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Meeting Summary: International Law Programme

Prosecuting Former Heads of State for International Crimes

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24 November 2011

INTRODUCTION

Immunities can stand in the way of the prosecution of heads of state and other senior officials in foreign courts. Following the *Pinochet* case there was an expectation that international law would develop to establish firmly an exception to the immunity of former officials in respect of prosecution for international crimes. The event was organised to discuss developments in this area since *Pinochet*, particularly in the light of the work being done by the International Law Commission and its Special Rapporteur. The event also saw the launch of a new Chatham House briefing paper, *Immunities for International Crimes? Developments in the Law on Prosecuting Heads of State in Foreign Courts* which is available on the Chatham House website.[1]

The participants included representatives of NGOs, embassies, academics and practising lawyers.

[1] http://www.chathamhouse.org/publications/papers/view/179865

SUMMARY OF MEETING AND DISCUSSION

Joanne Foakes, Associate Fellow, International Law Programme, Chatham House

The question of whether immunity should apply for international crimes in criminal proceedings against foreign state officials, including heads of state and other very high-ranking officials, has been a controversial issue since the Pinochet case.[2] It is a very sensitive topic for many states and one which it is all too easy to characterise in political terms. It is also an area where two important state objectives collide: the need to combat impunity for serious international crimes and the need to ensure the smooth conduct of international relations.

Questions regarding the immunities of foreign leaders and other foreign state officials arise more frequently now than they once did because of the development of universal jurisdiction for a growing number of international crimes, including war crimes and crimes against humanity. Most people now recognise that the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (the **Torture Convention**) and, in particular, its provisions allowing states parties to prosecute persons accused of torture anywhere in the world, lay at the heart of the *Pinochet* case. The development of international conventions such as the Torture Convention that allow for universal jurisdiction (or something very close to it) over a number of serious crimes has played a crucial role in bringing this issue to prominence. The nature of the crimes concerned is also significant. In some cases, such as torture and enforced disappearance, the crime by definition can only be committed by or with the acquiescence of a state official. In other cases, such as genocide and grave breaches of the Geneva Conventions, private individuals can, in theory, commit the crimes, but the primary focus of the conventions has been state conduct. None of the conventions relating to these crimes contain any articles on immunity and it is probable that their connection with the general rules on immunity was never examined. There is, however, an obvious tension between such international conventions and the crimes they cover and the traditional immunity enjoyed by state officials in regard to acts carried out in their official capacity.

Following the House of Lords ruling in the *Pinochet* case in 1999, which received extensive coverage around the world, it would not have been unreasonable to assume that, within a short period of time, similar cases would be brought in the UK and elsewhere which would enable the rules on

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2 *R v Bow Street Magistrates' Court ex parte Pinochet (No. 3)* [2000] AC 147.

immunity to be clarified and fully worked out. For various reasons that has not happened and, as stated in the advisory report recently commissioned by the Netherlands Foreign Ministry, this is "an area of international law that is presently very much in flux".[3]

The only point of relative clarity has been the decision of the International Court of Justice (**ICJ**) in the *Arrest Warrant case*[4] which ruled that the personal immunity enjoyed by an incumbent head of state, head of government and foreign minister was not subject to any exception with regard to international crimes. The decision was not, however, concerned with the separate functional immunity enjoyed by all state officials in respect of acts carried out in the exercise of their official capacity.

Academics and jurists who have commented on the issue directly have reached a near consensus that, for international crimes, an exception to immunity has emerged or is emerging, at least as regards functional immunity. This view has received some support both judicially and in public statements from governments. However, a study of state practice and decisions of national courts and prosecuting authorities reveals a somewhat patchy and inconclusive picture. There have been a significant number of attempts to prosecute foreign state officials and former officials for international crimes (particularly within Europe) but the outcome has been very variable and the number of successful convictions, usually involving relatively junior officials, very small. In many cases, it has not been clear whether the national court has fully considered the issue of immunity or whether, for example, it could be argued that the home state of the official concerned had impliedly waived any immunity. The diverse procedural and jurisdictional rules that apply in different countries have also served to obscure the real reasons why some cases have proceeded and others have not. In this atmosphere of general uncertainty, many state prosecuting authorities have shown a distinct reluctance to proceed against foreign state officials particularly where the official concerned was very senior and his home state is likely to object. As a result, it has been difficult to demonstrate with any certainty what the rules are.

In this context, the work of the International Law Commission (**ILC**) could play a crucial role. The topic 'Immunity of state officials from foreign criminal jurisdiction' has been included in its work programme and extensive

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[3] Advisory Committee on Issues of Public International Law, Advisory Report on the Immunity of State Officials, Advisory Report No. 20, The Hague 2011.

