CAN A STATE OR A HEAD OF STATE CLAIM THE BENEFIT OF IMMUNITIES IN CASE AN INTERNATIONAL CRIME HAS BEEN COMMITTED?

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I. INTRODUCTION

I propose to deal with a topic which is at the crossroads of what I see as the main tension in international law today. This is the tension—not to say more—between state sovereignty, on one side, and the protection of the human rights of individuals on the other.

It is quite banal to say that we are evolving from the Westphalian society where the state was at the center of everything and the sole subject of international law, to what some call the cosmopolitan society or—to be really “in”—the post-modern society, where the individual is the center or at least where numerous new private actors put in question the centrality of state sovereignty. These private actors range from multinational corporations and individuals to non-governmental organizations (NGOs), and pretend to become not only actors, but subjects of international law.

There is a topic where this conflict between state sovereignty and the protection of fundamental human rights reaches its climax—this is the question

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of state immunities. The parameters of the problem are quite simple, even if the ways to answer the problem are controversial.

The first element would be the fact that it is well known that in order to protect the sovereignty of states, immunities were granted to states and their representatives.

The second element that is raised today is the question whether these immunities should still stand when an international crime is committed. Before asking how this question should be resolved, I will study some elements of the general problem by firstly presenting the extent of the immunities granted to states and their representatives and secondly, the contours of what is known today as an international crime.

II. ELEMENTS OF THE GENERAL PROBLEM

First, a few words on immunities—while clearly stating that I am not dealing here with national immunities, only with international immunities. Immunities are deemed to protect state sovereignty. Therefore, they benefit the state and its representatives, the heads of state, diplomats, and other high officials.

Immunities have two cumulative aspects: immunity from jurisdiction means that a state cannot be brought to court in another state against its will. Immunity from execution means that even if a state has accepted to go to court in another country, the judgment cannot be executed against it, and its assets and properties cannot be seized.

At the beginning these immunities were absolute. The state was always immune for all civil actions that could be brought against it. The acting heads of state or diplomats were immune from all civil and criminal actions. The former heads of state and diplomats were immune for all acts performed in the exercise of their functions, which means that they could only be prosecuted for their private acts and only after they had left their functions.

It is quite clear that granting such broad immunities resulted in the irresponsibility of states and heads of states or diplomats. Everybody knows the famous story in the nineteenth century of the Sultan of Johore, Sultan Abu Bakar, who presented himself as Albert Baker. He was studying in England, dated an English girl, promised to marry her and then disappeared, so the girl sued him. The English courts determined in 1894 that they had no jurisdiction over an independent foreign sovereign, and did not grant any relief to the English girl.

2. Id. at 150–51.
3. Id. at 164.
It is also well known—and I give you this free advice as an international lawyer—that if you have a house or apartment to rent, do not rent it to a diplomat or a king. If they do not pay their rent, you cannot sue them because they have immunity.

With the development of the rule of law, these immunities are progressively shrinking. However, each attack on these immunities has led to huge controversy, and states have been extremely reluctant to see their privileges shrink and their accountability augmented. All the restrictions to immunities flow from the same idea that the sovereign function, and nothing else, is to be protected. In other words, all the acts that do not pertain to the sovereign function should be excluded from the benefit of immunities.

Two main evolutions can be witnessed. A first evolution towards a restrictive conception of state immunities is well known. It started at the beginning of the twentieth century, but really found its way in the 1970s when it was considered that what should be protected by immunities was the core political sovereignty. In other words, when a state acts de jure imperii, as a sovereign, it should be immune. When a state acts de jure gestionis, acting like an economic actor performing acts that anybody could do, like buying paper for the administration, it should not benefit from immunities. This evolution was not smooth and was strongly opposed by developing countries that, in the course of pursuing the development of their economy, considered that they were also acting as sovereign in fostering their economic sovereignty. However, the distinction between acts de jure imperii and acts de jure gestionis is today uncontroversial in its principle, although it is not always easy to characterize the different acts performed by states.

