THE IMPACT OF THE UN CONVENTION AGAINST TORTURE AND SUBSEQUENT PRACTICE ON THE LAW OF HEAD OF STATE IMMUNITY

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by

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Abstract

This thesis examines the current state of international law with regards to the doctrine of immunity for heads of state. In particular, this thesis provides an analysis of the repercussions of the UN Convention against Torture (CAT) on the law of head of state immunity. Much academic writing has supported the view that alleged violations of the prohibition of torture, should lead to the restriction of immunity for heads of state and higher officials for alleged acts of torture. Given the fact that the CAT is silent on the issue of immunity, this thesis investigates whether Articles 1 and 5 of the CAT have become customary international law (CIL). On a theoretical level, this thesis explores this hypothesis by scrutinizing the 'circularity' relationship between the Treaty and CIL. This involves treaty interpretation under Articles 31 and 32 of the Vienna Convention on the Law of Treaties [1969]. The purpose of the circularity debate is to determine how the CAT affects CIL, and how CIL affects the interpretation of the CAT in order to ascertain whether Articles 1 and 5 of the CAT have become CIL. On a more concrete level, the thesis examines the evidence, in particular, the *opinio juris* elements of head of state immunity such as the UNGA Resolutions, and the Committee against Torture. The jurisprudence of *ad hoc* tribunals also contribute to the understanding of definition of torture and the jurisdiction provisions. This thesis submits that there is conclusive evidence to indicate that Articles 1 and 5 of the CAT have become CIL, and could therefore restrict immunity *ratione materiae* for former heads of state and heads of government. The claim that the CAT has become CIL is supported by an in-depth analysis of the modern formation of the CIL method under the sliding scale theory. It will be seen that by relying on the subjective element there is no restriction for the claim that new CIL can be formed, provided enough evidence has been provided.

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List of Abbreviations

Committee against Torture (Committee)

Convention on Civil and Political Rights (CCPR)

Customary international law (CIL)

European Convention of Human Rights (ECvHR)

European Court of Human Rights (ECHR)

Foreign Sovereign Immunities Act 1976 (FSIA)

International Court of Justice (ICJ)

International Criminal Tribunal for the Former Yugoslavia (ICTY)

International Law Commission (ILC)

Non-governmental organisations (NGO)

Permanent Court of International Justice (PCIJ)

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Introduction

The law of head of state immunity presents a dilemma for international law. It is a matter of concern not only to international lawyers, but also to ordinary citizens. Certain atrocities committed during the Second World War, such as the holocaust and ethnic cleansing, have encouraged the expansion of human rights protection. In the current climate, atrocities in an obscure part of the world become instant global news and failures in justice systems are much more commonly detected by external observers from international and non-governmental organisations (NGOs). Amnesty International is one of the prominent organisations that has raised concerns over failures in some justice systems.[1] This points to the fact that some legal systems in the world remain deeply flawed. The effect of this is that the positions and authority of heads of states and senior government officials who have allegedly committed acts of torture, will remain strong and unchallenged. In other words, the level of abuses of immunity will continue to escalate unless they are stopped. This will inevitably have a serious impact on the contemporary world as well as hinder the primary objective of the doctrine of head of state immunity.

Due to worldwide condemnation of atrocities following the world wars, the world has witnessed the creation of international institutions,[2] the strengthening of existing national ones and the creation of certain hybrid courts, such as the Special Court for Sierra Leone (SCSL), to combat criminal acts of torture and other human rights violations. It can be said that the inception of these international institutions have contributed to the shape of globalisation.[3] Nevertheless, the level of exploitation of the doctrine of head of state immunity is still noticeable in this age of globalisation. This problem does not confine itself to a specific part of the world; abuses can be found in states on the African continent, Latin America and in the Far East. For instance, countries such as Cambodia and the Republic of the Union of Myanmar ('Myanmar') show the scale of the exploitation and abuses of the doctrine of head of

[1] See: The Amnesty International <http://www.amnesty.org.uk/news_details.asp?NewsID=19619> Accessed 21 October 2013. See also: <http://www.amnesty.org/es/node/3142> Accessed 21 October 2013; <http://www.justiceforkirsty.org/AMNESTY%20REPORT%20ON%20MEXICO.pdf>

[2] These have included: the United Nations, various International Tribunals and the International Criminal Court (ICC).

[3] Robert C. Power, 'Pinochet and the Uncertain Globalisation of Criminal law' [2007] 39 The George Washington International Law Review 89, 90.

state immunity in Asia. Similarly, in Europe, these problems occurred previously in the former Soviet Eastern Block. The sensitivity of the issue regarding the improper use of the doctrine of head of state immunity can also be found in allegations against the Vatican.[4] Hence, the uses and abuses of the principle of head of state immunity in an age of globalisation should not be overlooked.

A comprehensive understanding of the complexity of the rules relating to the law of head of state immunity has to be sought prior to a detailed analysis of the subject. The doctrine of head of state immunity originates from the law of state immunity. Immunities of senior state officials are granted to the heads of state and some select senior government officials. Serving heads of state enjoy absolute immunity due to the fact that they hold the highest office of the recognised sovereign states.[5] This is to ensure the effective performance of their duties while abroad and at home.

It is important to point out from the outset that the concept of immunity is associated with the adjudicatory power of courts to hear cases and claims. This means that when a plea of immunity is requested it prevents a court from hearing or adjudicating on the case.[6] In other words, the effect of the immunity plea is that it procedurally bars foreign national courts from jurisdictions to hear cases relating to other states. This is because the defendant is either a state or an agent of a foreign state. Agents of states may include heads of state, heads of government and other government officials.[7] The question over whether all classes of government officials are entitled to the immunity privileges is one which this thesis will consider in due course.

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[4] This thesis does not specifically deal with the claims and cases concerning the Vatican. It is no doubt interesting subject matter. Various authors and academics have written extensively about that area. For some general discussions see: ; Kurt Martens, 'The position of the Holy See and Vatican City State in international relations' [2006] 83 University of Detroit Mercy Law Review 729, ; Dina Aversano, 'Can the Pope be a defendant in American Courts?' [2006] 18 Pace International Law Review 495, .; Lucian C Martinez, 'Sovereign impunity - Does the FSIA bar lawsuits against the Holy See?' [2008] 83 Texas International Law Journal 123,

[5] Arthur Watts, 'The legal position in international law of heads of states, of governments and foreign ministers' [1994] 3 Recueil des Cours 9, 31-67.

[6] *Democratic Republic of the Congo v Belgium (Arrest Warrant Case)* [2002] 3 ICJ Reports 24 (ICJ) [60]. Ernest K. Bankas, *The state immunity controversy in international law : private suits against sovereign states in domestic courts*,(Springer 2005) 283. See also: XiaoDong Yang, 'Immunity for international crimes: a reaffirmation of traditional doctrine' [2002] 74 Cambridge Law Journal 242, 244.; Antonio Cassese, 'When may senior state officials be tried for international crimes? Some comments on the Congo v. Belgium Case ' [2002] 13 European Journal of International Law 853, 862.

[7] See: Rosanne van Alebeek, *The immunity of states and their officials in international criminal law and international human rights law*,(Oxford University Press 2008) 137.

The adjudicatory power and jurisdiction issues are determined by international law of jurisdiction. It allows national law to regulate such exercise of jurisdiction within the confines circumstances by international law.[8] Therefore, it can be said that the law relating to head of state immunity is a topic that makes reference to both national and international law. As far as national law is concerned, it deals with the contention of whether national courts have the relevant jurisdictions and are competent to hear cases involving heads of state or other senior government officials. This is because when a national court denies immunity it may give rise to an international dispute. On the other hand, the doctrine of head of state immunity is also concerned with international law issues. The reason for this is that, if national courts have the requisite adjudicatory choice over jurisdictions to hear proceedings involving heads of state, then the outcome of the case will be determined by international law. In other words, the question of establishing jurisdiction to try heads of state involves the matter of whether national courts will apply national or international law. Some constitutions say that the general rules of international law are hierarchically higher than national statutory rules. Therefore, national courts may have to apply them directly first. Hence, the subject of head of state immunity involves both national and international laws. This thesis will consider both of these aspects when determining the issue regarding immunity for heads of state.

As international law currently stands, the issue of head of state immunity is still governed by customary international law (hereafter 'CIL'). This is because there is no international treaty that comprehensively deals with the problem of head of state immunity.

The Objective of this Research

This thesis aims to examine whether the enactment of the 'UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' (1984) (hereafter 'CAT') and subsequent practice can have an impact on and abrogate immunity *ratione materiae* for former heads of state. Hence, this thesis will be a valuable piece of research because it provides an up-to-date analysis of the doctrine of head of state immunity after the enactment of the CAT. Besides, it also endeavours to provide answers to controversial questions, such as whether all

[8] Gernot Biehler, *Procedures in International Law*,(Springer 2008) 68.

government officials should be entitled to immunity; whether the violation of *jus cogens* norms itself is sufficient to abrogate immunity; whether the residual immunity *ratione materiae* can be removed for former heads of state, and whether a new custom can be formed based on only one of the essential elements of *opinio juris* and rely on the sliding scale theory. These are the main questions that this thesis will attempt to answer as well as provide justifications on the relevant findings.

Some have said that the CAT purports to have an impact in relation to the immunity privileges attached to former heads of state. This is due to the fact that many authors and some courts have considered that the CAT has changed the applicability of the doctrine of head of state immunity traditionally given under CIL.[9] One of the viewpoints is that they believed it was legitimate to deny head of state immunity to former heads of state as long as the states concerned in the proceedings were parties to the CAT.[10] Inevitably, this view poses problems as not all states are signatories to the CAT or have ratified the CAT. Moreover, under international law an international treaty, such as the CAT, will only bind those who have agreed to its provisions.

Accordingly, this thesis will attempt to explore and evaluate whether or not the CAT deals with the issue of head of state immunity adequately in the broader sense. This is because the CAT is generally silent on the immunity issue.[11] This is the dilemma that this thesis seeks to investigate. Thus, the issues surrounding head of state immunity will be addressed, notwithstanding that the CAT is silent on the matter as argued by Lord Goff in the *Pinochet (No.3)* case.[12] Two methods will be used to tackle this problem. The first approach is through treaty interpretation. Articles 31

[9] See for example: *R v Metropolitan Stipendiary Magistrate and others, ex parte Pinochet Ugarte (No.3)* [1999] 2 All ER 97 (House of Lords) [115g] (Lord Browne-Wilkinson).; Andrea Bianchi, 'Immunity versus Human Rights: The Pinochet Case' [1999] 10 European Journal of International Law 237, 243 and 247.; Alexander Orakhelashvili, 'State immunity and hierarchy of norms: Why the House of Lords got it wrong' [2008] 18 European Journal of International Law 955, 960.; Dapo Akande and Sangeeta Shah, 'Immunities of state officials, international crimes, and foreign domestic courts' [2010] 21 European Journal of International Law 815, 843.; Brad R Roth, 'Just short of torture: abusive treatment and the limits of international criminal justice' [2008] 6 Journal of International Criminal Justice 215, 216.

[10] Chile became a party on 30 September 1988; Sapin became a party on 21 October 1989; the United Kingdom became a party on 8 December 1988. See: The *Pinochet (No 3)* case, [109d] (Lord Browne-Wilkinson).

[11] The *Pinochet (No 3)* case [122c] (Lord Goff).

[12] ibid

and 32 of the Vienna Convention on the Law of Treaties (1969) (hereafter 'VCLT') will be utilised as tools of treaty interpretation to find out the 'real' meaning of Articles 1 and 5 of the CAT on the issue of head of state immunity. Article 1 of the CAT provides the definition of torture whereas Article 5 of the CAT describes the extensive jurisdiction provisions. It can be suggested that these two provisions under the CAT are relevant to the discussion. This is because Article 5 of the CAT establishes the jurisdiction over the offences of torture. Thus, Article 1 of the CAT also has to be taken into consideration in order to determine what encompasses acts of torture.

The second approach analyses whether Articles 1 and 5 of the CAT have become CIL. It has been termed the 'circularity issue' debate in this thesis and it involves the process of ascertaining whether the CAT has become new CIL. The consequence of this is that if Articles 1 and 5 of the CAT have become CIL, then they will automatically be binding on states when dealing with the issue of head of state immunity. When interpreting the two CAT provisions, Article 31(3)(c) of the VCLT specifically instructs that the current CIL, that is to say the rules on head of state immunity under CIL, need to be put into the same equation. In other words, Article 31(3)(c) of the VCLT states that when interpreting a treaty, such as the CAT, sensitivity should be displayed towards existing CIL rules on the law of head of state immunity. This corresponds with the fact that Articles 31 and Article 32 of the VCLT reflect CIL.[13] Hence, when interpreting treaties such as the CAT, the current existing rules of CIL on immunity, namely: immunity *ratione personae* and immunity *ratione materiae* have to be considered. These immunity doctrines are essential for the application of the immunity entitlement for serving and former heads of state.

Immunities of Senior State Officials

The problematic nature of the law of head of state immunity is particularly clear in a contemporary context. As mentioned earlier, the law of head of state immunity is traditionally governed by CIL. To understand how the law of head of state immunity operates, it is therefore important to examine the principles of CIL first. Chapter One

[13] Ulf Linderfalk, *On the interpretation of treaties: the modern international law as expressed in the 1969 Vienna convention on the law of treaties*,(Kluwer Academic Publishers 2007) 239.

of this thesis deals with the immunities of senior state officials. Nevertheless, it is important to distinguish between 'jurisdictional immunities of states' and 'immunities of senior state officials'. Although it is not within the scope of this thesis, it is important to differentiate these two issues from the outset. The former relates to the doctrine of state immunity and it is procedural bar in nature. [14] This is because it relates to traditional absolute rule of jurisdictional immunity based on the equal sovereignty of states expressed in the maxim 'par in parem imperium non habet'.[15] Nevertheless, the rule has evolved to a limited or restricted rule of immunity whereby national courts can only exercise jurisdiction over acts of a foreign state which have not been carried out in governmental acts or acta jure gestionis. Thus it concerns the ordinary rules of private transactions.[16]

On the other hand, immunities of senior state officials are within the scope of this thesis. Under international law, CIL grants two types of immunities to head of states: immunity *ratione personae* and immunity *ratione materiae.* The former is known as 'personal immunity', while the latter is 'functional immunity'. Personal immunity or immunity *ratione personae* is given to a small group of individuals, namely, heads of state and some senior serving government officials or ministers. Hence, it is granted according to the status of those individuals. This corresponds with the objective of the law of state immunity under CIL to ensure non-interference in official activities.[17] Therefore, personal immunity will be lost once a head of state or senior government official has left office.[18] The second type of immunity under CIL is immunity *ratione materiae* or functional immunity. This kind of immunity

[14] In the *Arrest Warant* case, the ICJ explained that while "jurisdictional immunity is procedural in nature, criminal responsibility is question of substantive law" in paragraph 60 of the judgment. See also: Lorna McGregor, 'Torture and State Immunity: Deflecting impunity, distorting sovereignty' [2008] 18 The European Journal of International Law 903, 907.

[15] Xiaodong Yang, *State immunity in international law*,(Cambridge University Press 2012) 3;Robert McCorquodale and Martin Dixon, *Cases and materials on international law*,(4th edn, Oxford University Press 2011) 305; Matthias Kloth, *Immunities of the right of access to court under Article 6 of the European Convention on Human Rights*,(Nijhoff 2010) 22; Alebeex (n 7) 22; Bankas (n 6) 74; Richard K Gardiner, *International Law*,(edn, Pearson Longman 2003) 343 ;Jürgen Bröhmer, *State immunity and the violation of human rights*,(Martinus Nijhjoff Publishers 1997) 17; Gamal Moursi Badr, *State immunity: an analytical and prognostic view*,(Nijhoff 1984) 103

[16] Mary Fan Guido Acquaviva, Alex Whiting, *International Criminal Law: Cases and Commentary*,(Oxford University Press 2011) 90.

[17] Brohmer (n 15) 42.

[18] Hazel Fox, 'Imputability and immunity as separate concepts: The removal of immunity from civil proceedings relating to the commission of an international crime', in Kaiyan Homi Kaikobad and Michael Bohlander (ed), *International law and power perspectives on legal order and justice* 2009) 166.

theoretically covers most other state officials. However, it only covers conduct performed in their official capacity.[19] In other words, it only covers former government officials provided that the conduct concerned was carried out in their official capacities whilst in office. Likewise, functional immunity also contains some problems in its application. For example, this thesis will deal with issues such as the level of seniority that government officials need to be in order to be entitled to this type of immunity and whether immunity also applies to other classes of government officials. Chapter One will attempt to answer these questions. In addition, it will seek to define the terms: heads of government and head of state. In the *Arrest Warrant* case, the International Court of Justice (hereafter 'ICJ') held that, "in international law it is firmly established that certain holders of high-ranking office in a State, such as the Head of State, enjoy immunities from jurisdiction in other States, both civil and criminal".[20] In other words, the *Arrest Warrant* case stipulated that a serving head of state enjoyed absolute immunity in a foreign court for criminal proceedings. The *Arrest Warrant* case concerned an incumbent foreign minister who had allegedly incited racial hatred, in various speeches, which led to the killing of hundreds of people. As far as former head of state immunity is concerned, immunity *ratione materiae* does not provide protection for private conduct or acts carried out in a personal capacity once they have left office. Chapter Three will further explore this matter when analysing the *Pinochet (No.3)* judgment. In this, the House of Lords held that former heads of state could not enjoy immunity *ratione materiae* for alleged acts of torture under the CAT notwithstanding that it was silent on the issue of immunity.[21]

Violation of Peremptory Norms or Jus Cogens as an Exception to the Immunity Rule

The advancement in the human rights movement has triggered the prohibition of torture. This has led to individual accountability for violation of peremptory norms such as torture.[22] As a result, heads of state and government officials are affected by this alleged exception to immunity. There is often much uncertainty in deciding

[19] Kimberley N. Trapp, *State responsibility for international terrorism*,(Oxford University Press 2011) 94.
[20] The *Arrest Warrant* case (n 7), [51].
[21] See generally: The *Pinochet (No 3)* case will be analysed in more detail in Chapter Three later.
[22] Yitiha Simbeye, *Immunity and international criminal law*,(Ashgate 2004) 66.

whether violation of peremptory norms or *jus cogens* is an exception to the law of head of state immunity. Article 53 of the VCLT says that, "a peremptory norm of general international law is a norm accepted and recognised by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character".[23]

Chapter Two of this thesis expands on the above claim and ventures to provide answers to this contentious matter. There is evidence from state practices to suggest that some national courts are still reluctant to deny immunity even for violations of peremptory norms such as torture.[24] The *Al-Adsani case v The United Kingdom* (*Al-Adsani*) best illustrates the latter argument.[25] Notwithstanding that the case was originally brought in the UK as a civil claim, it can be argued that the *Al-Adsani* case has provided a re-evaluation of the issues surrounding head of state immunity. It was held in that case by the European Court of Human Rights (hereafter 'ECHR') that the prohibition of torture, which was a *jus cogens* norm, could not override the immunity rule.[26] An analysis will also be carried out to explore the arguments between access to court and immunity in the same chapter. It will be seen that the prohibition of torture as a *jus cogens* norm does not necessarily provide automatic access to court. The majority and minority opinions from the *Al-Adsani* case will be used to demonstrate the controversy surrounding whether violation of peremptory norms, such as the prohibition of torture, is a legitimate way to trump the immunity rule. This will involve the normative hierarchy theory argument for determining whether one important international rule can trump another equally important one. Nevertheless, Chapter Two further illustrates that there should be no hierarchy of rules under international law. It will be shown that the arguments made by the minority opinions in the *Al-Adsani* case, that peremptory norms should trump immunity, are not convincing. The privileges of access to court should not trump immunity and vice versa. This is because they are both important international rules.

[23] Vienna Convention on the Law of Treaties 1969, Art 53.
[24] See for instance: *United States of America (Plaintiff) v Charles Emmanuel (Defendant)* [2007] WL 2002452 (S.D.Fla) (US District Court, S.D.Florida, Miami Division) ; *Ali Saadallah Belhas et al (Appellants) v Moshe Ya'Alon, former Head of Army Intelligence Israel (Appellee)* [2008] 515 F.3d 1279, 380 U.S.A. App.D.C.56 (US Court of Appeals, District of Columbia Circuit)
[25] *Al-Adsani v United Kingdom* [2001] 34 EHRR 273 (European Court of Human Right) .
[26] ibid [61].

It would be wrong to assume that violation of *jus cogens* norms, such as torture, is the ultimate trump card that gives priority when deciding cases involving serving head of state. The practice of systematically relying on *jus cogens* norms for certain human rights protections remains debatable.[27] Apart from the *Al-Adsani* case, other cases such as *Bouzari* and *Jones*[28] also proves that some national courts are reluctant to deny immunity even for alleged violations of torture.[29]

There are two groups of academics who have written extensively on the issue of peremptory norms or *jus cogens* norms. On the one hand, it has been argued by some academics that the violation of *jus cogens* norms, such as torture, should trump immunity of heads of state. The leading academic supporting this view is Orakhelashvili.[30] He argues that there is a strong doctrinal support which means that the violation of peremptory norms trumps state immunity, even before national courts.[31] He said that:

> it is the natural effect of peremptory norms as superior norms that they trump the "rules" of principles on the immunity of States and their officials, if and to what extent such rules actually exist.[32]

Another academic with similar views on the matter is MacGregor.[33] She believes that victims of torture should be dealt with in court and justice should be carried out.

The second group of academics thinks that violation of *jus cogens* norms, such as acts of torture, should not necessarily trump immunity. For example, Akande and Shah have stated that the idea of immunity being in conflict with *jus cogens* norms is not tenable.[34] From another perspective, Voyiakis argues that violation of

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[27] Olivier de Schutter, *International human rights law*,(Cambridge University Press 2010) 68.
[28] *Jones (Respondent) v Ministry of Interior Al-Mamlaka Al-Arabiya AS Saudiya (The Kingdom of Saudi Arabia) (Appellants) Mitchell and others (Respondents) v Al-Dali and others Ministry of Interior Al-Mamlaka Al-Arabiya AS Saudiya (the Kingdom of Saudi Arabia) (Appellants) Jones (Appellants) v Ministry of Interior Al-Mamlaka Al-Arabiya AS Saudiya (The Kingdom of Saudi Arabia) (Respondents)* [2006] UKHL 26 UKHL 26 (House of Lords)
[29] The discussions on these cases will be made in Chapter Two.
[30] Orakhelashvili (n 9) 964.
[31] ibid
[32] Alexander Orakhelashvili, *Peremptory norms in international law*,(Oxford University Press 2006) 341.
[33] Watts (n 5) 81. Sir Arthur Watt said that "The idea that individuals who commit international crimes are internationally accountable for them has now become an accepted part of international law". See also: Lorna McGregor, 'Immunity v Accountability: Considering the relationship between state immunity and accountability for torture and other serious international crimes' [2005] Redress
[34] Akande and Shah (n 9) 823.

peremptory norms does not necessarily trump immunity.[35] The view that he holds is that state immunity and peremptory norms are both equally important international norms. It would be impracticable to place one international norm hierarchically above another. The argument in this thesis falls within the latter group. It disagrees with those in the first group in saying that peremptory norms or *jus cogens* norms can trump immunity especially for serving heads of states as this is absolute. This is because there is not enough evidence or grounds to support the fact that prohibition of torture can be used to restrict immunity *ratione personae.* Nevertheless, the argument to support such a viewpoint is slightly different from the second group as it is based on the findings of *opinio juris,* and to a lesser extent on state practice. It will be submitted in this thesis that there are inconsistent state practices to suggest that violation of *jus cogens* norms can trump immunity. Moreover, there is no strong evidence of *opinio juris* by states to suggest the restriction for the doctrine of immunity *ratione personae* relating to serving heads of state and other senior government officials. Consequently, in order to restrict immunity under CIL, there is a need for a specific rule that expressly says so. One can argue that if there are specific rules to remove immunity privileges, then there will be no need for the existence of the complementary mechanism such as *ad hoc* international tribunals, the International Criminal Court (hereafter 'ICC') as well as the hybrid courts.

Hence, this thesis seeks to rebut the presumption made by some academics that the CIL has already changed the rule of immunity *ratione personae* in a wider context. It will be seen that the decision of the ICJ in the *Arrest Warrant* case has shed light on the fact that an alleged violation of *jus cogens* by a serving minister for foreign affairs is not enough to remove immunity *ratione personae* which is absolute. Therefore, the other important question to be asked is whether an allegation of torture could potentially remove immunity *ratione materiae* for former heads of state and heads of government. It has been argued by Zappala that heads of state should not benefit from the functional immunity or immunity *ratione materiae* for

[35] Emmanuel Voyiakis, 'Access to Court v State Immunity' [2003] 52 International and Comparative Law Quarterly 297, 321. He argued that: "it is not all clear how the prohibition of torture and the law of state immunity could collide in the first place. To risk some triviality, the prohibition of torture seems mainly about prohibiting the practice of torture, whereas the rules of State immunity are mainly about the exercise of jurisdiction over foreign States".

international crimes under CIL.[36] In contrast, Fox argues that there is no clear CIL relating to the precise nature and scope of the immunities of heads of state.[37] Moreover, Caplan argues that the undefined nature of *jus cogens* norms, which may potentially remove immunity, can cause problems for the courts.[38] Nonetheless, the issue of the issuance of immunity *ratione materiae* to former heads of state and heads of government officials will be scrutinised in Chapter Three of this thesis.

It is also interesting to note that there are now several complementary mechanisms for prosecuting serious violations of human rights by high-ranking officials through national, international and hybrid courts. The rules of immunity relate mostly to the national courts[39] because most cases are brought at national court level. Only in exceptional circumstances are cases heard at international tribunals or at hybrid court level. Thus, the complementary mechanism for prosecuting high-ranking officials means that there are now various pathways for victims of torture to address their claims. However, national courts still remain the main forum for cases to be brought against heads of state.[40] Immunities are still important because it is still up to the discretion of national courts to decide whether they can put government officials on trial pending issues of jurisdiction. Any changes to the law of immunity should not affect other mechanisms. The reason for this is that international tribunals and, to some extent, the hybrid courts have their own special mechanisms of enforcement. For example, the international tribunals and the hybrid courts need not be concerned with establishing jurisdiction issues to try heads of state or government officials because they are created by Chapter VII of the UN Security Council Resolutions.[41]

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[36] Salvatore Zappala, 'Do heads of state in office enjoy immunity from jurisdiction for international crimes? The Ghaddafi case before the French cour de Cassation' [2001] 12 European Journal of International Law 595, 595.

[37] Cf: Hazel Fox, 'The first Pinochet case: Immunity of a former head of state' [1999] 48 International and Comparative Law Quarterly 207-216, See also: Hazel Fox, 'The Pinochet Case No.3' [1999] 48 International and Comparative Law Quarterly 687, 692.

[38] Lee Caplan, 'State Immunity, Human Rights, and Jus Cogens: A Critique of the Normative Hierarchy Theory' [2003] 97 American Journal of International Law 741, 773.

[39] Hazel Fox, *The law of state immunity*,(2nd edn, Oxford University Press 2008) 1.

[40] M. Cherif Bassiouni, *International criminal law*,(3rd edn, Martinus Nijhoff 2008) 285.

[41] Ronli Sifris, 'The four pillars of transitional justice: a gender-sensitive analysis', in Sarah Joseph and Adam McBeth (ed), *Research Handbook on International Human Rights Law* (Edward Elgar 2010) 277.

The Pinochet (No 3) Case Effect

The importance of the prohibition of torture was brought into the spotlight in the UK case of *Regina* v *Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte* (No 3*)* (*Pinochet (No 3)*).[42] The outcome of this case was significant because the House of Lords refused the immunity *ratione materiae* plea from a former head of state. General Augusto Pinochet, a former head of state of Chile, came to London in 1998 for medical treatment. While he was in London, he was arrested in accordance with an arrest warrant issued by the Spanish Magistrate, Judge Baltasar Garzon. It was claimed that Pinochet allegedly committed torture, genocide and terrorism during his military regime. The House of Lords reached the decision of no immunity in accordance with the CAT because the states party to the case were all signatories to the CAT. The CAT was enacted by the UN General Assembly Resolution 39/46. It came into force on 26 June 1987. However, the ambiguity of the wording in the CAT on the law of head of state immunity caused a further problem. The problem lies in the assumption that the CAT is a well-equipped treaty to deal with matters regarding head of state immunity.

There are three reasons why the debate on examining the status of the law of head of state immunity under the CAT is important. The first is that current CIL governing the law of head of state immunity is unclear. Moreover, their applications in many jurisdictions are not consistent. There is no uniform consensus on the law as a standard approach by many states. It will be seen that the law of immunity under CIL is quite complex, especially with regard to the doctrine of immunity *ratione materiae*. The second reason is that the CAT is generally silent on the issue of immunity and yet the House of Lords in *Pinochet (No.3)* was able to decide on the abrogation of immunity *ratione materiae* for a former head of state.[43]

This case marks a starting point for the discussion on the legal issues surrounding head of state immunity. The reason for this is that the CAT is generally silent on the matter of immunity as correctly pointed out by Lord Goff in his dissenting

[42] *R v Metropolitan Stipendiary Magistrate and others, ex parte Pinochet Ugarte (No.3)* [1999] 2 All ER 97 (House of Lords) .
[43] ibid[113g] See: Craig Barker, *International law and international relations*,(edn, Continuum 2000) 156.

judgment.[44] Whether the CAT really can have an impact on the law of head of state immunity, in particular those affecting former heads of state, demands further investigation. Cases against Pinochet had been heard twice before. In *Regina* v *Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte* (No 1) (1998) (*Pinochet (No. 1)*),[45] it was held by the majority that Pinochet could not benefit from the immunity privileges for alleged acts of torture, which was contrary to the act of state doctrine. In other words, the act of torture could not have been an official function of a head of state. This meant that the residual immunity *ratione materiae* would not be available to cover former heads of state, such as Pinochet. However, Lord Hoffman's failure to disclose his involvement in the Amnesty International Charity Ltd as a former director has led to the disqualification of the *Pinochet (No.1)* judgment.

However, in *Pinochet (No.3)*, the House of Lords reached the no immunity *ratione materiae* verdict for Pinochet based on the CAT.[46] This triggers the need to find out the real meaning of the CAT when dealing with the problem concerning head of state immunity. However, not all the Articles in the CAT are discussed here. For the purpose of this analysis, only Articles 1 and 5 of the CAT are considered to see whether they can potentially remove immunity *ratione materiae* for former heads of state and senior heads of government who have allegedly committed acts of torture.

Chapter Three looks at the silent issue of the CAT on immunity in detail. Articles 31 and 32 of the VCLT assist in the interpretation of both of the relevant Articles from the CAT. In particular, Article 31(3)(c) of the VCLT mentions that, "any relevant rules of international law applicable in the relations between the parties" should be taken into consideration when interpreting a treaty such as the CAT. This means that any existing relevant rules of CIL in the area of head of state immunity should be considered, and therefore this will include immunity *ratione personae* and immunity *ratione materiae*.

Article 5 of the CAT concerns the jurisdiction provision for violations of acts of torture. It stipulates that: "Each State party shall take such measures as may be

[44] The *Pinochet (No 3)* case [122e] (Lord Goff).
[45] *Regina v Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (No.1)* [1998] 4 All ER 897 (House of Lords) 897.
[46] The *Pinochet (No 3)* case [115d] (Lord Browne-Wilkinson).

necessary to establish its jurisdiction over such offences in cases where the alleged offender is present in any territory under its jurisdiction".[47] Nevertheless, the definition of torture under Article 1 of the CAT also has to be considered in the analysis in order to find out what constitutes torture. Article 1 of the CAT defines torture as "any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person … when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity".[48] However, the definition of torture under Article 1 is problematic because the elements have to be fulfilled and yet the CAT does not say anything about whether all of these elements need to be present. The judgments of the *Pinochet (No.3)* case will be used to scrutinise whether the CAT is an effective treaty to deal with the immunity issue. Chapter Three will present a thorough analysis of *Pinochet (No.3)*. This consists of examining the majority and minority opinions made by the House of Lords. The Law Lords were divided, even in the majority opinions, over the question of immunity *ratione materiae* for General Pinochet as a former head of state. The Law Lords in the first group of the majority opinion based their judgments on a narrow approach; they included: Lord Browne-Wilkinson, Lord Hutton and Lord Saville. Their Lordships reasoned the findings according to the 'contractual' nature of the CAT between the member states in deciding the issue concerning immunity *ratione materiae.*[49] The second group of majority judges took a broader approach.[50] Their Lordships in this group consisted of: Lord Millett, Lord Phillips and Lord Hope. The Law Lords took their reasoning for the removal of immunity *ratione materiae* not just from the CAT, but also because of the conflict between state immunity and the position of torture as *jus cogens* under CIL. In addition to this discussion, Chapter Three will also analyse later decisions of the House of Lords that clarify the judgment of *Pinochet (No.3)*. It will be seen that there is lack of consistent practice along the lines of *Pinochet (No.3)*.

[47] Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984, Article 5.
[48] ibid, Article 1.
[49] For general discussion see: Rachel Swain, 'A discussion of the Pinochet case (House of Lords Decision of 24 March 1999) Noting the juxtaposition of international relations and international law perspectives' [2000] 69 Nordic Journal of International Law 223, 239.
[50] Erika De Wet and Jure Vidmar, *Hierarchy in international law : the place of human rights*,(Oxford University Press 2012) 129.

The third reason for the discussion of the issue of head of state immunity through the CAT is in relation to the hypothesis of whether CAT has become CIL. This indirectly relates to the minority opinion of the *Pinochet (No.3)* case by Lord Goff. His Lordship said that the CAT did not specifically mention head of state immunity.[51] This thesis proposes to expand further on the reasoning given by Lord Goff. His Lordship correctly argued that the CAT was silent on the issue of head of state immunity, yet his Lordship only presented half of the argument. Hence, through treaty interpretation, it will be suggested whether the definition of torture and extensive jurisdiction provisions have become new custom. If they have become CIL, then they will abrogate immunity *ratione materiae* for former heads of state and heads of government who have allegedly committed acts of torture. The discussion on the process of formation of potentially new CIL for the CAT is known as the 'circularity' issue, which will be dealt with in Chapter Four.

The Circularity Issue on the Formation of Customary International Law

In Chapter Four, the thesis moves to the debate on the circularity issue to determine whether Articles 1 and 5 of the CAT have become CIL. This is an alternative suggestion to investigate whether the CAT can have an impact on the law of head of state immunity. Article 31 of the VCLT says that when interpreting a treaty it should be done in the "light of its object and purpose". Article 31(3)(c) of the VCLT states that, "any relevant rules of international law applicable in relations between the parties" shall also be taken into account along with the context. In other words, under Article 31(3)(c) of the VCLT, the existing CIL on head of states should be considered when interpreting the CAT. As a result, this creates a 'circular' pattern of thought.