[4] *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium)*, Judgment, ICJ Reports 2002

preparatory work has already been undertaken. This is sort of situation of legal uncertainty where its diversity and expertise might be able to strike the delicate balance needed, although this will not be an easy task.

The ILC has yet to reach agreement on some fundamental issues. One question is from what general perspective should the Commission approach the topic. The rules on the immunity of state officials from foreign criminal jurisdiction are governed largely by customary international law. The ILC needs to decide whether to focus on existing international law as revealed by a close study of state practice (*lex lata*) or embark on an exercise of progressive development of the law in response to changes that have occurred (*lex ferenda*).

The rather mixed and inconclusive nature of current state practice and judicial decisions could reasonably lead to different conclusions as to what the existing law is. One state might argue that in limiting immunity for international crimes it was merely recognising a rule which has already emerged whilst another might see it as progressive development. In practice, most topics usually involve aspects of both codification and progressive development of the law. However, in this context, if it were to be accepted that only progressive development is involved then the very sensitive and competing policy interests in play may make it very difficult for agreement to be reached.

There are many substantive issues facing the ILC in dealing with this topic, and three in particular which are especially crucial.

The first is how far personal immunity should extend. Personal immunity refers to the extensive immunity derived from the office of the individual concerned which is wide enough to cover both public and private acts and which is time-limited so that once the individual has left office, the immunity ceases. On this issue the Special Rapporteur has used the decision of the ICJ in the *Arrest Warrant case* as a basis for his work and has, therefore, taken care to distinguish the two types of immunity – personal and functional. On the former, his reports have, perhaps unsurprisingly, adopted the conclusions of the ICJ insofar as the 'troika' of top officials are concerned (although even this remains controversial for some ILC members particularly as regards Foreign Ministers). In addition, the Special Rapporteur has indicated his view that such personal immunity should extend to other high ranking officials although it should be confined to a narrow circle of those officials. This is an interesting illustration of the Special Rapporteur's general approach of requiring explicit legal rulings to demonstrate any development of the law where he supports the existing position.

In determining the question of whether personal immunity should extend to certain high-ranking officials other than the 'troika', an examination of the underlying rationale for such immunity is important and in this context the ILC will need to grapple with the law on special missions. This is a separate topic but with a close bearing on the issue of personal immunity for certain high-ranking officials. Inevitably, those against any further extension of personal immunity will argue that the matter is already taken care of by the law on special missions. It is notable that in recent years states have increasingly granted personal immunity to high-level visitors who are part of special missions. There have been several cases of this in the UK, most recently when the Director of Public Prosecutions refused consent to arrest Tzipi Livni, the Israeli opposition leader who was visiting London, on the basis of a certificate from the Foreign and Commonwealth Office stating that she was part of a special mission.

The most difficult and contentious issue facing the ILC is probably the question whether immunity is or should be limited for international crimes and, if so, what the particular basis or rationale for that exception should be. There has been less focus so far on this particular aspect although that has not stopped the Special Rapporteur from concluding in his reports that the failure to build homogeneous practice in national courts post *Pinochet* means that it is difficult to talk of any exception having developed into a norm of customary international law. Others within the ILC have suggested that this approach does set the bar very high.

It is interesting to contrast the Special Rapporteur's position on this issue with the one he adopted on the personal immunity of officials other than the troika. When looking at whether there is an exception to immunity, he appears less willing to consider any arguments based upon logic such as the development of universal jurisdiction in relation to crimes which would be virtually coextensive with any official act immunity. Instead he suggests that it is necessary for those arguing for a limitation to point to widespread and homogeneous legal rulings to that effect. Essentially the approach of the Special Rapporteur is to identify immunity as the general, blanket rule from which one must then prove that an exception has fully emerged. Some other members of the ILC have criticised this approach at least in regard to functional immunity for serious international crimes and have questioned whether it is correct to regard the general rules on immunity as possessing this comprehensive, blanket character which automatically puts all the onus on those seeking to demonstrate an exception. It is also notable that in this respect there are inconsistencies even in the Special Rapporteur's own analysis as he appears to have identified a category of crimes committed by

foreign state officials for which immunity has never existed, namely crimes committed in the forum state.