A second evolution, on which I shall concentrate, has started more recently, at the end of the 1990s, and has been launched by the development of a universal concern for human rights. This time, the idea is not only to exclude commercial acts, considered as outside the sovereign functions of the state, but also some acts so egregious that they should not possibly be considered as entering into the functions of the state or one of its representatives. More precisely, the question today is whether international crimes, whether attributed to a state or one of its representatives, should benefit from immunities.

Secondly, after a presentation of the extent of state immunities, I will say a few words concerning the concept of international crime. This concept covers what the international community considers today as acts that should be condemned worldwide. These acts have therefore been qualified as international crimes at the international level through custom or treaty. The international crimes that can be prosecuted before the International Criminal Court (ICC)—that the United States does not like, I should say, even hate—comport essentially the following:
a) War crimes;  
b) Crimes against humanity;  
c) Genocide;  
d) Torture.  

Now that the framework of the problem that I want to discuss with you is presented, I want to ask you the central question:

III. HOW TO SOLVE THE QUESTION RAISED?

In your view: Can a state or a head of state claim immunity when there is an accusation of torture? So, I will ask you to vote: Who thinks that in order to maintain the stability of international society immunity should prevail when there is an accusation of torture? Who thinks that immunity should not be a bar to prosecution when there is an accusation of torture?  

Both the judges of the International Court of Justice (ICJ) and of the European Court of Human Rights (ECHR), as unbelievable as it seems, have considered that immunities should prevail. I will refer to this later in more detail.  

Also, I want to point out here that national courts are far more keen to have human rights prevail—like the Ex parte Pinochet Ugarte case illustrates—while international courts, rooted in the international system based on state sovereignty, have a tendency to protect this sovereignty far more than is acceptable in my view. In other words, the forces of progress that bring about less impunity are in national courts, whereas the forces of resistance are to be found in international courts. Today, we are in a transitional phase where the conflict of interest between these contradictory forces is not settled.  

I will now illustrate what I just said with two examples: A criminal prosecution against a representative of a state accused of torture and a civil action for damages against a state for torture.

IV. A CRIMINAL PROSECUTION AGAINST A REPRESENTATIVE OF A STATE ACCUSED OF TORTURE 

Let us look successively at the manner in which the English courts and the ICJ have dealt with a criminal prosecution against a representative of a state accused of torture. I will first address the Pinochet cases and then the Arrest Warrant of 11 April 2000 case involving the Democratic Republic of Congo and Belgium.

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4. From now on, I will take torture as the example of an international crime.  
5. This paper was first presented as the Keynote speech at the closing luncheon of the International Law Weekend of the American Branch of the International Law Association (ABILA), in New York, on October 27, 2007, and the quasi-unanimity of the participants voted in favour of the second proposition.
A. The Pinochet Case before the English Courts

Here, we have a former head of state accused of torture. In 1998, Pinochet went to an English clinic. The lawyers of torture victims, injured under Pinochet’s rule, asked that he be arrested. The High Court of London granted him immunity whilst the House of Lords, in two successive decisions, refused to grant him those immunities.

I recall here what I said earlier, that former heads of state will only be granted immunities for acts performed in the exercise of their functions. Of course, this can be analyzed in two different ways: acts performed in the exercise of their functions can mean that all official acts performed while in office are covered by immunity, and only private acts—like a head of state killing his wife—could be prosecuted. It can also mean that only those acts that can be considered as entering into the functions of a head of state will continue to enjoy immunity when he or she has left power.

It is well known that in the first decision of 25 November 1998, by a three to two majority, the House of Lords adopted a historic ruling revoking the immunity of Pinochet. In the second decision of 24 March 1999, the same solution was adopted by a six to one majority. Taken together the three minority Law Lords decided to stick with the traditional interpretation, according to which all official acts committed during the time when the head of state was in power, are covered by immunity.