As far as the process on the formation of new CIL is concerned, it requires two elements: state practice (objective element) and *opinio juris* (subjective element). State practice refers to consistent case laws.[52] Therefore, it should reflect the consistencies of states' behaviour. On the other hand, *opinio juris* denotes the beliefs

[51] The *Pinochet (No 3)* case [125g]-[125h] (Lord Goff).
[52] David Bederman, *Custom as a source of law*,(Cambridge University Press 2010) 144.

of states that they are bound by certain legal obligations.[53] The *North Sea Continental Shelf* cases confirmed the traditional approach on the formation of CIL which required both state practice and *opinio juris* elements.[54] The *Nicaragua* case also affirmed this traditional approach on the formation of CIL.[55]

Nevertheless, in recent years there have been suggestions that the traditional method of formation of CIL based on the presence of both of the elements should be put on a sliding scale.[56] This provides the counter-argument in this thesis on the traditional notion of the formation of CIL. Kirgis suggests that there should be a modern approach on the formation of CIL based on the sliding scale theory.[57] The sliding scale theory conveys the argument that if one of the elements has the edge over the other element, then it will be sufficient for the purpose of forming a new CIL.[58]

For example, if there is strong evidence of state practice, the *opinio juris* requirement can be given less priority. Similarly, if there are strong grounds for states to 'believe', then it will be adequate for the formation of CIL under the modern approach despite the lack of consistent state practice. However, it will be seen that writers such as Kirgis, Tasioulas and Roberts all say that whether CIL has been formed by the presence of enough *opinio juris* depends on the 'moral' nature of the customary rule involved.[59] Chapter Four explores this modern approach by

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[53] Andrew Guzmán, *How international law works: a rational choice theory*,(Oxford University Press 2008) 194.

[54] The *North Sea Continental Shelf* cases (n 56) [77]. The ICJ said that: "…not only must amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of the rule of law requiring it. The need for such a belief, ie, the existences of a subjective element, is implicit in the very notion of the *opinio juris sive* necessitates. The States concerned must therefore feel that they are conforming to what amounts to a legal obligation".

[55] *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v US)* [1986] Rep 14 ICJ 135 (ICJ) [207]. The Court said that "For a new customary rule to be formed not only must the acts concerned "amount to a settled practice" but they must be accompanied by the *opinio juris sive* necessitates". For general discussions see: George A Finch, *The sources of modern international law. Carnegie Endowment for international peace. Division of International law monograph series*,(1937) p. 47. ;James Leslie Brierly and Humphrey M. Waldock, *The law of nations : an introduction to the international law of peace*,(6th edn, Clarendon 1963) 59. ; Hans Kelsen, *Principles of international law*,(2nd edn, Holt, Rinehart and Winston 1966) 440- 441. . , H. W. A. Thirlway, *International customary law and codification : an examination of the continuing role of custom in the present period of codification of international law*,(A. W. Sijthoff 1972) p. 46. ;Karol Wolfke, *Custom in present international law*,(1964) 20-58.

[56] Frederic Kirgis, 'Custom on a sliding scale' [1987] 81 American Journal of International law 146, 146.

[57] ibid, 149.

[58] ibid

[59] See generally: John Tasioulas, 'In defence of relative normativity: communitarian values and the Nicaragua case' [1996] 16 Oxford Journal of Legal Studies 85, ; Anthea Elizabeth Roberts,

explaining that it is possible for new CIL to be created based on the *opinio juris* element under the sliding scale theory. This is due to the fact that there is the lack of consistent practice along the lines of *Pinochet (No.3).*

This theory will be put into practice based on the evidence of *opinio juris* supporting the fact that the CAT has become CIL. Chapter Four will produce evidence of *opinio juris* supporting the fact that Articles 1 and 5 of the CAT have become CIL. The evidence of *opinio juris* includes United Nations General Assembly Resolutions (hereafter 'UNGA Resolutions'). Notwithstanding that UNGA Resolutions are not generally binding on member states, it has been argued by some that if they are concerned with general norms of international law, then acceptance by a majority vote constitutes evidence of opinions of government in the widest forum where such opinions can be expressed.[60] The ICJ held in the *Legality of the Threat of Nuclear Weapons* case that despite the fact that the UNGA Resolutions were not generally binding, they could still contribute to the normative value for establishing the existence of a rule.[61] Furthermore, even when they are framed as "general principles", these resolutions still provide a basis for the progressive development of the law and the speedy consolidation of customary rules.[62] This was seen in the *Nicaragua* case where the ICJ said that the *opinio juris* itself can satisfy the requirement for the conformity of state practice.[63]

Chapter Four also takes into account the jurisprudence by the Committee against Torture (hereafter the 'Committee'). In particular, the views of the Committee are especially useful as they present the enforcement mechanism for the CAT to ensure that states adhere to their treaty obligations. It will be seen that the Committee has reinforced the obligation on state parties for their failure to exercise jurisdiction over the offences of torture.

Thus, Chapter Four will demonstrate that Articles 1 and 5 of the CAT have become CIL based on the evidence of *opinio juris* and relying on Kirgis's sliding scale

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'Traditional and modern approaches to customary international law: A reconciliation' [2001] 95 American Journal of International Law 757,

[60] The *Nicaragua* case (n 60) [187]-[195]; [203]-[205]. See also: Ian Brownlie, *Principles of Public International Law*,(7th edn, Oxford University press 2008) 15.

[61] *Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion)* [1996] ICJ Reports 226 (ICJ Reports) [70].

[62] Brownlie (n 60) 15.

[63] The *Nicaragua* case (n 60) [186].

theory argument. Moreover, it will be submitted that the combined effect of Articles 1 and 5 of the CAT strongly suggest that both of the treaty provisions can remove immunity *ratione materiae*. The effect of this is that former heads of state and senior heads of government will not be able to rely on the residual immunity *ratione materiae* accorded under international law for alleged acts of torture.

Cross-Examination for the Evidence of Opinio Juris on the Formation of New Custom

The penultimate chapter of this thesis complements the collective evidence of *opinio juris* supporting the fact that Articles 1 and 5 of the CAT have become CIL, as discussed in Chapter Four. Chapter Five will, therefore, provide an explanation as to why the state practice requirement is not needed in this instance. The cumulative evidence of *opinio juris* will be defended in the context of the CAT to support the claim that the two specific provisions have become CIL with the impact of restricting immunity *ratione materiae* for former heads of state.

Furthermore, it will be argued in Chapter Five that an international treaty like the CAT can be treated as *opinio juris*. This has been supported by the *North Sea Continental Shelf* cases. It will be submitted that these are strong pointers to suggest that the reliance on the *opinio juris* element in this instance can assist with the formation of new CIL by Articles 1 and 5 of the CAT. The consequence of this is that it will be argued that the CAT has had an impact on the law of head of state immunity.

Moreover, Chapter Five argues that the fact that the CAT has received more than half of its ratifications suggests that there is a general consensus on the intention of the CAT to enforce the prohibition of torture.[64] This is another factor which suggests that the CAT has evolved into new CIL with the effect of restricting immunity *ratione materiae* for former heads of state who have allegedly committed acts of torture.

Furthermore, a critical analysis in Chapter Five supports the view that UNGA Resolutions can aid the formation of new custom based on a general consensus and

[64] See: http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-9&chapter=4&lang=en Accessed 18 August 2014.

opinio juris of states. This is notwithstanding the general perception that UNGA Resolutions are not binding.[65] Nevertheless, Chapter Five rejects this presumption by arguing that the UNGA Resolutions are forms of *opinio juris*, and therefore manifest the consensus of states with regard to particular international law issues.

Chapter Five will analyse this from a different perspective to support these claims. Firstly, three recent case laws will be scrutinised in greater detail: *Khurts Bat*, *Khaled Nezzar* and *Hissène Habré*. The previous two were decided by domestic courts whereas the latter was decided by the ICJ. All of these cases are significant for the present discussion as they show that there is a trend both at domestic and international levels of courts being more eager to restrict immunity *ratione materiae* for former heads of state and other senior government officials. Chapter Five will argue that the judgments of the cases show that the perception and law of head of immunity has progressed since the *Pinochet (No 3)* case which was decided by the HL.

This chapter also explores the influence that international courts have on national courts. It does this by considering the jurisprudence of other courts in not applying the CAT, but which may have influenced other international tribunals such as the ICTY and the ICTR. The findings of the jurisprudence from the international tribunals will facilitate the interpretation of the definitions of torture (Article 1) and the extensive jurisdiction (Article 5) provisions under the CAT. As an illustration, these cases may be useful for interpretation purposes, to see whether there is any correlation with regard to the definition of torture under the CAT. Therefore, the impact of the jurisprudence by the international tribunals is that they will clarify the general norm relating to the issue of prohibition of torture and the extensive universal jurisdiction under the contemporary context through Article 31(3)(c) of the VCLT. This is vital as it illustrates the significance of the applicability of certain customary norms which can assist with the interpretation of the rules under the CAT. Furthermore, it has been suggested that the application of the jurisprudence of the international tribunals will reflect the relationship between human rights and other

[65] *Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion)* [1996] ICJ Reports 226 (ICJ Reports) [70].

norms.[66] Chapter Five will submit that the jurisprudence from the international courts coincides with the evidence of *opinio juris* when it comes to the definitions of torture and the jurisdiction provisions. It can also be seen that the international tribunals are encouraged to take the UNGA Resolutions into account when deciding on cases.[67] Hence, this process relates back to the fact that the UNGA Resolutions are considered as the opinions and consensus of states on certain legal issues. The third section of Chapter Five investigates the role of national courts in interpreting international law. It will be argued that signatories to the CAT have obligations to comply with the treaty. Therefore, domestic courts play an important role to ensure the full compliance by member states to the CAT and in overcoming obstacles to criminal accountability. Domestic courts also provide a pathway for the development of clarification of international law principles. This will be illustrated using the *Khurts Bat* case. As a result, Chapter Five will submit that the overwhelming cumulative evidence in Chapter Four together with the critical analysis put forward offer compelling evidence to state that the definition of torture (Article 1 of the CAT) and the extensive universal jurisdiction provisions (Article 5 of the CAT) have become CIL. This indicates that the residual immunity *ratione materiae* should not be granted for former heads of state.

Finally, the concluding chapter of this thesis will summarise all the main claims raised in each chapter as well as providing answers to those questions raised throughout this work. This thesis will submit that there is strong possibility for new CIL to be formed through general consensus and evidence of *opinio juris*.

[66] Phillipe Sands, 'Treaty, Custom and the Cross-Fertilization of International Law' [1998] 1 Yale Journal of Human Rights and Development Law 85, 87.

[67] For example see: Wladyslaw Czaplinski, 'Jus cogens, obligation erga omnes and international criminal responsibility', in Jose Doria, Hans-Peter Gasser and Cherif Bassiouni (ed), *The legal regime of the International Criminal Court : essays in honour of Professor Igor Blishchenko : in memoriam Professor Igor Pavlovich Blishchenko (1930-2000)* (Martinus Nijhoff 2009) 410.

Chapter One

Immunity of Senior State Officials under Customary International Law

In examining immunity of heads of State or other high-ranking officials, it is important to distinguish the different terms of immunity. Jurisdictional immunity according to the International Court of Justice (hereafter 'ICJ') in Germany v Italy: Greece Intervening ('hereafter 'Jurisdictional Immunities of the State case') said that was 'entirely distinct from the substantive law which determines whether…conduct is lawful or unlawful'.[68] The ICJ previously explained in the *Arrest Warrant* case that 'may well bar prosecution for a certain period', but it 'cannot exonerate the person to whom it applies from…criminal responsibility'.[69] In response to this apparent exception to immunity *ratione personae*, the ICJ clarified in the *Arrest Warrant* case that:

> Jurisdictional immunity may well bar criminal prosecution for a certain period or for certain offences: it cannot exonerate the person to whom it applies from all criminal responsibility.[70]

Hence, the ICJ held in that case that jurisdictional immunity did not mean impunity for international crimes allegedly committed by heads of state and high ranking officials. This was because jurisdictional immunity did not affect the criminal responsibility of the defendants which were related to substantive issues. The ICJ made it clear in the judgment and said that:

> the rules governing the jurisdiction of national courts must be carefully distinguished from those governing jurisdictional immunities: jurisdiction does not imply absence of immunity, while absence of immunity does not imply jurisdiction. Thus, although various international conventions on the prevention and punishment of certain serious crimes impose on States obligations of prosecution or extradition, thereby requiring them to extend their criminal jurisdiction, such extension of

[68] *Jurisdictional Immunities of the State (Germany v Italy: Greece Intervening)* [2012] ICJ (ICJ) [58].
[69] *Democratic Republic of the Congo v Belgium (Arrest Warrant Case)* [2002] 3 ICJ Reports 24 (ICJ) [60]; Francoise Bouchet-Saulnier, *The Practical guide to humanitarian law*,(Rowman & Littlefield Publishers 2013) 275.
[70] The *Arrest Warrant* case [60].

> jurisdiction in no way affects immunities under customary international law, including those of Ministers of Foreign Affairs. These remain opposable before the courts of a foreign State, even where those courts exercise such a jurisdiction under these conventions.[71]

Moreover, the ICJ said in the *Jurisdictional Immunities of State* case that:

> The fact that immunity may bar the exercise of jurisdiction in a particular case does not alter the applicability of the substantive rules of international law'.[72]

Therefore, jurisdictional immunities related to the doctrine of state immunity and it is procedural in nature; whereas criminal responsibility is a question of substantive law.[73] Nevertheless, it originates from the absolute rule of jurisdictional immunity where equal sovereignty of states expressed in the maxim 'par in parem imperium non habet'. International law has since evolved beyond this formulation towards a limited rule of immunity. This restrict immunity only empowers national courts to exercise jurisdiction over those acts of a foreign state that have not carried out in government acts (acta jure gestionis), but subject to the ordinary rules of private transaction.[74]

Essentially jurisdictional immunities relate to a foreign state in respect of a commercial activity the foreign state carries out while acting as would a private actor.[75] It refers to the direct confrontation between the two aspects of sovereignty, territorial and national.[76] Moreover, it also relates to the 'territorial tort exception' which excludes the jurisdictional immunity of a foreign state in instances of tortuous conduct.[77]

> Immunity from jurisdiction is an immunity not merely from being subjected to an adverse judgment but from being subjected to the trial process. It is…necessarily

[71] The *Arrest Warrant* Case [59]. . Similar views have been expressed in [4] (Separate Opinion of Judges Higgins, Kooijmans, and Buergenthal).
[72] *Jurisdictional Immunities of the State (Germany v Italy: Greece Intervening)* [2012] ICJ (ICJ) [100].; Christian J Tams and James Sloan, *The development of international law by the International Court of Justice*,(Oxford University Press 2013) 109-110.
[73] Mary Fan Guido Acquaviva, Alex Whiting, *International Criminal Law: Cases and Commentary*,(edn, Oxford University Press 2011) 88.
[74] Ibid 90.
[75] Dinah Shelton, *The Oxford handbook of international human rights law*,(edn, Oxford University Press 2013) 393.
[76] YB ILC 1981, A/CN.4/340 & Corr. 1 and Add1 & Corr.1, Third Report of Mr Sompong Sucharitkul 131, Joanne Foakes, *The position of heads of state and senior officials in international law*,(edn, Oxford University Press 2014) 301;Hazel Fox, *The Law of State Immunity*,(3rd edn, Oxford University Press 2013) 301.
[77] Dinah Shelton, *The Oxford handbook of international human rights law*,(Oxford University Press 2013) 393

> preliminary in nature. Consequently a national court is required to determine whether or not a foreign state is entitled to immunity as a matter of international law before it can hear the merits of the case brought before it and before the facts have been established.[78]

Thus, jurisdictional immunity will not form part of the thesis. On the other hand, immunities of head of State and senior government officials will form the main basis of the present analysis. There are two types of immunities namely *immunity ratione personae* and *immunity ratione materiae.* The difference between the two concepts will be discussed and explained in more detail below in this chapter.

The law relating to immunity of head of state is an area of international law which continues to be widely debated. The problem concerning head of state immunity has recently received attention due to the widely publicised outcome of *R v Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (No.3)* (hereafter *Pinochet (No.3)*), in the United Kingdom. This is due to a problem in its application and some doctrinal dilemmas. Nevertheless, it is important to note that the law of head of state immunity is not a new legal concept *per se*. Hence, some evaluation of the rich history of state immunity is useful here before discussing the doctrine of head of state immunity given under customary international law (hereafter 'CIL'). This is because the privileges which are attached to heads of states derive from the state itself.[79] 'State' here can be used to mean a country, nation, people, or government[80] and this immunity can be traced back to the principle of sovereignty.[81] Theoretically, a state usually enjoys immunity from the jurisdiction of foreign courts based on the dictum: *par in parem non habet imperium* (an equal has no power over another equal).[82] Hazel Fox defines state immunity as:

> a plea relating to the adjudicative and enforcement jurisdiction of national courts which bars the municipal court of one State from adjudicating the disputes of

[78] Tams and Sloan (n 72) 110.
[79] Brohmer (n 15) 29-30.
[80] Hazel Fox, *The law of state immunity*,(Oxford University Press 2004) 23.
[81] Brohmer (n 15) 11.
[82] H. Lauterpacht, 'The problem of jurisdictional immunities of foreign states' [1951] 28 British Yearbook of International Law 220, 221.; Ian Sinclair, 'The law of sovereign immunity: Recent Developments' [1980] 167 Recueil des Cours 113, 121.; Muthucumaraswamy Sornarajah, 'Problems in applying the restrictive theory of sovereign immunity' [1982] 31 International and Comparative Law Quarterly 661, 664.; Christos L. Rozakis, 'The law of state immunity revisited: The case law of the European Court of Human Rights' [2008] 61 Revue Hellenique de Droit International 563, 564.

> another State. As such it is a doctrine of international law which is applied in accordance with municipal law in national courts.[83]

Therefore, the term 'head of state immunity' entails a procedural bar of jurisdiction on another state to hear or try other heads of state.[84] As the law has changed significantly in the last century, the definition of head of state now encompasses not just monarchs[85], but also presidents and prime ministers who effectively run a country on a day-to-day basis.[86] In this way, it can be seen that the previously exclusive privilege of head of state immunity has now expanded to include other senior serving state officials. This includes those serving as the heads of their respective government departments. In the past, the sovereigns or heads of state had absolute immunity privileges.[87] This meant that the heads of state were completely immune from foreign jurisdiction in all cases and in all circumstances.[88] Nevertheless, it will be argued in this chapter that not all serving government officials enjoy the immunity concession.

The issue relating to the immunity of senior state officials is within the ambit of this thesis. It concerns itself with two types of immunity. The first type is termed immunity *ratione personae* or personal immunity. It is conferred according to the status of the individual and is limited to specific state officials.[89] A classic example of an individual who may enjoy personal immunity is a serving head of state.[90] Immunity *ratione personae* is lost once officials have left office.[91] Nevertheless, they will then be protected by a second type of immunity known as immunity *rationae materiae* or functional immunity but this only covers official acts which they have

[83] Hazel Fox, *The law of state immunity*,(Oxford University Press 2002) 1.
[84] Diane Orentlicher, 'Immunities and amnesties', in Leila Nadya Sadat (ed), *Forging a convention for crimes against humanity* (Cambridge University Press 2011) 203.
[85] The monarchies the titles of head of State may vary considerably: emperor, king, queen, prince, grand duke, sultan, emir. In the case of republics, it is known as presidents. For further discussions see: Joanne Foakes, *The position of heads of state and senior officials in international law*,(Oxford University Press 2014) 29-30.
[86] See: ibid 29-30; Czaplinski (n 67) 411.
[87] Watts (n 5) 31-67. ; Bankas (n 6) 255.
[88] Alebeek (n 7) 13.
[89] Barker (n 43) 150.
[90] ibid 150.
[91] Fox (n 39) 102.

carried out while in office.[92] Therefore, functional immunity is given according to the nature of the conduct.[93]

This chapter includes a discussion of the terms - heads of governments and heads of states. It seeks to establish which senior state officials, apart from the heads of state, enjoy immunity *ratione personae* whilst in office. It will be seen in this Chapter that the judgment by the International Court of Justice (hereafter 'ICJ') in the Democratic Republic of Congo v Belgium (hereafter the '*Arrest Warrant* case' is of particular significance.[94] It was held in that case that serving ministers of foreign affairs could be considered senior state officials and, as such, should enjoy immunity *ratione personae* whilst in office.[95] Analysis will be made based on the ICJ's reasoning from the *Arrest Warrant* case to determine which other 'classes' of senior state officials might deserve the same level of immunity.

Through investigation, this chapter will show that the scope of the application of the rules of immunity *ratione personae* does not just apply to serving heads of state. An analysis using the 'functional justification' test will be used to decide which other senior serving heads of government - apart from heads of state - might enjoy personal immunity. It will be submitted that some senior serving heads of government who hold important governmental roles and functions might be entitled to the same immunity privileges as the heads of state.[96]

This chapter consists of two sections. The first section explains in detail the two types of immunity, namely: immunity *ratione personae* and immunity *ratione materiae* granted under CIL. The second part involves the analysis of which other class of serving senior state officials might merit the same immunity privilege as heads of state.

1.1 Immunities Granted under Customary International Law

It is necessary to be clear from the outset regarding the underlying legal principle of immunity. When a person claims immunity, he or she is not claiming immunity from

[92] Philippa Webb, 'Human rights and the immunities of state officials', in Erika De Wet (ed), *Hierarchy in international law: The place of human rights* (Oxford University Press 2012) 120.
[93] Orentlicher (n 84) 203.
[94] *Democratic Republic of the Congo v Belgium* [2000] ICJ (ICJ)
[95] The *Arrest Warrant* case (n 103) [53].
[96] See generally: Watts (n 5) 54-55. ; Bankas (n 6) 255.

the alleged crimes committed.[97] On the contrary, immunity is a plea of procedural bar for the court to exercise jurisdiction over a case.[98] The judicial enforcement of international law is carried out through the domestic courts of the state, where the human rights violation or international crime occurred, and the courts of the state responsible for that violation.[99]

As far as the issue of immunity for heads of state is concerned, the issue is which type of immunity, that is, immunity *ratione personae* or *ratione materiae*, should apply. Sinclair has suggested that:

> The answer is probably both. Immunity applies *ratione personae* to identify the categories of persons, whether individuals, corporate bodies or unincorporated entities, by whom it may prima facie be claimable; and *ratione materiae* to identify whether substantively it may properly be claimed.[100]

Moreover, Watts has explained the distinction which must be drawn between individual responsibility and state responsibility:

> States are artificial legal persons; they can only act through the institutions and agencies of the State, which means, ultimately, through its officials and other individuals acting on behalf of the State. For international conduct which is so serious as to be tainted with criminality to be regarded as attributable only to the impersonal State and not to the individuals who ordered or perpetrated it is both unrealistic and offensive to common notions of justice.[101]

1.1.1 Immunity Ratione Personae (Personal Immunity)

Immunity *ratione personae* or personal immunity is conferred on people of high status and is only enjoyed by a limited number of serving high-ranking officials,[102] such as: serving heads of state, heads of government, ministers for foreign affairs, diplomats and other senior state officials.[103] This is supported by domestic law, for example, by the Restatement (Second) of Foreign Relations Law of the United

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[97] Paul J. Toner, 'Competing concepts of immunity: The (R)evolution of the head of state immunity defence' [2003-2004] 108 Pennsylvania State Law Review 899, 903.
[98] Caplan (n 38) 771-772.
[99] Akande and Shah (n 9) 816.
[100] Sinclair (n 82) 113.
[101] Watts (n 5) 82.
[102] Fox, *The law of state immunity* (n 39) 666. ; Fox, 'Impunitability and immunity as a separate concepts' (n 18) 181.
[103] Foakes (n 85) 7; Watts (n 5) 13. ; Chanaka Wickremasinghe, 'Immunities enjoyed by officials of states and international organisations', in Malcolm D.Evans (ed), *International Law* (OUP 2003) 389. ;Akande and Shah (n 9) 818. See also: International Law Commission, United Nations General Assembly 'Immunity of State Officials from foreign criminal jurisdiction: Memorandum by the Secretariat', (31 March 2008) A/CN.4/596 58.

States, which states that the heads of government and foreign ministers enjoy the same immunity as the head of state for official and private acts.[104]

The objective of immunity *ratione personae* is essentially to safeguard the performance of officials so that they are not interfering with or disrupting the relationship between states.[105] Therefore, it is wide enough to cover both official and private acts for serving heads of state.[106] Since immunity *ratione personae* only attaches to the office and not the acts, there is no distinction between private and public acts.[107] This means that officials who fall under this category are secured from personal inviolability.[108] It protects them from arrest, detention and gives them absolute immunity from criminal jurisdiction.[109] This is because international relations and cooperation between states requires unimpaired communication.[110] It is widely accepted that serving heads of state and serving heads of government enjoy full immunity from jurisdiction to ensure the effective performance of their functions under international law.[111] This was confirmed by the ICJ in *Djibouti v France* where it held that a head of state enjoyed "full *immunity ratione personae* from criminal jurisdiction and inviolability".[112] Moreover, the Institut de Droit International stated at the Vancouver session that:

> special treatment is to be given to a head of state or a head of government, as a representative of that state and not in his or her personal interest, because this is necessary for the exercise of his or her functions and the fulfilment of his or her

[104]US Restatement (Second) of Foreign Relations Law 1964-1965, [66].
[105] The *Arrest Warrant* case [75] (The Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal). See also: Mark Summers, 'Diplomatic immunity ratione personae: Did the International Court of Justice create a new customary law rule in Congo v Belgium' [2007] 16 Journal of International law and practice 459, 462.
[106] Trapp (n 19) 93.
[107] See: Carrie McDougall, *The crime of aggression under the Rome Statute of the International Criminal Court*,(Cambridge University Press 2013) 321; McCorquodale and Dixon (n 15) 327; Kloth (n 15) 203; Verbatim Record of Oral Pleadings in the Arrest Warrant Case (D.R.C. v. Belg.), CR 2001/5 (Oct. 15, 2001).; Watts (n 5) 56-57.
[108] Tams and Sloan (n 72) 119; Trapp (n 19) 93; John Jones, 'Immunity and "double criminality": General Augusto Pinochet before the House of Lords', in Sienho Yee and Wang Tieya (ed), *International law in the post-cold war world: Essays in memory of Li Haopei* (Routledge 2001) 255.
[109] Donald Rothwell, Stuart Kaye and Ruth Davis, *International Law: Cases and Materials with Australian Perspectives*,(Cambridge University Press 2014) 422; Sean D Murphy, 'Current development: The expulsion of aliens and other topics: The Sixty-Fourth Session of the International Law Commission' [2013] 107 American Journal of International Law 164, 170; Wickremasinghe (n 103) 389.
[110] Zappala (n 36) 611. ; Wickremasinghe (n 103) 380.
[111] Alain Winants, 'The *Yerodia* ruling of the International Court of Justice and the Belgium 1993/1999 Law on Universal Jurisdiction' [2003] 16 Leiden Journal of International Law 491, 496.
[112] *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v France)* [2008] ICJ Reports 177 (ICJ) 53 [170] (with emphasis).

> responsibilities in an independent and effective manner, in the well-conceived interest of both the state or the government of which he or she is the head and the international community as a whole.[113]

However, it has been said that the granting of immunity *ratione personae* depends on the answer to one important question, whether the individual concerned holds the position of head of state in a country.[114] However, international law does not define the term 'head of state'. It does not determine the methods for the acquisition of the title, nor its general functions.[115]

Therefore, the next section below will seek to explain the terms of 'head of state' and 'head of government. The latter part of this chapter will endeavour to establish which other category of 'senior state officials' will enjoy immunity *ratione personae* while serving in the office.

The distinction between Head of State and Head of Government

a) Head of States

It is important to distinguish from the outset between the terms of head of state and head of government. Traditionally, the position of head of states is typically that of King, Queen or President. They are usually the constitutional and titular rules of the State.[116] For example, Queen Elizabeth II is the head of state of the UK and fifteen other Commonwealth States.[117] The Government is acting on Her Majesty's behalf whereas the Governor-Generals in the Commonwealth States. Certain specific powers are vested in heads of states.[118] For example, in the UK, although most of the powers relating to the control and conduct of international relations are conferred on the Queen, nevertheless matters such as treaty-making power, the power to make war and the annexation or cessation of territory lie with the Parliament.[119]

[113] See: Joe Verhoeven, Institute of International Law 'Immunities from Jurisdiction and Execution of Heads of State and of Government in International Law', (2001), Preamble [3].
[114] Watts (n 5) 33.
[115] See: International Law Commission, United Nations General Assembly 'Immunity of State Officials from foreign criminal jurisdiction: Memorandum by the Secretariat', (31 March 2008) A/CN.4/596, 66.
[116] Arthur Watts, 'Heads of government and other senior officials' [2010] Max Planck Encyclopedia of Public International Law 1; Fox 'The law of state immunity' (n 39) 669.
[117] See: Foakes (n 85) 30.
[118] ibid 36
[119] ibid

Under international law, there is a presumption that a head of state may act on behalf of the State in its international relations.[120] Therefore, the recognition of heads of state as the main representatives of a state in international law justifies their immunity before the national courts of other states.[121] In the past, the sovereigns or heads of state had absolute immunity privileges.[122] This meant that the heads of state were completely immune from foreign jurisdiction in all cases and in all circumstances.[123] Nevertheless, in the UK the position on the heads of state is governed by Section 20 of the State immunity Act 1978, which provides that a sovereign or other head of state shall, subject to 'any necessary modifications' enjoy the same privileges and immunities as the head of a diplomatic mission.[124]

In the *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of Congo v Rwanda)*, the ICJ stated that:

> it is a well-established rule of international law that the Head of State … [is] deemed to represent the State merely by virtue of exercising [his] function, including for the performance, on behalf of the said State, of unilateral acts having the force of international commitments.[125]

It can be submitted that the most senior heads of government, such as, prime ministers and presidents should enjoy personal immunity similar to those of heads of state. These are the officials who are most likely to represent the state when they are abroad. As a result, they should be given immunity *ratione personae* due to their position and status. The argument for the protection of heads of state has also been recognised by the ICJ in the case of *Djibouti v France*. In that case, the ICJ reaffirmed the view of "full immunity from criminal jurisdiction and inviolability" of a head of state[126] and drew comparison with the rule of CIL under Article 29 of the Vienna Convention on Diplomatic Relations, which also applied to heads of state.[127]

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[120] ibid; Fox 'The law of state immunity' (n 39) 673.
[121] *Case Concerning Certain Criminal Proceedings in France (Republic of the Congo/France)* [2003] Provisional Measures Order ICJ Press Release 2003/20 102 (ICJ) Provisional Measures Order, 17 June 2003, 102.
[122] Watts (n 5) 31-67. ; Bankas (n 6) 255.
[123] Alebeek (n 7) 13.
[124] State Immunity Act 1978, s.20.
[125] *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of Congo v Rwanda)* [2002] General List 126 ICJ Case (ICJ) [46].
[126] *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v France)* [2008] ICJ Reports 177 (ICJ) para 170. For more discussion see: Philippa Webb, *International judicial integration and fragmentation*,(Oxford University Press 2013) 74.
[127] *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v France)* [2008] ICJ Reports 177 (ICJ), [174].

In addition, much legal literature has further strengthened the recognition of immunity *ratione personae* for heads of state.[128]

Therefore, it can be said that there is a general consensus that serving heads of state should protected by immunity *ratione personae* while abroad as they are representing the state.[129] If serving heads of state do not have such immunity, then they would not be able to travel overseas to carry out their duties efficiently due to the fear of lawsuits and be subject to the jurisdiction of another state as explained previously.

b) Head of Governments

On the other hand, the term head of government refers to the head of the executive branch of the state's government.[130] They may exercise the real power and authority within the State.[131] The role of head of government is different from that of head of state notwithstanding that the same person may occupy both offices, or the two roles may be combined into one office.[132] The US President is a good example of this.[133] In a separate office scenario, the head of government is usually referred as the prime Minister because he or she is the head of the executive.[134] The Prime Minister is the executive authority governing the state. However, there can be sometimes confusion between the two terms. Nevertheless, the titles given to the types of meetings at which representative types may attend will often make it clear.[135] This would include, for example, Meetings of Heads of States and Government of the Member States of the European Union.[136]

[128] See for example: Charles Pierson, 'Pinochet and the end of immunity: England's House of Lords holds that a former head of State is not immunity for torture' [2000] 14 Temple International and Comparative Law Journal 263, 273-274.; Zappala (n 36) 599-600. ;Virpi Koivu, 'Head of state immunity v Individual criminal responsibility under international law' [2001] 12 Finnish Yearbook of International Law 305, 312.; Xiaodong Yang, 'State immunity in the European Court of Human Rights: Reaffirmations and Misconceptions' [2003] 74 British Yearbook of International Law 333, 352-353.
[129] Watts (n 5) 100-113. ; Simbeye (n 22) 111.
[130] Watts (n 116) 1.
[131] Foakes (n 85) 110.
[132] ibid
[133] ibid
[134] ibid
[135] ibid
[136] ibid

There is some evidence to suggest the general acceptance that a head of government should enjoy immunities similar to those of a head of state.[137] This position is reflected in the 2001 Resolution adopted by the Institute of International Law on Immunities from Jurisdiction and Execution of Heads of State and of Government in International Law.[138] Article 15(1) of the 2001 Resolution states that a head of Government:

> shall enjoy the same inviolability, and immunity from jurisdiction recognised, in this Resolution, to the Head of State.

It has been suggested by Murphy that many scholars take the position that immunity *ratione personae* extend to other high ranking government officials.[139] Nevertheless, it will be argued in this chapter that not all senior serving government officials enjoy the immunity concession. This is because the state practice with regard to the treatment of heads of government and foreign ministers is less well developed compared to that for heads of state.[140]

The section below will examine the *Arrest Warrant* case where the ICJ has shed some light with regards to the immunity *ratione personae* enjoyed by serving Ministers of Foreign Affairs.

1.1.1.1 Immunity of Senior State Officials - Minister for Foreign Affairs

The *Arrest Warrant* case[141] concerned an international arrest warrant, which had been issued *in absentia*, against Abdulaye Yerodia Ndombasi (hereafter Yerodia), alleging that he had perpetrated crimes against humanity.[142] Yerodia was the serving

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[137] Ernest Mason Satow, *Satow's diplomatic practice*,(6th edn, Oxford University Press 2009) 184, para 12.17.

[138] Joe Verhoeven, Institute of International Law 'Immunities from Jurisdiction and Execution of Heads of State and of Government in International Law', (2001) Art 15(1).