Professor Georg Nolte, Member of the UN International Law Commission

The preliminary debates at the ILC in the spring and summer of 2011 and of the UN General Assembly Sixth Committee in October 2011 reflect an interesting discrepancy in the views expressed within the two bodies as to whether there is or should be an exception to functional immunity for international crimes in foreign court prosecutions. In the ILC debate, approximately twelve members had a tendency to acknowledge the exception, three did not express a firm view and three were more sceptical. In the Sixth Committee debate, of the thirty-five states which took the floor, nine appeared to be in favour of the exception, thirteen did not express a firm view and twelve appeared to suggest that the exception should not exist. There was a general view that the *Arrest Warrant case* will not be overturned and therefore the possible exception to immunity was only considered in relation to functional immunity of former, and not sitting, heads of state. The states in favour of the exception were all European, together with New Zealand; those against included some European states as well as states from other parts of the world. Interestingly, France, Germany and the United Kingdom were all sceptical as to whether an exception to the functional immunity of former heads of state for international crimes has developed in customary international law.

An important part of the preparatory debate in the ILC is the preliminary question as to whether the Commission should take a *lex lata* or *lex ferenda* approach. As the mandate of the ILC includes both, this is a choice for the Commission to make. A *lex lata* approach means that the ILC identifies and articulates what is already law, based on existing statements and judgements. This then provides law which national courts can apply as codified international law. An example of this is the Articles on State Responsibility which set down what was largely already established and accepted state practice. Under a *lex ferenda* approach the ILC prepares text which it believes reflective of developing law, which will only become law once it is accepted by states. If the ILC prepares a treaty in relation to functional immunity including an exception for international crimes it is only useful if relevant states will ratify it. Otherwise it becomes a counter-productive exercise.

Those in the ILC in favour of a core crimes exception to functional immunity have suggested that the ILC take a *lex ferenda* approach but, rather than drafting a treaty, set out what it considers the law should be and in this way develop and persuade national courts to move on from the traditional law. Others think that the ILC should look at the established law and unless any

exceptions are clearly established, the residual position is immunity. This was the view of the Special Rapporteur. A majority of those States in the Sixth Committee which seem to favour the exception to functional immunity were clear that the ILC should take the *lex lata* approach and this is likely to have an impact on how the Commission deals with the issue.

In terms of substance, it is very difficult to achieve a compromise regarding an exception to functional immunity for core crimes. There are two main arguments put forward in favour of the exception. The first is that *jus cogens* is a higher law than ordinary customary international law; the violation of a *jus cogens* principle should not attract immunity. This is too general a statement and was dealt with by the United Kingdom House of Lords in *Jones v Ministry of the Interior of Saudi Arabia,*[5] albeit in relation to civil jurisdiction. The second argument, which is more effective, is that some treaties, although they do not directly mention immunity, limit it implicitly. In the *Pinochet* case it was argued that according to the definition in the Torture Convention the crime of torture *can* only be carried out by a state official and that the purpose of the Convention would be totally frustrated if immunity was applied; this line of reasoning was accepted by the court. There may be other conventions that this line of reasoning could be applied to.

Care must be taken to make sure that there is a balance between the relative importance of immunity and sovereign equality as the basis of immunity on one hand and the fight against impunity and the values protected by norms prohibiting international crimes on the other.

A common argument is that there is a trend in international law towards an exception for the functional immunity of former heads of state in national courts where they are accused of international crimes, but in reality *Pinochet* did not start an immediate expansion of this exception. It is important to note that very soon after *Pinochet* the *Al Adsani*[6] and *Arrest Warrants* cases were heard in the European Court of Human Rights and the ICJ respectively and, while these dealt with different situations, the courts made it clear that *Pinochet* did not mean a general sweeping away of state immunity.

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[5] *Jones v Ministry of the Interior of the Kingdom of Saudi Arabia* [2006] UKHL 26 (UK House of Lords).

[6] *Al-Adsani v. The United Kingdom*, 35763/97, Council of Europe: European Court of Human Rights, 21 November 2001.

Christopher Keith Hall, Senior Legal Adviser, Amnesty International

The perspective of a non-governmental organisation that works to ensure that victims of crimes under international law such as genocide, crimes against humanity, war crimes, torture, extrajudicial executions and enforced disappearance receive justice, truth and full reparation is somewhat different from that of a state official or member of an expert legal body in an international organisation.

It is a problem from the perspective of the victim that international criminal law, along with human rights law, is seen as part of public international law and, therefore, subject to rules and considerations that are more appropriate with respect to relations between states than between individuals and states or between individuals. At some point in the next few decades, international criminal law and human rights law may well be considered separate from public international law and subject to largely different rules and considerations, solving many of the problems that arise today.

