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After Pinochet: developments on head of state and ministerial immunities

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SPEECH BY H.E. JUDGE ROSALYN HIGGINS,
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AT THE INCORPORATED COUNCIL OF LAW REPORTING
"AFTER PINOCHET: DEVELOPMENTS ON HEAD OF STATE AND MINISTERIAL IMMUNITIES "

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Thank you for the invitation to deliver the fifth annual Law Reports lecture. I know what very distinguished people have given this before me, which makes my task the more daunting. But I am delighted to give this lecture at the request of Nicholas Chambers with whom I spent hundreds of happy (and not so happy) hours on the International Tin Council cases.

It has been explained to me that the practice for this important lecture is to take a case reported in the Law Reports and use it as a vehicle for further ruminations. As you can see, I have chosen ***Ex p Pinochet Ugarte (No 3)*** **[1999] 2 All ER 97, [2000] 1 AC 147** as my launching point. But I should at the outset confess that it really is no more than that.

This is not just because there are in this hall tonight so many who have been involved, whether as Bench or as Bar, both in the Pinochet litigation and in the subsequent, and indeed very recent, case law in England. It is also that my objective is somewhat different. I will wish to explain how very important in the development of the international law on immunity is the role of national courts. And I will hope to explain something of how the important issues of international law relating to jurisdiction and immunity have, since the handing down of *Pinochet*, been evolving in a variety of leading courts.

But to come back to the required starting point for this evening: General international law and international treaties received into domestic law are part of the law of the land. The *Torture Convention 1984* entered English law by virtue of the *Criminal Justice Act 1988***.** In *Pinochet 3*, the House of Lords was concerned with the appropriate response to international arrest warrants issued in Spain for Senator Pinochet, who happened to be present in England, to stand trial for torture. These were followed by an extradition request. Both issues of jurisdiction and of immunity were involved. As to the former, the question was whether alleged acts of torture could qualify as extradition crimes under the UK *Extradition Act* 1989. This entailed the further question of whether universal jurisdiction meant that torture committed outside of the UK was already a crime punishable under UK law, before any statutory basis of jurisdiction was available. As to the

latter, the question was whether Pinochet could receive immunity as an ex-Head of State in relation to these offences, allegedly committed while he was Head of State.

Some circumstances changed between the Divisional Court Judgment in 1998 and later phases of the case. Important, but divergent opinions were rendered in *Pinochet 1*. And in *Pinochet 3*, a 6-1 majority decided that Senator Pinochet could not benefit from immunity for the specific torture claims then under consideration. But there were variations in the reasoning.

The events surrounding this litigation were at the time regarded as momentous. These types of cases are now arising thick and fast, and in different forms. Sometimes the respondent State itself has sought the extradition to it of the alleged offender (*Arrest Warrant*). Sometimes, as in the recently decided *Jones v Saudi Arabia* case, the issue is whether a civil action may be brought in the courts of one State against officials of another State and whether immunity exists in respect of those officials and their alleged deeds. These issues have also been arising in human rights treaty bodies such as the European Court of Human Rights, which has had to decide a rather specific question, namely, whether the application of the international law rules of immunity in the English Courts was an unwarranted limitation upon another right provided for in that *lex specialis* – the right of access to the Courts.

Context must inevitably play its role in these different scenarios. I have a further preliminary point to make: to address the great issues of immunity without a sense of what is happening in regards an expanding international jurisdiction is to miss half of the story, and to risk decision-making without relevance to context.

At the same time, there must also be a sufficient core understanding of the issues and concepts concerned for us to feel certainty in the application of the law and the values it protects. That being said, the issues and concepts are many in number. They are also interrelated in the sense that the answer to one necessarily affects the answer to another.

Let me briefly list what I see as today's big problems in this area of the law:

(1) Is there under customary international law a universal jurisdiction that States may exercise over the most grievous offences in international law? Or is the exercise of universal jurisdiction limited to treaties where it is expressly envisaged? (and indeed, obligatory -

though here we are in fact speaking of a jurisdiction that is not universal jurisdiction properly so called).

(2) Does the establishment of new the international criminal courts suggest that States intend these offences to be tried only in these, and not by national courts?

(3) Conversely, does the non-availability of immunity for such offences in the *Torture Convention* and *Genocide Convention* and in the Statutes of the new international criminal courts indicate that there is now also a no-immunity-rule for such offences in general international law?

(4) Do the answers to these questions depend upon whether the defendant is the Head of State or other Minister?

(5) Can there be different answers to these questions according to whether the case before the national court is a criminal or civil case?