[139] Sean D Murphy, 'Immunity ratione personae of foreign government officials and other topics: The Sixty-Fifth Session of the International Law Commission' [2014] 108 American Journal of International Law 41, 43; Philippa Webb, *International judicial integration and fragmentation*,(Oxford University Press 2013) 73-75James Crawford and Ian Brownlie, *Brownlie's principles of public international law*,(8th edn, Oxford University Press 2012) , Chanaka Wickremasinghe, 'Immunities enjoyed by officials of states and international organisations', in Malcolm Evans (ed), *International Law* (Oxford University press 2010) 410;Remy Prouveze, 'Immunities', in William Schabas and Nadia Bernaz (ed), *Routledge Handbook of International Criminal Law* 2011) 360;

[140] Foakes (n 85), 114.

[141] The *Arrest Warrant* case [54].

[142] For more discussion about the case see generally: Cassese (n 143) 853.; Kevin R. Gray, 'Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium)' [2002] 13 European Journal of International Law 723, 723.;Campbell McLachlan, 'Pinochet Revisited' [2002] 51 International and Comparative Law Quarterly 959, 959.; Alexander

Minister for Foreign Affairs of the Congo when the arrest warrant was issued. The alleged crimes committed by Yerodia were punishable under the Belgium municipal law.[143]

Congo claimed that there were two issues in this case. Firstly, Congo said that Belgian law violated the principle of sovereign equality, that is to say, a state may not exercise its authority on the territory of another state.[144] Therefore, Congo challenged Article 7 of the Belgium law which related to universal jurisdiction. Congo argued that a minister for foreign affairs, whilst in office, enjoys absolute immunity and inviolability for all his acts.[145] On the other hand, Belgium made four preliminary objections.[146] Belgium argued that the immunity given to a serving minister for foreign affairs was limited to 'official acts' only, and it could not be used for allegations of violations of international law, such as crimes against humanity or war crimes.[147] Secondly, the Congo claimed that Belgium's exercise of criminal jurisdiction on Yerodia had violated the diplomatic immunity that a minister for foreign affairs should enjoy.[148]

The ICJ had to determine two questions regarding immunity in this case. The first question was to what extent a minister for foreign affairs was entitled to immunity

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Orakhelashvili, 'Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium)' [2002] 96 American Journal of International Law 677, 677; Chanaka Wickremasinghe, 'Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium), Preliminary Objections and Merits, Judgment of 14 February 2002' [2003] 52 International and Comparative Law Quarterly 775, 775; Winants (n 111) 491; Steffen Wirth, 'Immunity for Core crimes? The ICJ's judgment on universal jurisdiction' [2002] 16 Leiden Journal of International Law 491, 491.; Jan Wouters, 'The judgment of the International Court of Justice in the *Arrest Warrant* Case: Some critical remarks' [2003] 16 Leiden Journal of International Law 253, 253.

[143] See: Article 3 of Belgium's Act Concerning the Punishment of Grave Breaches of International Humanitarian Law, as further amended on 23 April 2003.

[144] The *Arrest Warrant* case [57]. See also: Cassese (n 143) 854.; Wouters (n 142) 255.; Cherif Bassiouni, *Crimes against humanity : historical evolution and contemporary application*,(edn, Cambridge University Press 2011) 641.

[145] The *Arrest Warrant* case [47].

[146] The objections included: 1) Since Yerodia was no longer the Congo's foreign minister, there was no longer a "legal dispute" between the Congo and Belgium. Therefore, the ICJ lacked jurisdiction. 2) As Yerodia was no longer foreign minister, the case was deprived of its object. 3) As the factual situation had changed considerably from the time of the Congo's initial application, the ICJ should discontinue proceedings. 4) The fact that Yerodia was a former foreign minister, therefore, the case concerned an action of diplomatic protection in which the ICJ was restricted from deciding. See also: Orakhelashvili (n154) 677-678.

[147] The *Arrest Warrant* case [49].

[148] The *Arrest warrant* case [8] (Judge Oda).; Wouters (n 142) 255.; Edward McWhinney, Mariko Kawano and Shigeru Oda, *Judge Shigeru Oda and the path to judicial wisdom : opinions (declarations, separate opinions, dissenting opinions) on the International Court of Justice, 1993-2003*,(Martinus Nijhoff 2006) 568.

under international law (CIL). The second question was whether the immunity extended to international crimes such as crimes against humanity. In other words, it related to how far a State could go in granting jurisdiction to its domestic courts for international crimes.[149] The ICJ explained that since there was no specific treaty provision regarding ministers for foreign affairs, it relied on the traditional rules of immunities given under CIL.[150]

The *Arrest Warrant* case was the first authoritative statement of the law of state immunity by the ICJ.[151] The majority of the judges in the ICJ found in favour of immunity *rationae personae* for ministers for foreign affairs. The ICJ explained that due to their special position:

> a Minister for Foreign Affairs, responsible for the conduct of his or her State's relations with all other States, 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. He or she does not have to present letters of credence.[152]

In addition, Judges Higgins, Kooijmans and Buergenthal in their Joint Separate Opinions said that:

> the purpose of the immunities attaching to Ministers for Foreign Affairs under customary international law is to ensure the free performance of their functions on behalf of their respective states.[153]

Similarly, Judge Van den Wyngaert said that ministers for foreign affairs must be allowed to enjoy full immunity so that they are able to perform their functions diligently and efficiently. The Court further added that:

> if a minister for foreign affairs is arrested in another State on a criminal charge, he or she is clearly thereby prevented from exercising the functions of his or her office.[154]

In other words, the judges maintained that immunity under the rules of CIL was granted to ministers for foreign affairs to ensure the effective performance of their

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[149] Wouters (n 142) 253.
[150] The *Arrest Warrant* case [56]. ; Wouters (n 142) 255.
[151] Orakhelashvili (n 142) 680.
[152] The *Arrest Warrant* case [53]-[54]. See also: *Democratic Republic of Congo v Belgium, Preliminary Objections and Merits* [2000] Rep 3 ICJ Report (ICJ) 3.
[153] See: The *Arrest Warrant* case [83] (Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal).
[154] The *Arrest Warrant* Case, [54] (Judge Van den Wyngaert).

functions on behalf of the state.[155] It included the fact that foreign ministers must be able to travel freely to other states for important meetings.[156] As a result, the majority of the judges found that the issuance of the arrest warrant by Belgium had violated immunity from criminal jurisdiction and inviolability which was given to an incumbent foreign envoy under CIL.[157] Therefore, it meant that immunity was determined by the nature of the functions and their position.[158] However, the scope of the application of immunity *ratione personae* for foreign ministers has been rejected by some. For example, Judge Oda observed that it was not clear under CIL as to what kind of privileges ministers for foreign affairs should be entitled to.[159]

The ICJ has made the point that the role of minister for foreign affairs was comparable to that of a head of state or a head of government.[160] However, in the *Arrest Warrant* case, it was noted that the Vienna Convention on Diplomatic Relations and the Conventions on Special Missions, which were referred to by the parties in the proceedings, did not contain specific immunity provisions enjoyed by a minister for foreign affairs.[161] This arguably means that the ICJ is interpreting the law and granting immunity to ministers for foreign affairs and therefore treating them in a similar way to heads of state. The consequence of this is that the ICJ has been criticised for establishing a rule of CIL in an unconventional way.[162] For example, Orakhelashvili has argued that not many other officials, with the exception of heads of state or government qualify for the same degree of protection.[163] However, the ICJ has explained its reasoning in paragraphs 53 and 54 of the judgment[164] by stating that serving ministers of foreign affairs occupy a similar position to that of heads of state and heads of government.[165] The drawback of this is that it could endanger the legitimacy of the principle and weaken the position of CIL

[155] The *Arrest Warrant* case [53]-[54]. ; Caplan (n 107) 758-759. See also: Wouters (n 154) 255.; Winants (n 111) 497. It is important to note that the ICJ did not examine the crime of genocide in this case.
[156] The *Arrest Warrant* case [53]. ; Bankas (n 6) 282.
[157] The *Arrest Warrant* case [11]. See also: Bassiouni (n 144) 289.
[158] Wouters (n 142) 255.
[159] The *Arrest Warrant* case [14] (Dissenting Opinion of Judge Oda).
[160] The *Arrest Warrant* case [51]. See also: Wouters (n 142) 255.; Orentlichter (n 84) 213.
[161] The *Arrest Warrant* case [52]. ; Bassiouni (n 144) 289.
[162] Wouters (n 142) 258.
[163] Orakhelashvili (n 142) 681.
[164] The *Arrest Warrant* case [53]-[54].
[165] The *Arrest Warrant* case [53].

in international law.[166] The interpretation of the ICJ on the immunity issue for serving government officials could potentially trigger the widening of its application for other government officials. Nonetheless, it can be submitted that the ICJ's reasoning is correct in saying that ministers for foreign affairs should be entitled to the immunity privilege. This is due to the fact that they are very likely, for example, to need to travel internationally and deal with diplomatic missions around the world.[167] Hence, the ministers for foreign affairs should hold an important position in the structure of a government.

Nevertheless, in the *Arrest Warrant* case,[168] it was held that incumbent Foreign Minister was entitled to immunity *ratione personae* from the criminal jurisdiction of another State because he was a serving senior Minister at the time the arrest warrant was issued.[169] This means that former Minister for Foreign Affairs continue to enjoy immunity after leaving office. However, this immunity covers only the official acts they undertook while in office. Therefore, it does not cover acts before they take up or after leaving the office as well as private acts while in office.[170] More importantly, it does not mean that they do not enjoy immunity after leaving office.[171] However, it is important to note that former Minister for Foreign Affairs can be prosecuted in the national courts of a foreign State with jurisdiction for acts committed prior or subsequent to his or her term of office and acts committed in a private capacity during his or her period in office.[172]

Criticism of the Arrest Warrant case – The Dissenting Views

The reasoning by the ICJ in the *Arrest Warrant* case suffers from some weaknesses. It can be recalled that the minister for foreign affairs enjoys, during the tenure of his office, full immunity from criminal jurisdiction and inviolability in both a private and an official capacity.[173] In other words, it is believed that an incumbent foreign minister is immune from jurisdiction even during a private visit or when acting in a

[166] Andre Nollkaemper, 'The legitimacy of international law in the case law of the International Criminal Tribunal for the Former Yugoslavia', in T Vandamme and J H Reestman (ed), *Ambiguity in the rule of law: The Interface between national and international legal systems* 2001) 13.
[167] The *Arrest Warrant* case [53].
[168] *Democratic Republic of the Congo v Belgium (Arrest Warrant Case)* [2002] 3 ICJ Reports 24 (ICJ)
[169] Stephen Allen, *International law*,(Pearson 2013) 119.
[170] McDougall (n 107) 321.
[171] Tams and Sloan (n 72) 117.
[172] The *Arrest Warrant* case [61] ; McDougall (n 107) 321.
[173] The *Arrest Warrant* case [54]. See also: Wouters (n 142) 255.

private capacity.[174] Wirth has argued that the ICJ's judgment was correct in treating ministers for foreign affairs the same as heads of state.[175] However, some have criticised the fact that the ICJ's argument in drawing such similarities have been rejected in legal doctrine.[176] This has been supported by the dissenting opinions of Judges Van den Wyngaert,[177] Al Khasawneh[178] and the Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal.[179] Judges Higgins, Kooijmans and Buergenthal argued that there was "no basis for the argument that Ministers for Foreign Affairs are entitled to the same immunities as Heads of State".[180]

Nevertheless, the wide range of their immunity, extending to include their private acts, has been contested. For example, the arrest and detention of such a minister, while on a private visit, would arguably have a negative effect on the effective performance of his functions,[181] yet this signifies that it will not affect his official functions as it does not involve any official activities. In other words, it does not necessarily mean full immunity from criminal jurisdiction and complete inviolability of a minister for foreign affairs under the CIL rule.[182] Therefore, it has been argued that the ICJ's judgment about the extent of immunity under CIL for private acts was less evident.[183] The ICJ should have properly addressed this issue in the case.[184]

Some commentators have criticised the *obiter dictum* of the majority regarding the extent of the immunity *ratione personae* of a former foreign minister.[185] In particular, the narrow formulation of the following statement has been criticised: "a court may try a former Minister for Foreign Affairs of another State … in respect of acts committed during that period of office in a private capacity".[186] In the dissenting

[174] Cassese (n 143) 855.
[175] Wirth (n 154) 889. Cf: Cassese (n 6) 855.
[176] See: Watts (n 5) 102-103.; Hazel Fox, 'The resolution of the Institute of International Law on the immunities of heads of state and government' [2002] 51 International and Comparative Law Quarterly 119, 120.
[177] The *Arrest Warrant* case [20]-[21] (Dissenting Opinion of Judge Van den Wyngaert).
[178] The *Arrest Warrant* case [1]-[2] (Dissenting Opinion of Judge Al-Khasawneh).
[179] The *Arrest Warrant* case [81]-[83] (Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal).
[180] The *Arrest Warrant* case [81] (Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal).
[181] Wouters (n 142) 257.
[182] The *Arrest Warrant* case [54].
[183] Wouters (n 142) 257.
[184] The *Arrest Warrant* case [13] (Dissenting Opinion of Judge Van den Wyngaert).
[185] Wickremasinghe (n 142) 781. See generally: Wirth (n 142) 491; McLachlan (n 142) 959.
[186] See: *Democratic Republic of Congo v Belgium, Preliminary Objections and Merits* [2000] Rep 3 ICJ Report (ICJ) [61].

opinion of Judge Oda, the issue of whether a former foreign minister was entitled to the same privileges and immunities as an incumbent foreign minister was raised.[187] It has been criticised that the ICJ did not directly address the question of the possible existence of an exception in connection with the immunity *ratione materiae* for a former minister for foreign affairs. [188] However, the ICJ noted in the judgement that:

> after a person ceases to hold office of a Minister for Foreign Affairs, he or she will no longer enjoy all immunities accorded by international law in other States. Provided it has jurisdiction under international law a court of another State may try a former Minister for Foreign Affairs 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 a private capacity.[189]

In view of these facts, it is quite likely that if immunity continues to be given to former ministers for foreign affairs, then it will open the floodgates for the extension of immunity. The consequence of this will be as stated by Judge Van den Wyngaert, who was also a dissenting judge: "in practice immunity leads to *de facto* impunity".[190] Hence, it cannot be denied that the law is still unclear. It is submitted that serving ministers for foreign affairs should have a minimum immunity *ratione materiae* protection while they are on private visits abroad for personal or private engagements.

The *Arrest Warrant* case suggests that international crimes, which are allegedly committed by state officials, are official acts and immunity *ratione personae* would continue to be applied in foreign national courts.[191] However, writers such as Orakhelashvili question whether the ICJ was correct in deciding that a foreign minister enjoys absolute immunity except for allegations of war crimes and crimes against humanity.[192] As explained earlier, incumbent or former state officials are

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[187] The *Arrest Warrant* case [14[(Dissenting Opinion of Judge Oda).
[188] International Law Commission, United Nations General Assembly 'Immunity of State Officials from foreign criminal jurisdiction: Memorandum by the Secretariat', (31 March 2008) A/CN.4/596, 116.
[189] The *Arrest Warrant* case [61] (Judge Van den Wyngaert).
[190] The *Arrest Warrant* case [34] (Judge Van den Wyngaert).
[191] The Arrest Warrant case [58]. Cf: [1],[10] (Dissenting Opinion of Judge Van den Wyngaert); [8] (Dissenting Opinion of Judge Al-Khasawneh); Philippe Sands, 'International law transformed?: From Pinochet to Congo...?' [2003] 16 Leiden Journal of International Law 37, 48.; Wouters (n 142) 255-258.; Dapo Akande, 'International law immunities and the International Criminal Court' [2004] 98 American Journal of International Law 407, 411-412.; Ciara Damgaard, *Individual criminal responsibility for core international crimes: Selected pertinent issues*,(Springer 2008) 271; Damgaard (n 133) 271; Akande and Shah 'Immunities of state officials, intenational crimes, and foreign domestic courts' (n 9) 839.
[192] Orakhelashvili (n 142) 681.

protected, with respect to official acts, by immunity *ratione personae*.[193] Nevertheless, it has been argued that immunity *ratione personae* is no shield against core crimes prosecution.[194] However, it is important to note that incumbent Minister for Foreign Affairs could be subjected to the criminal jurisdiction of international tribunals.[195] This is because 'certain international criminal courts may prosecute, where they have jurisdiction' such as the *ad-hoc* tribunals for Yugoslavia and Rwanda.[196] The reason for this is that the ad hoc tribunals are established pursuant to Chapter VII of the UN Charter which overrides the immunity of anyone before them.[197]

The ICJ examined various evidence of state practice - including national legislation - and concluded that there was no exception for absolute immunity under CIL from criminal prosecution of an incumbent minister for foreign affairs for crimes against humanity or war crimes.[198] However, Judge Van den Wyngaert rejected the ICJ's approach, in the dissenting opinion, regarding the existence of both a customary rule conferring absolute immunity on serving foreign ministers and the absence of any exceptions to such rule even in cases of war crimes and crimes against humanity.[199] In supporting her claim, she argued that she could not find either state practice or *opinio juris* to support the ICJ's reasoning.[200] Furthermore, she pointed out that full immunity may exist in a limited state practice for current or former heads of state, but not for ministers for foreign affairs.[201] Similarly, Judge Al Khasawneh agreed with Judge Van den Wyngaert that there was no rule of CIL in the forms of state practice and *opinio juris* to support the proposition of full immunity for ministers for

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[193] The *Pinochet (No 3)* case [114j] (Lord Browne-Wilkinson). Cf: Cassese (n 6) 862. See also: Fox (n 39) 697.
[194] Zappala (n 36) 601.
[195] The *Arrest Warrant* case [61].
[196] *Democratic Republic of the Congo v Belgium (Arrest Warrant Case)* [2002] 3 ICJ Reports 24 (ICJ) [25]; Igor Blischenko, *The legal regime of the International Criminal Court: essays in honour of Professor Igor Blischenko: in Memoriam Professor Igor Pavlovich Blischenko (1930-2000)*,(Njihoff 2009) 250; Arrest Warant of 11 April 2000 (Democratic Republic of the Congo v Belgium) International Court of Justice 14 February 2002: Summary of the Judgment' [2002] 8 Annual Survey of International and Comparative Law 151, 161; Christine Van Den Wyngaert, 'International Court of Justice (ICJ):Case concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium) 14 February 2002' [2002] 41 International Legal Materials 536, 552 and 633.
[197] For more discussion see: Roberto Bellelli, *International Criminal Justice: Law and Practice from the Rome Statute to its review*,(Ashgate 2010) 12; Carsten Stahn, *The emerging practice of the International Criminal Court*,(edn, Nijhoff 2009) 308.; Damgaard (n 191) 294; Bassiouni (n 40) 225.
[198] The *Arrest Warrant* case [58].
[199] The *Arrest Warrant* case [10] (Dissenting Opinion of Judge Van den Wyngaert).
[200] ibid [12]-[23].
[201] See: Winants (n 111) 498.

foreign affairs.[202] They maintained that the failure of the majority of the ICJ to distinguish between immunity *ratione materiae* and immunity *rationae personae* for the purpose of determining what acts were protected by sovereign immunity, did not reflect state practice.[203] Furthermore, Wouters has agreed that the ICJ did not establish proof of state practice and *opinio juris* under CIL to support its judgment.[204]

In terms of a counter-argument for the above claim, Judge Koroma said that, "while it would have been interesting if the Court had done so, the Court did not consider it necessary to undertake a disquisition of the law in order to reach its decision".[205] Likewise, Cassese has claimed that the granting of immunities to a minister for foreign affairs, while on an official visit, was supported by state practice and *opinio juris*.[206] Cassese argued that when a Minister for Foreign Affairs acted on behalf of the State, those acts were attributed to the State and not to the minister *per se*.[207] It can, therefore, be stated that the immunity of an incumbent foreign minister is unlimited. Therefore, the ICJ has extended its decision to former ministers for foreign affairs and put incumbent and former high-ranking officials on an equal footing.[208] This means that the ICJ had recognised the unrestricted nature of immunity for all acts committed by a former minister for foreign affairs in an official capacity.[209]

As a result, such unlimited immunity would even cover allegations of crimes against humanity and war crimes.[210] The ICJ found that the CIL did not allow such exceptions.[211] Moreover, the ICJ explained that it did not find that authorities from

[202] The *Arrest Warrant* case [11]-[23] (Dissenting Opinion Judge ad hoc Van den Wyngaert); [8] (Dissenting Opinion of Judge Al-Khasawneh). See also: Wouters (n 142) 256.
[203] See: The *Arrest Warrant* Case [85].
[204] Wouters (n 142) 256.
[205] The Arrest Warrant case [6] (Separate Opinon of Judge Koroma).
[206] *Democratic Republic of Congo v Belgium, Preliminary Objections and Merits* [2000] Rep 3 ICJ Report (ICJ) [47] and [49].
[207] Cassese (n 6) 862.
[208] Wirth (n 142) 881.
[209] The *Arrest Warrant* case [53].
[210] The *Arrest Warrant* case [58] (Joint Separate Opinion).
[211] ibid [58]-[59] (Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal).

the past practice[212] suggested that there was an exception under CIL with regard to 'domestic' courts.[213] The ICJ clarified that:

> It has been unable to deduce from this practice that there exists under customary international law any form of exception to the rule according immunity from criminal jurisdiction and inviolability to incumbent Ministers for Foreign Affairs, where they are suggested of having committed war crimes or crimes against humanity.[214]

This reasoning has been rejected by Wirth who has said that former ministers for foreign affairs are entitled to immunity for core crimes prosecutions.[215] It has been argued that if there was any immunity, which could be raised against the warrant, then it would not be an immunity attaching to the official character of the acts, but only to Yerodia's official status at the time of the issuance of the warrant.[216] In other words, Wirth disapproved of the Court's reasoning because former officials no longer perform any functions which would require protection.[217] The reasoning given by the ICJ regarding the lack of exceptions to the rule of immunity, even for crimes against humanity, is persuasive. This is because the past practices only restrict immunity at international tribunal level. Furthermore, the state practices at national level appear to be inconsistent. Therefore, it is submitted that the reasoning given by Judge Al Khasawned quoted earlier is convincing. This included the idea that serving ministers for foreign affairs should be entitled to immunity *ratione personae* whilst in office.

It is also interesting to see that several judges and some legal scholars have argued that the process of investigating criminal charges against a minister for foreign affairs should pass the functionality criterion that the ICJ upholds.[218] This evokes the idea that, when a minister for foreign affairs goes abroad, it is acceptable for a criminal investigation to be carried out as it is not impinging on his overseas mission. This view is supported by Judges Higgins, Kooijmans and Buergenthal who

[212] They are the: the Charter of the International Military Tribunal of Nuremberg (Art.7); Charter of the International Military Tribunal of Tokyo (Art.6); ICTY (Art.7, para.2); ICTR (Art.6, para.2) and the ICC (Art 27).
[213] Bankas (n 6) 282.
[214] The *Arrest Warrant* case [58].
[215] Wirth (n 142) 890.
[216] ibid 881.
[217] ibid
[218] Wouters (n 142) 258.

reasoned that the commencement of an investigation did not violate the inviolability or immunity of that person.[219] Furthermore, Judge Al Khasawned said that:

> A Minister for Foreign Affairs is entitled to immunity from enforcement when on official mission…but the mere opening of criminal investigations against him can hardly be said by any objective criteria to constitute interference with the conduct of diplomacy. A faint- hearted or ultra-sensitive Minister may restrict his private travels or feel discomfort but this is a subjective element that must be discarded.[220]

It is very possible that what the judges have maintained regarding investigation of criminal charges against ministers for foreign affairs is valid. On the one hand, it would be wrong to refuse immunity to serving ministers for foreign affairs on government missions abroad. On the other hand, the right not to carry out criminal investigations at the same time as an overseas visit would be equally unjustifiable. The distinctions between the two contrasting issues are particularly important here.

The ICJ observed that although various conventions impose obligations on states to prosecute or extradite which leads to criminal jurisdiction, it did not affect immunities under CIL.[221] Nonetheless, the ICJ judgment in the *Arrest Warrant* case stated that:

> an incumbent or former Minister for Foreign Affairs, may be subject to criminal proceedings before certain criminal courts, where they have jurisdiction. Examples include the International Criminal Tribunal for the former Yugoslavia, and the International Tribunal for Rwanda, established pursuant to Security Council resolutions under Chapter VII of the United Nations Charter, and the future International Criminal Court created by the 1988 Rome Convention.[222]

Equally relevant to the discussion on immunity *ratione personae* is that it does not apply to lower ranked state officials, except in very specific circumstances.[223] One reason for this is that lower ranked government ministers are usually only required to deal with domestic and local matters rather than international affairs. Hence, it is logical to restrict immunity *ratione personae* from serving junior government

[219] The *Arrest Warrant* case [59] (The Joint Separate Opinion).
[220] The *Arrest Warrant* case [4] (Dissenting Opinon of Judge Al-Khasawneh).
[221] International Law Commission, United Nations General Assembly 'Immunity of State Officials from foreign criminal jurisdiction: Memorandum by the Secretariat', (31 March 2008) A/CN.4/596, 18.
[222] The *Arrest Warrant* Case [61].
[223] International Law Commission, United Nations General Assembly 'Immunity of State Officials from foreign criminal jurisdiction: Memorandum by the Secretariat', (31 March 2008) A/CN.4/596, 58. Three categories in which lower officials enjoy such immunity included: diplomatic agents, heads of mission and the members of the diplomatic staffs of a mission to an international organisation of a universal character.

ministers. Withholding immunity in this way is potentially controversial but one should consider that if such immunity is granted to all serving government ministers irrespective of whether they really ought to have such a privilege, then this could lead to the fusion of the status of ministers in general.

In the *Pinochet (No.3)* case,[224] Lord Millett stated quite clearly that immunity *ratione personae* "should not be made available to serving heads of governments who are not heads of state, military commanders and those in charge of the security forces".[225] His Lordship meant that only those who have exclusive control of the security forces and armed forces should have immunity *ratione personae*. With due respect to this opinion, it can be submitted that this view may not be viable in every case. Although having control of military forces is vital, it indirectly refers to roles of ministers such as defence ministers and this goes against the long-standing view under international law that immunity *ratione personae* should be given to serving heads of state and certain serving senior government ministers. Besides, his Lordship's suggestion may not work as the ICJ has demonstrated in the *Arrest Warrant* case, where ministers for foreign affairs should have immunity *ratione personae* notwithstanding the fact that they have no control of security forces.

Universal Jurisdiction

As far as the second question regarding jurisdiction is concerned, in the Joint Separate Opinion, the judges suggested that immunity was not a free-standing topic of international law but was linked to the issue of jurisdiction.[226] This has been supported by writers such as Orakhelashvili, as he has said that the issue was connected to that of universal jurisdiction under international law.[227] However, it is important to note that the ICJ did not address the issue of universal jurisdiction in this case.[228] Once again, the ICJ has been criticised for failing to tackle the question of immunity from jurisdiction, as to whether other states can exercise extraterritorial

[224] *R v Metropolitan Stipendiary Magistrate and others, ex parte Pinochet Ugarte (No.3)* [1999] 2 All ER 97 (House of Lords) . The full discussion and analysis of the *Pinochet (No 3)* case will be discussed later in Chapter Three.
[225] The *Pinochet (No 3)* case [171c]-[171d] (Lord Millett) (emphasis added). Furthermore, his Lordship gave an example that this type of immunity (ratione personae) would have been made available to Hitler but not to Mussolini or Tojo.
[226] The *Arrest Warrant* case [2]-[3] and [71] (Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal).
[227] Orakhelashvili (n 142) 681.
[228] Wouters (n 142) 383.

criminal jurisdiction under international law.[229] Nevertheless, it was partly dealt with in the Separate Opinions[230]. President Guillaume distinguished between 'universal jurisdiction' and 'universal jurisdiction by default'. The former concerns the jurisdiction over extraterritorial crimes by foreigners based on the presence of the accused in the forum state; and the latter deals with jurisdiction, which has been asserted by a state, without any link with the crime of the defendant.[231] Therefore, President Guillaume reasoned that there was no universal jurisdiction over war crimes, "committed abroad by foreigners against foreigners when the perpetrator is not present in the territory of the State in question".[232] He further added that there was no universal jurisdiction with regard to crimes against humanity[233] and that international law only authorised universal jurisdiction for piracy.[234] Treaties, on the other hand, oblige contracting parties to exercise universal jurisdiction proper.[235] Judge Rezek took a similar view on the matter.[236] Judges Higgins, Kooijmans and Buergenthal argued that CIL did not prohibit universal jurisdiction for other offences, though this was subject to a set of conditions that they set out carefully.[237] To support their arguments, Judges Higgins, Kooijmans and Buergenthal distinguished between universal jurisdiction and territorial jurisdiction. They explained that universal jurisdiction:

> is jurisdiction over crimes committed abroad by foreigners against foreigners, without the accused being in the territory of the forum state, and territorial

[229] Cassese (n 6) 855.
[230] The *Arrest Warrant* case [1]-[17] (President Guillaume); [1]-[12] (Judge Ranjeva); [2]-[18] (Joinst Separate Opinon of Judges Higgins, Kooijmans, Buergenthal); [3]-[11] (Judge Rezek); [4] and [7] (Judge Van den Wyngaert)
[231] The Arrest Warrant case [5] and [9] (Separate Opinion of President Guillaume).
[232] ibid [9], [16]-[17].
[233] ibid [9].
[234] ibid [5]-[9].
[235] ibid [12]-[13].
[236] The *Arrest Warrant* case [6] (Judge Rezek).
[237] See: The *Arrest Warrant* case [59]-[60], [79]-[85] (Joint Separate Opinon of Judges Higgisn, Kooijmans and Buergenthal).The conditions that they have set up included: i) the State intending to prosecute a person must first 'offer to the national state of the prospective accused person the opportunity itself to act upon the charges concerned'; ii) the charges may only be laid by a prosecutor or investigating judge who is fully independent of the government; iii) the prosecution must be initiated at the request of the person concerned, for instance at the behest of the victims or their relatives; iv) criminal jurisdiction is exercised over offences that are regarded by the international community as the most heinous crimes; v) jurisdiction is not exercised as long as the prospective accused is a foreign minister (head of state, or diplomatic agent) in office; after he leaves office, it may be exercised over 'private acts'.

> jurisdiction over persons for extraterritorial events, that is jurisdiction over persons present in the forum state who have allegedly committed crimes abroad.[238]

Thus, all the judges agreed on the validity of universal jurisdiction when the perpetrator was found on the territory of the prosecution state.[239] On a positive note, the *ratio decidendi* judgment of the case has clarified a previously uncertain area of the law, as it confirmed the immunity from criminal jurisdiction and inviolability of serving ministers for foreign affairs.[240] Wickremasinghe submits that it is advisable to concentrate more on the *ratio decidendi* of what has been said, rather than seeking to draw more from conclusions on what was not said.[241] The judgement of the *Arrest Warrant* case was followed by the Belgian Court of Cassation when it rejected a criminal complaint against Ariel Sharon who was the incumbent Prime Minister of Israel.[242]

It will be argued that based on the reasoning by the ICJ in the *Arrest Warrant* case, it does not just apply to foreign ministers but also to other senior government ministers. An analysis will be made later in this chapter to attempt to apply the ICJ's reasoning in the *Arrest Warrant* case to determine which other senior state officials might deserve the same immunity privilege.

c) Other senior government officials

As the law has changed significantly in the last century, the definition of head of state now encompasses not just monarchs[243], but also presidents and prime ministers who effectively run a country on a day-to-day basis.[244] In this way, it can be seen that the previously exclusive privilege of head of state immunity has now expanded to include potentially to other senior serving state officials.

However, the term 'senior state official' is more difficult to define. This is because 'official' may refer to holders of political offices or to non-political civil servants.[245]

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[238] The *Arrest Warrant* case [31]-[52].
[239] The *Arrest Warrant* case [4]-[21]. See also: Winants (n 119) 500.
[240] Wickremasinghe (n 142) 781.
[241] ibid
[242] *H.S.A. et al v S.A. et al (Decision related to the indictment of Ariel Sharon, Amos Yaron and others)* [2003] No P.02.1139.f, reproduced in International Legal Materials, vol 42, No.3 596 (Court of Cassation) 596-605.
[243] The monarchies the titles of head of State may vary considerably: emperor, king, queen, prince, grand duke, sultan, emir. In the case of republics, it is known as presidents. For further discussions see: Foakes (n 85) 29-30.
[244] ibid. Czaplinski (n 67) 411.
[245] Watts 'Heads of government and other senior officials' (n 116) 1.

Nevertheless, the ICJ has given some clarification in relation to 'holders of high-ranking office' and 'persons 'of high rank' in few cases.[246] This includes those serving as the heads of their respective government departments.

It can be suggested that a selective serving senior government ministers should also have the same immunity privileges at least similar to those of heads of government. This is because certain senior serving government ministers are also representing the states when they are abroad on government missions. The removal of their personal immunity would substantially affect their functions as a government spokesperson. The decision over which senior government officials should have the exclusive immunity *ratione personae* is problematic.[247]

Discussion on the Immunity Accorded to Senior Government Officials

In the *Arrest Warrant* case, the ICJ mentioned the reason for granting immunity to serving ministers for foreign affairs.[248] Despite its explanation, the ICJ did not specifically mention which other class of senior state officials might also be entitled to this immunity. Hence, this section will seek to draw an analysis, based on the judgment of the ICJ from the *Arrest Warrant* case, to establish other classes of senior state officials who may merit this immunity. In particular, the ICJ has indirectly provided some criteria for the issuance of immunity *ratione personae*.[249]

One of the main questions that needs to be asked is which class of other senior state officials might deserve immunity *ratione personae* apart from heads of state and ministers for foreign affairs. The ICJ, in the *Arrest Warrant* case, explained that:

> 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 (immunity ratione personae) from jurisdiction in other States, both civil and criminal.[250]

[246] See: Ministers of Foreign Affairs in *Democratic Republic of the Congo v Belgium (Arrest Warrant Case)* [2002] 3 ICJ Reports 24 (ICJ) para 51; Ministers of Defence in *Nuclear Tests Case (Australia v France) [Merits]* [1974] ICJ 253 (ICJ) paras 40-41; Ministers of Justice in *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Rwanda)* [2002] ICJ 219 (ICJ) para 48.

[247] The analysis as to which class of senior State officials may be entitled to *immunity ratione personae* will be assessed in the later section after the discussion of the *Arrest Warrant* case judgment.

[248] The *Arrest Warrant* case [53].

[249] ibid

[250] ibid [51] (emphasis added).

