Immunity for Dictators?

A summary of discussion at the International Law Programme Discussion Group at Chatham House on 9 September 2004; participants included lawyers, academics, and representatives of NGOs and of UK Government Departments.

The subject of the discussion was the scope and nature of **immunity from jurisdiction for heads and former heads of state (as well as other state officials) before national and international courts**. A clear distinction was drawn between the positions in national and international courts, especially in light of the recent decision of the Special Court for Sierra Leone in the *Taylor* case. In that case the Court had decided that Charles Taylor (who was still President of Liberia when the proceedings were instituted against him) did not enjoy immunity before the Court; this ruling had been based on a decision, made by the court itself, that the Special Court was an "international court".

One speaker noted two different conceptions of the function of international law: (i) the maintenance of effective and unencumbered relations between states, and (ii) the protection of individual rights and individual justice. It was evident that judgments over the last five years of both national and international courts regarding the issue of immunity have turned on whichever of these conceptions is adopted by the judges.

The central issue for the Appeals Chamber in the Taylor case had been whether an entitlement to immunity arose for a Liberian head of state (now a former head of state) before the Special Court for Sierra Leone (the **SCSL**), given that it had been established by a treaty between the United Nations and Sierra Leone, to which Liberia was not a party. It was predicted that a similar question over the entitlement to immunity of serving heads of non-party states would come before the International Criminal Court (the **ICC**), to which 96 states have signed up. Afghanistan, now a party to the ICC, might be a possible example of where such an issue might arise.

History and background to immunity of heads of state before international courts

The speaker pointed out that until the 20th Century there were no international courts which could exercise jurisdiction over heads of state, and national courts could not exercise jurisdiction over serving heads of state or former heads of state for public acts carried out while in office. This classical position under international law has since evolved.

The first development occurred with Article 227 of the Treaty of Versailles (1919) whereby the former Kaiser, William II, was indicted for prosecution before a special tribunal to be constituted by the victorious powers. Then came the trials before the Nuremberg and Tokyo International Military Tribunals at the end of World War II. The emerging principle that immunity could not claimed at the highest levels before international courts was then taken up by the International Law Commission in its work between 1950 and 1996.

Subsequent developments occurred in the mid-1990s with a coincidence in the ILC's completion of the draft Statute of the International Criminal Court (the **ICC**), and the setting up of the International Criminal Tribunal for Yugoslavia (the **ICTY**) and Rwanda (the **ICTR**) by the UN Security Council in resolutions adopted under Chapter VII of the UN Charter. It was clear that there was no entitlement to immunity for persons subject to the jurisdiction of those tribunals.

Then, in July 1998, states adopted the Statute of the ICC Article 27 of which provided that there was no entitlement to immunity for any person subject to the jurisdiction of the court. Three months later, on 16 October, Senator Pinochet was arrested in London and his request for immunity as a former head of state of Chile in relation to the extradition request that he be transferred to Spain was ultimately rejected by the House of Lords. The common line which runs through the six House of Lords opinions is that a claim to immunity in respect of torture was incompatible with the Torture Convention 1984 (which was completely silent on the question of immunity, including in its *travaux preparatoires*). The majority took the view that states could not have intended to exercise a potentially global jurisdiction over the crime of torture, and at the same time have intended to exclude from jurisdiction those at the top of the pyramid in relation to the commission of such acts. A strong dissenting opinion from Lord Goff in Pinochet No.3 put forward the classical view that a foreign state's *a priori* entitlement to immunity before national courts could only be lost by an express (as opposed to implicit) statement.

Thus, Pinochet No.3 stands for the proposition that before **national** courts a former head of state is no longer entitled to claim immunity where the act in question is governed by a treaty such as the Torture Convention, where obligations are established to prosecute or extradite and those obligations could not be carried out if all or most of the persons covered by the treaty enjoyed immunity. The case is silent, however, on the question of immunity before international courts, although there is plenty of dicta from Lord Slynn tosupport the view that the question would be answered differently before an international criminal court. This is picked up on by the SCSL in the Taylor case.

Two years later, the International Court of Justice in the *Yerodia* case gave a judgment on the entitlement to immunity of the serving foreign minister of the Democratic Republic of Congo in respect of an arrest warrant issued by a

Belgian prosecutor. The Court firmly rejected the notion that, having regard to the developments in international law and in particular customary international law, a serving foreign minister was not entitled to claim immunity before a **national** court. It held that the immunity before national courts was not affected by the existence of treaties such as the Torture Convention. (This, in the opinion of one speaker appears to be an implicit statement that the Pinochet ruling was wrong; the House of Lords might have decided Pinochet differently had they had the benefit of the Yerodia judgment at the time.)