(6) Is any immunity that a Head of State or Government Minister has, retained after he or she ceases to be in that office?

(7) Is it correct today to speak of absolute immunity as being "the rule", and exceptions needing to be specifically demonstrated in international and/or national law?

(8) And are there reasons of law and judicial policy which make immunity unavailable, in customary international law, for egregious human rights offences?

Pinochet 3 has addressed in particular the first and the third of these queries. The recent judgment in *Jones v. Saudi Arabia* has addressed the third, fourth, fifth and eighth of these problems.

I will tonight confine myself to offering some thoughts on the first, second and sixth of these problematic issues.

As we turn to look at the international law on these questions, one point of importance has to be noted. In the related fields of jurisdiction and State immunity – as in almost no other field of international law – the role of national courts and legislation has a very particular significance. The potential for this was already recognised in the Statute of the International Court of Justice. Article 38, which effectively states the sources of law for the Court to apply, provides that the Court shall apply, *inter alia*, "international custom, as evidence of a general practice accepted as law". The process of identifying custom involves a close examination of State practice, including national legislation. Article 38 also state that the Court can look to "judicial decisions" – note, not "international judicial decisions" - as a subsidiary means for the determination of rules of law. So

there we have it. National courts look at us, and in certain areas of international law, we look at national courts.

Let me make the point by turning to the ICJ's ***Arrest Warrant* case**.

In 2001 we found ourselves, in somewhat unusual circumstances, in the business of State immunity law. Although immunity is very much a question of international law, we see the issue very rarely. The DRC applied for a Declaration by the Court that various actions of Belgian authorities violated customary international law.

An international arrest warrant had been issued by a Belgian investigating judge of the Brussels Tribunal de première instance against Mr. Yerodia, the Minister of Foreign Affairs of the Congo. It sought his provisional detention pending a request for extradition to Belgium for alleged crimes constituting "serious violations of international humanitarian law". Unlike the *Pinochet* cases, where the English Courts and the UK Government found themselves caught in a maelstrom not of their own choosing, the Belgian judiciary was itself the initiator of events, acting as it was fully entitled to do under then existing Belgian legislation. Article 7 of the Belgian Law provided that "The Belgian courts shall have jurisdiction in respect of the offences provided for in the present Law, wheresoever they may have been committed".

Yerodia was accused of having made various speeches directly inciting racial hatred - claimed to constitute listed offences under the Belgian Law – before he became Foreign Minister (at which later time the arrest warrant was issued); by the time the case came to Court, Mr. Yerodia had ceased to be Foreign Minister and had became Minister of Education. The Court refused Belgium's request to remove the case from the Court's List in the light of this change.

At issue was the inviolability of an incumbent Minister of Foreign Affairs from criminal jurisdiction. Unlike the *Pinochet* case where the *Torture Convention* was, for the later offences charged, very much at the centre of things, the matter was one of customary international law, crimes against humanity not being covered by any particular convention. But the Court, in an obiter dictum, stated that:

> 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 (at 21).

The Court was obviously speaking in the context of general international law, not in the context of any particular treaty undertakings.

The Congo sought an Order that the arrest warrant should be annulled, on the grounds that it violated a rule of customary international law concerning the absolute inviolability and immunity from criminal process of incumbent Foreign Ministers.

The Congo also contended that, regardless of any immunity issue, the broad international jurisdiction that Belgium had enacted in respect of international crimes also violated international law. In the event, although this point was argued, counsel for both sides were eventually content that the matter should be decided on the immunity issue, this being sufficient to dispose of the matter.

This suggestion was somewhat gratefully accepted by the Court, immunity of an acting Foreign Minister being a rather more straightforward matter than the very complex issue of the status of so-called universal jurisdiction.

Let me pause there to say that the receipt of this Application was rather unexpected, in the sense that when one State believes itself, or a high official, to be immune from the jurisdiction of the courts of another State, the purported exercise of that jurisdiction is usually challenged in the courts of the forum State. Indeed, that is precisely why the ICJ rarely sees such cases. That was never done by the Congo, which came straight to the ICJ with an inter-State case. It told the International Court that to appear in Belgian courts would itself have been a submission to Belgium's jurisdiction. That is, of course, not correct: it is well established everywhere (and not just in our 1978 Act) that to appear to challenge the jurisdiction is not an acceptance of the jurisdiction.

However, no argument was made by Belgium as to any "prematurity" of the inter-State case for resolution by the International Court of Justice.