The nine majority Law Lords adopted an innovative interpretation considering that certain unacceptable acts, like international crimes, must be considered per se as falling outside the functions of a head of state. Lord Nicholls, for example, stated that, and I quote “it hardly needs saying that torture of [Pinochet’s] own subjects, or of aliens, would not be regarded by international law as a function of a head of state.” Lord Steyn added that it follows inexorably from the reasoning of the High Court granting immunity “that when Hitler ordered the ‘final solution’ his act must be regarded as an official act deriving from the exercise of his functions as Head of State.”

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7. Id. at 898; Ex parte Pinochet Ugarte (No 3), 2 All E.R. 97, 115(d) (H.L. 1999) [hereinafter Pinochet No 3].
8. Ex parte Pinochet Ugarte, 4 All E.R. at 898.
9. Pinochet No 3, 2 All E.R. at 115(d).
10. Pinochet No 3, 2 All E.R. at 168–69 (Saville, L., dissenting); Pinochet No 3, 2 All E.R. at 171 (Millett, L., dissenting); Pinochet No 3, 2 All E.R. at 185–86 (Phillips, L., dissenting).
12. Ex parte Pinochet Ugarte, 4 All E.R. at 939.
13. Id. at 945.
So, after the decisions in the *Pinochet* cases, it seemed clear that the acts for which a former head of state does not benefit from immunity are not only private acts that are *functionally outside* the exercise of official duties, but also international crimes like torture, which even if performed as part of the exercise of power, are to be considered as *teleologically outside* the functions of a head of state. But unfortunately, the situation is less clear after the decision of the ICJ in the *Arrest Warrant* case.

**B. The Arrest Warrant Case before the ICJ**

This case was brought by the Democratic Republic of the Congo (DRC) against Belgium before the ICJ.\(^{14}\) What triggered the case was an arrest warrant launched against the Minister of Foreign Affairs of the DRC by a Belgian judge using universal jurisdiction, permitting to prosecute in Belgium international crimes committed outside the country towards foreigners and by foreigners.\(^{15}\)

The DRC pleaded that this arrest warrant was violating the traditional immunities of a representative of the state.\(^{16}\) The ICJ considered that indeed this was so, which is not surprising, as the immunities of a person still in function are absolute.\(^{17}\) This was also reiterated by the Law Lords in the *Pinochet* case.\(^{18}\) Nonetheless, the Court decided to add an *obiter dictum* in order to reverse the solution adopted in the *Pinochet* case for former heads of state, when it stated: "a court of one State may try a former Minister for Foreign Affairs of another State in respect of acts committed prior or subsequent to his or her period of office, as well as in respect of acts committed during that period of office in private capacity."\(^{19}\) No word about the exclusion of international crimes committed while in function.

In my view, this statement is unfortunate, especially as the prosecution of a former head of state would permit a better protection of human rights, and does not endanger the state sovereignty, which is the basic justification for granting immunities.

Interestingly, we can perceive exactly the same dichotomy between national courts and international courts when the problem raised is a civil action against a state for damages due to torture.


\(^{15}\) *Id.* at *6*.

\(^{16}\) *Id.*

\(^{17}\) *Id.* at *68*.

\(^{18}\) *Ex parte Pinochet Ugarte, 4 All E.R. at 919*.

\(^{19}\) *Arrest Warrant, 2002 I.C.J. LEXIS at *25*. 
V. A CIVIL ACTION FOR DAMAGES AGAINST A STATE FOR TORTURE

A. In the National Courts

Here, I have no breakthrough case like the Pinochet cases to present, but it is possible to say that there are some national decisions here and there that have lifted immunities when extremely serious violations of human rights were committed. I can give the example of a Federal District Court in the District of Colombia that refused the immunity to Chile for the murder of Mr. Letelier—who was Minister of Foreign Affairs of Chile and then Ambassador—by Chilean National Intelligence Directorate (DINA) agents in Washington, D.C. Many other examples could be given, but I would like now to proceed to present the position on the question at the international level.