The Court did make clear that the position in respect of entitlement to immunity would be different before **international** courts, and identified a number of such "international courts", but did not mention the SCSL.

Kinds of immunity available in national courts

Another speaker clarified the two main kinds of immunities available to current and former state officials in **national** courts*:* immunity *ratione personae* (i.e. immunity attaching to the official status of the person) and immunity *ratione materiae* (i.e. immunity attaching to official acts).

Immunity ratione personae

Essential characteristics of immunity *ratione personae* are that it applies: (i) only to a limited number of persons (eg heads of states, heads of government and foreign ministers); (ii) only while such persons are in office; (iii) it is unclear if it extends beyond the categories of heads of state, heads of government and foreign ministers; and (iv) it is an absolute immunity – even in relation to international crimes - as held by the ICJ in the Yerodia case, and a multitude of national courts (e.g. recent UK district judge's decision rejecting Peter Tatchell's application for an arrest warrant against Robert Mugabe).

Immunity ratione materiae

Essential characteristics of immunity *ratione materiae* are that it applies: (i) to acts of state officials during and after their period of office; (ii) only if carried out in an official capacity; and (iii) it is not absolute. Though there is some debate (e.g. dissent of Lord Goff in Pinochet), many would agree that it does not apply in respect of international crimes. Some argue that *immunity ratione materiae* does not apply to international crimes because they cannot be said to be official acts. Others say that they are contrary to peremptory norms. It was suggested that neither of these reasons were correct, for reasons to be explored later in the discussion.

Kinds of immunity available in international courts

The speaker pointed out that the extent to which immunities should apply (or not) in international courts requires analysis of the purpose behind entitlement to immunity under international law. In the speaker's view, it is commonly agreed that immunity derives from the notion of the equality of states, and the

idea that one state must not intervene in the sovereign affairs of another. Hence, it is argued that immunity only applies in horizontal interstate relationships, and so does not apply to proceedings before international courts.

The speaker commented that the view that immunity can never be pleaded before international courts was an oversimplification of the issue. Two factors in particular needed to be looked at on the question of immunity before any international court:
(1) Do the particular provisions of the statute of that international court expressly provide for, or deny, immunity for state officials?
(2) What is the nature of the international court and what was the manner of its establishment?
Some were of the view that only where a state consents to the lifting of immunity, can it be so deprived. In this context, there was a significant difference between the SCSL and other precedents for international courts: in the case of the Treaty of Versailles (1919), Germany was a party to that treaty; in the case of the Tokyo tribunal, Japan gave the Supreme Allied Commander powers under which he established the tribunal; the ICTY and ICTR were established by Chapter VII Security Council resolutions, by which all members of the UN were bound by the decision to remove immunity for state officials. A more debatable precedent was the Nuremberg tribunal where it was unclear if it was established on the basis of a treaty, or whether the allies were exercising sovereign powers over Germany. In summary, in almost all of the precedents, the relevant states consented in some form, and so do not dispose of the question as to whether immunity still applies before *all* international courts.

The speaker said that if the underlying purpose of immunity was to prevent the exercise of jurisdiction over the territory of a foreign state, it made little difference if that jurisdiction was exercised unilaterally or collectively by virtue of an agreement between other states, for example if EU member states signed a treaty creating a court with jurisdiction over war crimes committed in Iraq, and that court then sought to indict the US President or Secretary of State. The court's "international" nature did not, by itself, make its exercise of jurisdiction over a third state's officials any less of an infringement of sovereignty. To hold otherwise was a subversion of the purpose of state immunity.

Moreover, it was noted that in at least one case (*Prosecutor v. Blaskic*), the ICTY held that international immunities can be pleaded before an international court. In that case, which was not quoted to the SCSL in *Taylor*, the ICTY held that it could not compel a state official to produce a document because immunity continued to apply.