The issue decided by the International Court in that case was important, but narrow in content. It stated that the immunities entitled to Ministers of Foreign Affairs must be decided on

the basis of customary international law. These immunities were not granted for their personal benefit, "but to ensure the effective performance of their functions on behalf of their respective States" (at 21). The Court then considered the nature of the functions exercised by a Minister of Foreign Affairs. Freedom to travel and freedom of communication was mentioned and it was also said that a Foreign Minister "occupies a position such that, like the Head of State or the Head of Government, he or she is recognised under international law as representative of the State solely by virtue of his or her office" (at 22). At the same time, the Court appeared to back away from the suggestion that, for a Foreign Minister there would be full immunity *ratione personae*, for it continued, "… the functions of a Minister of Foreign Affairs are such that, throughout the duration of his or her office, he or she when abroad enjoys full immunity from criminal jurisdiction and inviolability" (at 22). It added that this immunity and inviolability protected 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" (at 22).

Several points may be noted. Unlike the immunity of a Head of State *ratione personae*, the immunity of a Foreign Minister is for the protection of function. And a claim to exercise jurisdiction in a national court as regards a particular offence is to be measured against the free performance of diplomatic and representational functions. Further, the Court's finding of a violation by Belgium was with respect to infringed immunity from criminal jurisdiction, although the Court had said obiter that its findings would apply also to civil jurisdiction.

An arrest warrant, which seeks to detain a person pending extradition, in principle clearly intrudes upon the functions of a Foreign Minister.

It was put to the Court that, be that as it may, international law now clearly precludes immunity for the most grave offences. To find the answer to the state of customary international law on the matters in issue, the Court had first to decide whether the rules precluding immunity contained in certain treaties and legal instruments establishing international criminal tribunals suggest that immunity is no longer available in customary international law, even to Foreign Ministers, for certain types of international offences.

There were two issues at stake. First, was the recent making of immunity unavailable limited only to where it had been agreed by treaty that it should be unavailable? And other than the Torture Convention and one or two other such treaties, was any such unavailability of immunity for

the gravest offences only accepted in international law where these offences were being tried in international criminal courts established for that purpose?

Belgium answered these question in the negative, saying that these recent examples of the non-availability of immunity were not to be regarded as exceptions, but rather reflected the contemporary trend in general international law.

It was to national courts, and national legislatures, that the International Court of Justice turned to illuminate the position in customary international law as it related to immunities in national courts.

At that time, Judges Kooijmans, Buergenthal and I, when writing out Joint Separate Opinion, found relatively little in terms of national case law and practice. We referred briefly to what we had discovered. But in preparing for this lecture, it became apparent that much has happened in a few short years – both in terms of national case law and national legislation. There seems to have been an outburst of judicial and legislative activity.

This very month, a case was opened in Spain that accuses seven Chinese leaders (including a former President and former prime minister) of genocide, torture and crimes against humanity in Tibet during the 1980s. Also in Spain, the Supreme Court decided that a lawsuit brought by the Falun Gong accusing a top Chinese official of genocide could proceed.

Why should it be that, notwithstanding the wide ratification of the *Torture Convention*, and the establishment of these ICTY, the ICTR and the ICC, there is today so much activity in national courts? It may be said that these cases are simply "political", but it is also the case that not all circumstances where NGOs, and the public generally, feel there should be no immunity are in fact covered by these treaties and bodies. Crimes against humanity still fall under customary international law, and the ICTY and ICTR are limited in their jurisdiction to crimes allegedly committed in the territory of the former Yugoslavia since 1991, and crimes allegedly committed in the territory of Rwanda and in the territory of neighbouring States by Rwandan citizens in the period between 1 January 1994 and 31 December 1994, respectively. And the jurisdiction of the ICC is forward-looking and limited by the principle of complementarity. Non-States Parties are largely protected from its reach because, unless there is a Security Council referral, the ICC may exercise its jurisdiction only if either the territorial State or the State of which the alleged perpetrator is a national is a party to the Statute. It is the national courts that are perceived by

victims, or by human rights activists, as the forum to address all the rest of the major human rights violations that regrettably occur with such regularity.

The practice of national legislatures and courts is suggestive as to the question of universal jurisdiction, and the question of immunity. I shall take each of these in turn.