It is important to reiterate that the ICJ, in the reasoning above, did not specifically mention immunities for ministers for foreign affairs, but did suggest that in order for the government official to have immunity *ratione personae*, he or she should be required to travel internationally frequently and to have a constant need to communicate with the government and representatives of another state.[251] Therefore, the ICJ followed a functional justification of the immunity *ratione personae*. In other words, the ICJ determined the immunity *ratione personae* according to the function of that particular government official. In addition, it can be assumed that those officials, who have to deal with international matters, are very likely to hold senior positions in the government. This narrows down the potential recipients to those in the government. For example, in the UK, government ministers are collectively known as the executive. They are the people who run the country on a daily basis. However, not all ministers in the executive are entitled to this limited immunity privilege.

The ICJ pointed out that the nature of the functions of the government officials dictate whether they can have immunity *ratione personae*.[252] This means that the functions that he or she holds must be in charge of the government's diplomatic activities and must act as a representative in intergovernmental meetings.[253] An example of the similarity between the functions of government officials can be illustrated in *Re Bo Xilai*. The Bow Street Magistrates' Court had to deal with this case which concerned the applicant's request for an arrest warrant against Mr Bo Xilai, the former Minister for Commerce and International Trade of the People's Republic of China, alleging that he committed torture.[254] It was held that Mr Bo, who has been served an arrest warrant, was entitled to immunity because:

> functions are equivalent to those exercised by a Minister for Foreign Affairs and, adopting the reasoning of the International Court of Justice in [the Arrest Warrant case] … that under the customary international law rules Mr Bo ha[d] immunity from prosecution as he would not be able to perform his functions unless he is able to travel freely.[255]

[251] ibid [53].
[252] ibid
[253] ibid
[254] *Re Bo Xilai* [2005] 128 ILR 709 (England, Bow Street Magistrates' Court) 713.
[255] ibid 713-715.

The *Bo Xilai* case endorses the reasoning found in the *Arrest Warrant* case and this confirms the fact that Ministers for Commerce and International Trade are entitled to immunity *ratione personae*. Nonetheless, it can be submitted that different countries use different terms for ministers who have to deal with trade matters. For example, they can be called 'International Trade Ministers' or 'Minister of International Commerce'. The wording of their title should not be a barrier to this immunity. As long as their roles and functions primarily deal with international trade or commerce, then they should be given immunity *ratione personae*. This corresponds with the reasoning, as stated in the *Re Bo Xilai* and *Arrest Warrant* cases, that the immunity is given to ministers so that they can carry out their duties, without the fear of prosecution, when they are overseas.

Thus, according to the explanation above, the nature of the functions plays an important part in deciding who is entitled to immunity *ratione personae*. The ICJ in the *Arrest Warrant* case explained that the nature of the functions should involve "diplomatic activities and generally acts as its representative in international negotiations and intergovernmental meetings.[256] In view of these pointers, it is likely that serving senior ministers holding the positions of: defence, finance,[257] international development and business are all entitled to immunity *ratione personae*. This is due to the fact that these officials are very probably going to represent their country in international negotiations, for instance, in international summits or conventions for their departments. They are also likely to represent their country in various intergovernmental meetings. This was confirmed and clarified in *Re General Shaul Mofaz* where it was held that "a Defence Minister would automatically acquire State immunity in the same way as that pertaining to a Foreign Minister".[258]

In the *Arrest Warrant* case, the ICJ also said that immunity *ratione personae* is granted if the ministers concerned are required to travel internationally. This means that they must be able to travel freely whenever the need arises.[259] An example of this is the *Re Bo Xilai* case where it was held that a serving Minister for Commerce

[256] The *Arrest Warrant* case [53].
[257] Financial matters may include those serving as heads in the monetary and treasury departments.
[258] *Re General Shaul Mofaz* [2004] 53 International and Comparative Law Quarterly 771 (District Court (Bow Street)), 771-773.
[259] The *Arrest Warrant* case [53].

and International Trade was required to travel internationally to deal with international commerce and trade issues.[260] Hence, the requirement to be able to travel internationally is one of the major factors in determining whether one senior serving government minister can have such immunity.

Further evidence of this issue can be seen in *Khurts Bat v Germany and others*[261] as well as *Djibouti v France*.[262] In both of these cases, the protection of *immunity ratione personae* was rejected because of the position of the government officials in question.[263]

In the *Arrest Warrant* case, the ICJ reached the decision that a minister for foreign affairs was entitled to immunity *ratione personae*.[264] The ICJ stated that: "in international law it is firmly established that … certain holders of high-ranking office in a State, such as the Head of State … enjoy immunities from jurisdiction in other States, both civil and criminal".[265] The decision of this case provides some explanations with regard to immunity *ratione personae.* However, a critical analysis will be made by referring to the reasoning made by the judges in the *Arrest Warrant* case to decide which other category of senior state officials should be entitled to the residue immunity *ratione materiae.* This is because the obiter dictum by ICJ in the Arrest Warrant case implicitly recognised that the former Minister for Foreign Affairs enjoyed immunity *ratione personae* for acts committed in his official capacity.[266] Nevertheless, the ICJ did not discuss about the residue immunity *ratione materiae* explicitly. Thus, the section below will seek to explore the residual immunity *ratione materiae* in more detail.

[260] *Re Bo Xilai* [2005] 128 ILR 709 (England, Bow Street Magistrates' Court), 713-715.
[261] *Khurts Bat v Investigating Judge of the Federal Court of Germany* [2011] 3 WLR EWHC 2029 180 ((Admin))
[262] *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v France)* [2008] ICJ Reports 177 (ICJ)
[263] There will be a full discussion of these two cases in more details in Chapter Five later.
[264] The *Arrest Warrant* case [54]; Roger O'Keefe and Christian J. Tams, *The United Nations convention on jurisdictional immunities of states and their property : a commentary*,(Oxford University Press 2013) 90; Philippa Webb, *International judicial integration and fragmentation*,(Oxford University Press 2013) 75; Tams and Sloan (n 72) 116.
[265] The *Arrest Warrant* case [54]
[266] Webb (n 264) 82.

1.1.2 Immunity Ratione Materiae (Functional Immunity)

Immunity *ratione materiae* or functional immunity is given by reference to the characteristics of the conduct.[267] Therefore, immunity *ratione materiae* is not attached to the individual person, but to the actions themselves which seek to protect the dignity of the state.[268] Hence, it could be described as a subject-matter based immunity.[269] In other words, it only covers state officials for acts they perform in their official capacity.[270] Thus, immunity *ratione materiae* only gives immunity in limited circumstances and is narrower in its application. Lord Millett explained that:

> The immunity is sometimes also justified by the need to prevent the serving Head of State or diplomat, from being inhibited in the performance of his official duties by fear of the consequences after he has ceased to hold office. This last basis can hardly be prayed in aid to support the availability of the immunity in respect of criminal activities prohibited by international law.[271]

As a result, the scope of this immunity is much narrower than immunity *ratione personae*. State officials are generally covered by immunity *ratione materiae*, irrespective of the ranking of their positions in the state.[272] This means that it is available to most state officials, such as: heads of diplomatic missions, and those whose conduct is called into question after they have left office.[273] Therefore, this type of immunity is wide enough to be available to former ministers.[274]

The aim of immunity *ratione materiae* is to prevent national courts from determining the legality of certain acts of foreign states and their officials.[275] This includes the prosecution of former heads of state or other government officials who have allegedly committed crimes, for example, crimes against humanity and torture.

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[267] International Law Commission, United Nations General Assembly 'Immunity of State Officials from foreign criminal jurisdiction: Memorandum by the Secretariat', (31 March 2008) A/CN.4/596, 101.

[268] Steffen Wirth, 'Immunities, Related Problems, and Article 98 of the Rome Statute' [2001] 12 Criminal Law Forum 429, 431.

[269] The *Pinochet (No 3)* case [171h] (Lord Millett).

[270] Webb (n 264) 82 ;Toner (n 97) 902. ; Akande and Shah (n 9) 825.

[271] The *Pinochet (No 3)* case [172a] [Lord Millett].

[272] Chanaka Wickremasinghe, 'Immunities enjoyed by officials of States and International Organizations', in Malcolm Evans (ed), *International Law* (Oxford University Press 2006) 397.

[273] Shelton (n 77) 803;Hans Kelsen and Fletcher School of Law and Diplomacy., *Principles of international law*,(Rinehart 1952) 236-237. ; Zappala (n 36) 595. ; Cassese (n 6) 862; Fox (n 39) 667.; Wickremasinghe (n 139) 383.

[274] Cf: *Democratic Republic of the Congo v Belgium (Arrest Warrant Case)* [2002] 3 ICJ Reports 24 (ICJ) [61].

[275] Reed Brody and Michael Ratner, *The Pinochet papers: The case of Augusto Pinochet in Spain and Britain*,(Kluwer Law International 2000) 337. ; Akande and Shah (n 9) 831.

Nevertheless, as will be seen in the later chapters of this thesis, immunity from criminal jurisdictions is still a sensitive area in the law at national court level.

However, the scope of immunity for civil jurisdiction is more transparent.[276] This statement has been supported by Wickremasinghe who has stated that, "*immunity ratione materiae* potentially apply to the official acts of all the State officials … from at least the civil jurisdiction of the Courts of other States, where the effect of proceedings would be to undermine or render nugatory the immunity of the employer State".[277] This illustrates the fact that immunity *ratione materiae* will not prevent former heads of state or any other government officials from standing trial in civil courts regarding their personal or private matters.

Some writers, such as Cassese, believe that it is necessary for immunity *ratione materiae* to be made available to government officials even after they have left office. This is to safeguard them for acts that they have carried out whilst in an official capacity.[278] Cassese states that immunity *ratione materiae* "covers official acts of any *de jure* or *de facto* state agent".[279] This reasserts the fact that immunity *ratione materiae* should be given to former government officials for official acts notwithstanding that they have left office. This view is supported by Robertson, a distinguished human rights lawyer, who said that, "ex heads, along with agents such as generals and police chiefs and ministers, enjoy only restrictive *immunity ratione materiae*, which covers all acts performed officially but does not include actions taken for private gratification".[280]

The views mentioned above appear to be practicable. However, there are many problems associated with immunity *ratione materiae*. One of them is whether immunity *ratione materiae* should apply to every government official irrespective of their ranking.

[276] See: Alebeek (n 7) 178 and 181.
[277] Wickremasinghe (n 142) 471.
[278] David S. Koller, 'Immunities of foreign ministers: Paragraph 61 of the Yerodia Judgment as it pertains to the Security Council and the International Criminal Court' [2004] 20 American University International Law Review 7, 26.
[279] Cassese (n 6) 863.
[280] Geoffrey Robertson, *Crimes against humanity: The struggle for global justice* (The Penguin Press 1999) 402.

1.1.2.1 Other Government Officials

As mentioned earlier, this type of immunity is theoretically available to all government officials irrespective of their position provided that the acts have been carried out in an official capacity. Nevertheless, it will be argued that such an extensive scope of application of functional immunity is not tenable. An explanation is required to determine which class of senior state officials deserve immunity *ratione materiae*. This more restrictive approach to the applicability of immunity *ratione materiae* and it aims to prevent the exploitation of this rule.

As far as other government ministers or junior officials are concerned, it has been suggested that they should enjoy immunity as they are individuals acting as representatives of the state.[281] In the *Armed Activities in the Congo (Congo/Rwanda)* case, the ICJ noted the similarity in the functions between some high ranking government officials with other junior government officials. It said that:

> with increasing frequency in modern times other persons representing a State in specific fields may be authorised by that State to bind it by their statements in respect of matters falling within their purview. This may be true, for example, of holders of technical ministerial portfolios exercising powers in their field of competence in the area of foreign relations, and even of certain officials.[282]

In addition, Lord Millett in the *Pinochet (No.3)* case said that:

> Immunity *ratione materiae* … is available to former heads of State and heads of diplomatic missions, and any one whose conduct in the exercise of the authority of the State is afterwards called into question, whether he acted as head of government, government minister, military commander or chief of police, or subordinate public official. The immunity is the same whatever the rank of the office-holder.[283]

Furthermore, this is supported by Article 15(2) of the Resolution on Immunities of Heads of State and of Heads of Government by the Institute of International Law where it states that:

> without prejudice to such immunities to which *other* members of the government may be entitled on account of their official functions.[284]

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[281] Fox (n 39) 671.

[282] *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo/Rwanda)* [3 February 2003] Jurisdiction and Admissibility of the Claim (ICJ) [47].

[283] The *Pinochet (No 3)* case [171h] [Lord Millett].

[284] Joe Verhoeven, Institute of International Law 'Immunities from Jurisdiction and Execution of Heads of State and of Government in International Law', (2001) , Art 15(2).

The first aspect to point out is that there appears to be some indication, as above, to suggest that junior ranked government ministers, apart from other senior officials, should be given some kind of immunity while they are serving in the government. This is because there seems to be an impression that the functions of some senior and junior government ministers are very similar. From the outset, bestowing immunity to government ministers irrespective of their rank may seem to be an ideal solution. However, this may not work in practice because some of these junior government ministers do not hold important roles compared with their senior counterparts. The purpose of differentiating between senior and junior government officials is based primarily on practicability. By way of illustration, it can be said that junior ministers should be given the same type of immunity as the head of state or minister for foreign affairs. However, this will not work to a large extent. Firstly, it is very likely that junior ministers do not deal with major international issues such as diplomatic relationships involving other states. Secondly, their scope of duties is potentially limited only to their home country. These two reasons are strong enough to support the view that junior government officials should not be given immunity or if they are, it should be at a basic level only. Most national laws seem to be reluctant to extend the same privilege of immunity for heads of state to other state officials.[285] This can be seen, for example, under Section 20 of the SIA and Section 36 of the Australian Foreign States Immunities Act of 1985.

Conclusion

This chapter began by defining the terms 'head of state', 'head of government' and other 'senior government official'. This is because it is important to ascertain which class of senior state officials may be entitled to immunity *ratione personae*. It has explained that 'immunities of senior state officials' is the focus of this thesis. There are two types of immunities given under the CIL doctrines for senior state officials: immunity *ratione personae* and immunity *ratione materiae*. Immunity *ratione personae* or personal immunity is given according to the status of that individual. Therefore, serving heads of state and some other senior state officials, such as serving ministers for foreign affairs, are entitled to this absolute immunity. On the other hand, functional immunity or immunity *ratione materiae* is generally given to

[285] See for example: UK State Immunity Act 1978, s 20.; Australian Foreign States Immunities Act 1985, s 36.

other state officials including former heads of state. Nevertheless, it only covered 'official acts'. In other words, in order to claim this second type of immunity, the government officials have to prove that he or she is protected by immunity *ratione materiae* due to the official nature of his or her conduct.

The *Arrest Warrant* case held by the ICJ said that a serving minister for foreign affairs was entitled to immunity *ratione personae*. Hence, the main question that this chapter sought to answer was which class of state officials should enjoy absolute immunity. An analysis has been carried out based on the judgment of the *Arrest Warrant* case. The ICJ has set out the criteria as to which other state officials may potentially benefit from immunity *ratione personae*. Notwithstanding that the ICJ has set out certain criteria aimed specifically at ministers for foreign affairs, it is still applicable to other senior government ministers provided they fulfil certain requirements. In other words, it is based on the 'functional justification' of the positions and tasks that the heads of government hold. Provided that the heads of government have satisfied the functional justification test, then they should be given immunity *ratione personae* while serving.

It has been argued that not all government ministers should be given immunity *ratione personae.* Only a limited number of senior serving government ministers deserve to have the same exclusive immunity as the serving heads of state. Thus, this chapter has submitted that those who should enjoy immunity *ratione personae* include heads of government in the areas of defence, finance, international development and business. The reason for this result is that the heads of government mentioned earlier have significant roles in dealing with other states as well as representing their states in the international arena. Hence, they should be given this exclusive absolute immunity in order for them to carry out their duties while abroad without the danger of being subject to the jurisdiction of other states. As explained earlier, immunity *ratione personae* will be removed once they are no longer the heads of such governmental departments.

From another perspective, it can be seen in *Khurts Bat* and *Djibouti v France* that other senior government officials do not enjoy immunity *ratione personae*. In addition, the ICJ has made it clear that in order to claim immunity privileges, the

forum state must be notified so that the entitlement to immunity is respected. This was also the case in *Khurts Bat*.

The doctrines of immunities given under CIL have been investigated and explained. The next chapter explores a different and controversial question, whether torture, which is classified as a peremptory norm, can challenge the ambiguous law on head of state immunity. It has been argued by some that the violations of peremptory norms by heads of state and government officials should be treated outside the scope of immunity *ratione materiae*.[286] Chapter Two will address this issue and analyse whether the violation of *jus cogens* norms, such as torture, can trump the rules of immunities under CIL due to its allegedly special status under international law.

[286] International Law Commission, United Nations General Assembly 'Immunity of State Officials from foreign criminal jurisdiction: Memorandum by the Secretariat', (31 March 2008) A/CN.4/596, 130.

Chapter Two

The Impact of *Jus Cogens* on the Law of Head of State Immunity

This chapter will examine the effect of peremptory norms in more detail, to ascertain whether they are a factor in restricting the application of head of state immunity. Specifically, this chapter intends to find out whether the qualification of torture, as a crime under *jus cogens,* serves to deny immunity to serving heads of state. The notion of prohibition of torture is a relatively new concept. It was established between the two world wars.[287] After the wars, it was determined that acts of torture were *jus cogens* violations.[288] The doctrine of *jus cogens* is based upon the acceptance of a set of fundamental and higher shared principles within the system.[289] It is said to be similar to those of public order or public policy in domestic legal systems.[290]

The concept of peremptory norms was introduced into contemporary international law through the enactment of the Vienna Convention on the Law of Treaties.[291] Due to the rapid development of human rights in a contemporary context, the prohibition of *jus cogens* crimes, such as genocide and torture, are said to be so serious that they override the privileges attached to individuals, notwithstanding their positions as

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[287] Alfred Verdross, 'Forbidden Treaties in International Law' [1937] 31 American Journal of International Law 571, 571. See also:Christian Tomuschat and Jean-Marc Thouvenin, *The fundamental rules of the international legal order : Jus Cogens and obligations Erga Omnes*,(Martinus Nijhoff Publishers 2006) 21.

[288] Dinah Shelton, 'International law and 'relative normativity'', in Malcolm D Evans (ed), *International Law* (Oxford University Press 2014) 150;Shane Darcy, *Judges, Law and War: The judicial development of international humanitarian law*,(Cambridge University Press 2014) 79; Bassiouni (n 144) 212; Cherif Bassiouni, *Crimes against humanity : historical evolution and contemporary application*,(Cambridge University Press 2011) 212. , Mark Goodale, *The practice of human rights: tracking law between the global and the local*,(Cambridge University Press 2007) 301.

[289] For more discussion see: Orakhelashvili (n 32) 9. See also: Alebeek (n 7) 316.

[290] See for example: United Nations, 'Responsibility of States for Internationally Wrongful Acts 2001', (2005), Art 26. ; Ian Sinclair, *The Vienna convention on the law of treaties*,(2nd edn, Manchester University Press 1984) p 203.

[291] Vienna Convention on the Law of Treaties 1969, Art 53. See generally: Olivier De Schutter, *International human rights law: Cases, materials, commentary*,(Cambridge University Press 2014) 91;Alexxandra Gianelli, 'Absolute invalidity of treaties and their non-recognition by third states', in Enzo Cannizzaro (ed), *The law of Treaties beyond the Vienna Convention* (Oxford University Press 2011) 333; McCorquodale and Dixon (n 15) 419; Brian D Lepard, *Customary international law : a new theory with practical applications*,(Cambridge University Press 2010) 7;Cherif Bassiouni, *International Criminal Law: Multilateral and bilateral enforcement mechanisms* (Brill 2008) 204; Czaplinski (n 67) 83.

heads of state or government officials.[292] This relates to the 'normative hierarchy theory', the theory which holds that one international law principle prevails over another.[293] The argument that the violation of torture can trump head of state immunity has inevitably attracted criticism.[294] The argument involves two distinct international law doctrines, namely: state immunity and peremptory norms. As far as head of state immunity is concerned, the privileges attached to serving heads of state are said to belong to the former.[295] It is important to note that *jus cogens* norms are 'substantive' in nature; whereas the doctrine of immunity is 'procedural'.[296] Lord Hoffman clarified this in the *Jones (Respondent) v Minister of Interior Al Mamlaka Al- Arabiya AS Saudiya (the Kingdom of Saudi Arabia)* (*Jones*) case, where he stated that:

> To produce a conflict with … immunity, it is therefore necessary to show that the [substantive *jus cogens* prohibition] has generated an ancillary procedural rule which, by way of exception to … immunity, entitles or perhaps requires States to assume … jurisdiction over other States in cases in which torture is alleged.[297]

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[292] Antonio Augusto Cancado Trindade, *International law for humankind: Towards a new jus gentium Revised Edition*,(Martinus Nijhoff 2013) 299; Duncan B Hollis, *The Oxford Guide to Treaties*,(Oxford University Press 2012) 573; Yang (n 15) 429; Cherif Bassiouni, *Introduction to International Criminal Law*,(2nd Revised Edition Martinus Nijhoff Publishers 2012) 73; Carlo Focarelli, *International law as social construct: The struggle for global justice*,(Oxford University Press 2012) 437;Christine Chinkin, 'In re Pinochet: United Kingdom House of Lords (Spanish request for extradition): Regina v Bow Street Stipendiary Magistrate, ex parte Pinochet Ugarte (No.3)' [1999] 93 American Journal of International Law 703, 711. Chinkin said that: "(t)he challenge to the immunity ratione materiae claimed by a former head of state for official acts of torture represented a choice between two visions of international law: a horizontal system based upon the sovereign equality of state and a vertical system that upholds norms of jus cogens such as those guaranteeing fundamental human rights". See also: Brigitte Stern, 'Immunities for heads of state: Where do we stand?' in Mark Lattimer and Philippe Sands (ed), *Justice for crimes against humanity* (Hart Publishing 2003) 103.

[293] Rothwell, Kaye and Davis (n 109) 60; Mashood A Baderin and Manisuli Ssenyonjo, *International Human Rights Law: Six Decades after the UDHR and Beyond*,(Ashgate Publishing 2013) 440;Nerina Boschiero, Tullio Scovazzi, Cesare Pitea and Chiara Ragni, *International Courts and the development of international law: Essays in Honour of Tullio Treves*,(Springer Science & Business Media 2013) 808; Alebeek (n 7) 219 -221.; Paola Gaeta, 'Immunity of states and state officials: A major stumbling block to judicial scrutiny?' in Antonio Cassese (ed), *Realizing utopia: The future of international law* (Oxford University Press 2012) 230.

[294] See for example: John Parry, *Understanding torture: Law, violence, and political identity*,(University of Michigan Press 2010) 78.

[295] Brohmer (n 15) 29.

[296] Nicholas Tsagourias and Nigel D White, *Collective Security*,(edn, Cambridge University Press 2013) 329; Gernot Biehler, *Procedures in International Law*,(Springer 2008) 160.

[297] *Jones (Respondent) v Ministry of Interior Al-Mamlaka Al-Arabiya AS Saudiya (the Kingdom of Saudi Arabia) (Appellants)* [2006] 26 UKHL (House of Lords). [44]-[45]. See also: Andreas Zimmermann, 'Sovereign Immunity and violations of international jus cogens - some critical remarks' [1994-1995] 16 Michigan Journal of International Law, 438.; Fox 'The law of state immunity' (n 83) 525.

It is important to point out that a *jus cogens* norm is different from an *erga omnes* obligation.[298] *Erga omnes* obligations are directed at everybody.[299] Thus, obligation *erga omnes* is considered largely a concept of state responsibility.[300] However, *erga omnes* obligations mainly affect jurisdictional issues rather than immunity issues.[301] Therefore, the only obligations that can effectively precede obligations under immunity rules are those obligations imposed by Chapter VII of the UN Security Council.[302] In addition, Article 103 of the UN Charter provides that:

> in the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.[303]

This Chapter will argue that violations of *jus cogens*, such as torture, do not necessarily abrogate the doctrine of head of state immunity. A critical analysis will be carried out to support this view, in particular, from the judgments of the *Al-Adsani* case.[304] Notwithstanding that the prohibition on torture had achieved the status of international *jus cogens*, the majority of judges were unable to discern any firm basis in the current state practice for concluding that a state no longer enjoyed immunity from civil claims in the court of another state for alleged acts of torture.[305] This view is also supported by the majority of judges in the *Arrest Warrant* case. In this case, the ICJ held that an alleged violation of *jus cogens* was not enough to remove immunity *ratione personae*, which is absolute for serving heads of state.[306]

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[298] Hugh Thirlway, *The Sources of international law*,(Oxford University Press 2014) 148; Amos Enabulele and Bright Bazuaye, *Teachings on Basic topics in public international law*,(Ambik Press 2014) 64; Lepard (n 291) 268.

[299] Bankas (n 6) 267.

[300] There are plenty of literatures on obligation *erga omnes.* See for example: Claudia Annacker, 'The legal regime of erga omnes obligations in international law' [1994] 13 Austrian Journal of International Law 131, 131. ; Peter Coffman, 'Obligations Erga Omnes and the Absent Third State' [1996] 39 German Yearbook of International Law 285, 285. ;Michael Byers, 'Conceptualising the relationship between Jus Cogens and Erga Omnes Rules' [1997] 66 Nordic Journal of International Law 211, 211.;Karl Zemanek, 'New Trends in the enforcement of *erga omnes* obligations' [2000] 4 Max Planck UN Yearbook 1, 1. ; Stefan Kadelbach, 'Jus Cogens, obligations erga omnes and other rules - The identification of fundamental norms', in Christian Tomuschat and Jean-Marc Thouvenin (ed), *The fundamental rules of international legal order* (Martinus Nijhoff Publishers 2006) 35.

[301] Christian J. Tams, *Enforcing obligations erga omnes in international law*,(Cambridge University Press 2005) 160.

[302] Alebeek (n 7) 221.

[303] See: The Charter of the United Nations 1945, ; In respect of the ICTY and ICTR see: Paola Gaeta, 'Official capacity and immunities', in Paola Gaeta (ed), *The Rome Statute of the International Criminal Court: A Commentary* 2002) 989. ; Alebeek (n 7) 221.

[304] *Al-Adsani v United Kingdom (21 November 2001)* [2002] 34 (11) EHRR 273 (European Court of Human Right), [61].

[305] ibid [61]. See also: Tomuschat and Thouvenin (n 287) 218.

[306] The *Arrest Warrant* case [51].

Hence, heads of state and some heads of government enjoy immunity *ratione personae* while they are still in office.

This Chapter is divided into three main sections. The first section defines and explains the general principles of *jus cogens* rules. The second section investigates the effect of *jus cogens* on the law of head of state immunity where examples of state practices, such as those in the *Al-Adsani* and the *Bouzari* cases, are debated. The majority and the dissenting judgments (minority view) in the *Al-Adsani* case will be considered, particularly to uncover whether the prohibition of torture is a factor and has the substance to outweigh the doctrine of state immunity. Finally, the third section dissects the arguments regarding 'access to court' and immunity. It will be argued that the 'normative hierarchy theory' does not necessarily supersede another international law norm; on the contrary, they complement each other on a more subtle level.

2.1 The Definition of a Peremptory Norm and *Jus Cogens*

2.1.1. *Jus Cogens* Rule

The starting point for defining peremptory norms or *jus cogens* can be Article 53 of the VCLT 1969. The Article states that:

> A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character. [307]

It is interesting to note that the International Law Commission (hereafter 'ILC') has said that the notion of peremptory norms, as contained in Article 53 of the VCLT, "had been recognised in public international law before the Convention existed, but that instrument gave it both a precision and a substance which made the notion one of its essential provisions".[308] Article 53 of the VCLT sets out two requirements for the formation of *jus cogens.* Firstly, a norm will not be *jus cogens* unless it is

[307] Vienna Convention on the Law of Treaties 1969, Art 53.
[308] United Nations, United Nations 'United Nations Conference on the law of treaties between states and international organisations or between international organisations', (1986) UN Doc. A/CONF.129/16/Add.1 (Vol.II) 44.

accepted and recognised by the international community of states as a whole.[309] In other words, *jus cogens* will only reach such special status if it has been accepted as being a superior value by the international community.[310] In a way, it is rather similar to the notion of public order or public policy in domestic legal orders.[311] Therefore, in order for a *jus cogens* rule to be binding, it requires the universal acceptance of the proposition as a legal rule by states and the recognition of it as a rule of *jus cogens* by an overwhelming majority of states, crossing ideological and political divides.[312] Macdonald maintains that, 'the consent of a 'very large majority' will suffice to create a rule of *jus cogens'*.[313] Moreover, Alexidze has explained that, since *jus cogens* norms are based on the common will of the international community and are absolute, they should bind even the dissenting states.[314] However, Danilenko has pointed out that Article 53 of the VCLT states that the peremptory norms of general international law should be accepted and recognised not by individuals *per se*, but by 'the international community of states as a whole'.[315] Therefore, the main problem here relates back to the primary issue of consent by states as to whether they should be bound by something they have not explicitly agreed upon.

Secondly, according to Article 53 of the VCLT, *jus cogens* must be a norm from which no derogation is permitted, and which can only be modified by a subsequent general international law norm that has a similar character.[316] Therefore, *jus cogens* is a notion in international law which cannot be subject to contracting out.[317]

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[309] Vienna Convention on the Law of Treaties 1969, Art 53.

[310] Rafael Nieto-Navia, 'International peremptory norms (Jus cogens) and International Humanitarian law', in Lal Chand Vohrah, Fausto Pocar, Yvonne Featherstone, Olivier Fourmy, Christine Graham, John Hocking and Nicholas Robson (ed), *Man's Inhumanity to man: Essays on international law in honour of Antonio Cassese* (Kluwer Law International 2003) 624.

[311] ibid See also: Dinah Shelton, 'Normative hierarchy in international law' [2006] 100 American Journal of International law 291, 297.

[312] Sinclair (n 290) 218-224.

[313] Referred in: Gennady Danilenko, 'International Jus Cogens: Issues of law-making' [1991] 2 European Journal of International Law 42, 51.

[314] ibid 50.

[315] ibid 49.

[316] Rothwell, Kaye and Davis (n 109) 434; Focarelli (n 292) 314; Lepard (n 291) 215; John F Murphy, *The evolving dimenstions of international law: Hard choices for the world community*,(Cambridge University Press 2010) 23;Andrew Mitchell, 'Leave your hat on? Head of State immunity and Pinochet' [1999] 25 Monash University Law Review 225, 234. – Citing Article 53 of the Vienna Convention on the Law of Treaties.

[317] Faustin Z. Ntoubandi, *Amnesty for crimes against humanity under international law*,(Martinus Nijhoff Publishers 2007) 220;Bankas (n 6) 146.; B G Ramcharan, *The International Law*

Furthermore, Article 64 of the VCLT says that if a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void. The effect of this is that any treaty which conflicts with it will be void *ab initio*.[318] A state is not free to decide whether to be bound by a legal rule; for *jus cogens* norms, states are automatically bound by it and they cannot ignore it.[319] Therefore, *jus cogens* rules apply in the context of customary rules and no derogation is permitted either by local or special custom.[320]

Jus cogens rules are substantive rules which are recognised as having a higher status.[321] They have now been accepted on the international stage as norms of superior value.[322] Writers like Bassiouni have argued that *jus cogens* can be considered "compelling law", and to be in the highest hierarchical position among all other norms and principles.[323] Therefore, *jus cogens* norms are deemed to be absolutely binding and restrictive of the freedoms enjoyed by the parties.[324] Bassiouni has proposed three other considerations which must be taken into account

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Commission: Its approach to the codification and progressive development of international law,(Martinus Nijhoff Publishers 1977) 143

[318]Eirik Bjorge, *The evolutionary interpretation of treaties*,(Oxford University Press 2014) 162; Antonio Cassese, *Realizing utopia: The future of international law*,(Oxford University Press 2012) 167 ; Michelle Farrell, *The prohibition of torture in exceptional circumstances*,(Cambridge University Press 2013) 99; William Slomanson, *Fundamental perspectives on international law*,(Cengage Learning 2010) 372;Marko Milanovic, *Extraterritorial application of human rights treaties: Law, principles and policy*,(Oxford University Press 2011) 74; Donald Earl Childress III, *The role of ethics in international law*,(Cambridge University Press 2011) 81; Bankas (n 6) 266.

[319] Hollis (n 292) 561; Yang (n 15) 429; Gideon Boas, *Public International Law: Contemporary principles and perspectives*,(Edward Elgar Publishing Limited 2012) 95. , Marko Milanovic, *Extraterritorial application of human rights treaties: Law, principles and policy*,(edn, Oxford University Press 2011) 105.

[320] See: Vienna Convention on the Law of Treaties 1969, Art 53.

[321] Scott Sheeran and Nigel Rodley, *Routledge Handbook of International Human Rights Law*,(Routledge 2014) 358;Gleider Hernandez, *The International Court of Justice and the judicial function*,(Oxford University Press 2014) 234; Tams and Sloan (n 72) 143; Larry May, *Global justice and due process*,(Cambridge University Press 2011) 176;Anthony D'Amato, 'International law as an autopoietic system', in Rudiger Wolfrum and Volker Roben (ed), *Developments of international law in treaty making* (Springer 2005) 394.; Alexander Orakhelashvili, 'State immunity and international public order' [2003] 45 German Yearbook of International Law 227, 258.

[322] Bankas (n 6) 266.

[323] Cherif Bassiouni, 'International Crimes: Jus Cogens and obligatio erga omnes' [1996] 59 Law and Contemporary Problems 63, 67.