B. In the European Court of Human Rights

Here, I will speak of a famous case, the Al-Adsani v. United Kingdom case. The facts were the following: Mr. Al-Adsani was a British and Kuwaiti citizen who was tortured in Kuwait and tried to obtain damages from Kuwait before the English Courts. When the English Courts—High Court, Court of Appeal—granted immunity to Kuwait, Al-Adsani went to Strasbourg to the ECHR, claiming a violation of his right to a fair trial. By a decision rendered by a nine to eight majority, on 21 November 2001, the European Court upheld the position of the English court—in other words, it considered that the commission of torture does not justify the lifting of immunity. Although the Court considered that torture was a violation of a jus cogens rule, it stated that the fact of granting immunity to a state in civil matters, even when torture is at stake, is not a disproportionate restriction to the access of justice guaranteed by Article VI of the European Convention on Human Rights. Eight dissenting judges considered that immunity should not have been a bar to the granting of damages. Their reasoning was the following:

1) Torture is a violation of jus cogens;
2) Rules on immunities are not jus cogens
3) Immunities must be set aside so that jus cogens can prevail.

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22. Id. ¶ 14.
23. Id. ¶ 18.
24. Id. ¶ 61.
25. Id. ¶ 56.
Although I consider the outcome of the dissenting opinion preferable to the outcome of the decision, I have to confess that I consider its reasoning as somewhat simplistic. The main reason why the dissenting opinion is not legally convincing is that, in international law, a hierarchy of norms only applies between norms having the same object. The *jus cogens* rule forbidding torture is a substantive rule, while immunities are a procedural device and so there is no evident hierarchy between them.

Does this mean that the solution of the Court should prevail? I do not think so—I think, on the contrary, that the solution of the dissenting judges should have been adopted, but on the basis of a legally stronger reasoning quite similar to the one adopted by the majority of the Law Lords in the *Pinochet* cases: immunities should have been lifted, as torture should be considered as outside the functions of a state.

If we summarize what is today the positive international law, it is possible to say that for states, immunity stands even in the face of an international crime like torture in civil actions. For heads of state and other representatives in office, immunity stands, as well, in the face of an international crime whether in criminal or civil cases. For former heads of state and other representatives of the state, immunity does not stand in criminal matters according to the House of Lords, but does stand according to the ICJ. Of course, NGOs are advocating that the *Pinochet* solution should be extended to acting heads of state and that immunity should also be set aside for acting heads of state if they can be charged with an international crime. Personally, I am not in favor of such a move as it might create political manipulations. As an example, I can cite a judgment of a court in Belgrade a few years ago sentencing George H. Bush, Jacques Chirac and Tony Blair to twenty years of prison because of war crimes committed by the North American Treaty Organization (NATO) in the bombing of Kosovo. This, of course, does not mean that I favor impunity for heads of state in office committing international crimes—they can indeed be prosecuted before the ICJ.

**VI. CONCLUSION**

In conclusion, although there is still an intense debate, I foresee—or at least, I wish—that just as it is nowadays well accepted that immunity does not apply to acts *de jure gestionis* in civil matters, immunities should not be permitted to protect a state or its representatives either in criminal cases or in

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27. *Al-Adsani*, 34 Eur. Ct. H.R. ¶ 51. No criminal case can be brought against a state.
29. *Ex parte* Pinochet Ugarte, 4 All E.R. at 941(c); Arrest Warrant, 2002 I.C.J. LEXIS at *53.
civil cases when an international crime is committed, since such an act should be considered as dramatically outside the functions of a state. Only then, could it be possible to say that there is a new vision of international law, where impunity of states and their representatives for international crimes, condemned by the international community, will no longer prevail.