Universal jurisdiction

The International Court in the *Arrest Warrant* case did not in the event have to decide jurisdictional issues, but views on the status of universal jurisdiction were touched on in individual opinions. It is in issue, once again, in the pending case between the Republic of Congo and France (along with other issues). The phrase is frequently loosely used. Universal jurisdiction is not the same as the principle *aut dedere aut punier* whereby parties to a treaty agree, should an alleged offender be found in their territories, either to try him themselves or to extradite him for trial elsewhere. The *Genocide Convention*, the *Hijacking Convention*, the *Hostages Convention* and the *Torture Convention* are examples. The principle of universal jurisdiction, in contrast, allows every State to exercise jurisdiction over a limited category of offences of universal concern, irrespective of the situs of the offence and the nationalities of the offender and the offended.

The prestigious Institut de droit international meeting in Krakow in 2005, determined that there existed in international law a universal criminal jurisdiction with regard to the crime of genocide, crimes against humanity and war crimes. No such jurisdiction exists in respect of human rights violations more generally. The Institut Resolution also provides that the forum State "should carefully consider and, as appropriate, grant any extradition request addressed to it by a State having a significant link, such as primarily territoriality or nationality, with the crime, the offender, or the victim, provided such State is clearly able and willing to prosecute the alleged offender".[1]

A recent decision in Spain took a less constrained view than that of the Institut, apparently making Spanish courts among the most open in the world to transnational prosecutions. In September 2005, in its judgment on the *Guatemala Genocide* case, the Constitutional Tribunal reversed a series of earlier decisions and found the complaint against a group that included former presidents and defence and interior ministers, admissible in its entirety. In doing so, it strongly endorsed broad universal jurisdiction. It found that no nexus or tie to Spain – nor the presence of the defendant, the nationality of the victims, or Spanish national interest – was needed to initiate a

[1] http://www.idi-iil.org/idiE/resolutionsE/2005_kra_03_en.pdf.

complaint. It also rejected the idea that in order to proceed, complainants needed to show that trial in the territorial state was not possible.

The *Guatemala Genocide* case illustrates how significantly Spanish judicial thinking has changed through time: from subsidiarity, to the need for a nexus to the forum State, to a broad view of universal jurisdiction. When Judge Guillermo Ruiz Polanco of the Audiencia Nacional first agreed to open an investigation into the case in March 2000, he found that Spanish jurisdiction was appropriate because the local courts had not acted. He introduced the notion of "subsidiarity" into the case – universal jurisdiction is required and justified when domestic courts have failed to address a particular matter themselves. The full court of the Audiencia Nacional then accepted this subsidiarity principle but held that it was not met as there was insufficient evidence that the Guatemalan courts were unable or unwilling to prosecute. This decision was then partially overturned in an 8-7 vote by the Spanish Supreme Tribunal where the majority based their decision on the nexus requirement. They held that only cases with a clear tie to Spain could proceed, namely, cases involving victims of Spanish ancestry (and perhaps for refugees residing in Spain); all the genocide charges were dismissed. In their view, extraterritorial jurisdiction, when not authorised by the UN or regulated by a treaty, required a point of contact with national interests. Such a connection to state interests creates legitimacy and rationality in international relations and expresses respect for the non-intervention principle. According to the seven dissenters, universal jurisdiction in cases of genocide was justified, being the only effective means of avoiding impunity. The image they invoked was of the State acting "in representation" of the international community. A tie to Spain was merely an element in applying this rule, not a jurisdictional prerequisite.

However, when Prime Minister Zapatero took office in 2004, the Public Prosecutor's Office changed its hitherto hostile stance towards universal jurisdiction cases and started supporting victims' groups in litigating existing cases. This brings us back to the 2005 decision of the Constitutional Tribunal, which largely mirrored the dissent of the Supreme Tribunal. The Constitutional Tribunal found it "highly debatable" that the nexus requirement is to be found in customary international law. As for the immunity of the former Presidents and Ministers, the Constitutional Tribunal stated - correctly - that the International Court's *Arrest Warrant* case had been explicitly limited to the immunity of a sitting Foreign Minister.

In November 2004, a complaint was filed in Germany against Donald Rumsfeld and other military officials over events in the Abu Ghraib prison by the New York-based Centre for Constitutional Rights and a Berlin human rights group on behalf of four Iraqis. Germany was chosen due to universal jurisdiction being available under its *Code of Crimes Against International*

Law. In February 2005, the German prosecutor decided not to take the case on the ground that he believed that the US, which had primary jurisdiction for prosecuting the alleged crimes, would itself investigate the matter. This decision was based on the logic of complementarity as laid down in the ICC Statute. This principle provides that States with primary jurisdiction have the first responsibility and right to prosecute international crimes and action elsewhere may only be taken if these national legal systems prove unwilling or unable to prosecute. This was appealed in September 2005, Stuttgart's Higher Regional Court finding that the prosecutor had an almost complete discretionary power to dismiss the complaint. A similar case was brought in Belgium against retired General Tommy Franks in Belgium for the invasion of Iraq. It was dismissed when the expansive Belgian universal jurisdiction law was soon after modified in 2003, as I will discuss a little later.