[324] See for instance: Suy, 'The concept of jus cogens in public international law, in Carnegie Endowment for International Peace Papers and Proceedings II: The concept of Jus cogens in International Law' [1967] 3rd Conference on International Law at Lagonisi (Greece) between 3-8 April 1966, 18.

in determining whether a given international crime has reached the status of *jus cogens*.[325]

> The first has to do with the historical legal evolution of the crime. Clearly, the more legal instruments that exist to evidence the condemnation and prohibition of a particular crime, the better founded the proposition that the crime has risen to the level of jus cogens. The second consideration is the number of states that have incorporated the given proscription in their national laws. The third consideration is the number of international and national prosecutions for the given crime and how they have been characterised. Additional supporting sources that can be relied upon in determining whether a particular crime is a part of jus cogens is other evidence of general principles of law and the writings of the most distinguished publicists.[326]

The effect of *jus cogens* is said to preserve the legal relationships established by certain norms by prevailing over and invalidating rules which threaten the integrity and the foundation of the law.[327] Therefore, it has been argued that peremptory norms should trump the rules on immunity of states and their officials if the two stand in conflict with each other.[328] Academics like Chigara believe that peremptory norms overarch national constitutions and deny states the defence of national sovereignty for breaches of international law.[329] He has stated that:

> Norms of peremptory general international law sometimes referred to as norms jus cogens are of such importance to the international legal system that even in the exercise of their sovereign right to enter treaties one with another, States may not breach norms of this category.[330]

Nevertheless, it has been argued that the scope of *jus cogens* is limited to treaties and does not extend to acts and other rules.[331] Therefore, it does not extend to the question of immunity.[332] This is because states are only bound by treaties which they have agreed to.[333] As far as serving heads of state are concerned, it can be submitted that they are still being protected under immunity *ratione personae.* This is the case, notwithstanding the fact that the qualification of torture as a crime falls under *jus*

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[325] Ntoubandi (n 317) 215.
[326] Bassiouni (n 323) 70-71.
[327] Hermann Mosler, *The international society as a legal community*,(Sijthoff & Noordhoff 1974) 33.; See also: Hermann Mosler, 'The international society as a legal community' [1974] 140 Recueil des courts 1, 1.
[328] Orakhelashvili (n 321) 255.
[329] Ben Chigara, *Amnesty in international law : the legality under international law of national amnesty laws*,(Pearson Education Limited 2002) 36.
[330] ibid
[331] Orakhelashvili (n 321) 256.
[332] Stern (n 292) 103.; Orakhelashvili (n 321) 256.
[333] See: Vienna Convention on the Law of Treaties 1969, Art 11.

cogens. The basic issue here effectively relates back to the consent of states; that is, whether they have agreed to any international treaties that could affect state immunity, which subsequently influence the privileges enjoyed by their serving head of state.

However, it has been argued that the effect of *jus cogens* on crimes against humanity is that it permits universal jurisdiction for their breach which means that they are subjected to the principle of *aut dedere aut judicare*.[334] Having said this, it has been suggested that the *aut dedere aut judicare* principle is merely theoretical.[335] In terms of the universal jurisdiction provision that is triggered by the crime of torture, states have attempted to implement the universal jurisdiction provision more systematically through their domestic legislations.[336] One reason for this is because of the conflict between *realpolitik* or diplomacy and the doctrine of universal jurisdiction.[337] There is undoubtedly some truth in the friction between the two doctrines. The reason for the friction is due to the fact that the law of head of state immunity may be affected as it involves the exercise of extensive jurisdiction. The problem relating to the universal jurisdiction as a result of allegations of a *jus cogens* crime will be dealt with later in the thesis in the context of Article 5 of the CAT.

The definition of *jus cogens* has already been discussed in relation to Article 53 of the VCLT. However, it is important to distinguish it from the older voluntarist view of international law on *jus cogens* because it does not support the modern approach towards *jus cogens* under Article 53 of the VCLT.

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[334] This Latin principle literally means an obligation to extradite or prosecute. Nidal Jurdi, *The International Criminal Court and national courts: A contentious relationship*,(edn, Ashgate Publishing Limited 2013) 31. See generally: Anthony Aust, *Handbook of International Law*,(2nd edn, Cambridge University Press 2010) 271. See also: Ntoubandi (n 311) 220. ; Laura Olson, 'Re-enforcing enforcement in a specialised Convention on Crimes against Humanity: Inter-State cooperation, mutual legal assistance, and the aut dedere aut judicare obligation', in Leila Nadya Sadat (ed), *Forging a Convention for Crimes against Humanity* (Cambridge University Press 2011) 326.

[335] Xavier Philippe, 'The principles of universal jurisdiction and complementarity: how do the two principles intermesh?' [2006] 88 International Review of the Red Cross 375, 376.

[336] ibid

[337] ibid

The Voluntarist Approach towards *Jus Cogens*

The voluntarist theory on *jus cogens* maintains that states are sovereign; so they cannot be bound by legal obligations without their express consent.[338] This theory applies to both treaties and custom.[339] In S.S. Lotus (France v Turkey) (hereafter the '*Lotus'*), the Permanent Court of International Justice (hereafter 'PCIJ') explained that:

> The rules of law binding upon States therefore emanate from their own free will as expressed by ... usages generally accepted as expressing principles of law and established in order to regulate the relations between these coexistent independent communities or with a view to the achievement of common aims.[340]

In other words, international rules of *jus cogens* only bind those who have accepted and recognised them.[341] This was supported by the decision in Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States) 1986 (hereafter '*Nicaragua Case'*):

> In international law there are no rules, other than such rules as may be accepted by the State concerned, by treaty or otherwise, whereby the level of armaments of a sovereign State can be limited, and this principle is valid for all States without exception.[342]

Therefore, it can be seen that both the *Lotus* and *Nicaragua* cases have outlined a voluntarist approach which does not support the aim of the *jus cogens* doctrine to remove state immunity without the states' prior consent on certain issues. This means that states do not accept the fact that the violation of *jus cogens* norms, such as torture, can trump the doctrine of state immunity. As far as head of state immunity is concerned, the voluntarists argue that states have never wanted to be bound by *jus cogens* norms in the first place. The effect of this is that the prohibition of torture will not affect immunity privileges of heads of state given under state immunity.

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[338] Maurice Mendelson, 'The Formation of customary international law' [1998] 272 Recueil des Cours 155, 254.
[339] ibid
[340] *S.S Lotus [France v Turkey]* [1927] Ser.A No.10 PCIL , 18.
[341] Evan Criddle and Evan Fox-Decent, 'A fiduciary theory of jus cogens' [2009] 34 Yale Journal of International Law 331, 339; ;Danilenko (n 299) 47.
[342] *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v US)* [1986] Rep 14 ICJ 135 (ICJ) [269].

2.1.2. *Erga Omnes* Obligations

E*rga omnes* obligations are, literally, directed towards everybody.[343] The ICJ described *erga omnes* norms as obligations towards the international community of states as a whole.[344] In other words, *erga omnes* means a sense of legal obligation incumbent on all states and that each state can exercise the protection of its own interest and the interests of the international community in general.[345] It is said that *jus cogens* norms which are derived from custom and treaty law are connected to obligations *erga omnes*.[346] Therefore, any crime which attracts obligations *erga omnes* has no territorial restrictions.[347] In other words, obligations *erga omnes* affect jurisdictional issues but not immunity issues.[348]

2.2 The Effect of the Peremptory Norms (*Jus Cogens*) on the Law of Head of State Immunity

2.2.1. The Growth of Human Rights Protection

Since the Second World War, there has been a surge in emphasis on the protection of human rights in general due to certain crimes that have affected the interests of the world community as a whole. These have threatened the peace and security of humankind and have shocked its moral conscience.[349] For example, the prohibition of torture has been widely recognised in the international community. This can be seen specifically in: Article 7 of the Covenant on Civil and Political Rights 1966 (ICCPR); Article 3 of the European Convention of Human Rights (ECvHR); Article 5 of the American Convention on Human Rights 1969 (ACHR); and the UN Convention Against Torture (CAT).[350] Some have suggested that it has now been

[343] Arthur Watts, Arnold Pronto and Michael Wood, *The International Law Commission 1999-2009: Volume IV: Treaties, Final draft articles, and other materials*,(Oxford University Press 2010) 769 ;Bankas (n 6) 267.
[344] *Barcelona Traction, Light & Power Co. (Belgian v Spain) Second Phase* [1970] REP 3 ICJ (ICJ), [33].See: Tomuschat and Thouvenin (n 287) 35.
[345] Ntoubandi (n 317) 216.
[346] Bankas (n 6) 267.
[347] Jan Anne Vos, *The function of Public International Law*,(Springer Science and Business Media 2013) 259 ; Leila Nadya Sadat and Michael P Scharf, *The theory and practice of International Criminal Law: Essays in Honour of M Cherif Bassiouni*,(Brill 2008) 130 ;Bankas (n 6) 267
[348] Friedrich Kratochwill, *The status of law in world society: Meditations on the role and rule of law*,(Cambridge University Press 2014) 160; Tams and Sloan (n 72) 79; Hazel Fox, *The Law of State Immunity*,(3rd edn, Oxford University Press 2013) 39
[349] Bassiouni (n 323) 68 and 70.
[350] Sarah Joseph, *Seeking remedies for torture victims: a handbook on the individual complaints procedures of the UN treaty bodies*,(edn, Geneva: WOAT/OMCT 2006) 30; Lauri Hannikainen,

established that torture is absolutely prohibited in all circumstances.[351] Legal literature also suggests that the following international crimes are also *jus cogens*: aggression, genocide, crimes against humanity, war crimes, piracy, slavery and slave-related practices.[352] Furthermore, a substantial amount of evidence has been gathered to suggest that the legal rules prohibiting torture, the use of force, war crimes and crimes against humanity are peremptory in nature.[353]

Significant developments in the protection of human rights have led to the idea of individual criminal responsibility for violations of humanitarian law and acts of torture.[354] This means that the growth of human rights norms do not protect the interests of states, but the interests of individuals and mankind.[355] Verdross agrees with this and has made the point that:

> a very important group of norms having the character of *jus cogens* are all rules of general international law created for a humanitarian purpose.[356]

2.2.2. Torture as an Exception to Head of State Immunity

The issue of head of state immunity has been discussed in many cases. These cases have shed some light on the law surrounding the current status of the head of state immunity for alleged acts of torture.

The nature of the general prohibition of acts of torture is not just visible in international conventions and treaties, but is also seen in case law from various jurisdictions. In the American case of *Filartiga v Pena-Irala* it was held that, "the torturer has become, like the pirate and the slave trader before him, *hostis humani*

Peremptory norms (Jus cogens) in international law : historical development, criteria, present status,(edn, Lakimiesliiton Kustannus : Finnish Lawyers' Publishing Co. 1988) 499.

[351] Ed Bates, 'The Al-Adsani Case, State Immunity and the International Legal Prohibition on Torture' [2003] 3 Human Rights Law Review 193, 197.

[352] Goodale (n 288) 301 ;Bassiouni (n 323) 68.

[353] Tams (n 301) 145. ; May (n 321) 121.

[354] Voyiakis (n 35) 317-318.

[355] Giuseppe Barile, 'The protection of human rights in Article 60, paragraph 5 of the Vienna Convention on the Law of Treaties', in *International Law at the Time of its codification, Essays in Honour of Roberto Ago* 1987) 3 -4.

[356] Alfred Verdross, 'Jus dispositivum and jus cogens in international law' [1966] 60 American Journal of International law 55, 59.

generis, an enemy of all mankind".[357] This is supported by the decision in *Siderman de Blake v Republic of Argentina*:[358]

> International law does not recognise an act that violates *jus cogens* as a sovereign act. A State's violation of the *jus cogens* norm prohibiting official torture therefore would not be entitled to the immunity afforded by international law.[359]

In the Furundzija case, the International Criminal Tribunal for the former Yugoslavia (hereafter 'ICTY') noted the *jus cogens* status on the prohibition of torture and the implications this could have at international and domestic law were spelt out.[360] It also said that international rules "should prohibit the failure to adopt the national measures necessary for implementing the prohibition, and the maintenance in force or passage of laws which are contrary to the prohibition".[361]

As far as the law of head of state immunity is concerned, it is governed by CIL as discussed in Chapter One.[362] These privileges will most probably be curtailed if a head of state commits a crime against humanity which has a *jus cogens* element. The emphasis on the protection of human rights has been put into practice. This has been achieved by the enactment of various international conventions.

The first attempt to restrict head of state immunity was introduced by the Nuremberg Military Tribunal. Article 7 of the Charter of the Nuremberg Tribunal stated that:

> The official position of defendants, whether as Heads of State or responsible officials in Government Departments, shall not be considered as freeing them from responsibility or mitigating punishment.[363]

The International Criminal Court (hereafter 'ICC') stated in Article 27(1) that:

> In particular, official capacity as Head of State or Government, a member of the Government or parliament, an elected representative or a government official shall

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[357] *Filartiga v Pena-Irala* [1980] 630 F.2d 876 (US Circuit Court of Appeals (2nd Circuit)) p.890.; William J Aceves, *The anatomy of torture: a documentary history of Filartiga v Pena Irala*,(Brill 2007) xvii.

[358] *Siderman de Blake v Republic of Argentina* [1992] 965 F.2d 699 (US 9th Circuit Court of Appeals), 717.

[359] ibid

[360] *Prosecutor v Anto Furundzija* [1998] Case No. IT-95-17/1-T (ICTY, Trial Chamber) [153]-[157].

[361] ibid [148].

[362] This has been explained in Chapter One with respect to the law of head of state immunity under CIL.

[363] Charter of the International Military Tribunal - Annex to the Agreement for the prosecution and punishment of the major war criminals of the European Axis ("London Agreement") 1945, Art 7.; Charles Chernor Jalloh, *The Sierra Leone Special Court and its legacy: The impact for Africa and International Criminal Law*,(Cambridge University Press 2013) 43.

> in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence.[364]

Article 27(2) goes on to say:

> Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the court from exercising its jurisdiction over such a person.[365]

One would expect that, since the prohibition of torture has a *jus cogens* character, it would result in the courts having no difficulty in reaching decisions on torture cases. However, this has not been the case. Differences of opinion can be found in the following cases.

a) Case Law by International Courts where the Immunity Plea Is Not Accepted

The treaties mentioned above only restrict head of state immunity before international courts and not national courts. The proceedings involving Charles Taylor, the Liberian President accused of crimes against humanity, brought up many legal issues. These included: the legal basis for the Special Court for Sierra Leone; whether the Special Court was an international criminal tribunal; and whether it had jurisdictional immunity. Essentially, the main issue was whether the Special Court had the necessary authority and jurisdiction to try Charles Taylor, an incumbent head of state. This was because the Special Court was not set up through the traditional method, by Chapter VII of the United Nations Charter like other *ad hoc* tribunals such as the ICTY and ICTR.[366] However, in the *Special Court for Sierra Leone concerning Charles Taylor*, the Special Court said that it has a mixed *ratione materiae* jurisdiction whereby the Prosecutor could invoke both international and

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[364] Rome Statute of the International Criminal Court 1998, Art 27(1).; Kai Ambos, *Treatise on International Criminal Law: Volume 1: Foundations and General Part*,(Oxford University Press 2013) 414; Bassiouni (n 292) 77; Errol Mendes, *Peace and justice at the International Criminal Court: A court of law resort*,(Edward Elgar Publishing 2010) 171.

[365] Rome Statute of the International Criminal Court 1998, Art 27(2). M Cherif Bassiouni, *International Extradition: United States Law and Practice*,(Oxford University Press 2014) 457; Philip Alston and Ryan Goodman, *International Human Rights*,(Oxford University Press 2013) 1220; Sarah Nouwen, 'Legal equality on trial: Sovereigns and individuals before the International Criminal Court' [2012] 43 Netherlands Yearbook of International Law 151, 160; Fox 'The law of state immunity' (n 348) 555; Webb (n 264) 72.

[366] Alhagi B M Marong, 'Fleshing Out the contours of the crime of attacks against United Nations Peacekeepers - The contribution of the Special Court for Sierra Leone ', in Charles Chernor Jalloh (ed), *The Sierra Leone Special Court and its Legacy: the impact for Africe and International Criminal Law* (Cambridge University Press 2014) 294 ; Abdul Tejan-Cole, 'The complementary and conflicting relationship between the Special Court for Sierra Leone and the truth and reconciliation commission' [2011] Yearbook of International Humanitarian Law 313, 317;

Sierra Leonean law to prosecute offenders.[367] Nevertheless, it was argued by the Prosecution that the question of whether there was any immunity from the exercise of jurisdiction must be distinguished from that of whether jurisdiction existed.[368] Notwithstanding that the Special Court was set up in a different setting, it did not necessarily mean that it would not have jurisdiction to try the case, as explained by Article 6(2) of its governing Statute:

> The official position of any accused persons, whether as Head of State or Government or as a responsible Government official, shall not relieve such a person of criminal responsibility nor mitigate punishment.

This Special Court Statute mirrored Article 7(2) of the Statute of the ICTY, Article 6(2) of the Statute of the ICTR and Article 27(2) of the Statute of the International Criminal Court.[369] In May 2004, the Special Court held that Charles Taylor did not enjoy immunity from prosecution notwithstanding the fact that he was a serving head of state at the time. The Special Court said that:

> We hold that the official position of the Applicant as an incumbent Head of State at the time when these criminal proceedings were initiated against him is not a bar to his prosecution by this Court. The Applicant was and is subject to criminal proceedings before the Special Court for Sierra Leone.[370]

Furthermore, the Special Court said that, "[s]ince we have found that the Special Court is not a national court, it is unnecessary to discuss the cases in which immunity is claimed before national courts".[371] This suggests that the privileges of immunity only restrict national courts and not international ones.[372] In other words, only an international court such as the Special Court for Sierra Leone, the ICTY, the ICTR and the ICC may properly adjudicate on torture cases since such courts are not

[367] Statute of the Special Court for Sierra Leone 2000, Art 8.;See also: Clara da Silva, 'The hybrid experience of the Special Court for Sierra Leone', in Bartram S Brown (ed), *Research Handbook on International Criminal Law* (Edward Elgar Publishing 2011) 232 ;Charles Chernor Jalloh, 'The contribution of the Special Court for Sierra Leone to the development of international law' [2007] 15 African Journal of International and Comparative Law 165, 173.
[368] *Prosecutor v Charles Ghankay Taylor (Decision on immunity from jurisdiction)* [2004] SCSL-2003-01-I Special Court for Sierra Leone (Special Court for Sierra Leone) [31].
[369] Bassiouni (n 144) 237.
[370] *Prosecutor v Charles Ghankay Taylor (Decision on immunity from jurisdiction)* [2004] SCSL-2003-01-I Special Court for Sierra Leone (Special Court for Sierra Leone) ibid [53].
[371] ibid [54].
[372] See: Leo J. Bouchez, 'The Nature and Scope of State Immunity from Jurisdiction and Execution' [1979] 10 Netherlands Yearbook of International Law 3, 4.

organs of any particular state.[373] In this way, the exercise of jurisdiction does not infringe the principle of sovereign equality which is the backbone of state immunity.[374]

b) Cases showing the Reluctance of Courts to Deny Immunity over Allegations of Torture by National Courts

i) The *Al*-Adsani case

It is important to point out from the outset that the *Al-Adsani* case concerned civil proceedings rather than criminal proceedings.[375] The claimant sought compensation in a UK court for physical and mental health injuries allegedly perpetrated by the Sheikh and the Government of Kuwait.[376] The applicant, who held dual UK-Kuwaiti nationality, was accused of being responsible for the circulation of videos containing sex scenes involving the relatives of the Sheikh. The claimant, Al-Adsani, claimed that he was kidnapped, taken to a prison in Kuwait and tortured by security guards. The Queen's Bench dismissed the case due to its lack of jurisdiction and explained that Kuwait was entitled to foreign state immunity under the UK State Immunity Act 1978 (hereafter 'SIA').[377] In other words, the claimant could not claim compensation because the UK court barred the case due to state immunity.[378]

The case was then taken to the Court of Appeal after two additional individuals were added as defendants.[379] The Court reasoned that it was up to the applicant to prove, on the balance of probabilities, that the Government of Kuwait was not entitled to

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[373] Larissa van den Herik and Carsten Stahn, *The diversification and fragmentation of International Criminal Law*,(Martinus Nijhoff Publishers 2012) 10 ;Gloria J Browne-Marshall, 'International Criminal Tribunals and Hybrid Courts', in Mangai Natarajan (ed), *International Crime and justice* (Cambridge University Press 2011) 354 ;Sonja C. Grover, *The European Court of Human Rights as a pathway to impunity for international crimes*,(edn, Springer 2010) 4.

[374] Sonja C. Grover, *The European Court of Human Rights as a pathway to impunity for international crimes*,(Springer 2010) 4.

[375] Sangeeta Shah, 'Detention and trial', in Daniel Moeckli, Sangeeta Shah, Sandesh Sivakumaran and David Harris (ed), *International Human Rights Law* (Oxford University Press 2014) 274; Brice Dickson, *Human rights and the United Kingdom Supreme Court*,(Oxford University Press 2013) 153;Magdalena Forowicz, *The reception of international law in the European Court of Human Rights*,(Oxford University Press 2010) 292.

[376] *Al-Adsani v United Kingdom (21 November 2001)* [2002] 34 (11) EHRR 273 (European Court of Human Right) 278 [15].

[377] *Al-Adsani v Government of Kuwait* [1996] 107 ILR 536 (CA) 542.

[378] Philip Leach, *Taking a case to the European Court of Human Rights*,(Oxford University Press 2011) 275.

[379] *Al-Adsani v United Kingdom (21 November 2001)* [2002] 34 (11) EHRR 273 (European Court of Human Right), 278 [16].

immunity under the SIA.[380] Nevertheless, it has been said that international law could only be used to assist in the interpretation, if a statute was ambiguous and the terms were unclear.[381] The Court of Appeal subsequently held that the applicant had failed to establish, on the balance of probabilities, that the Kuwaiti Government was responsible for the threats made in the UK.[382] The applicant's case was refused leave to appeal to the House of Lords in November 1996 because of the Kuwaiti Government's entitlement to state immunity.[383] The claimant then brought the case to the ECHR. He argued that the UK had failed to ensure his right not to be tortured, which was contrary to Article 3 of the ECvHR.[384] This case is important because it has provided a re-evaluation of the law regarding the privileges normally attached to head of state immunity at the European court level.

The case also raised the question as to whether the granting of immunity to a foreign state for the acts of torture violated Article 6 of the ECvHR, which allowed the right to access to court.[385] The ECHR explained that foreign states were generally immune from civil claims not incurred in the forum territory.[386] Since Article 3 of the ECvHR prohibited torture, the main issue of this case was whether these torture acts, being *jus cogens* norms, were excluded from immunity.[387] The ECHR rejected the violation of *jus cogens* norms as an excuse to refuse state immunity in civil claims.[388] The ECHR reasoned that:

> Notwithstanding the special character of the prohibition of torture in international law, the Court is unable to discern in the international instruments, judicial authorities or other materials before it any firm basis for concluding that, as a matter of international law, a State no longer enjoys immunity from civil suits in the courts of another State where acts of torture are alleged.[389]

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[380] ibid
[381] ibid [17].
[382] ibid [17]-[18].
[383] ibid 280 [19].
[384] ibid. Article 3 of the European Convention on Human Rights provides that: "No one shall be subjected to torture or to inhuman or degrading treatment or punishment.
[385] Helmut Philipp Aust, *Complicity and the law of state responsibility* (Cambridge University Press 2011) 38; Orakhelashvili (n 9) 343.
[386] *Al-Adsani v Government of Kuwait* [1996] 107 ILR 536 (CA) [57].
[387] Voyiakis (n 35) 304.
[388] *Al-Adsani v United Kingdom* [2001] 34 EHRR 273 (European Court of Human Right) [61].
[389] ibid

The ECHR granted immunity to Kuwait despite the fact that the Court noted that torture as "a violation of a fundamental human right … is a crime and a tort for which the victims should be compensated".[390] The ECHR held that:

> [we do] not accordingly find it established that there is yet acceptance in international law of the proposition that States are not entitled to immunity in respect of personal injury for damages for alleged torture committed outside the forum State.[391]

A dissenting judge, Judge Ferrari Bravo said that the Court had, missed "a golden opportunity to issue a clear and forceful condemnation of all acts of torture".[392] Other dissenting judges[393] in the Al-Adsani case reasoned that the prohibition of torture, as a rule of *jus cogens*, should prevail over the law of state immunity.[394] They argued that Kuwait could not legitimately hide behind the rules of State immunity to avoid proceedings for a serious claim of torture before a foreign jurisdiction.[395] They claimed that a number of authorities have shown that the prohibition of torture has steadily crystallised to become a *jus cogens* rule.[396] Therefore, according to the dissenting judges, the acceptance of prohibition of torture as a *jus cogens*, would mean that it was hierarchically higher than any other rules of international law.[397] This would suggest that a *jus cogens* norm would override any other rule which did not effectively have the same status.[398] This view corresponds with the normative hierarchy theory which will be discussed in section three (2.3). The dissenting judges' opinions obviously contradicted those of the majority - that state immunity which was derived from both customary and international law did not fall within *jus cogens.*[399] It has also been argued that states sometimes waived their immunity rights and this showed that state immunity rules

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[390] *Al-Adsani v Government of Kuwait* [1996] 107 ILR 536 (CA) 4.
[391] *Al-Adsani v United Kingdom* [2001] 34 EHRR 273 (European Court of Human Right) para.66
[392] See: *Democratic Republic of the Congo v Belgium (Arrest Warrant Case)* [2002] 3 ICJ Reports 24 (ICJ) [Dissenting opinion Judge Ferrari Bravo].; Bates (n 351) 205.
[393] They were Judges Rozakis, Caflisch, President Wildhaber and Judges Costa, Cabral Barreto, and Vajic.
[394] The *Arrest Warrant* case [4] (Dissenting Opinions of Judges Rozakis and Catflisch joined by Judges Wildhaber, Costa, Cabral Barreto and Vajic). ; David Harris, Michael O'Boyle, Edward Bates and Carla Buckley, *Law of the European Convention on Human Rights*,(3rd edn, Oxford University Press 2014) 406; Kloth (n 15) 72; Voyiakis (n 35) 306-307.
[395] Voyiakis (n 35) 307.
[396] *Al-Adsani v United Kingdom* [2001] 34 EHRR 273 (European Court of Human Right) [1] (Dissenting Judgment).
[397] ibid
[398] ibid
[399] ibid [2].

did not enjoy as high a status as *jus cogens* norms.[400] According to the dissenting judges:

> The acceptance … of the jus cogens nature of the prohibition of torture entails that a State allegedly violating it cannot invoke hierarchically lower rules (in this case, those on State immunity) to avoid the consequences of the illegality of its actions.[401]

ii) The Bouzari Case

In *Bouzari v Islamic Republic of Iran*,[402] Houshang Bouzari claimed that he was tortured in Tehran for eight months. He alleged that he was also subjected to several fake executions by hanging, suspension by the shoulders for lengthy periods of time and beatings to the head which damaged his hearing.[403] Bouzari brought civil proceedings against the Islamic Republic of Iran under Canada's State Immunity Act 1985 (hereafter 'Canada SIA') for the allegation that he was tortured.[404] The Ontario Court of Appeal held that none of the enumerated exceptions in the Canada SIA applied.[405] It was explained that the statute had a civil rather than a criminal nature and therefore it did not have the commercial activity exception.[406] In other words, the Court of Appeal reaffirmed that the Canada SIA provided no exception for torture.[407] Nevertheless, it was agreed that the prohibition of torture constituted a *jus cogens* norm but it did not encompass the civil remedy sought by Bouzari.[408] The reasoning made in *Bouzari* is supported by the dissenting judges in the *Al-Adsani* case, where Judges Rozakis and Caflisch said that the prohibition of torture "in the

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[400] ibid

[401] ibid See also: Brad R Roth, 'Sovereign Equality and non-liberal regimes', in *Netherlands Yearbook of International Law 2012: Legal Equality and the international rule of law - Essays in Honour of P H Kooijmans* 2012) 43;Voyiakis (n 339) 318.; Erika de Wet, 'The prohibition of torture as an international norm of jus cogens and its implications for national and customary law ' [2004] 15 European Journal of International Law 97, 107.

[402] *Bouzari and Others v Islamic Republic of Iran* [2004] 124 ILR 128 (Ontario Court of Appeal)

[403] *Bouzari v Islamic Republic of Iran* [2004] 2800 Docket No.C38295 (OJ) [12].

[404] *Bouzari v Islamic Republic of Iran* [2002] No. 1624, Court File No. 00-CV-201372 OJ (Ontario Superior Court of Justice), [18]. See also: Lorna McGregor, 'State immunity and jus cogens' [2006] 55 International and Comparative Law Quarterly 437, 442.; Noah Benjamin Novogrodsky, 'Immunity for torture: lessons from Bouzari v Iran' [2007] 18 European Journal of International Law 939, 940.

[405] *Bouzari v Islamic Republic of Iran* [2002] No. 1624, Court File No. 00-CV-201372 OJ (Ontario Superior Court of Justice), [18].; McGregor (n 385) 437.

[406] ibid See paras. 18-34.

[407] Kloth (n 15) 83.

[408] *Bouzari v Islamic Republic of Iran* [2004] 2800 Docket No.C38295 (OJ) [87] and [94].; Paul David Mora, 'Jurisdictional Immunities of the state for serious violations of international human rights law or the law of armed conflict' [2012] 50 Canadian Yearbook of International Law 243, 260.

international sphere, the doctrine acts to deprive the sovereign of immunity and the criminal or civil nature of the [subsequent] domestic proceeding is immaterial".[409]

The decision of this case caused controversy, notwithstanding that the Court acknowledged the peremptory status of the prohibition of torture under international law, but it refused to read a human rights exception into the Act.[410] As a result, the UN Committee against Torture (UNCCAT) said, with respect to Canada's failure to provide a civil remedy, that:

> the absence of effective measure to provide civil compensation to victims of torture in all cases … and Canada should review its position under article 14 of the Convention to ensure the provision of compensation through its civil jurisdiction to all victims of torture".[411]

The *Bouzari* case posed the important question as to whether states may continue to claim immunity in foreign courts for *jus cogens* violations. The lawyer acting on behalf of Bouzari argued that the prohibition of torture constituted a peremptory norm which overrode the civil immunity given to foreign sovereigns.[412] The reason for this is that those *jus cogens* norms are said to have a higher status. Nevertheless, writers like Caplan have argued that there was no international norm and inherent right of state immunity to shield foreign states from human rights litigation.[413]

iii) The Jones Case

In *Jones*, Jones, who was a British national, claimed that the agents of the Saudi government tortured and abused him. The purpose of the torture was to extract a confession from him. When Jones returned to the UK, he claimed that he suffered from a severe psychological condition and was unable to work. Jones brought claims against the Ministry of Interior for the Kingdom of Saudi Arabia and Lieutenant-Colonel Abdul Aziz, who was one of the alleged torturers. In response to the claim, the Ministry sought to strike out the claim due to state immunity under the SIA. The claimant's claim was refused. The House of Lords held that state officials, when they have committed an act of torture when performing official duties, were immune from

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[409] *Al-Adsani v United Kingdom* [2001] 34 EHRR 273 (European Court of Human Right) [4] (Dissenting Judgment).; Novogrodsky (n 404) 944.
[410] McGregor (n 404) 442.
[411] UN Committee Against Torture, United Nations Committee Against Torture 'Conclusions and recommendations of the Committee against Torture: Canada', (2005) CAT/C/CR34/CAN , [4(g)] and 5(f)].
[412] Novogrodsky (n 404) 944.
[413] Caplan (n 38) 781.

jurisdiction if the act concerned was 'in discharge or purported discharge of their public duties'.[414]

Lord Bingham explained that, as far as the *jus cogens* norm issue was concerned, *Bouzari* involved substantive matters.[415] Therefore, it did not affect the procedural issue on which the courts were entitled to enforce it.[416] Moreover, his Lordship reasoned that domestic courts were not suited to the task of enforcing the *jus cogens* prohibition against torture.[417] Both Lord Bingham and Lord Hoffman, in their dissenting judgments, clarified the difference between the two concepts, by quoting Fox who said that:

> State immunity is a procedural rule going to the jurisdiction of a national court. It does not go to substantive law: it does not contradict a prohibition contained in a *jus cogens* norm but merely diverts any breach of it to a different method of settlement. Arguably then, there is no substantive content in the procedural plea of State immunity upon which a *jus cogens* mandate can bite.[418]

The main question in this case was whether or not proceedings against state officials, who have allegedly committed torture, were to be dealt with by judicial assessment of their appropriateness and proportionality on a case by case basis.[419] As far as the SIA is concerned, Lord Bingham explained that it represented an external rule barring court proceedings in the relevant case.[420] However, the English Court could not be said to be denying access to justice, contrary to Article 6, when they had no such access to give.[421] His Lordship was unconvinced by the argument that the issue of immunity was *ratione materiae,* and it did not cover the torture allegations because they were outside the official capacity of the defendants.[422]

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[414] *Jones (Respondent) v Ministry of Interior Al-Mamlaka Al-Arabiya AS Saudiya (The Kingdom of Saudi Arabia) (Appellants) Mitchell and others (Respondents) v Al-Dali and others Ministry of Interior Al-Mamlaka Al-Arabiya AS Saudiya (the Kingdom of Saudi Arabia) (Appellants) Jones (Appellants) v Ministry of Interior Al-Mamlaka Al-Arabiya AS Saudiya (The Kingdom of Saudi Arabia) (Respondents)* [2006] UKHL 26 UKHL 26 (House of Lords) [11].

[415] The *Jones* case [48] (Lord Bingham). See also: Oliver Jones, 'Jones v Ministry of Interior of Kingdom of Saudi Arabia: An exercise in interpretation' [2007] 11 Singapore Yearbook of International Law and Contributors 163, 170.

[416] See: Jones (n 415) 170.

[417] The *Jones* case [24] (Lord Bingham).

[418] The Jones case [44] (Lord Bingham); ; Fox 'The law of state immunity' (n 348) 40.

[419] Jones (n 415) 166.

[420] The *Jones* case [64] (Lord Bingham). See also: Jones (n 415) 169.

[421] The Jones case [14] (Lord Bingham).

[422] The Jones case [85] (Lord Bingham). See also: Jones (n 415) 169.

2.3 Discussions on the Dichotomy Between Access to Court and State Immunity

The doctrine of sovereignty and the concept of human rights are increasingly in conflict.[423] Richard Falk observed that "sovereignty and democracy are profoundly affected by the realization of human rights…".[424] The conventional view states that international law cannot grant immunity for prosecution in relation to acts which international law condemns as criminal and as attacks on the interest of the international community as a whole.[425] This corresponds to those who subscribe to the normative hierarchy theory, who believe that the litigation problem in human rights stems from a conflict between two international law norms: state immunity and *jus cogens*.[426] Just as *jus cogens* norms overrule conflicting rules of international law, so too does the prohibition on torture prevail over state immunity which traditionally grants the head of state immunity.[427] In other words, this theory postulates that the *jus cogens* norm trumps state immunity due to its superior status.[428] In *Princz v Federal Republic of Germany*, Wald J stated that:

> A State is never entitled to immunity for any act that contravenes a *jus cogens* norm … The rise of *jus cogens* norms limit state sovereignty in the sense that the 'general will' of the international community of states, and other actors, will take precedence over the individual wills of states to order their relations.[429]

In other words, *jus cogens* outweighs the individual interests of any one state, such as the immunity from foreign domestic proceedings.[430] Nevertheless, it has been explained that since there are no accepted multilateral treaties to govern state immunity law, the normative hierarchy theory has to be based on the assumption that

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[423] Richard Pierre Claude and Burns H Weston, *Human rights in the world community: Issues and action*,(3rd edn, University of Pennsylvania Press 2006) 5 ;Bianchi (n 9) 260; Richard Falk, *On humane governance: Toward a new global politics*,(Polity Press 1995) 251.
[424] Falk (n 423) 251.
[425] Bianchi (n 9) 261.
[426] The *Jones* case [44]-[45] (Lord Bingham). Paul B Stephan, 'Sovereign immunity and the International Court of Justice: The state system triumphant', in *Foreign Affairs litigation in United States courts* (Brill 2013) 76. See also: Caplan (n 38) 771.
[427] Orakhelashvili (n 9) 344. Cf: Bates (n 351) 221.
[428] Michael Byers, 'Conceptualising the relationship between Jus Cogens and Erga Omnes Rules' [1997] 66 Nordic Journal of International Law 211, 220.; Caplan (n 38) 743.; Christine Schwobel, *Global constitutionalism in international legal perspective*,(edn, Martinus Nijhoff Publishers 2011) 40. Cf: Roth (n 401) 42; Prosper Weil, 'Towards relative normativity in international law?' [1983] 77 American Journal of International law 413, 413.
[429] *Princz v Federal Republic of Germany* [1994] 26 F.3d 1166, 1182 (District Court Circuit) 26 F.3d 1166, 1182.
[430] Caplan (n 38) 745.

state immunity is either the fundamental principle of international law or a rule of customary international law.[431]

There are two interesting claims made in the *Al-Adsani* case on whether access to courts should override state immunity. This can be seen in the conflicting majority and minority opinions from the *Al-Adsani* judgments which will be dealt with below.