The "will" of the international community and the SCSL

Discussion moved to whether the SCSL was an international court for the purpose of immunities. Could state A get around the obligation to provide immunity to the head of state B, by entering into a treaty with state C to set up

an “international” court? This issue was considered by the amicus in the *Taylor* case. It was obviously not right to circumvent the ICJ’s ruling in *Yerodia* in this way. It was submitted, however, that such concerns did not apply to the setting up of the SCSL, because the SCSL had the “will” of the international community behind it. This could be seen from the negotiated history of the court, the role of the Security Council, the broad support from all sections of the international community for its creation – political and financial -, and that it was set up pursuant to (although not by) a Security Council resolution. It was this unexpressed fact which gave the SCSL a sufficient degree of comfort to hold that it was an international court before which immunity of a head of state did not apply. Moreover, it was submitted that the idea that immunity pre-exists and must be expressly waived, is a minority view. In contrast, majority academic opinion favoured the view that there was no *a priori* entitlement to immunity before international courts, and therefore nothing to be waived.

It was countered that the “will” of the international community was overly vague. A state either has to have expressly consented to the lifting of immunity, or was obliged by virtue of a Security Council resolution

It was noted that the SCSL has considered itself to be set up by the Security Council. This begs the question of why it had not been set under Chapter VII as were the ICTY and ICTR. There must have been a specific reason. It was noted that the UN had its own separate legal personality. The fact that the UN entered into a treaty with a particular state, does not mean that every member state of the UN entered into that treaty. It was suggested that perhaps the reason for the way in which the SCSL was set up, was totally unrelated to the issue of immunity. It was related to a desire to separate the proceedings from Sierra Leone’s domestic criminal law and legal system.

Surrender to the ICC of persons from non-party states

A hypothetical question was posed as to whether the ICC could have jurisdiction over US Ministers if they were delivered to the Court voluntarily by a state party to the ICC Statute. On voluntary handing over of a person, Article 98(1) (which precludes the Court from asking a state for surrender of a person enjoying immunity) would not arise because no request for surrender would be necessary. It was suggested that a solution to the difference of opinion mentioned above was determinative of this question . One view was that the question of immunity could not be determined by a treaty to which a relevant state was not a party. To hold otherwise would be to take away an international law right of a third-party state . The other view is reflected in the *Taylor* case in the SCSL; the court decided the question in accordance with a treaty to which Liberia was not a party.

Asylum in Nigeria for Charles Taylor

Discussion then moved on to whether Nigeria’s decision to provide asylum for Charles Taylor was a breach of international law, in light of the above arguments in relation to the will of the international community, and the

SCSL's exercise of jurisdiction over Taylor. But there did not appear to be any bilateral extradition treaty between Nigeria and Sierra Leone or other obligation for treaty assistance to the SCSL, or any other obligations under a Chapter VII resolution. And the court itself had said (in paragraph 57 of its judgment) that in the absence of a treaty obligation or of a Chapter VII obligation there was no obligation to surrender an individual to the court. (The question of whether a state could lawfully shelter a fugitive from international justice is another matter.)

Issue of arrest warrants

In *Yerodia* the ICJ found that the mere circulation of an arrest warrant was a violation of immunity under international law. It was suggested that this decision was wrong, and that the dissenting opinion of Judge Oda was correct: the mere issuance of an arrest warrant did not require action by the receiving state and thus had no consequence for state sovereignty.

An apparent contradiction was also pointed to between, on the one hand, the SCSL's classical international law approach in *Taylor* that transmission of the arrest warrant to Ghana was not a breach of international law (because there was no treaty obligation in place and the warrant was not self-executing), and on the other hand, the SCSL's more controversial approach to the question of immunity and the issue of consent.

Special Missions Convention

As regards immunity in national courts, mention was made of the UK District Judge ruling in respect of the application for an arrest warrant against Israeli defence minister Mofaz earlier this year. In that decision, Pratt J. stated that defence ministers have immunity , and gave his view as to which ministers might and might not enjoy such immunity: eg defence ministers would benefit from immunity, while sports ministers would not. It was questioned whether such an approach was correct. Instead, it was suggested that a better approach might be to ring-fence ministers on "official business abroad". It was suggested that acceding to the Special Missions Convention might help in this regard. Others agreed that UK law ought to be clear on high level delegations and that the Special Missions Convention was one way of achieving that, but that even in the absence of UK legislation, customary international law may well provide immunity for high level delegations. The difficulty of expressly listing who could and who could not benefit from immunity made it riskier to go down the avenue of a Special Missions Convention.

(Note prepared by Daniel Geron, ILP, Chatham House)