We should not underestimate the impact of technically unrelated factors. Much of the national legislation that exists in this field has occurred as a result of the implementation of the Rome Statute of the International Criminal Court. The ICC website lists the national implementing legislation of 41 states parties. Judicial decisions regarding the exercise of universal jurisdiction now often reflect this concept of "complementarity" found in the ICC Statute even as regards cases totally unrelated to the ICC. The principle is beginning to make itself felt in the area of universal jurisdiction as a matter of general international law.

If the Belgian legislation as it stood in 1999 and the draft German legislation at that time represented a high water mark of a broad assertion of universal jurisdiction for grave crimes, we can today see a clear tendency for more States to arm themselves with the entitlement to assert a universal jurisdiction in these circumstances, but now with explicit discretionary clauses allowing the authorities in the forum concerned not to proceed. The exercise of such discretion often relates to links with the forum State. For example, the German *Code of Crimes Against International Law* introduced in 2002, in response to the formation of the ICC, provides for universal jurisdiction over genocide, crimes against humanity and war crimes, even when the crime has been committed abroad and has no link to Germany. At the same time, Section 153(f) of the German *Code of Criminal Procedure* gives the prosecutor discretion to reject certain cases where there is no link, namely, where neither the victim nor the alleged perpetrator is a German national or the alleged perpetrator is not in Germany (although it does make exceptions for compelling cases). Germany's Justice Minister justified these discretionary limitations by saying that Germany should not act as a "global policeman" in prosecuting all crimes against international law regardless of where they have occurred.

Belgium, whose broad universal jurisdiction law occasioned the events that led to the *Arrest Warrant* case, revised its legislation in 2003. It has now narrowed access to its courts in relation to international crimes committed elsewhere by requiring either that the defendant be present or that the victim be Belgian or have resided in Belgium for at least three years when the alleged crimes took place.

The Netherlands passed the *International Crimes Act* in June 2003 and it closely resembles the revised Belgian law. Article 2 limits jurisdiction by requiring either that the defendant be present in the Netherlands or a Dutch national (this includes becoming a Dutch national after the alleged crime was committed), or that the victim is a Dutch national. In the explanatory memorandum, the Dutch Government explained these limits on the ground that current international law allows, but does not oblige, a State to establish absolute universal jurisdiction.

The UK *International Criminal Court Act* 2001 and the comparable legislation in Canada also provide for the assertion of a jurisdiction on grounds other than universality.

Clearly, none of these is universal jurisdiction, properly understood. We are rather seeing a pattern emerging of non-territorial jurisdiction, broader than hitherto matched by broad prosecutorial discretion not to proceed - sometimes checked also by judicial or executive review. National diplomatic and political interests are factored in. In the case of the UK, Clauses 53 (3) and 54 (5) of the Act require that proceedings for any of these offences may not be instituted in England and Wales "except by or with the consent of the Attorney General".

This expansion of national jurisdiction over such crimes is sometimes treaty-based. For example, the two Afghan officials convicted in The Hague were charged under Dutch laws that flow from the *Geneva Conventions* of 1949 and from the *Torture Convention*, not from general international law. The Hague District Court held that the *Geneva Conventions* of 1949 themselves constitute a basis for universal jurisdiction. It found that the Geneva Conventions include the obligation to penalise "grave breaches" (and, indeed, other violations as well).[2]

Are these trends in expanding national jurisdictions to address international crimes committed overseas a welcome support for human rights? Or are they, as some of those at whom

[2] Case against Heshamuddin Hesam and Habibulla Jalalzoy, Hague District Court, 14 October 2005, Case No. 09/751004-04.

they are directed clam, a latter-day exercise in colonialism? This was the strongest element of resentment in the case that the DRC brought against Belgium at the ICJ, repeated over and over again to us by the Congo in oral pleadings. The ICC has also attracted criticism for the fact that all of its initial cases relate to Africa (Uganda, Democratic Republic of Congo, Sudan and Central African Republic). The ICC's response is that it is charged with the mission of investigating and trying the "most serious crimes of concern to the international community as a whole", and the grim reality is that at the present time mass atrocities are disproportionately occurring in Africa.

Immunity

International criminal jurisdictions, established by treaty or by Security Council resolution, ensure that the assertion of immunity will not preclude the exercise of jurisdiction. The *Torture Convention* does likewise; that, of course, had its important role to play in *Pinochet*.