2.3.1. The Majority Opinion in *Al-Adsani*

The decision in the *Al-Adsani* case was based on "generally recognised rules of public international law on State immunity".[432] The majority held that compliance with the prohibition of torture did not mean the suspension of immunity.[433] They explained the importance of state immunity as follows:

> Sovereign immunity is a concept of international law, developed out of the principle of *par in parem non habet imperium*, by virtue of which one State shall not be subject to the jurisdiction of another State. The Court considers that the grant of sovereign immunity to a State in civil proceedings pursues the legitimate aim of complying with international law to promote comity and good relations between States through the respect of another State's sovereignty.[434]

In other words, the majority rejected the idea that the prohibition of torture enjoyed an advantage over the rule of state immunity.[435] It has been argued that granting state immunity to offending states and their agents in such civil cases undermines the *jus cogens* prohibition against torture, which is a well established CIL.[436] The ECHR noted that the *Al-Adsani* case was not concerned with criminal liability, but was a civil suit, explaining that:

> notwithstanding the special character of the prohibition of torture in international law, the Court is unable to discern the international instruments, judicial authorities or other materials before it any firm basis for concluding that, as a matter of international law, a State no longer enjoys immunity from civil suit in the courts of another State where acts of torture are alleged.[437]

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[431] ibid
[432] *Al-Adsani v United Kingdom* [2001] 34 EHRR 273 (European Court of Human Right) [56].
[433] ibid [66]. See also: Voyiakis (n 35) 320.
[434] The *Al-Adsani* case [54].; Fox 'The law of state immunity' (n 348) 13.
[435] Voyiakis (n 35) 319.
[436] Grover (n 374) 3.
[437] The *Al-Adsani* case [61]. Tsagourias and White (n 296) 397 (footnote 73); Georg Nolte, *Treaties and subsequent practice*,(Oxford University Press 2013) 259; Roberto Bellelli, *International Criminal Justice: Law and Practice from the Rome Statute to its review*,(Ashgate 2010) 179 (footnote 19).

Hence, the rationale and practice on immunities have shown that the availability of immunity was never going to be determined on the basis of the type of proceeding involved.[438] Rather, the type of proceedings, whether criminal or civil, should not be a factor used to decide on the presence of immunity. Voyiakis criticised the majority opinion that the act of torture was a peremptory norm, as the judges did not provide an authority to say that the superior status of peremptory norms would suspend the immunity of states in civil proceedings at foreign courts.[439]

2.3.2. The Minority or Dissenting Opinion in the *Al-Adsani* Case

The view of the minority or dissenting judges was that the recognition of the prohibition of torture in international law would automatically overturn any other international law rules as they were of a lower status.[440] They argued that state immunity did not belong to the category of peremptory norms as was generally perceived.[441] Therefore, states which have violated their rights to immunity cannot use hierarchically lower rules, such as state immunity, to avoid an action.[442] Some writers, like McGregor, have argued that states have chosen to waive their rights to immunity on some occasions[443] and so head of state immunity would not apply in such circumstances.

The normative hierarchy theory seems to support the minority view in the *Al-Adsani* case, the view that the violation of peremptory norms would lead to a plea of no immunity. The significance of this theory is explained as follows:

> because *jus cogens*, by definition, is a set of rules from which states may not derogate, a state act in violation of such a rule will not be recognised as a sovereign act by the community of states, and the violating state therefore may not claim the right of sovereign immunity for its actions.[444]

[438] McGregor (n 33) 38.
[439] Voyiakis (n 35) 318.
[440] The *Al-Adsani* case [61]. See also: Voyiakis (n 35) 319.
[441] The Al-Adsani case [1] (Dissenting opinon of Judges Rozakis and Caflisch). See also: Opinions of Judges Wildhaber, Costa, Cabral Barreto and Vajic; McGregor (n 417) 36.; Mora (n 408) 246; Aust (n 385) 39; Jonathan Black-Branch, 'Sovereign immunity under international law: the case of Pinochet', in Diana Woodhouse (ed), *The Pinochet case: A legal and constitutional analysis* (Hart Publishing 2000) 93.;
[442] Voyiakis (n 35) 319.
[443] McGregor (n 33) 36.
[444] Adam C.Belsky, Mark Merva and Naomi-Roht-Arraiza, 'Implied Waiver under the FSIA: A proposed exception to immunity for violations of peremptory norms of international law' [1989] 77 California Law Review 365, 377.

Bianchi supports the normative hierarchy theory, and has stated that, "reliance on the hierarchy of norms in the international legal system is a viable argument to assert non-immunity for major violations of international human rights".[445] He has further claimed that the application of international law requires judges to give more weight to international law norms, such as the protection of human rights, than state immunity which was considered of lesser importance.[446] For instance, it has been argued that state sovereignty is unable to engage in acts of 'official torture'.[447] This has been explained by Glueck in the following way:

> In modern times a state is … incapable of ordering or ratifying acts which are … contrary to that international law to which all States are perforce subject. Its agents, in performing such acts, are therefore acting outside their legitimate scope.[448]

Nevertheless, D'Amato has argued that the proponents of the normative hierarchy theory have failed to provide a precise list of human rights norms with a peremptory character.[449] In addition, Caplan has argued that state immunity is not an absolute right under the international legal order.[450] He explained that the normative hierarchy theory failed to acknowledge that it was the forum state and not the foreign state defendant which enjoyed ultimate authority through a domestic legal system for human rights violations.[451] He further argued that the availability of state immunity was based on a presumption.[452] This is because state immunity is seen as an exception to the jurisdictional authority of the forum state that would otherwise exist.[453] Nevertheless, he argued that those who support the normative hierarchy theory presumed that there was an inherent right to state immunity.[454] In other words, Caplan maintained that the normative hierarchy theory is based purely on the

[445] Andrea Bianchi, 'Denying state immunity to violators of human rights' [1994] 46 Austrian Journal of Public International Law 195, 219.
[446] ibid 222.
[447] Grover (n 374) 12.
[448] Sheldon Glueck, 'The Nuremberg trial and aggressive war.' [1946] 59 Harvard Law Review 396, 427.
[449] Anthony D'Amato, 'It's a bird, it's a plane, it's jus cogens!' [1990] 6 Connecticut Journal of International Law 1, 1.
[450] Caplan (n 38) 744.
[451] ibid
[452] ibid 771
[453] ibid
[454] ibid; See also: McGregor (n 33) 36.

assumption that state immunity was either the product of a fundamental principle of international law or a rule of CIL.[455]

As far as the normative hierarchy theory argument is concerned, its main objective is to enforce the prohibition of torture which its supporters believe has a superior status in the law as it is a peremptory norm. However, Voyiakis argued that the minority had failed to provide a concrete rule following the principle of prohibition of torture.[456] As a result, both the majority and minority have to prove that their answers have a better claim to reflect international law.[457] In other words, both of these claims are effectively saying that state sovereignty and access to courts are both affected by different *jus cogens* norms when it comes to dealing with the prohibition of torture. Nevertheless, it can be submitted that access to court applies directly to this prohibition of torture to ensure justice is achieved for its victims. On the other hand, immunity is applied to the political independence of states.

The distinctions between access to court for the protection of human rights against immunity in relation to the protection of the functions of serving heads of state is theoretically problematic. Therefore, the paradoxical dilemma of differentiation as to which peremptory norms are more important has to reach some conclusion. This issue will be discussed next to ascertain whether there really is a conflict between access to court and immunity.

2.3.3. A Critical Assessment of the Connection Between Access to Court and Immunity

As the law currently stands, there is no universally accepted multilateral treaty to govern the law of state immunity.[458] Judge Loucaides, in his dissenting opinion, argued that the key issue was the conflict between a peremptory norm and another norm under international law.[459] The conflict between access to court (the minority view) and state immunity (the majority view) is a fine one. It can be argued that the argument which favours immunity is also applicable to the prohibition of torture. From the outset, these two principles may seem to be completely different legal concepts. Nevertheless, it can be said that state immunity is equally important to the

[455] Caplan (n 38) 745.
[456] Voyiakis (n 35) 322.
[457] Voyiakis (n 339) 322-323.
[458] ibid
[459] The Al-Adsani case [34] (Dissenting opinion of Judge Loucaides). See also: McGregor (n 33) 38.

prohibition of torture. Immunity plays an important role in the protection of the dignity of states. Supporters of immunity in general, would argue that the torture allegations made by victims towards states may not necessarily be true. It has been suggested that in cases where victims cannot identify the individual perpetrators of the torture because they were blindfolded during the incident, suing the state may be the only option available to the victim in his or her efforts to obtain a judicial remedy.[460] This, however, does not mean that each case that alleges torture may be wrongly claimed. To illustrate this point, Voyiakis has argued that the conventional theory of *jus cogens* prevailing over state immunity does not provide a convincing picture of conflicts between the international rules.[461] Therefore, it is rather impossible to strike a balance between the two - to say that state sovereignty trumps access to the court, because both of these are supported by different and equally important *jus cogens* norms. On the one hand, those who support the prohibition of torture argue that it is supported by the higher international law norm of *jus cogens*.[462] On the other hand, those who support state immunity say that the doctrine of state sovereignty is more important.

Looking at the issue from another perspective, the dilemma of differentiation in the outcomes of claims from criminal and civil proceedings do not prove to be helpful either. It can be argued that since torture has never been an 'act of state', therefore immunity would not come into the picture of the debate. Furthermore, it can be submitted that maintaining state immunity is as important as access to court where victims of torture can have a fair trial and remedy. Voyiakis has argued that if one agreed with the minority view that prohibition of torture would prevent immunity, then the conflict between access to court and immunity would have been resolved at the substantive level.[463] Moreover, he explained that if that was the case, then the conflict could be said to be solved long before the issue could ever come into existence in the first place.[464] Therefore, there would not have been the need to make any further claims that those rules which have a lower status than the peremptory

[460] Grover (n 374) 32-33.
[461] Voyiakis (n 35) 321. He explained that: "it is not all clear how the prohibition of torture and the law of State immunity could collide in the first place. To risk some triviality, the prohibition of torture seems mainly about prohibiting the practice of torture, whereas the rules of State immunity are mainly about the exercise of jurisdiction over foreign States",
[462] *Prosecutor v Anto Furundzija* [1998] Case No. IT-95-17/1-T (ICTY, Trial Chamber), [153]-[156].
[463] Voyiakis (n 35) 321.
[464] ibid

norm of prohibition of torture would succeed.[465] Hence, it would be wrong to place peremptory norms over state immunity. They are both effectively different international law norms which have their own functions and purposes.

At the same time, the arguments put forward by the minority of judges in the *Al-Adsani* case who believed that the prohibition of torture should trump other rules, such as state immunity, were not plausible either. The issues become more complicated if it is assumed that the individuals are acting on behalf of the state, and if the case involves the issue of immunity afforded to them by state immunity. This is because the prohibition of torture, which ensures victims of torture have access to courts, is equally important to the concept of state immunity for the protection of the political independence of the state. These two hypotheses are also significant in international law. For example, Voyiakis has questioned whether state immunity constituted a legitimate aim for the refusal of access to court, by saying that the aim was related more to "policy objectives pursued by national governments, such as public safety, national security, the protection of public health and economic well-being of the country, or the rights of other individuals".[466] It has been suggested that each of these principles (access to court against immunity) must be viewed in the light of the others in order to see coherence and consistency among them.[467] Therefore, in order to set criteria and specifications as to which legal rules are more important requires more evidence to support them. An analogy that illustrates this point is that of the Houses of Parliament in the UK. When deciding whether the House of Lords or the House of Commons is more important, it can be seen that they both have equal status and have their own particular functions. Therefore, the protection of human rights for torture victims, allowing them to bring actions and claims is equally vital to the protection of immunity.

The problematic nature of the equal bargaining power between state immunity and access to court can be viewed from another perspective. If a state is stable; in its politics, economic growth and legal system, then it will lead to the fact that individuals will have access to the courts more easily because they know that their cases will be tried fairly. This indicates that a state with a fair legal system upholds

[465] ibid
[466] ibid 310.
[467] ibid 329-330.

the prohibition of torture in the first place. This permutation of state immunity, access to court and prohibition of torture to a lesser degree, will form a virtuous circle. At the same level, the topic of access to court also applies to immunity. This will allow an individual to conceptualise the consequence of the access to court for the prohibition of torture to ensure that a state upholds its international law obligation to ensure that it maintains its sovereignty. In other words, it must ensure that it can maintain the stability of its own internal politics in order to sustain the state immunity doctrine.

It is clear that the normative hierarchy theory assumption can be rebutted. However, upon close critical analysis the matter is not as straightforward as it seems. Access to court and immunity are interrelated and support each other in a subtle way. They transcend the ordinary meaning as understood by the wider public. It can be submitted that they complement each other in such a way that while one ensures that justice can be served, the other encourages the legal system of a state to be sound and decent. Therefore, it will be wrong to assume that *jus cogens* norms can be used as a 'sword' to defend its validity. The analogy between the two Houses of Parliament is a good example of negating the normative hierarchy theory about one superior rule: *jus cogens* norms trumping another principle law of equal footing: state immunity.

Conclusion

The main issue that this chapter has dealt with has been whether the qualification of torture as a crime under *jus cogens* serves to deny immunity to serving heads of state and heads of government. This chapter has come to the conclusion that an alleged violation of *jus cogens* alone is not sufficient to remove immunity *ratione personae* for serving heads of state, which is absolute. The reasoning given by the ECHR in the *Al-Adsani* case has been scrutinised. It found that a violation of torture cannot trump immunity *ratione personae*.[468] This view is further supported by cases such as

[468] *Al-Adsani v United Kingdom (21 November 2001)* [2002] 34 (11) EHRR 273 (European Court of Human Right) [55]-[66].; *Jones (Respondent) v Ministry of Interior Al-Mamlaka Al-Arabiya AS Saudiya (The Kingdom of Saudi Arabia) (Appellants) Mitchell and others (Respondents) v Al-Dali and others Ministry of Interior Al-Mamlaka Al-Arabiya AS Saudiya (the Kingdom of Saudi Arabia) (Appellants) Jones (Appellants) v Ministry of Interior Al-Mamlaka Al-Arabiya AS Saudiya (The Kingdom of Saudi Arabia) (Respondents)* [2006] UKHL 26 UKHL 26 (House of Lords), [30]-[31].; See also: *Bouzari v Islamic Republic of Iran* [2004] 124 ILR 427 (Canada Ontario Superior Court) ; Kloth (n 15) 202.

Bouzari and *Jones*. There is no doubt that a case like *Al-Adsani* is concerned with civil jurisdiction.[469] Still, all these cases shared common ground when dealing with the act of torture. The important point here is not to assume that violation of peremptory norms (*jus cogens*) is the ultimate yardstick to justify that any other international law rules which conflicts with it will prevail under international law. The normative hierarchy theory has been rejected in this chapter because it is wrong to assume that one rule of international law is hierarchically higher than another similarly important rule. The wider international legal doctrines have to be taken into consideration when evaluating two different legal principles which are on a par under international law.

Furthermore, this chapter has also considered the conflict between access to court and state immunity. As it was explained earlier, the relationship between the two is not as simple as it appears to be. It is wrong to assume that access to court overrides immunity or vice versa. It has been submitted that they both complement each other because one ensures that justice can be served, while the other encourages the legal system of a state to be sound and decent. As far as heads of state are concerned, the immunity privilege is important for them to be able to perform their duties abroad without any fear of being prosecuted.[470] Therefore, the existing practices show that immunity *ratione personae*'s specific function has been preserved and is absolute in respect of serving heads of state and some other senior serving heads of government, such as, serving ministers for foreign affairs as held in the ICJ *Arrest Warrant* case.[471]

The problems relating to immunity for serving heads of state has been dealt with. The only problem left to consider is whether former heads of state, who have allegedly committed acts of torture, will be protected by immunity *ratione materiae* once they have left office. The next chapter will examine the claim regarding whether an allegation of torture could potentially remove immunity *ratione materiae* from retired former heads of state and heads of government. This contention will

[469] Shah (n 375) 274; Dickson (n 375) 153; Forowicz (n 375) 292.
[470] *Democratic Republic of the Congo v Belgium (Arrest Warrant Case)* [2002] 3 ICJ Reports 24 (ICJ) [54].
[471] ibid [56].; Examples of cases on immunity for Minister of Defence and for Minister of Commerce see: *Re General Shaul Mofaz* [2004] 53 International and Comparative Law Quarterly 771 (District Court (Bow Street)) and *Re Bo Xilai* [2005] 128 ILR 709 (England, Bow Street Magistrates' Court) respectively.

provide a contrasting viewpoint from the one that states that serving heads of state are protected under immunity *ratione personae* whilst still in office. The landmark *Pinochet (No.3)* case considered by the House of Lords has shed some light on this residual immunity issue at a domestic level. Therefore, the judgment of the House of Lords will be analysed in detail as the Law Lords reached the conclusion that General Pinochet was not entitled to immunity *ratione materiae* according to the CAT instead of relying on the traditional rules of immunity accorded under CIL.

Chapter Three

The Impact of the Convention against Torture (CAT) on the Law of Head of State Immunity

The previous chapter concluded that torture as a crime under *jus cogens* did not appear to deny immunity *ratione personae* from serving heads of state and other senior serving senior government officials. The judgment by the ICJ in the *Arrest Warrant* case supports this claim. This chapter deals with the question regarding the potential removal of immunity *ratione materiae* from former heads of state and heads of government.[472] This is because the Law Lords in *Pinochet (No.3),*[473] interpreted the CAT, rather than the more traditional CIL rules, and because of this reached the decision to refuse head of state immunity to General Pinochet as a former head of state.[474] The *Pinochet (No.3)* case was said to be a landmark case because it was "the first time that a local domestic court has refused to afford immunity to a head of state or former head of state on the grounds that there can be no immunity against prosecution for certain international crimes".[475] More importantly, it was explained in that case that torture was not the official function of a head of state and hence no immunity *ratione materiae* could be granted as a result.[476]

This Chapter examines the position of the law of head of state immunity after the enactment of the CAT. In particular, it will examine the effect of the CAT on immunity *ratione materiae* for former heads of state and heads of government. The central question that requires an answer is whether an allegation of torture potentially removes immunity *ratione materiae*. This question really concerns the impact of the CAT on jurisdiction matters. There are two Articles (1 and 5) under the CAT which

[472] Clive Nicholls, Clare Montgomery, Julian B Knowles, Anand Doobay and Mark Summers, *Nicholls, Montgomery, and Knowles on The Law of Extradition and Mutual Assistance*,(3rd edn, Oxford University Press 2013) 100.
[473] *R v Metropolitan Stipendiary Magistrate and others, ex parte Pinochet Ugarte (No.3)* [1999] 2 All ER 97 (House of Lords) hereafter the '*Pinochet (No3)* case'.
[474] See also: Gunther Handl, 'The Pinochet case, foreign state immunity and the changing constitution of the international community', in Wolfgang Benedek, Hubert Isak and Renate Kicker (ed), *Development and Developing International and European Laws: Essays in Honour of Konrad Ginther on the occasion of his 65th birthday* (Peter Lang 1999) 60.
[475] The *Pinochet (No 3)* case [111e] (Lord Browne-Wilkinson).
[476] The *Pinochet (No3)* case [122e] (Lord Goff).

are relevant to the discussion of head of state immunity. Both of these Articles are found under the substantive provisions of the CAT. Article 5 obliges states to establish jurisdiction over the offence of torture. Article 1 also has to be taken into consideration as it defines what acts constitute torture. These two Articles purport to affect the rule of immunity *ratione materiae* for former heads of state.

Both of these Articles will be examined through their keywords to understand the 'object and purpose' of the Convention and whether they can influence issues of immunity. As the CAT is silent on the immunity issue, one way of determining the impact of the CAT on CIL is to find out whether the CAT can affect heads of state under the 'circularity' issue debate. The 'circularity' issue involves interpreting Articles 1 and 5 of the CAT to discover whether they can indeed restrict immunity for heads of state for alleged violations of torture or peremptory norms. In order to interpret any treaties, such as the CAT (Articles 1 and 5), it is necessary to refer to Articles 31 and 32 of the Vienna Convention of the Law of Treaties 1969 (hereafter 'VCLT'). These Articles provide guidelines as to how one should interpret a treaty such as the CAT. Not only do Articles 31 and 32 of the VCLT provide rules on interpretation, they also reflect CIL.[477] In other words, they are not just ordinary treaty provisions. This is because Article 31 of the VCLT also requires one to consider existing CIL when interpreting a treaty. Article 31(3)(b) of the VCLT says that, "any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation" should be taken into consideration when interpreting a treaty.[478] Hence, any cases which deal with the application of the CAT should be considered when interpreting Articles 1 and 5 of the CAT. Furthermore, when interpreting Articles 1 and 5 of the CAT, the current law of immunity under CIL also needs to be taken into consideration. It is this process of referring back to existing CIL, as required by Article 31(3)(c) of the VCLT, which creates the effect of 'circularity' between the CAT and CIL.

[477] See for examples: *Kaskilli/Sedudu Island Case* [1999] (II) ICJ Reporter 1045 (ICJ) [18].; *LaGrand (Germany/USA) Case* [2001] ICJ Reports 501 ICJ Reports 501 (ICJ), [99].; *Legality of Use of Force (Serbia and Montenegro/Belgium) (Preliminary Objections) Case* [2004] ICJ Reports 318 ICJ Reports (ICJ) [100]. See also: Ulf Linderfalk, *On the interpretation of treaties: the modern international law as expressed in the 1969 Vienna convention on the law of treaties*,(Kluwer Academic Publishers 2007) 239.

[478] Vienna Convention on the Law of Treaties 1969, Art 31(3)(b). In addition, Article 31(3)(b) of the VCLT can also means that it gives less weight to the state practice element as an interpretative tool when considering treaty interpretation. See: James C Hathaway, *The rights of refugees under international law*,(Cambridge University Press 2005) 69.

The discussion on circularity, in terms of the relationship between a treaty and CIL, will be examined in more detail in the form of evidence of *opinio juris* in Chapter Four. It will show that the UK has jurisdiction in respect of the issue of international crimes under CIL, notwithstanding the absence of specific domestic legislation to give effect to it.[479] It will be submitted that the evidence of the UN General Assembly Resolutions (hereafter 'UNGA Resolutions') and the Security Council Resolutions are examples of *opinio juris* and these reflect the view that Articles 1 and 5 of the CAT have become CIL.

Through analysis and discussion in this chapter, it will be argued that the combined effect of Articles 1 and 5 of the CAT do appear to remove immunity *ratione materiae*. The findings from the majority opinions in *Pinochet (No.3)* showed that the CAT has restricted immunity *ratione materiae* for former heads of state who had allegedly committed acts of torture. The outcome of this case was important for many reasons, not least because the CAT is generally silent on the issue of immunity.[480] However, the Law Lords were able to interpret the CAT in a particular way, based on the extensive jurisdiction provision contained under Article 5 of the CAT. The minority opinion given by Lord Goff will also be analysed as it provides a counter-argument to the whole discussion about the rule of immunity.

Therefore, this chapter intends to show that the CAT can abrogate immunity *ratione materiae* at a domestic level for former heads of state as shown in the *Pinochet (No.3)* case, and that the CAT has had an impact on the law of head of state immunity, in particular, as it affects former heads of state and heads of government.

This chapter consists of two main sections. The first section seeks to undertake a thorough analysis of the *Pinochet (No.3)* case opinions. The majority and minority opinions of the Law Lords will be evaluated for their discussions on refusing immunity *ratione materiae* for former heads of state. Furthermore, later decisions of the House of Lords, in particular the *R v Jones* case[481], which have clarified the

[479] See: *Trendtex Trading Corporations v Central Bank of Nigeria* [1977] 2 WLR 356 (Queen's Bench Division) 888-889.
[480] The *Pinochet (No 3)* case [129g] (Lord Goff).
[481] *Jones (Respondent) v Ministry of Interior Al-Mamlaka Al-Arabiya AS Saudiya (The Kingdom of Saudi Arabia) (Appellants) Mitchell and others (Respondents) v Al-Dali and others Ministry of Interior Al-Mamlaka Al-Arabiya AS Saudiya (the Kingdom of Saudi Arabia) (Appellants) Jones (Appellants) v Ministry of Interior Al-Mamlaka Al-Arabiya AS Saudiya (The Kingdom of Saudi Arabia) (Respondents)* [2006] UKHL 26 UKHL 26 (House of Lords)

judgment of the *Pinochet (No.3)* case will also be considered. The second section of this chapter provides a critical analysis of the interpretation of Articles 1 and 5 of the CAT based on the *Pinochet (No.3)* case judgment. The treaty interpretation method as contained under Articles 31 and 32 of the VCLT will be used to analyse whether Articles 1 and 5 of the CAT can affect immunity *ratione materiae* for former heads of state and heads of government in general.

3.1 Critical Analysis of *Pinochet (No.3)* Case

The Facts of Pinochet (No.3) Case

The facts of this case are well reported and published.[482] Nevertheless, these will be briefly mentioned here to set out the background for the discussion.[483] General Augusto Pinochet was the military ruler of Chile from 1973 to 1990. He was arrested in London on the 16th October 1998 while he was having medical treatment. It was the Spanish Judge, Baltasar Garzon, who requested that Pinochet be extradited from the UK to Spain for egregious human rights violations. The alleged crimes were committed by the military junta led by General Pinochet. Some of the charges were linked to Spain, but none of them had any connection with the United Kingdom.[484] The *Pinochet* case was the first case where a former head of state was subjected to the jurisdiction of a foreign court for crimes that were in violation of international law.[485] Furthermore, this case was the only municipal court decision which denied immunity to a recognised ex-head of state for crimes committed while he was in

[482] For a detailed discussion of the facts of the case see: Michael Byers, 'The law and politics of the Pinochet case' [1999-2000] 10 Duke Journal of Comparative and International Law 415, ; Fox 'The Pinochet Case No 3' (n 37) 687; Swain (n 49) 223;Nigel Rodley, 'Breaking the cycle of impunity for gross violations of human rights: The Pinochet case in perspective' [2000] 69 Nordic Journal of International Law 11, 11. ;C.H. Powell and A. Pillay, 'Revisiting Pinochet: The development of customary international criminal law' [2001] 17 South African Journal on Human Rights 477, 477.; Diana Woodhouse, 'The progress of Pinochet through the UK extradition procedure; an analysis of the legal challenges and judicial decisions', in Madeleine Davis (ed), *The Pinochet case: Origins, Progress and Implications* (Institute of Latin American Studies 2003) 87 ;David Lloyd Jones, 'The role of lawyers in "establishing" customary international law in the *Pinochet* case' [2004] 4 Non-State Actors and International Law 49, 49.; Rt Hon The Lord Millett, 'The Pinochet case - Some personal reflections', in Malcolm Evans (ed), *International Law* (Oxford University Press 2006) 8.;Rebecca Zaman, 'Playing the Ace? *Jus cogens* crimes and functional immunity in national courts' [2010] 17 Australian International Law Journal 53, 55.

[483] For brief summary of the Pinochet case see: Kate Nash, 'Democratic human rights', in Rhiannon Morgan and Bryan Turner (ed), *Interpreting Human Rights: Social Science Perspectives* (Routledge 2009) 96.

[484] The *Pinochet (No 3)* case [101j] (Lord Browne-Wilkinson).; Powell and Pillay (n 482) 479.

[485] Kerry Creque O'Neill, 'A New Customary Law of Head of State Immunity?: Hirohito and Pinochet' [2002] 38 Stanford Journal of International Law 289, 310.; Reed Brody and Michael Ratner, *The Pinochet papers: The case of Augusto Pinochet in Spain and Britain*,(Kluwer Law International 2000) 272.

office.[486] The outcome of the case was hailed as a precedent for future trials of ex-dictators. [487]

The Law Lords, by a majority of six to one relied on the CAT instead of CIL to find that Pinochet had no immunity *ratione materiae*.[488] The judges relied on the extensive jurisdiction provision under Article 5 of the CAT to establish that the crimes allegedly committed by Pinochet could lead to universal jurisdiction.[489] This is because Article 5 of the CAT authorises states party to exercise jurisdiction over those suspected of being responsible for acts of torture, irrespective of where the alleged acts took place, the nationality of the alleged perpetrator or that of the victim.[490] General Pinochet was held not to be immune under Article 5 of the CAT, to which all three states, namely; UK, Chile and Spain were party.[491] Nevertheless, the majority of the judges in *Pinochet (No.3)* have been criticised for avoiding the issue of determining the outcome of the case under the traditional doctrine of head of state immunity, which some believe has lost its place under customary law.[492]

In the *Pinochet (No.3)* case, the HL had to decide two major issues.[493] Firstly, the Law Lords had to consider whether the Spanish charges constituted 'extradition crimes' within the meaning of the Extradition Act 1989.[494] Secondly, they had to consider whether General Pinochet, as a former head of state, was entitled to

[486] Forowicz (n 375) 290.
[487] Powell and Pillay (n 482) 479.
[488] The *Pinochet (No 3)* case [1113] (Lord Browne-Wilkinson).; Naomi-Roht-Arriaza, 'The multiple prosecutions of Augusto Pinochet', in Ellen L Lutz and Caitlin Reiger (ed), *Prosecuting Heads of State* (Cambridge University Press 2009) 86 ;Naomi-Roht Arriaza, *The Pinochet effect: Transnational justice in the age of human rights*,(University of Pennsylvania Press 2005) 56;O'Neill (n 458) 305.
[489] The *Pinochet (No 3)* case [111d] (Lord Browne Wilkinson); Chris Ingelse, *The UN Committee against Torture: An assessment*,(Kluwer Law International 2001) 352.
[490] The *Pinochet (No 3)* case [109j] (Lord Browne Wilkinson); Malcolm Evans and Claudine Haenni-Dale, 'Preventing torture? The development of the optional protocal to the UN Convention Against Torture' [2004] 4 Human Rights Law Review 19, 21.
[491] The *Pinochet (No.3)* case, [111d] (Lord Browne-Wilkinson).; Mark Berlin, 'From Pirates to Pinochet: Universal jurisdiction for torture', in Alison Brysk (ed), *The politics of the globalisation of law: Getting from rights to justice* (Routledge 2013) 98; Kathryn Sikkink, 'The age of accountability: The global rise of individual criminal accountability', in Francesca Lessa and Leight A Payne (ed), *Amnesty in the age of human rights accountability: Comparative and international perspectives* (Cambridge University Press 2012) 37.
[492] O'Neill (n 485) 310.
[493] The *Pinochet (No 3)* case [101j] (Lord Browne-Wilkinson): "firstly, are the charges made against Senator Pinochet extradition crimes and secondly, if so, is Senator Pinochet immune from trial from committing those crimes".
[494] The *Pinochet (No 3)* case, [101j] (Lord Browne-Wilkinson).; Debra L DeLaet, *The global struggle for human rights: Universal principles in world politics*,(2nd edn, Cengage Learning 2014) 180.

immunity from arrest and prosecution in the UK for crimes committed in Chile.[495] Their Lordships had to consider two types of immunity, namely: immunity *ratione personae* and immunity *ratione materiae*. The former covers immunity for both public and private acts while in office; whereas the latter covers acts committed while in office, but excludes private acts. Both of these are given under CIL as discussed earlier in Chapter One. It is important to note from the outset that the focus of the discussion here is on Articles 1 and 5 of the CAT.

As far as the extradition crimes claims are concerned, the discussion relates to the jurisdiction provision contained under Article 5 of the CAT. This is because if jurisdiction is exercisable over a former head of state, then it will affect the privileges bestowed by immunity. When it comes to the issue of immunity *ratione materiae* for former heads of state, Article 1 of the CAT defines whether the acts of torture can be classified as official acts.

The majority and minority opinions of the *Pinochet (No.3)* case are worth examining in detail. This is because it will provide a good platform for the thorough analysis of the *Pinochet (No.3)* case judgment along with later House of Lords decisions clarifying it. One relevant example is *R v Jones*.[496] The *Jones* case was held by the House of Lords, and it commented on the *Pinochet (No.3)* case judgment. It is worth pointing out that even within the majority opinions of the *Pinochet (No.3)* case, there appeared to be two separate views on the justifications for the restriction of immunity *ratione materiae* for Pinochet. These can be termed the narrow approach and the broader approach. The former relies mainly on the CAT to abrogate immunity *ratione materiae* for Pinochet, whereas the latter focuses on the CAT as well as the *jus cogens* norms arguments. The analysis of the two main questions in *Pinochet (No.3)* will be explored further, together with the majority and minority opinions.

