

1. to make a formal finding that the issue and international circulation of the warrant, and said that this finding in itself would constitute an appropriate form of satisfaction and would provide reparation for the consequent moral injury.

2. to find that the violations of international law underlying the issue and circulation of the warrant preclude any state, including Belgium, from executing it.

3. to require Belgium to recall and cancel the warrant and to inform the foreign authorities to whom the warrant was circulated that Belgium renounced its request for their co-operation in executing the unlawful

warrant.

The Congo argued that the warrant was unlawful ab inititio, that it was fundamentally flawed, and therefore could have no legal effect, and that the termination of the official duties of Mr Yerodia in no way operated to efface the wrongful act and the injury flowing from it, which continued to exist. The purpose of its request was reparation for the injury caused; requiring the restoration of the situation which would in all probability have existed if the said act had not been committed. It stated that as the wrongful act consisted in an internal legal instrument, only the withdrawal and cancellation of the warrant could provide appropriate reparation.

Belgium maintained that a finding by the court, that the immunity enjoyed by Mr Yerodia as minister for foreign affairs had been violated, would in no way entail an obligation to cancel the arrest warrant, as Mr Yerodia was no longer the Congo's minister for foreign affairs and there was no suggestion that the warrant infringed the immunity of the Congo's minister for foreign affairs at the time the case was heard.

The court said that the issue and circulation of the arrest warrant by the Belgian authorities engaged Belgium's international responsibility. The Court considered that its findings constituted a form of satisfaction making good the moral injury complained of by the Congo. The court said that in this case "*the situation which would, in all probability, have existed if the illegal act had not been committed"* could not be re-established merely by a finding by the Court that the arrest warrant was unlawful under international law. The warrant was still extant, and remained unlawful, notwithstanding the fact that Mr Yerodia had ceased to be minister for foreign affairs. The Court said that Belgium must, by means of its own choosing, cancel the warrant in question and inform the authorities to whom it was circulated.

This decision of the court that the warrant should be cancelled was criticised in the joint separate opinion of Judges Higgins, Kooijmans and Buergenthal, because the restoration of the status quo was not possible, as Mr Yerodia was no longer minister for foreign affairs. These three judges were of the opinion that the court erred in requiring the withdrawal of the warrant, as there was no continuing international wrong. This argument was rejected by a majority of ten judges to six, and Belgium was ordered to cancel the warrant.

The decision of the court relating to issuance and circulation of the warrant was by a majority of thirteen to three, and one of the dissenting Judges was ad hoc Judge Van Den Wyngaert, appointed by Belgium. This is a powerful statement by the court, and it is submitted that this judgment has crystallised customary international law on this point. Ministers for foreign affairs are inviolate and immune, and a warrant should not be issued for the arrest of a foreign minister even if it is not intended to be executed until he has left office. The warrant should not be issued, rather than withdrawn when immunity is claimed.

The ICJ at paragraph 51 of the judgment said that a there is a "firmly established rule of customary international law that certain holders of high ranking office in a State, such as the head of State, head of government and minister for foreign affairs, enjoy immunities from the jurisdiction of other States, both civil and criminal." By using the term 'such as' the ICJ was not limiting the high state officials entitled to immunity to those three offices, rather those three offices are quoted as examples of those to whom such immunity is granted. One possible explanation for this sentence is that the function of foreign ministers may be undertaken by other officials. For example the US Assistant to the President for National Security Affairs is the chief adviser to the US President on national security issues. This a position which has no direct equivalent in other states, but the function of the post is comparable to that of a foreign minister, and therefore, on the reasoning of the ICJ the holder of the post should be entitled to immunity ratione personae.

E. Conclusion

Heads of state, heads of government and foreign ministers have immunity from prosecution before the criminal courts of other states. They are immune because of the position they occupy. Such immunities are granted to enable the officials to perform their role on behalf of their state. These officials who are entitled to immunity ratione personae are easily identifiable, and there is a coherent reason for their immunity. There are indications that state immunity ratione personae may extend to other ministers or other state officials if they are representative of their state, and if their functions are such that being involved in foreign affairs is an intrinsic part of their role. State immunity ratione personae is the immunity of the state, in that it can be waived by the state, but it a separate entitlement to immunity from that of the state, and it is not dependent upon whether the state itself is immune. Immunity ratione personae is a wide immunity in that covers all conduct before or after an official took office. Those entitled to it are completely immune and inviolable.

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