Let us begin with Heads of State. The situation regarding sitting Heads of State is clear under general international law. The Head of State is seen as personifying the sovereign State and the immunity to which he was entitled is predicated on status.

The practice of national courts clearly reflect the international legal role as regards Heads of State. In 2004, a private application for an extradition warrant against the President of Zimbabwe, Robert Mugabe, was refused by the Bow Street Magistrate's Court. That Court stated that "whilst international law evolves over a period of time, international customary law, which is embodied in our Common Law, currently provides absolute immunity to any Head of State".[3]

A civil suit against President Mugabe was also brought in the United States alleging serious human rights abuses in violation of the *Alien Tort Claims Act*, the *Torture Victim Protection Act*, and international human rights norms. In October 2004 the US Court of Appeals for the Second Circuit ruled that President Mugabe enjoyed absolute inviolability and immunity from US jurisdiction.[4] The US Government intervened in the case filing a "suggestion of immunity" on behalf of President Mugabe, asserting he was entitled to absolute immunity from jurisdiction under general international law as well as diplomatic immunity under the *Convention on Privileges and*

[3] *Application for a Warrant for the Arrest and Extradition of Robert Gabriel Mugabe, President of the Republic of Zimbabwe, on charges of torture under Section 134 of the Criminal Justice Act 1988,* before Bow Street Magistrate's Court, 7 and 14 January 2004, decision of Judge Timothy Workman 14 January 2004 (unreported).
[4] Tachiona v. United States, 386 F.3d 205, 2004 U.S. App. LEXIS 20879 (2d Cir. Oct. 6, 2004) (*Tachiona II*).

Immunities of the United Nations and the *Vienna Convention on Diplomatic Relations* (he was in New York for the UN Millennium Summit when he was served).

Around the same time, a decision was issued by the US Court of Appeals for the Seventh Circuit in respect of a civil suit against Jiang Zemin, the former President of the People's Republic of China, alleged torture, genocide, and other major human rights abuses perpetrated against members of the Falun Gong.[5] The complaint was actually filed when he was still President, but by the time the case was heard Zemin had departed from office. The US Government again intervened to argue that as he was Head of State at the time of filing, Zemin was entitled to absolute immunity from jurisdiction and inviolability from all service of process. The Court held the Government's suggestion of immunity was conclusive and must be accepted.

An early treaty exception to the immunity of Heads of State had been made with respect to genocide. Article IV of the *Genocide Convention* provides that "persons committing genocide . . . shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals". This provision was the centrepiece of the case brought against Ariel Sharon in Belgium. In 2003, the Cour de Cassation noted the importance of Article IV, but observed that Article VI of the Convention provided that such persons may be prosecuted either before the courts in the State where the acts were committed or before an international criminal tribunal. The Court determined that given the absence of an express provision for third States such as Belgium to claim jurisdiction, and given that the exclusion of immunity for such jurisdiction was not provided by customary international law, Belgium could not exercise jurisdiction over a current Head of State for acts of genocide, crimes against humanity or war crimes.[6] It did, however, expressly leave open the possibility of an investigation after he left office. Undoubtedly, there were many elements at work here, including the recent handing down of the ICJ *Arrest Warrant* Judgment, and pressures from the United States regarding the breadth of the Belgian legislation. Belgium immediately complied with the ICJ's order to annul the arrest warrant for Yerodia, and a short time later revised its legislation. These events formed the backdrop to the Ariel Sharon case.

The Constitutional Tribunal of Spain in the *Guatemala Genocide* case saw differently the argument that Article VI of the *Genocide Convention* meant that other jurisdictions were "subsidiary". Rather, the Tribunal found that Article VI simply established the minimum

[5] Wei Ye v. Jiang Zemin, 383 F.3d 620, 2004 U.S. App. LEXIS 18944 (7th Cir. Sept. 8, 2004).
[6] 24 September 2003 (no. P031217F), Cour de Cass. 2e ch., Belgium.

obligations on states and could not be read as an implicit limitation on alternative jurisdictions. For that Tribunal, the obligations to avoid impunity found in customary international law were incompatible with such a limited reading of the *Convention*.