[495] The *Pinochet (No 3)* case, [115d] (Lord Browne-Wilkinson).; Nicholls, Montgomery, Knowles et all (n 472) 99.
[496] *Jones (Respondent) v Ministry of Interior Al-Mamlaka Al-Arabiya AS Saudiya (the Kingdom of Saudi Arabia) (Appellants)* [2006] 26 UKHL (House of Lords)

3.1.1 The Majority Opinion

3.1.1.1 The Narrow Approach

The majority opinions can be divided into two groups. The first group encompasses those who relied on the CAT to refuse immunity *ratione materiae*.[497] Their Lordships in this narrow approach group included: Lord Browne-Wilkinson, Lord Hutton and Lord Saville of Newdigate.[498] The majority judges, both in the narrow and the broader approaches, held that Pinochet was not entitled to immunity *ratione materiae* as a former head of state.[499] Lord Browne-Wilkinson explained the reasoning, which is worth quoting in full here:

> Finally, and to my mind decisively, if the implementation of a torture regime is a public function giving rise to *immunity ratione materiae,* this produces bizarre result. *Immunity ratione materiae* applies not only to ex-heads of state and ex-ambassadors but to all state officials who have been involved in carrying out the functions of the state. Such immunity is necessary in order to prevent state immunity being circumvented by prosecuting or suing the official who, for example, actually carried out the torture when a claim against the head of state would be precluded by the doctrine of immunity. If that applied to the present case, and if the implementation of the torture regime is to be treated as official business sufficient to found an immunity for the former head of state, it must also be official business sufficient to justify immunity for his inferiors who actually did the torturing. Under the convention the international crime of torture can only be committed by an official or someone in an official capacity. They would all be entitled to immunity. It would follow that there can be no case outside Chile in which a successful prosecution for torture can be brought unless the state of Chile is prepared to waive its right to its officials' immunity. Therefore, the whole elaborate structure of universal jurisdiction over torture committed by officials is rendered abortive and one of the main objectives of the Torture Convention - to provide a system under which there is no safe haven for torturers - will have been frustrated. In my judgment all these factors together demonstrate that the notion of continued immunity for ex-heads of state is inconsistent with the provisions of the Torture Convention.[500]

Thus, the Law Lords in the first group of the majority opinion depended on the 'contractual' nature of the CAT when dealing with the issue of state immunity.[501] Their Lordships accepted that torture was an international crime, and yet they declined to exercise universal jurisdiction over it.[502] This was because the UK had no

[497] The *Pinochet (No 3)* case, [115c] (Lord Browne-Wilkinson).
[498] Foakes (n 85) 27; Rothwell, Kaye and Davis (n 109) 362; Shelton (n 77) 804.
[499] See for instance: The *Pinochet (No 3)* case [143e] (Lord Hope). See also: Fox (n 39) 687.
[500] The *Pinochet (No 3)* case [114j] (Lord Browne-Wilkinson).
[501] The *Pinochet (No 3)* case [111g] (Lord Browne-Wilkinson). See also: Swain (n 49) 239.
[502] The *Pinochet (No 3)* case [164b] (Lord Hutton). See also: Powell and Pillay (n 482) 481.

jurisdiction over torture crimes prior to the enactment of the UK Criminal Justice Act 1988 (hereafter 'CJA').[503] They reasoned that, in order to have jurisdiction to hear the case in the House of Lords, they would have to rely on the CAT rather than the rules under CIL.[504] Therefore, as all three countries (UK, Spain and Chile) in this case are signatories to the CAT, and torture was a prohibited act in the UK when the CJA came into force on 8th December 1988, this led to the restriction of immunity for former heads of state.[505] As part of this, Lord Browne-Wilkinson said that the UK could only exercise criminal jurisdiction over offences which occurred within its geographical boundaries.[506] Lord Browne-Wilkinson reasoned that:

> the issue is whether international law grants state immunity in relation to the international crime of torture and if so whether the Republic of Chile is entitled to claim such immunity even though Chile, Spain and the United Kingdom are all parties to the Torture Convention … and are therefore "contractually bound" to give effect to its provisions from these dates.[507]

Thus, his Lordship believed that the scope of jurisdiction was obtained through the enactment of the CAT into UK domestic law. It has been argued that the UK had no jurisdiction over crimes of torture before 28 September 1988, the date in which the CJA came into force.[508] The CJA, which brought the CAT into force in the UK, reinforced the assertion that an act of torture could not be an official function for the purpose of immunity.[509]

The House of Lords was unanimous in its decision on the first question regarding the extradition crimes claims.[510] The Law Lords, by a majority of six to one, held that Pinochet, as a former head of state, was not entitled to immunity *ratione materiae*.[511]

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[503] The *Pinochet (No 3)* case [142h] [164b]-[164c] and [190f] (Lord Hope); Richard Stone, *Textbook on civil liberties and human rights*,(Oxford University Press 2014) 488; Bassiouni (n 365) 458; ; Dickson (n 375) 134-135; Jeffrey Jowell and Dawn Oliver, *The Changing constitution*,(7th edn, Oxford University Press 2011) 141.

[504] The *Pinochet (No 3)* case [114f] (Lord Browne-Wilkinson). ; de Wet (n 401) 116.

[505] The *Pinochet (No 3)* case, [152h] (Lord Hope).; David Haljan, *Separating powers: International law before national courts:* ,(Springer 2013) 240.

[506] The *Pinochet (No.3) case*, [100] (Lord Browne-Wilkinson). ; Woodhouse (n 482) 201.

[507] The *Pinochet (No 3)* case [111g] (Lord Browne-Wilkinson); Shelton (n 77) 804. Lord Millett also shared similar opinion. Geoff Gilbert, *Responding to international crime*,(Martinus Nijhoff Publishers 2006) 99.

[508] *Pinochet (No 3)* case [164b] (Lord Hutton). ; Nina H. B. Jorgensen, *The responsibility of states for international crimes*,(Oxford University Press 2000) 225-226 ;Powell and Pillay (n 482) 481.

[509] *Pinochet (No 3)* case [114f] and [115d]-[115e] (Lord Browne-Willkinson).

[510] *Pinochet (No 3)* case [168a] (Lord Saville)

[511] Fox 'The law of state immunity' (n 348) 176; Wickremasinghe 'Immunities enjoyed by officials of states and international organisations' (n 139) 402; Andrea Birdsall, *The international politics of*

Nevertheless, all the Law Lords rejected the construction which held that, "the double criminality rule required the conduct to be criminal under English law at the conduct date and not at the request date".[512] According to the law, Pinochet could only be extradited for 'extradition crimes' contained under Section 2 of the Extradition Act 1989.[513] This Section requires that the alleged conduct must be a crime under both UK and Spanish law.[514] In other words, the Law Lords reasoned that in order for the offence to be extraditable, the alleged conduct must be a criminal offence under English law at the time it was committed.[515]

It is important to note that both Lord Browne-Wilkinson and Lord Saville accepted that immunity *ratione materiae* under CIL would technically be available to Pinochet for the extradition claim. Therefore, according to their Lordships, immunity *ratione materiae* would still be available unless it had been expressly removed or waived by Chile.[516] Both Lords Browne-Wilkinson and Saville clarified that all three states to the proceedings were parties to the CAT from 8 December 1988.[517] As a result, their Lordships argued that the Articles of the CAT were inconsistent with the doctrine of immunity *ratione materiae* granted to former heads of state.[518] It has been criticised that the CAT specifically outlawed official acts of torture, whereas the remit of immunity *ratione materiae* was to protect the acts performed in an official capacity.[519] Nevertheless, their Lordships believed that the CAT had crystallised the fact that official acts of torture were an international crime.[520] Thus, Lord Browne-Wilkinson claimed that immunity *ratione materiae* was not removed by express waiver from Pinochet. Rather, this was due to the objectives and

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judicial intervention: Creating a more just order,(Routledge 2009) 60-61 ;Fox 'The Pinochet Case No 3' (n 37) 690.

[512] The *Pinochet (No 3)* case [107a] (Lord Browne-Wilkinson).; Roht-Arriaza 'The multiple prosecutions of Augusto pinochet' (n 488) 86.

[513] Extradition Act 1989, s 2. defines 'extradition crime' as: '(a) conduct in the territory of a foreign State, a designated Commonwealth country or colony which, if it occurred in the United Kingdom, would constitute an offence punishable with imprisonment for a term of 12 months, or any greated punishment, and which, however described in the law of the foreign state, Commonwealth country or colony, is so punishable under the law…'. Aaron Fichtelberg, *Law at the vanishing point: A philosophical analysis of international law*,(Ashgate 2008) 151-152.

[514] The *Pinochet (No 3)* case [100] (Lord Browne-Wilkinson).

[515] The *Pinochet (No 3)* case [143e] (Lord Hope).

[516] The *Pinochet (No.3)* case [170f] (Lord Millett).

[517] The *Pinochet (No 3)* case, [111d] (Lord Browne-Wilkinson). Haljan (n 505) 240.

[518] The *Pinochet (No 3)* case, [115c] (Lord Browne-Wilkinson).

[519] The *Pinochet (No 3)* case [122e] (Lord Goff).

[520] The *Pinochet (No 3)* case [114f] (Lord Browne-Wilkinson).

jurisdiction in which the CAT was established.[521] In this way, it created contractual relationships and obligations for states who were signatories to the Convention.[522] This meant that states party to the CAT were unable to assert immunity *ratione materiae* due to their "contractual obligation" under the treaty.[523] This has been supported by the fact that the drafters of the UN Working Group in the *travaux preparatoires*[524] of the CAT said that the Convention's purpose was not to define torture, but, in the absence of international tribunals, to provide a mechanism in a states' local courts to ensure that a torturer could not find safe haven in another country.[525]

The other question to be asked was whether Pinochet was entitled to any immunity for alleged acts of torture and conspiracy committed after 29 September 1988.[526] This is an important question because the CAT only came into force after 8 December 1988, and Pinochet could potentially be immune from the alleged acts of torture committed prior to that date. Lord Hutton held that Pinochet was not entitled to immunity after 29 September 1988, due to the fact that the alleged acts of torture were not the functions of a head of state under international law.[527] Lord Hutton explained that torture could not be regarded as a function of a head of state because international law prohibited it, and the United Kingdom gained extraterritorial jurisdiction of acts of torture through the CJA.[528] Furthermore, Lord Hutton reasoned that the CAT provisions expressly outlawed acts of torture by a state.[529] Similarly, Lord Saville argued that the unequivocal terms of the CAT constituted an express waiver by Chile.[530] Therefore, it can be submitted that both Lord Hutton and Lord Saville agreed with the explanation made by Lord Browne-Wilkinson that the

[521] The *Pinochet (No 3)* case [115c] (Lord Browne-Wilkinson).
[522] The *Pinochet (No 3)* case [111g] (Lord Browne-Wilkinson).
[523] The *Pinochet (No 3)* case [111g] (Lord Browne-Wilkinson). ; Swain (n 456) 242.
[524] See: J. Herman Burgers and Hans Danelius, *The United Nations Convention against Torture : a handbook on the Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment*,(Martinus Nijhoff Publishers 1988) 131. ; Fox (n 459) 697.
[525] The *Pinochet case (No 3)* [115c] (Lord Browne-Wilkinson).
[526] The *Pinochet (No 3)* case [142f] (Lord Hope) ; Birdsall (n 511) 66; Rodley (n 482) 20.
[527] The *Pinochet (No 3)* case [165d] (Lord Hutton).
[528] The *Pinochet (No 3)* case [164b] (Lord Hutton); Manfred Nowak, Elizabeth McArthur and Kerstin Buchinger, *The United Nations Convention against torture : a commentary*,(Oxford University Press 2008) 293. ; Brody and Ratner (n 485) 43.
[529] The *Pinochet (No 3)* case [164b] (Lord Hutton).
[530] The *Pinochet (No 3)* case [170b] (Lord Saville).; Rosalyn Higgins, 'International Law', in Louis Blom-Cooper, Brice Dickson and Gavin Drewry (ed), *The judicial House of Lords: 1876-2009* (Oxford University Press 2009) 468.

objectives in which the CAT was established set the authority over the offences of torture, which was contained under Article 5 of CAT.

An interesting point was raised in the *Jones* case in the House of Lords.[531] In the judgment, Lord Bingham differentiated the situation in *Pinochet (No.3),* when he explained that it concerned criminal proceedings falling within the universal criminal jurisdiction as set out in the CAT.[532] Lord Bingham explained that:

> The essential ratio of the decision, as I understand it, was that international law could not without absurdity require criminal jurisdiction to be assumed and exercised where the Torture Convention conditions were satisfied and, at the same time, require immunity to be granted to those properly charged.[533]

The points made by Lord Bingham in the *Jones* case regarding the *Pinochet (No.3)* judgment are interesting because he claimed that international law could not acquire criminal jurisdiction even if the CAT conditions had been satisfied. Furthermore, Lord Bingham said that immunity should be granted to those who were properly charged. It can be submitted that the view posed by Lord Bingham was correct to a certain extent. As the CAT is an international treaty, it would only be enforceable if the states party to the proceedings were parties to the CAT. Problems will arise if the criminal jurisdiction provision is created through an international treaty, such as the CAT, when none of the states party to the proceedings are parties to the treaty. In such a situation, it would be more valid to establish the criminal jurisdiction provisions under international law rules. Lord Bingham in *Jones*, correctly stated that immunity should "be granted to those properly charged".[534] This is because if the alleged acts have been carried out under the scope of official duty, then it would be unjust not to grant immunity for those circumstances. Nevertheless, it is submitted that it would be wrong to assume criminal jurisdictions and the refusal of immunity outright. It should depend on the facts of each individual case.

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[531] *Jones (Respondent) v Ministry of Interior Al-Mamlaka Al-Arabiya AS Saudiya (the Kingdom of Saudi Arabia) (Appellants)* [2006] 26 UKHL (House of Lords)
[532] The *Jones* case [19] (Lord Bingham).
[533] Ibid; Foakes (n 85) 152 (footnote 73).
[534] The *dicta* by both Lord Bingham (para 14) and Lord Hoffmann (para 64) from the Jones v Saudi Arabia case have been cited in: *Entico Corporation Limited v United Nations Educational Scientific and Cultural Association* [2008] 531 EWHC (Queent's Bench Division (Commercial Court)) ; Philip Alston and Ryan Goodman, *International Human Rights*,(Oxford University Press 2013) 1196; Henry J Steiner, Philip Alston and Ryan Goodman, *International human rights in context: Law, Politics, Morals*,(3rd edn, Oxford University Press 2008) 1224

One should, nevertheless, consider the defences' arguments from another perspective. Pinochet, the former head of state of Chile, gave two counter-arguments for the claims which had been brought against him. Firstly, he claimed that the English courts had no jurisdiction over offences committed by a foreigner abroad.[535] As far as the defence for the extradition crimes of torture were concerned, Pinochet argued that as a former head of state he enjoyed immunity from these proceedings.[536] These arguments appeared to be rather convincing because the UK did not technically have jurisdiction as none of the victims or the alleged crimes took place in the UK. As UK common law is based on territorial jurisdiction, the Law Lords would have found it difficult to justify their scope of jurisdiction in the *Pinochet (No.3)* case due to the international law doctrine of state sovereignty. It was interesting to see that the Law Lords used the 'contractual' relationship between all three states party to the proceedings to avoid this sensitive question of state sovereignty and subsequently exercised their jurisdiction. If the UK was not a signatory and had not ratified the CAT, then the Law Lords would have to proceed with the complex rules of law of immunity under CIL. Nevertheless, the Law Lords could argue that the UK had jurisdiction to try Pinochet under the universal jurisdiction principle. A good example to support this is the *Attorney General of Israel v Eichmann* case.[537] The court held in that case that:

> International law is, in the absence of an International Court, in need of the judicial and legislative organs of every country to give effect to its criminal interdictions and to bring the criminals to trial.[538]

Despite this argument, one should accept that the Law Lords had carefully fashioned the jurisdiction issue reasoning in the *Pinochet (No.3)* case for the extradition claims based on a treaty, such as the CAT, instead of under international law principles. It is vital to point out that the CAT does not specify explicitly in its wording that it will abrogate immunity for former heads of state. Therefore, it can be argued that the CAT does not technically apply to Pinochet. However, it is submitted that Article 5

[535]See: Lord Millett (n 482) 8.
[536] The *Pinochet (No 3)* case [132c] (Lord Hope). This defence related to the availability of immunity under Part 1 of the UK State Immunity Act 1978.; Chandra Lekha Sriram, Olga Martin-Ortega and Johanna Herman, *War, conflict and human rights: Theory and practice*,(Routledge 2014) 188.
[537] *Attorney General of Israel v Eichmann* [1961] 36 (ILR) 5.
[538] ibid [12].; Robert Cryer, Hakan Friman, Darryl Robinson and Elizabeth Wilmshurst, *An introduction to International Criminal Law and Procedure*,(edn, Cambridge University Press 2010) 54.

of the CAT provided similar jurisdiction provisions to those under CIL to extradite Pinochet. This is because Article 5 of the CAT creates obligations on states to establish jurisdiction over the offences of torture.[539] Therefore, there was no need for the Law Lords to mention the international law obligations under CIL. The discussions on both CIL and the CAT only caused further confusion in the law. This led to one academic to argue that, "the Pinochet case provided minimal guidance on the vexed question of former head of state immunity in general".[540]

As far as the second question in the *Pinochet (No.3)* case is concerned, the issue is whether CIL requires the grant of immunity from prosecution to a former head of state in respect of allegations of torture, murder and hostage-taking when carried out as an instrument of state policy.[541] Lloyd Jones QC suggested that the main point about *Pinochet* was whether CIL required the grant of immunity from prosecution to a former head of state in respect of allegations of torture, murder and hostage-taking when used as an instrument of state policy.[542] In the *Pinochet (No.3)* case, the House of Lords had to decide which type of immunity would apply, i.e., immunity *ratione personae* or immunity *ratione materiae*. As the CAT did not mention anything about immunity, both types of immunities under CIL were raised. This was because if the alleged torture acts were 'official', then Pinochet would be immune under immunity *ratione personae*, which was a status-based immunity. As a consequence, if the alleged torture acts were 'official', he would also be entitled to immunity *ratione materiae*, which was a 'subject matter' immunity, after he has left office. Inevitably, the arguments as to which type of immunity given under CIL should be granted were greatly debated at the time.

It is interesting that Lord Hutton sought to confine the issue regarding the immunity question about the CAT on technical grounds. His Lordship explained that:

[539] See: Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984, Art 5.; Michelle Farrell, *The prohibition of torture in exceptional circumstances*,(Cambridge University Press 2013) 45; Burgers and Danelius (n 524) 130-131.
[540] Craig Barker, 'The future of former head of state immunity after ex parte Pinochet' [1999] 48 International and Comparative Law Quarterly 937, 949.
[541] Jones (n 459) 52.
[542] ibid

> As your Lordships hold that there is no jurisdiction to extradite Senator Pinochet for acts of torture prior to 29 September 1988 … it is unnecessary to decide when torture became a crime against international law prior to that date.[543]

This point links back to Article 1 of the CAT and its definition of torture. It restricts torture when carried out, "at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity".[544] This wording seeks to distinguish between official and private acts.[545] It has been argued under international law that torture is committed by states and their agents.[546] Therefore, immunity is not enjoyed by an individual, but rather by a State which he or she is representing.[547] Lord Browne-Wilkinson argued that torture could only be committed by someone in an official capacity.[548] He went on to say that: "How can it be for international law purposes an official function to do something which international law itself prohibits and criminalises?".[549] Inevitably, this connects back to the issue of sovereignty because heads of state are the official representatives of their states, and hence reflect sovereignty. This has led to Biersteker and Weber to claim that the doctrine of sovereignty is an artificial social construct of states operating within international society.[550] It is very possible that the concept of sovereignty under international law is merely an operating mechanism for the interaction between states in the international arena, but it would be wrong to dismiss its importance because of this, as submitted in Chapter Two previously. Nevertheless, Keohane suggests that states exercise their sovereignty by choosing to sign an agreement;[551] as

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[543] The *Pinochet (No 3*) case [164b] (Lord Hutton).

[544] Burgers and Danelius (n 524) 45; Sarah Joseph, Katie Mitchell and Linda Gyorki, *Seeking remedies for torture victims: A handbook on the individual complaints procedures of the UN treaty bodies*,(World Organisation Against Torture OMCT 2006) 210.

[545] Pnina Baruh Sharvit, 'The definition of torture in the United Nations Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment' [1993] 23 Israel Yearbook of International Law 147, 165.

[546] Natan Lerner, 'The definition of torture in international law' [1986] 16 Israel Yearbook on Human Rights 126, 134.

[547] Foakes (n 85) 81; Rodley (n 482) 21.

[548] The *Pinochet (No 3)* case [110f] (Lord Browne-Wilkinson). Philippe Sands, 'From Nuremberg to the Hague : the future of international criminal justice', in Philippe Sands (ed), (Cambridge University Press 2003) 101.

[549] The *Pinochet (No 3)* case [114f] (Lord Browne-Wilkinson). Shelton (n 77) 804; Birdsall (n 511) 66; Carla Ferstman, 'The approach of the United Kingdom to crimes under International law: The application of extraterritorial jurisdiction', in *International prosecution of human rights crimes* (Springer 2007) 154.

[550] Thomas Biersteker and Cynthia Weber, 'The social construction of State sovereignty ', in T Biersteker and C Weber (ed), *State sovereignty as a social construct* (Cambridge University Press 1996) 68-97.

[551] Robert Keohane, 'Compliance with international commitments: politics within a framework of law' [1992] American Society of International Law (Proceedings) 176, 176.

a result, they curtail their sovereignty.[552] It can be argued that since Chile has signed and ratified the CAT there is a strong presumption that it has unwillingly waived part of its state sovereignty. This may reluctantly affect heads of state to a certain extent.

As far as the immunity defence is concerned, Pinochet asserted that as a former head of state he was entitled to state immunity for acts committed as part of his official function.[553] Furthermore, he argued that the CJA, which gave the court extraterritorial jurisdiction, was not retrospective.[554] It is submitted that Pinochet was correct to argue that the CJA had no retrospective effect. Due to the limitations set by the CJA's lack of retrospective effect, the Law Lords reduced the number of claims which could be heard by them. In view of these restrictions, the Law Lords could only consider the torture charges from the second warrant-murder, and conspiracy-to-murder charges which were added after the first *Pinochet* case was heard.[555] If one weighs the pros and cons of the case, one soon realises that Pinochet can potentially be considered a victim of justice himself because the Law Lords were constantly redefining the facts of the case to enable them to legitimately hear the case. From these facts, one may argue that the Law Lords interpreted the *Pinochet (No.3)* case in order to achieve the 'desired' outcome. Thus, a major problem with this kind of wide interpretation is that it will inevitably attract criticism. Therefore, if Articles 1 and 5 of the CAT have become CIL, as this thesis seeks to prove, then perhaps this will clear up the ambiguity in the law and set a consistent precedent.

3.1.1.2 Broader Approach

The second set of judges of the majority opinions based on the broader approach, comprised of: Lord Millett, Lord Phillips and Lord Hope. It has been suggested by the five Law Lords in the *Pinochet (No.3)* case that the crimes allegedly committed by Pinochet were of a specific customary nature.[556] The Law Lords in this category based their opinions not just on the CAT, but also on the discord between state immunity and the status of torture as *jus cogens* under CIL, in order to restrict with the issue of immunity *ratione materiae* for Pinochet.

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[552] ibid
[553] Lord Millett (n 459) 8.
[554] The *Pinochet (No 3)* case [178b] (Lord Millett)
[555] The *Pinochet (No 3)* case [143e] (Lord Hope).
[556] The *Pinochet (No 3)* case [152f]-[152g] (Lord Hope).

In terms of the extradition claims regarding Pinochet, Lord Millett conceded that he could not be extradited for any acts of torture committed prior to the coming into force of Section 134 of the CJA.[557] Nevertheless, his Lordship argued that:

> As with the *Pinochet* case, the moral justification is that some crimes are so great that they are not just crimes against domestic law and order but crimes against humanity itself. Those who commit them do not merely offend against their own domestic law, but are 'enemies of all mankind'.[558]

Therefore, according to Lord Millett the courts would not need any statutes to confer the power to exercise universal jurisdiction.[559] His Lordship explained that:

> Customary international law is part of the common law, and accordingly I consider that the English courts have and always have had extra-territorial criminal jurisdiction in respect of crimes of universal jurisdiction under customary international law.[560]

Lord Millett's reasoning would have been more persuasive if his Lordship had used the jurisdiction provision under Article 5 of the CAT when providing reasons for his findings. This is because when a jurisdiction provision is established through an international treaty, such as the CAT, then the enforcement argument is likely to be stronger than those under common law. Notwithstanding that the common law legal system is a well established legal system, relying on the CAT to establish the jurisdiction provision for the extradition claims in the *Pinochet (No.3)* case will reduce the difficulty relating to the enforcement date of the CJA in the UK.

Furthermore, Lord Millett reasoned that "the systematic use of torture on a large scale and as an instrument of state policy" had become an international crime under CIL.[561] The effect of this was that it would attract universal jurisdiction for such a crime.[562] Therefore, perpetrators of these alleged crimes could be prosecuted by any

[557] The *Pinochet (No 3)* case [178d] (Lord Millett). ; See also: Rodley (n 482) 20.
[558] See: Lord Millett (n 459) 10; Boas (n 319) 140.
[559] The Pinochet (no 3) case [177h]-[177j], [178b]-[178d] (Lord Millett).
[560] The *Pinochet (No 3)* case [177h] (Lord Millett). See also: Lord Millett (n 459) 9. His Lordships said that: " I considered that it meant, as a matter of customary international law, which is part of the common law, the United Kingdom already possessed extraterritorial jurisdiction".
[561] The *Pinochet (No 3)* case [178b] (Lord Millett).; Gilbert (n 507) 98.
[562] The *Pinochet (No 3)* case [178b] (Lord Millett); Powell and Pillay (n 482) 480. ; Lord Millett (n 482) 9.

state irrespective of their nationality, the nationality of their victims, or the country in which the acts were committed.[563] His Lordship explained that:

> the English courts have and always have had extraterritorial criminal jurisdiction in respect of crimes of universal jurisdiction under CIL. [564]

It is also interesting to note that in spite of torture having become an international crime, the difference between the definition of the crime of torture under the CAT and CIL are noticeable. One of the unclear issues was whether the applicable rules of English law were to be found in the SIA, or in common law rules reflecting public international law.[565] It has been argued that judges in national courts are not usually experts on international law.[566] Therefore, they are often hesitant about relying heavily on it when making their decisions.[567] In view of these facts, it is quite likely that this was the case in *Pinochet (No.3).* This is because the majority opinions depended on the CAT, which is silent on the immunity issue, to enable the jurisdiction provisions for the extradition claims which subsequently led to the restriction of immunity *ratione materiae* for Pinochet. This view has been supported by Byers who has argued that it took more than twenty national judges in the *Pinochet* case, none of whom were young enough or specialists in international law, to decide the case.[568] Their Lordships would have been more comfortable with the traditional, state-centric model. Bradley and Goldsmith are particularly critical on this point. They have argued that:

> Many Law Lords reasoned, or at least insinuated, that Pinochet's immunity was abrogated in or by 1988 not because of the Convention *per se*, but rather because of the status of torture as an 'international crime' under CIL. The Law Lords were extraordinarily casual in their identification of torture as an international crime, relying in varying degrees on the writing of scholars, unadopted International Law Commission codes, and General Assembly resolutions that did not at the time of

[563] Byers (n 482) 417. For the discussion of universal jurisdictions see: Michael Akehurst, 'Jurisdiction in International Law' [1973] 46 British yearbook of International Law 145, 145.; Derek Bowett, 'Jurisdiction: Changing patterns of authority over activities and resources' [1982] 53 British yearbook of International Law 1, 1.
[564] The *Pinochet (No 3)* case [177h] (Lord Millett).; Haljan (n 505) 240.
[565] Jones (n 415) 52.
[566] Byers (n 428) 420.
[567] ibid 421.
[568] ibid

> their issuance have the status of law. In addition, the Law Lords were imprecise regarding when torture became an international crime, and why.[569]

Perhaps even more problematic is answering the second question in the *Pinochet (No.3)* case. The main issue here is whether the head of state immunity, which is accorded in respect of acts performed in the exercise of official functions, could extend even to alleged international crimes by former heads of state after they leave office.[570] Similar to the explanations for the extradition claims above, it was held that Pinochet had no immunity *ratione materiae* after 8th December 1988, the enactment date of the CJA. Section 20 of the SIA is the provision which is suggested governs the immunity of a former head of state.[571] This is because under the SIA, incumbent heads of state enjoy the same privileges of immunity as heads of a diplomatic mission.[572] In *R v Bow Street Metropolitan Stipendiary Magistrate ex parte Pinochet Ugarte (No.1)*[573] ('hereafter '*Pinochet (No.1)*'), the Divisional Court held that Section 20 of the SIA did not apply to proceedings with respect to matters that happened before the Act came into force.[574] On the contrary, Lord Millett in *Pinochet (No.3)* suggested that CIL had become part of English common law by 1973.[575] Therefore, no immunity *ratione materiae* would have been allowed even prior to the enactment of the CJA on the 8th December 1988.[576]

From another perspective, Lord Phillips stated that the UK courts had attained universal jurisdiction over international crimes from 1988.[577] His Lordship adopted a different approach when deciding on the conflict regarding state immunity and criminal proceedings in UK courts.[578] Lord Phillips alone found the relevant rules under CIL.[579] His Lordship examined the sources of law under Article 38 of the Statute of the ICJ. The key sources of international law under Article 38 can be listed as follows: international treaties, custom, judicial decisions, the writings of

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[569] Curtis Bradley and Jack Goldsmith, 'Pinochet and International Human Rights Litigation ' [1999] 97 Michigan Law Review 2129, 2145.
[570] Fox (n 459) 691.
[571] The *Pinochet (No 3)* case, [115f] (Lord Browne-Wilkinson). ; Rodley (n 459) 11.
[572] The *Pinochet (No 3)* case, [145h] (Lord Hope).
[573] *Regina v Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (No.1)* [1998] 4 All ER 897 (House of Lords) 904. See: Lord Slynn of Hadley's judgment.
[574] See: Jones (n 415) 52.
[575] The *Pinochet (No 3)* case, [177h], [178b] (Lord Millett).
[576] The *Pinochet (No 3)* case [153a] (Lord Hope).
[577] The *Pinochet (No 3)* case [188h] (Lord Phillip). His Lordship also agreed with Lord Browne-Wilkinson on the 'double criminality' rule.
[578] The *Pinochet (No 3)* case [186f] (Lord Phillips).
[579] The *Pinochet (No 3)* case [183d] (Lord Phillips).

authors.[580] Lord Phillips reasoned that no international law rule required that immunity *ratione materiae* be given in relation to the prosecution of an international crime of a certain category.[581] According to Lord Phillips:

> no established rule of international law requires state immunity *ratione materiae* to be accorded in respect of prosecution for an international crime. International crimes and extra-territorial jurisdiction in relation to them are both new arrivals in the field of public international law. I do not believe that state immunity ratione materiae can co-exist with them. The exercise of extra-territorial jurisdiction overrides the principle that one state will not intervene in the internal affairs of another.[582]

As a result, his Lordship concluded that immunity *ratione materiae* was incompatible with the terms of the CAT. However, from the majority opinions, the Law Lords held that Pinochet, as a former head of state, was not entitled to immunity *ratione materiae* with respect to the extradition proceedings for the alleged conspiracy to torture committed by him after 8 December 1988.[583] This was because these alleged acts were contrary to international law.[584] Therefore, the majority opinions agreed that had the alleged acts of torture occurred prior to 8 December 1988, Pinochet would be entitled to claim immunity *ratione materiae*.[585]

On the other hand, in *Pinochet (No.3)*, the Law Lords accepted that immunity *ratione personae* was applicable even for international crimes.[586] Lord Saville and Lord Hope commented that torture could be a function of a head of state, and that CIL would grant immunity to former heads of state even for systematic and widespread violations of international law.[587] In other words, their Lordships conceded that, under CIL, former heads of state enjoyed immunity from criminal and civil proceedings in other countries for official acts done in the capacity of head of

[580] The *Pinochet (No 3)* case [183a]-[183b] (Lord Phillips).
[581] The *Pinochet (No 3)* case [188h] (Lord Phillips).
[582] The *Pinochet (No 3)* case [189j]-[190a] (Lord Phillips).; Alston and Goodman 'International Human Rights' (n 534) 1213; Francisco Forrest Martin, Stephen J Schnably, Richard J Wilson, Jonathan S Simon and Mark V Tushnet, *International Human Rights and Humanitarian Law: Treaties, Cases and Analysis*,(Cambridge University Press 2006) 161 ;Michael Ratner, 'The Lords' Decision in Pinochet III', in Reed Brody and Michael Ratner (ed), *The Pinochet Papers: The case of Augusto Pinochet in Spain and Britain* (Kluwer Law International 2000) 43.
[583] See for example: The *Pinochet (No 3)* case [170e] (Lord Saville).
[584] The *Pinochet (No 3)* case [190f] (Lord Phillips).
[585] The *Pinochet (No 3)* case [153a] (Lord Hope).
[586] See: The *Pinochet (No 3)* case [152e] (Lord Hope). ; Rodley (n 482) 21.
[587] The *Pinochet (No 3)* case [152e] (Lord Hope); [168j] (Lord Saville). See also: Nowak, McArthur and Buchinger (n 528) 293.; Ratner (n 582) 49.

state.[588] This has been supported by the *Hatch* v *Baez* case.[589] However, Lord Millett argued that: "These were not private acts. They were official and governmental or sovereign acts by any standard".[590] His Lordship clarified that: "The official governmental nature of the act, which forms the basis of the immunity, is an essential ingredient of the offence. No rational system of criminal justice can allow an immunity which is co-extensive with the offence".[591] In addition, Lord Millett emphasised that, "in future, those who commit atrocities against civilian populations must expect to be called into account if fundamental human rights are to be protected".[592]

In approaching this issue, Lord Browne-Wilkinson was cautious about the *jus cogens* argument of trumping the immunity doctrine. His Lordship said that:

> I have doubts whether, before the coming into force of the Torture Convention, the existence of the international crime of torture as *jus cogens* was enough to justify the conclusion that the organisation of state torture could not rank for immunity purposes as performance of an official function. At that stage there was no international tribunal to punish torture and no general jurisdiction to permit or require its punishment in domestic courts. Not until there was some form of universal jurisdiction for the punishment of the crime of torture could it really be talked about as a fully constituted international crime. But in my judgment the Torture Convention did provide what was missing: a worldwide universal jurisdiction.[593]

Powell and Pillay have suggested that Pinochet would have lost immunity either as a former head of state or incumbent head of state because the doctrine of immunity was contrary to the existence of international crimes.[594] This relates back to the argument regarding the conflict between state sovereignty and immunity in Chapter Two. Nevertheless, it can be argued that their assumption was incorrect. As

[588] The *Pinochet (No 3)* case [113d] (Lord Browne-Wilkinson). See also: Antonio Remiro Brotons, 'International Law after the Pinochet case', in Madeline Davis (ed), *The Pinochet case: Origins, Progress and Implications* (Institute of Latin American Studies 2003) 240.; See also: Fox (n 37) 689.; Brody and Ratner (n 485) 139.
[589] *Hatch v Baez* [1876] 7 Hun 596.
[590] The *Pinochet (No 3)* case [172j] (Lord Millett).; Barker 'International Law' (n 4.) 155.
[591] The *Pinochet (No 3)* [178j] (Lord Millett). See also: Higgins (n 530) 468; Barker (n 4) 155 ; Nigel Rodley, 'Introduction - The beginning of the end of immunity and impunity of officials responsible for torture', in *The Pinochet papers: The case of Augusto Pinochet in Spain and Britain* (Kluwer Law International 2000) 4.; Rodley 'Breaking the cycle of impunity for gross violations of human rights: The Pinochet case in perspective' (n 482) 22.
[592] The *Pinochet (No 3)* case [180d] (Lord Millett).
[593] The *Pinochet (No 3)* case [114f] (Lord Browne-Wilkinson). See also: Diane Orentlichter, 'Immunities and Amnesties', in Leila Nadya Sadat (ed), *Forging a Convention for Crimes Against Humanity* (Cambridge University Press 2011) 210. ; Gilbert (n 507) 99.
[594] Powell and Pillay (n 482) 486.

explained in Chapter Two, it is inaccurate to say that incumbent and former heads of state will be immune from allegations of international crimes. This is because, from the evidence shown, immunity *ratione personae* is still intact for incumbent heads of state or high-ranking government officials. The judgment in the *Arrest Warrant* case strongly supports this view. Another problem with their approach is that they fail to take into account the complex arguments behind the doctrine of state sovereignty. It has been submitted that sovereignty and immunity are two correspondingly important international law principles. Therefore, one norm cannot trump another, as correctly indicated by Lord Browne-Wilkinson in his judgment. Nevertheless, one should accept that the situation is different for former heads of state and high-ranking government officials, in particular, regarding the application of immunity *ratione materiae*. The next chapter will consider this matter further.

