

The Position of Heads of State and Senior Officials in International Law

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Overview and General Principles

1. Introduction

In recent years the legal position of heads of State and other very senior State representatives has received considerable attention from national and international courts, writers, and practitioners. So much so that it is no longer necessary to preface a study of the subject with the kind of remarks made by Sir Arthur Watts in his early and influential monograph. There he noted that it might, at first sight, seem a somewhat narrow and specialized topic, concerning directly as it does a relatively small group of individuals but added, with impressive perception, that it was worth a closer look than it is often given.

Since 1994 when that monograph was published, the subject has become one of increasing practical concern for both States and individuals in a variety of contexts. As Watts noted, 'To a much greater extent than was formerly the case, senior State representatives are active participants on the international stage, often travelling outside their own States, and being frequently involved in the conduct of international relations'.¹ This trend has continued so that ad hoc high-level meetings now play a regular part in diplomatic activity.² In addition there are numerous routine periodic meetings and 'summits' within the framework of various international organizations and other less formal State groupings. In such cases, attendance by heads of State, heads of government and Foreign Ministers may be required but they can also involve a variety of other government ministers and senior officials, for example, within the context of the European Union. Developments in transport and communications have also meant that private travel by heads of State and other high-level State officials and their families has become far more frequent than it was. It is now common for such persons to take regular and often well-publicized visits abroad for such purposes.

¹ Sir A Watts 'The Legal Position in International Law of Heads of States, Heads of Governments and Foreign Ministers' (1994) 247 III Recueil des cours 19.

² 'When you become Prime Minister, the first thing they do, after telling you how to launch the nuclear bomb, is to take your passport from you and then the rest of the time trying to get you to travel around the world.' Tony Blair, speaking to the Labour Party Conference in 1998.

Other factors have played their part: an increased media scrutiny of high-level State representatives and their families; the rapid growth of internet communications; and a growing tendency to personalize political affairs. Heads of State and other senior representatives may encourage such attention by travelling with spouses and other family members who may, themselves, participate in separate visits and activities on the international stage. A further complication is the fact that many former heads of State, heads of Government, and other senior representatives remain active in the international sphere long after retirement or loss of office. Sometimes, such activities are carried out under the auspices of a particular international organization but in other cases may be performed more informally in an ad hoc capacity.

All these factors have to be set against a background in which international law, itself, has changed and expanded into new fields. New fields such as the protection of human rights and the development of international criminal law are of particular relevance and are symptomatic of the way in which international law has had to accommodate the needs and demands, not only of States, but also non-State actors, including individuals and non-governmental organizations (NGOs). Such non-State actors have their own agenda which does not necessarily accord priority to the traditional objectives of the old State-centred system. In the words of a former judge of the International Court of Justice (ICJ), 'International law is deepening as well as broadening, for it is now being invoked by corporations and human rights activists in their own courts and in foreign courts'.³ Of particular note has been the development of principles permitting (and, in some cases, requiring) the exercise by States of extra-territorial jurisdiction in relation to certain international crimes.⁴ National case law has often reflected a tension between the rules conferring immunity on foreign States and their officials and principles of human rights.

The position in international law of heads of State and other senior State representatives has been one of the issues at the heart of this debate and, together with the position of other more junior foreign State officials, has become a common feature in national court cases around the world. It is often said that the establishment of the International Criminal Court (ICC) and the ad hoc international criminal tribunals,⁵ together with a number of high

³ Rosalyn Higgins, *Problems and Process: International Law and How We use it* (Oxford University Press, 1994).

⁴ See Weller, 'On the Hazards of Foreign Travel for Dictators and other Criminals' (1999) 75(3) *International Affairs* 599 where he notes: 'As many of the most grave offences to which universality attaches can typically be executed only by state officials, the process of the gradual expansion of legal universalism has obvious implications for the doctrine of immunities from jurisdiction.'