What States have agreed on, when setting up international criminal courts and tribunals to deal with major international crimes, is that immunity will be unavailable. This is achieved through somewhat oblique wording (a fact noted as regards the *Torture Convention*, and found unsatisfactory to displace customary international law, by Lord Goff in *Pinochet 3*). Under the ICTY and ICTR Statutes, the official position of any accused does not relieve that person of criminal responsibility nor does it mitigate punishment (Articles 7(2) and 6(2) of the ICTY and ICTR Statutes, respectively). These Tribunals have not hesitated to indict, try and punish Heads of State and Government, including Slobodan Milosevic, President of Serbia and then President of the Federal Republic of Yugoslavia, and Jean Kambanda, Prime Minister of Rwanda. The ICTY provision is mirrored in Article 6(2) of the Statute for the Special Court for Sierra Leone, which is now about to try the former President of Liberia, Charles Taylor. Article 27 of the ICC Statute provides that the Statute shall "apply equally to all persons without any distinction based on official capacity".

If it is clear that in customary law a Head of State remains immune from prosecution and suit in foreign national courts, there is still the issue of what specific actions in national courts do violate that immunity. What if the Head of State or Senior Government Minister is not the target of the claim as such, but is wanted as a witness? On the docket of the International Court, there is the case concerning *Certain Criminal Proceedings in France (Republic of the Congo v. France)*. It relates to a request by a French investigating judge to examine the Congolese President, Denis Sassou Nguesso, as a witness in an investigation into human rights abuses occurring in the Congo. France does not dispute that President Nguesso is entitled to full immunity from its jurisdiction, but argues that the proposed deposition does not constitute a coercive legal action that would violate these immunities.

In the ICTY, where the immunity issue as such of the accused is settled, the comparable issue of coercive acts as regards persons who under general international law might be regarded as immune, has also arisen. Last year, the Trial Chamber was seized of applications by the Assigned Counsel of Milosevic, for the testimony (and pre-testimony interview) of Tony Blair and Gerhard

Schröder.[7] Assigned Counsel argued that these two individuals possessed information that was necessary for the resolution of specific issues relevant to the Kosovo indictment and requested either a binding order to the Governments of the UK and Germany directing them to provide the witnesses, or a subpoena to Mr. Blair and Mr. Schröder to compel their attendance at the trial. In response, the two States argued that calling Mr. Blair and Mr. Schröder as witnesses served no legitimate forensic purpose and that the official capacity of the prospective witnesses entitled them to certain immunities which may prevent the issuance of a subpoena against them.

The Trial Chamber concluded (paras. 66 and 67) that a party seeking to secure the testimony or pre-testimony interview of a State official must apply for a subpoena. According to the applicable rule of the Tribunal, a subpoena for testimony must be "necessary" for "the preparation or conduct of trial", which in turn means that the application for testimony must have a legitimate forensic purpose and should only be used as a "last resort." The Trial Chamber found that the issuance of a subpoena was not warranted in relation to either Mr. Blair or Mr. Schröder. Because the applications failed on the "necessity" test, the Chamber did not have to consider whether the status of the prospective witnesses as senior State officials would have given them immunity from a subpoena compelling them to attend an interview or testify in a trial before the Tribunal.

Turning from the immunity of Heads of State or Government to the immunity of all kinds of senior officials, a recent ministerial order of the Schweizerische Bundesanwaltschaft is of some interest. The Order of 8 May 2003 refused to allow the "Association for solidarity with victims of the war against Iraq" to bring a suit against George W. Bush, Dick Cheney, Donald Rumsfeld, Colin Powell, Condoleeza Rice, Bill Clinton, Tony Blair, Jack Straw and others for crimes against humanity, genocide and war crimes. The Order stated, *inter alia,* that in the absence of a warrant from an international court or tribunal, President Bush had absolute immunity. The Order then went to the *Vienna Convention on Diplomatic Relations* of 1961 and used Article 31(1) to grant immunity to ministers and "high-ranking persons", noting that international law is not precise about the situation of high-ranking persons and the jurisprudence is evolving. But it should be noted that the language of the ICJ in *Arrest Warrant* suggests that Mr Yerodia might not have benefited from immunity had he been Minister of Education (as he was to become) at the time of the issue of the

[7] ICTY DECISION ON ASSIGNED COUNSEL APPLICATION FOR INTERVIEW AND TESTIMONY OF TONY BLAIR AND GERHARD SCHRÖDER, Case No. IT-02-54-T, 9 December 2005.

arrest warrant. Clearly, the Court had functional-related immunity in mind for Ministers, in contrast to the immunity *ratione personae* in the case of Heads of State.

The "out of office" scenario

I now turn to the difficult question regarding those who are in high office at the time of the offence or the time of the filing of the indictment or the issuance of the arrest warrant, but later no longer hold the previous office.