It is also a problem that with regard to serving officials, the balance between the state's interest in continuing to conduct effective diplomatic relations and justice for the victims almost always tips in favour of the state rather than the victim. It is questionable whether it can really be argued successfully that it is more catastrophic for peaceful relations between states that high level suspects risk arrest when they travel than for them to travel freely with impunity, often continuing to commit the crimes in question, as has been seen with President Omar Al-Bashir of Sudan.

It should not make any difference whether a person accused of committing a crime under international law is tried in an international court, an internationalized court, or a national court. The evidence is not there to suggest that trials in international courts and internationalized courts, such as the Extraordinary Chambers in the Courts of Cambodia, the Special Panels for Serious Crimes in Dili, Timor-Leste or the UNMIK and EULEX international panels in Kosovo are or were fairer, more impartial and less corrupt than trials in national courts. Regardless of the forum, it cannot be justified to give a president personal immunity from prosecution for life.

In the *Arrest Warrant* case, the International Court of Justice held that Belgium had failed to prove that an exception to a supposed rule of customary international law of immunity for a foreign minister with respect to war crimes and crimes against humanity existed at the time of the act in question, when the Court itself could not establish that such a rule had ever existed in state practice. Many commentators are of the view that this was a

flawed decision and that there has been too much widespread acceptance of it, allowing a form of judicial legislation in relation to immunity. The Court contended that there were four alternatives to immunity which were sufficient to ensure that senior officials could not act with impunity: trial in the home state of the official, waiving of immunity by the home state, prosecution for 'acts committed during that period of office in a private capacity' or trial in an international court. These alternatives are generally either unavailable or useless, and the possibility of prosecuting an official for acts done in a private capacity excludes crimes under international law such as war crimes and crimes against humanity.

The increased granting of immunity to individuals by conferring special mission status on them is a pernicious development. Under the Convention on Special Missions, a person who is part of a special mission must represent their state and the status must be agreed before they travel. Such a person is usually a diplomatic officer and part of a high level mission representing the sending state in a similar way to a permanent diplomatic mission. Recently, however, these requirements have been relaxed and special mission status has been granted to lower-ranking officials and, recently, to a member of the opposition of a foreign state when the FCO found out that the Director of Public Prosecutions was considering issuing a warrant for her arrest for grave breaches of the Fourth Geneva Convention. This was despite the fact that the treaty prohibits a state party from absolving "any other High Contracting Party of any liability incurred…by another High Contracting Party in respect of [grave] breaches"[7]. Regrettably, national courts in most countries refuse to look behind such grants of special mission status, deferring to the executive.

Amnesty International has provided extensive comments on the second report of the ILC Special Rapporteur. Amnesty International is of the view that the ILC should build on its position of the past six decades during which it has affirmed that foreign officials of any rank are not only subject to criminal responsibility if they commit genocide, crimes against humanity and war crimes, but also that they are not entitled to immunity from prosecution for such crimes in foreign national courts, not just international criminal courts. The 1950 Principles on International Law Recognised in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal – applicable in national and international courts - included a clear statement that the ILC was treating criminal responsibility and the absence of immunity as a unified

[7] Article 148 (common to all four Conventions), Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War (adopted 12th August 1949, entered into force 21st October 1950).

concept. The 1954 Draft Code of Offences against the Peace and Security of Mankind, which was intended to apply as a transitional measure in national courts until the establishment of an international criminal court, did not include any indication that the ILC wanted national courts to be unable to act when the international criminal court was unable to. This principle was reiterated in the 1996 Draft Code of Crimes against the Peace and Security of Mankind . It stated that national courts have concurrent jurisdiction with international courts and that '[i]t would be paradoxical to allow the individuals who are, in some respects, the most responsible for the crimes covered by the Code to invoke the sovereignty of the State and to hide behind the immunity that is conferred on them by virtue of their positions particularly since these heinous crimes shock the conscience of mankind, violate some of the most fundamental rules of international law and threaten international peace and security."

Discussion

Georg Nolte

The comment that the ILC should build on its past position against impunity is misleading, because when the ILC produced the 1950 rules it assumed that these would be applied to an international criminal jurisdiction which was not yet established. Similarly, the draft code of crimes was supposed to become an international treaty and if states became a party then they would accept the terms of the treaty and renounce the customary international law of immunity.

Special missions have not so far been a focus of the ILC. Assuming that there is customary international law recognising the status of special missions, the conferring of an ad hoc immunity should only be for persons on serious official business and not just used to provide a political cover to someone who may not have entered the country on official business. Nolte assumes that Courts in Germany would inquire about whether certificates are well founded and whether the consent for the special mission was given beforehand and not just when the government discovered that the person was in the country and that a prosecution was underway. It is important to find a way to balance the different interests at stake.