⁵ See the trial of Serbian leader Slobodan Milosevic before the International Criminal Tribunal for the Former Yugoslavia (ICTY); the conviction of the former President of Liberia, Charles Taylor, before the International Court for Sierra Leone; the conviction of Rwanda's former Prime Minister,

profile criminal prosecutions of former foreign leaders in national courts,⁶ reflects a growing belief that heads of State and other very senior officials should be held accountable for serious violations of international humanitarian and human rights law. Moreover, there has been an increasing number of cases in which private litigants have sought to bring civil claims against States, heads of State, and other senior State officials in foreign jurisdictions. The right of access to a judicial remedy has been a particular focus in such cases.

It has been argued that international law is now at a stage where immunity should no longer apply in relation to serious international crimes. By contrast, others have emphasized the political and practical difficulties inherent in allowing national courts to serve as a tool for the transnational enforcement of penalties or damages for crimes committed abroad by the leaders and officials of foreign States. The resulting controversy has led the International Law Commission (ILC) to include the topic 'Immunity of State officials from Foreign Criminal Jurisdiction' in its work programme.⁷ The matter has also been the subject of a review by the US State Department⁸ and has prompted several other inquiries and reviews within a variety of governmental and non-governmental contexts.⁹

More generally, national courts and governmental authorities have frequently been faced with questions relating to the legal status, privileges, protection, and 'dignity' of foreign heads of State and their families. In recent

Jean Kambanda, before the International Tribunal for Rwanda (ICTR); and the indictments of the serving President Omar Al Bashir of Sudan and the Libyan leader, Muammar Gaddafi, by the ICC. Laurent Gbagbo was also indicted while he was still President of Cote d'Ivoire and is currently in ICC custody awaiting trial. In addition, the Kenyan President, Unuru Kenyatta is currently facing trial before the ICC.

⁶ See eg *R v Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (No 3)* [2000] 1 AC 147 (UKHL, 24 May 1999) and proceedings in Belgium against the former President of Chad, Hissene Habre. Belgium has sought to extradite Habre from Senegal where he may also face charges and the ICJ has now ruled that Senegal must extradite or prosecute him without further delay—*Questions relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)* (2012) ICJ Rep.

⁷ See Report of the ILC on the Work of its 63rd Session, UN GAOR, 66th Session, para 8, UN Doc A/C.6/66/L.25 (8 November 2011) (draft resolution by the Sixth Committee). Roman Kolodkin, the Special Rapporteur, submitted three reports on the topic. See Preliminary Report, UN Doc A/CN.4/601 (29 May 2008); Second Report, UN Doc A/CN.4/631 (10 June 2010); and Third Report, UN Doc A/CN.4/646 (24 May 2011). See also ILC Secretariat Memorandum, 'Immunity of State Officials from Foreign Criminal Jurisdiction' (31 March 2008,) UN Doc A/CN.4/596). At its 3132nd meeting on 22 May 2012, the Commission appointed Ms Concepcion Escobar Hernandez as the new Special Rapporteur and she has submitted two reports—Preliminary Report, UN Doc A/CN.4/654 and Second Report, UN Doc A/CN.4/L.184.

⁸ See Koh, 'Foreign Official Immunity after Samantar: A United States Government Perspective' (2011) 44 V and J Transnational L 1141, 1152.

⁹ See eg *Advisory Report on the Immunity of Foreign State Officials* (No 20 The Hague, May 2011) produced by the Advisory Committee on Issues of Public International Law (Commissie van advies inzake volkenrechtelijke vraagstukken CAVV) at the request of the Netherlands Foreign Minister. See also decision by the African Union to consider seeking an advisory opinion from the ICJ regarding immunities of State officials under international law (see Summit of Assembly of African Union 23–30 January 2012).

years, such cases have covered a wide range of issues including: whether a head of State is entitled to a private hearing for a preliminary plea of immunity in connection with divorce proceedings brought against him;¹⁰ the extent to which a court should be prepared to redact its judgment in order to spare a head of State personal embarrassment;¹¹ whether the arrest and detention abroad of a head of State's son infringed any rules of customary international law or international comity or courtesy; and whether the wife of a head of State on a private shopping trip abroad should be immune from prosecution.

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¹⁰ *Harb v King Fahd Bin Abdul Aziz* [2005] EWCA Civ 632.

¹¹ *Aziz v Aziz and Sultan of Brunei* [2007] EWCA Civ 712.