Pinochet, of course, was precisely such a case. The structure of the *State Immunity Act* 1978 (S. 20(1)) meant that , for a Head of State, the *Diplomatic Privileges Act* 1964 applied rather than the immunity provisions of Section 1 of the Act itself. The *Diplomatic Privileges Act* 1964 gives effect in English law to the *Vienna Convention on Diplomatic Relations*. And Article 39(2) of that provides that:

> When the functions of a person enjoying privileges and immunities have come to an end, such privileges and immunities shall normally cease at the moment when he leaves the country . . . However, with respect to acts performed by such a person in the exercise of his functions as a member of the mission, immunity shall continue to subsist.

Certain of their Lordships in *Pinochet 1* and *3* found these provisions singular. But in any event, this is why, in English law, the focus is on what acts of ex-Heads of State can be said to have been "in the exercise of his functions". That is a great debate, on which important, and divergent, views have been expressed. It is also a debate in which I do not propose here to enter.

I confine myself to saying that this perception of the relationship between the *Vienna Convention on Diplomatic Relations* and the status of a Head of State does not seem so sharply entrenched in the thinking of some other jurisdictions, with the result that the issue of the availability of continuing immunity for an ex-Head of State is perhaps more uncertain.

The International Court addressed this situation in the context of responding to the claim that immunity for Mr. Yerodia was effectively impunity. I was on Thursday last at the Security Council, and every Member from whatever region, identified the ending of impunity as a major task for the Security Council.

The Court was not indifferent to the argument that international law should not be used in the service of impunity. It observed:

> [A]fter the person ceases to hold the office of Minister for Foreign Affairs, he or she will no longer enjoy all of the immunities accorded by international law in other states. Provided that it has jurisdiction under international law, a court of one State may try a former Minister of Foreign Affairs of another State in respect of acts committed prior or subsequent to his or her period in office… (at 25).

This had a certain resonance for Mr. Yerodia because his infamous speeches calling for the Tutsi to be treated as "vermin" (which speeches were followed by the slaughter of thousands of Tutsi) were made before he was called to office as Foreign Minister. The Court has left some possibilities as to action against him for the future. But the implication is that if the actual offences occurred during his time in office, they would continue to attract immunity in national courts even after he left office. But this <u>is</u> obiter, and cannot be regarded as fully determined by the International Court, before whom indeed this matter had not been argued.

It does seem that in courts the "out of office" provision is not yet fully played out. Again, we may see the beginnings of a practice where more leeway is given to "special courts" than to normal national courts. Recently, Charles Taylor, the former President of Liberia, was handed over to the Special Court for Sierra Leone to face charges of crimes against humanity. An indictment was issued three years ago even when he was President. He shortly after stepped down and accepted an offer of asylum from the Nigerian Government. But three years later, he is standing trial on offences allegedly committed when President, having been transferred to the Special Court at the request of Liberia's new democratically elected government. It may well be significant that the request came from ex-President Taylor's own country.

(As a side note, the trial of Taylor will take place in The Hague with the Special Court sitting in the premises of the ICC. A Security Council resolution to this effect was passed on 16 June (S/RES/1688). If convicted, the British Government has said that he can serve his prison sentence in the UK.)

The scope of the "out of office" provision is being tested now in Senegal. In May, the UN Committee against Torture ruled that Senegal had violated the *Torture Convention* by failing to prosecute or extradite Hissène Habré, the former President of Chad (1982-1990), who has lived in

Senegal since 1990. This is because the *Convention* requires in Article 7(1) that the "state party in territory under whose jurisdiction a person alleged to have committed [torture] shall . . ., if it does not extradite him, submit the case to its competent authorities for the purpose of prosecution". A Senegalese judge had ordered the arrest of Habré in 2000 on torture charges, but the Court of Appeals of Dakar rejected the case on the basis of his immunity, citing the ICJ *Arrest Warrant* case. This would appear to misunderstand our Judgment, which was based on customary international law not on the *Torture Convention*. In 2005, Belgium made an extradition request for Habré to stand trial for crimes against humanity, war crimes and torture. Senegal referred the case to the African Union, which has appointed a Committee of Eminent African Jurists to discuss the options and report back next month. On 15 June, the Belgian Senate "firmly" supported the extradition request issued by the Belgian government last September. The Belgian Government has said that if Senegal refuses to extradite Habré, it will invoke Article 30 of *Torture Convention*, which could lead it to taking Senegal before the International Court.

So we at the ICJ may possibly be back in the immunity business again, with more opportunities for the symbiotic relationship between international law and national courts to develop further in this challenging area of law.