In response to a comment that political repercussions can affect prosecutions in different countries (Slobodan Milosevic, for example, would probably have preferred to be tried in a non-NATO country) **Georg Nolte** agreed that the issue as to whether national courts should have the power to prosecute international crimes in certain contexts is complex.

A question was asked about whether the crime of aggression should be added to the list of possible exceptions to immunity, in view of the link with the actions of state official as with the definition of torture. **Christopher Hall** recalled that a year ago, at the first review conference, it was decided to amend the Statute of the International Criminal Court by defining the crime of aggression, although this amendment is not yet in force. At national level there are some states that have defined a form of the crime of aggression as a crime under national law and many of these have provided for universal jurisdiction. The same arguments in favour of removing immunity used in relation to other international crimes would apply to the crime of aggression but it is an area of law that is not well developed. In the 1996 Draft Code the ILC focussed on the treatment of war crimes, crimes against humanity and genocide as national crimes and treated aggression separately on an international level. The law surrounding the crime of aggression is very

complex and it is hard to know what the rule of immunity in relation to a case would be in national courts today.

A question was raised about how state or former state leaders who are involved in active acquiescence in relation to torture and genocide (including leaders of liberal democracies which at one time, for example, supported Saddam Hussein) should be treated. **Georg Nolte** stated that there is a new debate about establishing responsibility in international law in relation to aiding and assisting. Article 16 of the draft Articles on State Responsibility covers this and it has been discussed in the past decade with respect to the attack against Iraq. An argument has been made, for example that while Germany did not participate militarily in the invasion of Iraq it did provide airports and other forms of support and that this action could entail state responsibility (assuming the attack violated international law).

It is a separate question whether this concept is included in provisions that establish individual criminal responsibility. The language in the Convention on the Prevention and Punishment of the Crimes of Genocide (**Genocide Convention**) is not limited to the main perpetrators and includes a provision which creates an obligation for states to criminalise aiding genocide. This is a point that should be discussed further.

The comment was made that immunity is only a limited aspect of a very wide issue which has jurisdiction at its heart, an area that international law has wrestled with. Universal jurisdiction remains the subject of disagreement, and prosecutions for international crimes under universal jurisdiction have been largely by western countries in relation to officials from less developed states. **Christopher Hall** stated that Amnesty International has recently published a preliminary survey of the universal jurisdiction legislation in states.[8] It found that an overwhelming majority of states have designated at least one of the international crimes as a crime under national law and provided courts with universal jurisdiction. Until recently there was a failure by police authorities in the less developed world to open investigations and initiate prosecutions in relation to international crimes, but this is changing. There are two universal jurisdiction cases pending in Argentina, while Rwanda has indicated that it is willing to exercise jurisdiction over the former President of Chad and an in South Africa an attempt to investigate a Zimbabwean official for torture is under judicial review.

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[8] Amnesty International 2011, Universal Jurisdiction: A preliminary survey of legislation around the world. Available at http://www.amnesty.org/en/library/asset/IOR53/004/2011/en/d997366e-65bf-4d80-9022-fcb8fe284c9d/ior530042011en.pdfb [Accessed 25 November 2011].

The comment was made that if a national court tries a foreign national for an international crime committed abroad, the victim, evidence and witnesses are all likely to be abroad and the court will have to deal with a foreign language and legal system. In the light of such obstacles as these would the courts be able to conduct a trial according to proper standards of administration of justice, if the exception to immunity does exist?

Georg Nolte pointed out that most states give themselves jurisdiction to prosecute crimes which have been conducted against their own nationals abroad and there is no concern that the procedures are not adequate because the evidence is abroad. Proper administration of justice is crucial, including the need to acquit no matter how horrendous the crime if there is not enough evidence, but the location of the evidence should not be an insuperable problem. **Christopher Hall** added that the difficulties of evidence being located abroad arise in relation to a whole range of crimes such as drug trafficking and money laundering. Crimes under international law have a special dimension in that all states have a shared responsibility to make sure that crimes are investigated and, if there is sufficient evidence, prosecuted. The only reason that universal jurisdiction cases arise is because the territorial state or state of the suspect's nationality has failed to investigate or prosecute. That state can then choose to either cooperate or undertake the investigation and potential prosecution itself. A problem that does need to be addressed is in relation to mutual legal assistance and extradition for crimes under international law. There are legal and practical obstacles to effective universal jurisdiction for international crimes, but there is also a lack of political will.