It is interesting to see that Lord Hope based his judgment on the relationship between the CAT and the loss of immunity.[595] His Lordship explained that the CAT must be "construed in accordance with the customary international law and against the background of the subsisting residual former head of state immunity".[596] Lord Hope was not convinced, however, that there was an express waiver by Chile or an implied term that former heads of state should be restricted from their immunity *ratione materiae* for all acts of official torture.[597] His Lordship clarified that:

> It is just that by the date at which Chile ratified the Convention, the obligation under customary international law with respect to … [the prohibition against systematic torture as an instrument of state policy] were so strong as to override any objection by [Chile] on the ground of immunity ratione materiae, once the UK had jurisdiction over these crimes.[598]

This view is supported in the later House of Lords case of *Jones*. Lord Bingham said that:

> The reason why General Pinochet did not enjoy immunity ratione materiae was not because he was deemed not to have acted in an official capacity that would have removed his acts from the Convention definition of torture. It was because, by necessary implication, international law had removed the immunity.[599]

[595] The *Pinochet (No 3)* case [136d] (Lord Hope).
[596] The *Pinochet (No 3)* case [148d] (Lord Hope).
[597] The *Pinochet (No 3)* case [150g] (Lord Hope).
[598] The *Pinochet (No 3)* case [152g] (Lord Hope) [emphasis added].
[599] The *Jones* case [81] (Lord Bingham).

It is important to note that, notwithstanding the majority findings that immunity had been lost, there is still no clear *ratio decidendi* for this decision.[600] It has been criticised that the Law Lords "failed to explain why official immunities were consistent with the international crime of torture established by custom, but not consistent with the international crime of torture established by treaty".[601] This means that the Law Lords have failed to clarify two interconnecting points. The point relates to the question of why custom allows immunity for acts of torture; and yet immunity is not consistent under international treaty. Lord Bingham explained in *Jones* that: "Torture cannot be justified by any rule of domestic or international law. But the question is whether such a norm conflicts with a rule which accords state immunity".[602] It can be submitted that Lord Bingham is correct to identify the conflicts of rules given under the doctrine of immunity. This is because the Law Lords had combined the CIL points and the CAT when deciding on the *Pinochet (No.3)* case. As all the states party in the *Pinochet (No.3)* case were signatories to the CAT, there was no need to refer to CIL when dealing with the immunity issue. It would be much easier for the Law Lords to deal with the CAT in their judgments as it would provide a much clearer explanation to the law of head of state immunity. Therefore, the solution is to strike a balance between the two sources of international law. The fact that the Law Lords brought in the discussion about the prohibition of torture under CIL only muddled the conflict between the two sources of international law.

Furthermore, one writer has suggested that the delicate question coming out of the *Pinochet (No.3)* case was whether the international public interest in suppressing violations of international norms, does or should prevail over, the principle of immunity from domestic legal process traditionally invokable by foreign heads of states and the states themselves.[603] In approaching this issue, some of the Law Lords in the *Pinochet (No.3)* case spontaneously conceded that the principles of international criminal law took precedence over sovereign immunity.[604] For example, this can be seen in the judgment of Lord Phillips regarding the sovereign immunity issue, where his Lordship said that:

[600] Powell and Pillay (n 482) 485.
[601] Bradley and Goldsmith (n 569) 214.
[602] The *Jones* case [43] (Lord Bingham).
[603] Handl (n 474) 59-83.
[604] The *Pinochet (No 3)* case [128a]-[129b] (Lord Goff).

> If … we are bound by the 1978 Act to accord to Senator Pinochet immunity in respect of all acts committed, 'in the performance of his functions as head of state', I would not hold that the course of conduct alleged by Spain falls within that description … I do not believe that those functions can … extend to actions that are prohibited as criminal under international law.[605]

Thus, some believe that the *Pinochet (No.3)* judgments have contributed to customary international criminal law.[606] The importance of human rights as a legitimate international concern became apparent in the aftermath of the Second World War.[607] It is generally agreed that human rights has achieved great importance in the international political agenda and international legal discourse.[608] Nevertheless, it is important to note that it has only done so with the consent of states.[609] Thus, domestic courts should assume a supportive role in upholding the core concepts of the international community.[610] Notwithstanding that the general issues on the protection of human rights are important, it is submitted that domestic or municipal courts are not the suitable forum to handle cases relating to international crimes. This is because domestic courts would have to deal with the problems of infringing the state sovereignty of another state. Therefore, the *Pinochet (No.3)* precedent is arguably an exception. It seems that Lord Browne-Wilkinson in the majority opinion of the *Pinochet (No.3)* case has foreseen this dilemma. As a result, his Lordship has interpreted the *Pinochet* case (No.3) by refusing immunity *ratione materiae* based on the CAT rather than under the difficult rules under CIL. This has been supported by one academic who has argued that the mutual coexistence of human rights and state sovereignty is problematic as the realisation of either is incommensurable with the fulfilment of the other.[611]

Nevertheless, it is important to note that the majority judges in the *Pinochet (No.3)* case acknowledged that had the claims being brought against Pinochet while he was a serving head of state, he would then have been protected by immunity *ratione*

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[605] The *Pinochet (No 3)* case [192d]-[192g] (Lord Phillips).
[606] Powell and Pillay (n 482) 492.
[607] See generally: Tony Evans, *US hegemony and the project of universal human rights*,(Macmillan Press 1996) Chs 1 and 2. ; Moses Moskowitz, *International concern with human rights*,(A W Sijthoff International Publishing 1974) 149.
[608] Rasmus Mariager and Karl Molin, 'Cold War and human rights', in Rasmus Mariager, Karl Molin and Kjersti Brathagen (ed), *Human rights in Europe during the Cold War* (Routledge 2014) 3 ;Swain (n 49) 223.
[609] ibid
[610] Handl (n 474) 74.
[611] See: Hedley Bull, *The anarchical society: A Study of order in world order in world politics*,(3rd edn, Columbia University Press 2002) 147.

personae.[612] In other words, Pinochet would have enjoyed immunity had he still been a head of state.[613] Moreover, if the issue of immunity was governed by common law, which reflected the position in public international law, then one would expect that immunity *ratione personae* would be governed by the current law at the time the plea was raised and decided.[614] The key dilemma with this is that Pinochet could potentially argue that he should be immune under the current law at the time of the plea which was governed by the CIL. Therefore, immunity *ratione materiae* should continue to apply to him as the CJA would not have retrospective effect. One major criticism of the interpretation in the *Pinochet (No.3)* case is that the "Torture Convention withdrew immunity against criminal prosecutions, but did not affect the immunity for civil liability" as noted by Lord Bingham in the *Jones* case.[615] Effectively, this brings to the fore whether cases such as *Pinochet (No.3)*, are suitable for adjudication by a foreign domestic court consistent with basic notions of international justice and fairness.[616]

It will be interesting to assess the dissenting or minority opinion in the *Pinochet (No.3)* case given by Lord Goff. In contrast to the majority, his Lordship critically evaluated the CAT to say that it was generally silent on immunity and therefore should not affect Pinochet's immunity privileges. This counterpoint will provide a comprehensive debate to the judgment of the *Pinochet (No.3)* case and will be examined next.

3.1.2 The Minority Opinion

In his dissenting judgment, Lord Goff considered why the CAT did not specifically mention head of state immunity[617] by summarising the main points from the CAT.[618]

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[612] Swain (n 49) 247.
[613] The *Jones* case [49] (Lord Bingham). ; Philippa Webb, 'Human rights and the immunities of state officials', in Erika De Wet (ed), *Hierarchy in international law: The place of human rights* (Oxford University Press 2012) 120.
[614] Jones (n 415) 53.
[615] The *Jones* case [68] (Lord Bingham).
[616] Handl (n 474) 73. Nevertheless, the discussion about international justice and fairness is beyond the scope of this thesis.
[617] The *Pinochet (No 3)* case [130f] (Lord Goff).; Diana Woodhouse, *The Pinochet case : a legal and constitutional analysis*,(Hart Pub. 2000) 222.
[618] 1) Torture within the meaning of the Convention can only be committed by "a public official or other person acting in an official capacity", but these words include a head of state. A single act of official torture is "torture" within the Convention;
2) Superior orders provide no defence;

There are a couple of points that are worth examining here, namely, points 4 and 5 from his summary. Point 4 deals with the fact that the CAT did not explicitly deal with head of state immunity. Lord Goff explained that:

> In broad terms I understand the argument to be that, since torture contrary to the convention can only be committed by a public official or other person acting in an official capacity, and since it is in respect of the acts of these very persons that states can assert state immunity ratione materiae, it would be inconsistent with the obligations of state parties under the convention for them to be able to invoke state immunity ratione materiae in cases of torture contrary to the convention.[619]

More importantly, his Lordship argued that if the CAT intended to exclude state immunity it would have included an express clause to that effect.[620] Thus, Lord Goff suggested that immunity *ratione materiae* had been refused by implied terms by the majority.[621] Furthermore, his Lordship argued that those terms were not properly formulated.[622] His Lordship said that:

> the proposed implied term has not been precisely formulated; it has not therefore been exposed to that valuable discipline which is always required in the case of terms alleged to be implied in ordinary contracts.[623]

It followed that Lord Goff agreed with Lord Slynn from *Pinochet (No.1)* that there was no settled practice relating to torture outside the context of armed conflict until after 1989.[624] Moreover, Lord Goff claimed that as he could not find any state practice relevant to the issue, he would not have found Pinochet to be criminally liable for the alleged torture acts.[625] His Lordship reached such a reasoning as there was no settled practice which caused immunity not to be applicable before a national

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3) If the states with the most obvious jurisdiction (the Article 5(1) states) do not seek to extradite, the state where the alleged torturer is found must prosecute or, apparently, extradite to another country, i.e. there is universal jurisdiction.
4) There is no express provision dealing with state immunity of heads of state, ambassadors or other officials.
5) Since Chile, Spain and the United Kingdom are all parties to the Convention, they are bound under treaty by its provisions whether or not such provisions would apply in the absence of treaty obligation. Chile ratified the Convention with effect from 30th October 1988, and the United Kingdom with effect from 8th December 1988.

[619] The *Pinochet (No 3)* case [122e] (Lord Goff). ; Alebeek (n 7) 227.
[620] The *Pinochet (No 3)* case [125g]-[125h] (Lord Goff).
[621] The *Pinochet (No 3)* case [125g]-[125h] (Lord Goff).
[622] The *Pinochet (No 3)* case [122e] (Lord Goff); Woodhouse (n 617) 223.
[623] The Pinochet (*No* 3) case [122e] (Lord Goff).
[624] See also: Powell and Pillay (n 482) 490.
[625] The *Pinochet (No 3)* case [120j]-[121b] (Lord Goff).

court for torture and other crimes against humanity.[626] For this reason, Lord Goff argued that, since the CAT did not explicitly remove immunity, Pinochet could technically still claim immunity *ratione materiae* as a former head of state.[627] It is worth arguing that despite the fact that Chile had signed the CAT, it had waived some of its state sovereignty. However, as the CAT did not mention specifically head of state immunity, Chile could argue that it still had most of the state immunity attached. Had Chile intervened in the *Pinochet (No.3)* case proceedings under state immunity, it would be very possible that the outcome of the case would have been very different.

As a means of clarification, the drafters of the CAT should have included and mentioned the immunity position of heads of state and other senior government officials when they have allegedly committed acts of torture. It is due to this reason that this thesis proposes to explore the subject from another angle. One way of analysing this is through the 'circularity issue' argument. This involves the argument as to whether Articles 1 and 5 of the CAT have become CIL. Since the CAT does not refer to head of state immunity, one way of dealing with such an issue is through treaty interpretation as stipulated under Article 31(3)(c) of the VCLT. This means that the current customary norms relating to the law of head of state immunity may determine the interpretation of international treaty law, such as the CAT. Therefore, the CIL rules of immunities "shall be taken into account" when interpreting whether Articles 1 and 5 of the CAT have become CIL.

Hence, the hypothesis of finding out whether Articles 1 and 5 of the CAT have become CIL in this thesis originated and expanded from the dissenting judgment by Lord Goff in *Pinochet (No.3)*. His Lordship was correct to argue that the CAT was generally silent on the immunity issue. Furthermore, Lord Goff correctly pointed out that there would be express terms on the restriction of immunity *ratione materiae* in the CAT if that was the intention of the drafters. He also convincingly argued that, if immunity *ratione materiae* was removed, it would restrict the protection for heads of state when they were abroad. Without doubt his Lordship has made very important findings on the intention and drawbacks of the CAT. However, it can be suggested that his Lordship's interpretation of the CAT is a rather narrow one.

[626] The *Pinochet (No 3)* case [131h]-[131j] (Lord Goff).
[627] ibid

Therefore, this thesis will argue that the CAT, in particular Articles 1 and 5, have become CIL. The impact of this is that they will remove the residual immunity *ratione materiae* from former heads of state and some senior heads of government. This answers the point on the disadvantages of the CAT, as maintained by Lord Goff, that there was no express terms in the CAT which could abrogate immunity *ratione materiae* for former heads of state. The advantage of arguing that the CAT has become CIL is that the latter is automatically applicable to states. Furthermore, Chapters Four and Five will prove that the argument regarding the circularity issue that Articles 1 and 5 of the CAT have become CIL is plausible. Besides, it will submit that the consistent state practice requirement is not really needed on the formation of new CIL. This is because under the sliding scale theory, if sufficient evidence of *opinio juris* is collected to suggest that the CAT has become CIL, then it can subsequently abrogate immunity *ratione materiae.* Besides, through the treaty interpretation under the VCLT, it supports the proposition that former heads of state and certain senior heads of government should not benefit from their alleged acts of torture.

Another question that needs to be asked is whether the nature or the seriousness of the alleged acts will affect the immunity issue. Lord Goff, in the minority opinion, suggested that, notwithstanding that an act was criminal in nature and performed by a head of state, it did not render that act 'non-governmental' in character.[628] In approaching this issue, Lord Goff explained the aim of the immunity rule:

> state immunity ratione materiae operates … to protect former heads of state, and (where immunity is asserted) public officials, even minor officials, from legal process in foreign countries in respect of acts done in the exercise of their functions as such, including accusation and arrest in respect of alleged crimes.[629]

One cannot deny that Lord Goff has made an important contribution, and one which points back to the basic foundation of the rule of immunity under international law. Lord Goff goes on to state that:

> if immunity ratione materiae was excluded, former heads of state and senior public officials would have to think twice about travelling abroad, for fear of being the

[628] The *Pinochet (No 3)* case [125j], [126b]-[126c] (Lord Goff).
[629] The *Pinochet (No 3)* case [128a] (Lord Goff).

> subject of unfounded allegations emanating from states of a different political persuasion.[630]

Therefore, if the restrictions on immunity *ratione materiae* apply, it would defeat the purpose of having the rule of immunity in the first place. One should not forget, however, that the situation is different because the three states party to the proceedings were signatories to the CAT, the Law Lords could therefore rely on the CAT to abrogate immunity *ratione materiae* for Pinochet.

Indeed, Lord Goff was correct to say that the CAT did not mention anything on the issue of head of state immunity. As a matter of fact, it can be argued that the CAT would not be the appropriate treaty to deal with the issue of head of state immunity in the *Pinochet (No.3)* case. This is because Pinochet's residual immunity entitlement problem should have been dealt with under the traditional CIL rules as they are well established and clearer in their scope of application. Nevertheless, it has been suggested by Fox that only Lord Slynn in *Pinochet (No.1)* and Lord Goff in *Pinochet (No.3)* in their dissenting judgments, show recognition of the fact that "international law is immature, weak in its supporting theoretical structure and based on pragmatic compromise to avoid political confrontation".[631] Thus, in the *Pinochet (No.3)* case, the Law Lords found that the principles of international criminal law took precedence over sovereign immunity.[632] Their views point to the conflict between UK legislation and international law.[633]

In the same way, it has been criticised that the House of Lords decision in the *Pinochet (No.3)* case did not seem to address the issue, but that the judges were content to "hand over to the Home Secretary".[634] This is due to the fact that it was essentially up to the discretion of the then Home Secretary, Jack Straw, to decide whether Pinochet should be extradited from the UK. The outcome of the House of Lords decision only provided the view from the judiciary legal perspective. In spite of this, the ultimate point of action is determined by the executive. This has led some

[630] The *Pinochet (No 3)* case [128a]-[128b] (Lord Goff).
[631] Fox 'The Pinochet Case No 3' (n 37) 688.
[632] See: The *Pinochet (No.3)* case [188c] (Lord Phillips). See also: Powell and Pillay (n 482) 492.
[633] The *Pinochet (No 3)* case [192d]-[192g] (Lord Phillips).
[634] Fox 'The Pinochet Case No 3' (n 37) 688.

to believe that Lord Millett, and possibly Lord Hutton, wanted Pinochet to be allowed to leave for Chile.[635]

There is no doubt that the facts of the *Pinochet* case have given rise to a legal proceeding which was highly political and emotionally-charged.[636] Ultimately, the *Pinochet (No.3)* case concerned the relationship between State sovereignty and human rights.[637] The main question in this case was whether Pinochet could enjoy immunity for the alleged acts of torture committed for which his extradition was sought.[638] Thus, the *Pinochet (No.3)* case magnified the problematic relationship between international law and politics.[639] On the one hand, the growth of protection of human rights has penetrated the barrier of the rule of immunity which has traditionally been well guarded for its obvious purpose. On the other hand, there is continued resistance at state level to put a stop to immunities enjoyed by official foreign agents accused of international crimes, notwithstanding that jurisdiction has been accepted.[640]

In spite of the fact that both the majority and minority judges have provided valid points on the discussion of immunity *ratione materiae* for former heads of state, who have allegedly committed acts of torture, the next section will interpret Articles 1 and 5 of the CAT to suggest that the combined effect of these serves to remove immunity *ratione materiae* as put forward by the House of Lords.

3.2 Ways of Interpreting the Convention against Torture

This section will focus on the interpretation of Articles 1 and 5 of the CAT based on the decision in *Pinochet (No.3)* examined previously. Through the analysis, it will be submitted that the combined effect of Articles 1 and 5 of the CAT can remove immunity *ratione materiae* for former heads of state. The interpretation of both of these CAT Articles and their keywords, by means of treaty interpretation under Article 31 and 32 of the VCLT, will support this finding.

The starting point to interpret any treaties such as the CAT is to refer to Article 31 of the VCLT. Article 31 of the VCLT states that:

[635] Byers (n 482) 436.
[636] Jones (n 415) 49.
[637] Swain (n 49) 234.
[638] Rodley (n 482) 19.
[639] Byers (n 482) 416.
[640] Brotons (n 588) 240.

> A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

It has been said that Article 31 of the VCLT reflects CIL.[641] This means that the rules of interpretation under Article 31 of the VCLT is significant and is accepted in practice in relation to all kinds of treaties.[642] Furthermore, Article 31 of the VCLT establishes that a treaty should be interpreted in good faith, ordinary meaning of its terms and 'object and purpose'.[643] Therefore, the text, context and 'object and purpose' must be viewed together as a package and none may be given greater weight than the others.[644] Article 31(3)(c) of the VCLT is particularly useful in the interpretation of Articles 1 and 5 of the CAT. This is because it demonstrates that the current customary international law norms can provide an interpretation of treaty law. Thus, it will present the most accurate view of the norms relating to prohibition of torture under the CAT and the immunity rules privileges.

Besides this, Article 32 of the VCLT is the supplementary tool of treaty interpretation. It provides that if the wording of the articles leaves the meaning ambiguous, obscure or leads to a result which is manifestly absurd or unreasonable, then the preparatory work or the *travaux preparatoires* of the treaty should be taken into account. Therefore, it can be suggested that Articles 31 and 32 of the VCLT are useful tools for interpreting Articles 1 and 5 of the CAT. They can be used to find out what Articles 1 and 5 of the CAT mean in terms of the immunity issue even if it has not been specifically mentioned in the CAT. Thus, the 'object and purpose' of the texts of Articles 1 and 5 of CAT will be examined in relation to the discussion regarding immunity *ratione materiae*.

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[641] *Kaskilli/Sedudu Island Case* [1999] (II) ICJ Reporter 1045 (ICJ) 1059, [18]. See: Hazel Fox, 'Article 31(3)(a) and (b) of the Vienna Convention and the Kasikili/Sedudu Island Case', in Malgosia Fitzmaurice, Olufemi Elias and Pnos Merkouris (ed), *Treaty Interpretation and the Vienna Convention on the Law of Treaties: 30 years on* (Martinus Nijhoff 2010) 65;Rudolf Bernhardt, 'Evolutive treaty interpretation, especially of the European Convention of Human Rights' [1999] 42 German Yearbook of International Law 11, 13.; Shabtai Rosenne and Hague Academy of International Law, *The perplexities of modern international law*,(edn, Martinus Nijhoff Publishers 2004) 349. ; Jack L. Goldsmith and Eric A. Posner, *The limits of international law*,(edn, Oxford University Press 2005) 55.

[642] Alexander Orakhelashvili, Sarah Williams and British Institute of International and Comparative Law., *40 years of the Vienna Convention on the Law of Treaties*,(British Institute of International and Comparative Law 2010) 119.

[643] Kerstin Mechlem, 'Treaty bodies and the interpretation of human rights' [2009] 42 Vanderbilt Journal of Transnational Law 905, 911.; Ian Sinclair, *The Vienna convention on the law of treaties*,(2nd edn, Manchester University Press 1984) 131.

[644] ibid.

3.2.1 The Dissection of Articles 1 and 5 of the CAT

3.2.1.1 The Definition of Torture under the CAT - Article 1 of the CAT

Lord Goff, in his minority opinion, correctly noted that the CAT was generally silent on the immunity issue. In approaching this issue, one should firstly explore the wording of Article 5 of CAT. This Article essentially creates an obligation upon states to establish jurisdiction over the offences of torture. Therefore, the meaning of 'torture' also has to be examined as it will provide a list of torture acts over which member states can exercise jurisdiction. Article 1 of the CAT provides the definition of torture.

The forerunner of the CAT is the 1975 UN Declaration against Torture and other Cruel, Inhuman and Degrading Treatment and Punishment. Article 1 of the 1975 Convention includes the definition of 'torture'.[645] It is based on Article 5 of the Universal Declaration of Human Rights,[646] and Article 7 of the International Covenant on Civil and Political Rights (ICCPR).[647] Thus, the 1975 UN Declaration's definition of 'torture' serves as the framework for the definition of CAT.[648]

The aim of the CAT is to strengthen the existing provisions and procedures with regard to the issue of prohibition of torture and other forms of illegal treatment.[649] Nonetheless, it is important to note that the CAT was not the first international law document to outlaw torture and other cruel, inhuman or degrading treatments or punishments.[650] On the contrary, it serves as a recognition of existing practices which already outlawed torture under international law.[651] Article 1(1) of the CAT defines torture as:

> For the purposes of this Convention, the term "torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a

[645] UN Declaration against Torture and other Cruel, Inhuman and Degrading Treatment and Punishment 1975, Art 1.
[646] United Nations Universal Declaration of Human Rights 1948, Art 5: "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment."
[647] Article 7 of the ICCPR: "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation".
[648] Malcolm D. Evans and Rodney Morgan, *Preventing torture : a study of the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment*,(Clarendon Press ; Oxford University Press 1998) 77.
[649] Geir Ulfstein, Thilo Marauhn and Andreas Zimmermann, *Making treaties work : human rights, environment and arms control*,(Cambridge University Press 2007) 97.
[650] Burgers and Danelius (n 524) 1.
[651] ibid

> person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

There is a general acceptance of the main elements contained in the definition of Article 1.[652] This is because the definition of torture under Article 1 of the CAT mirrors various other international instruments. Therefore, the question that needs addressing here is whether the CAT impliedly withdraws immunity, and secondly whether this is withdrawn because it is inconsistent with the CAT's definition of torture as an "official act"? As far as the first question is concerned, in the *Pinochet (No.3)* case judgment, the majority opinions believed that the definition of torture under Article 1 of the CAT would cover former heads of state, such as Pinochet. However, rather surprisingly, the majority judges in the 'narrow' approach were silent on the question of whether CAT impliedly removed immunity. On the other hand, only Lord Hope and Lord Goff held in the judgments that the CAT had not impliedly withdrawn immunity.[653] This finding by the majority Law Lords has been supported by two leading academics. Burgers and Danelius have said that the wording, 'such purposes as', contained in Article 1 of the CAT should include bodies which have a connection with the interests or policies of the state and its organs.[654] Therefore, the definition of torture under the CAT means that public officials who directly participate in torture and those who turn a blind eye to acts of torture by unofficial groups such as paramilitary organisations are criminally responsible.[655] Furthermore, it is suggested that, 'other persons acting in an official capacity', which includes certain non-state actors whose authority is comparable to government authority, should also be held accountable.[656]

In addition, it is important to recall that the CAT is silent on the issue of immunity for public officials. In the thirty-fourth session of the Commission on Human Rights,

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[652] See for example: *Prosecutor v Anto Furundzija* [1998] Case No. IT-95-17/1-T (ICTY, Trial Chamber) [111].
[653] The *Pinochet (No 3)* case [125c], [125h] (Lord Goff).
[654] Burgers and Danelius (n 524) 119.
[655] Nigel Rodley and Matt Pollard, 'Criminalisation of torture: State obligations under the United Nations Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment' [2006] 11 European Human Rights Law Review 115, 122.
[656] Nowak and Buchinger (n 528) 78.

the Working Group of the Commission was unable to decide upon a definition of the term 'public official'.[657] This naturally creates a problem over the question of immunity when a public official is involved. Nevertheless, the 1975 Declaration of the Torture Convention together with the original Swedish draft, reflected the view that states could only be held accountable for human rights violations through state actors.[658] Therefore, it can be submitted that since the CAT is one of the human rights treaties, it should *prima facie* give priority to its intended beneficiaries, that is to say, torture victims. Hence, the CAT should be interpreted in a manner that protects individual rights, and not for the mutual benefit of the parties to a convention.[659] This means that former heads of state should not enjoy the immunity privileges as given to them under state sovereignty.

3.2.1.2 Problems of the Definition of Torture under Article 1 of the CAT

When it comes to the second question about whether immunity *ratione materiae* is removed because it is inconsistent with the CAT's definition of torture as an "official act", the 'object and purpose' element of treaty interpretation requires that treaty articles be interpreted with the most appropriate interpretation in order to realise the aims and achieve the object of a treaty.[660] Therefore, for an act to qualify as torture, it must: (a) cause severe physical or mental suffering; (b) be inflicted for a purpose; and (c) be inflicted by, or with the acquiescence of, an official.[661]

Furthermore, Article 31 of the VCLT says that treaty interpretation may raise issues of more general applicability.[662] This could mean that the 'object and purpose' of the CAT are for the regulation and prohibition of all governmental conduct which inflicts pain or suffering under Article 1.[663] It can be said that the purpose and effect of the conduct are the significant elements in determining whether they constitute torture.[664] Some commentators have said that the purpose requirement is

[657] United Nations Commission on Human Rights, United Nations Commission on Human Rights 'Draft Articles of the Convention on Torture (35th session)', (1978) U.N.Doc. E/CN.4/1314 6.; Ahcene Boulesbaa, *The U.N. Convention on Torture and the prospects for enforcement*,(Kluwer Law International 1999) 27.
[658] Nowak and Buchinger (n 528) 77.
[659] Mechlem (n 643) 912.
[660] See: *Wemhoff v Federal Republic of Germany* [1968] 2122/64 ECHR 55 (ECHR) p.75
[661] Malcolm Evans, 'Getting to grips with torture' [2002] 51 International Comparative and Law Quarterly 365, 375.
[662] Richard Gardiner, *Treaty interpretation*,(Oxford University Press 2010) 199.
[663] Boulesbaa (n 657) 15.
[664] ibid

inadequate.[665] Nevertheless, in the *Pinochet (No.3)* case most of the Law Lords, with the exception of Lord Hope and Lord Goff, argued that immunity *ratione materiae* was removed due to the fact that it was incompatible with the CAT's definition of torture as an "official act". However, Burgers and Danelius have warned that Article 1 of CAT should be seen as providing a description for the instruction of torture, and not be considered a legal definition which can be directly incorporated into national law.[666] Besides, they also maintained that the underlying meaning of Article 4 of the CAT, aiming to criminalise torture did not incontrovertibly mean that there should be a specific isolated offence covering the conduct as described under Article 1 of the CAT.[667] Moreover, they explained that torture could be interpreted in other types of offences, such as assault.[668] What has been suggested by Burgers and Danelius certainly creates problems.[669]

From another perspective, Article 2(3) of the CAT further reinforces the idea that no defence is available for 'superior orders' which excuses criminal charges against torture.[670] It was further added that the "general principles of international law" especially in the Charters of the Nuremberg and Tokyo Tribunals, allowed consideration of superior orders in mitigation of sentence.[671] In addition, Boulesbaa has argued that the ILC implied that superior orders could be considered in mitigation of sentences.[672] Therefore, under international humanitarian law, a commander is not responsible due to his position of authority.[673] Staff officers are only responsible if they have participated in the delivery and execution of criminal orders which can be proven.[674] However, the doctrine of 'command responsibility' will prevent superiors from making a defence for the crimes committed by their subordinates. The concept of command responsibility means that no actions have

[665] Maxime Tardu, 'The United Nations Convention against Torture and other Cruel, Inhuman, or Degrading Treatment or Punishment' [1987] 56 Nordic Journal of International Law 303, 305.
[666] Burgers and Danelius (n 524) 122.
[667] ibid 129.
[668] See also: Rodley and Pollard (n 655) 118.
[669] Burgers and Danelius, (n 524) 129.
[670] Article 2(3) of CAT states that: "An order from a superior officer or a public authority may not be invoked as a justification of torture".
[671] ibid.
[672] Rodley and Pollard (n 655) 128.
[673] See generally: Ilias Bantekas, 'The contemporary law of superior responsibility' [1999] 93 American Journal of International law 573, 577.
[674] See: the United States v Von Leeb (High Command case), US Military Tribunal Nuremberg, (1948), 684. ; Bantekas (n 673) 581.

been taken to prevent or punish crimes which have occurred or are likely to occur.[675] Hence, people who have knowingly failed to prevent or punish their subordinates for illegal acts such as torture are liable under command responsibility.[676]

3.2.2 Jurisdiction Provisions under Article 5 of the CAT

Under international law, jurisdiction refers to the power of each state to prescribe and enforce its municipal laws with regard to persons and property.[677] As far as immunity is concerned, immunity from jurisdiction means that a court cannot hear a case as it is procedurally barred from doing so.[678] In order to have a procedural bar under the doctrine of immunity, jurisdiction must first be established.[679] On the contrary, one academic has been suggested that immunity signifies the presence of jurisdiction rather than the absence or lack of it.[680]

In the *Pinochet (No.3)* case, the Law Lords relied on the CAT to exercise jurisdiction to extradite Pinochet for alleged acts of torture. It is, therefore, important to understand the wording of the jurisdiction provision, that is to say, Article 5 of the CAT, to ascertain whether it has any effect on the law of head of state immunity since it is generally silent on the issue.

3.2.2.1 Article 5(1) CAT

Article 5(1) of the CAT states that:

> Each State Party shall take such measures as may be necessary to establish its jurisdiction over the offences referred to in Article 4 in the following cases: a) When the offences are committed in any territory under its jurisdiction or on board a ship or aircraft registered in that State; b) when the alleged offender is a national of that State; c) when the victim is a national of that State if that State considers it appropriate.[681]

Article 5(1) of the CAT ensures that states' domestic criminal law recognises territorial jurisdiction over offences of torture in their national criminal law. It would

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[675] Bantekas (n 673) 593.
[676] ibid 575.
[677] Marko Milanovic, *Extraterritorial application of human rights treaties : law, principles, and policy*,(Oxford University Press 2011) 39.
[678] See: Dickinson v Del Solar [1930] 1 KB 376, 380 (Lord Hewart CJ). ; Boulesbaa (n 657) 177.
[679] Paul J. Toner, 'Competing concepts of immunity: The (R)evolution of the head of state immunity defence' [2003-2004] 108 Pennsylvania State Law Review 899, 903.; Brigitte Stern, 'Immunities for heads of state: Where do we stand?' in Mark Lattimer and Philippe Sands (ed), *Justice for crimes against humanity* (Hart Publishing 2003) 75.
[680] Xiaodong Yang, *State immunity in international law*,(Cambridge University Press 2012) 426.
[681] Convention against Torture 1984, Art 5.

ensure that alleged perpetrators cannot avoid safe havens for perpetrators of torture.[682] The jurisdiction provision under Article 5 of the CAT is echoed in various treaty provisions which are already in force such as: aircraft hijacking, protection of diplomats, and hostage taking.[683] The relevant Articles and their Treaties in this respect are: Article 4 of the Convention for the Suppression of Unlawful Seizure of Aircraft (1971); Article 5 of the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (1973); Article 3 of the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons (1973); and, Article 5 of the International Convention against the Taking of Hostages. It is, therefore, this universality principle which constitutes the problem for some countries. This is because some States were unenthusiastic about provisions such as Article 5 of the CAT, as they feared that it would cause problems within their own domestic criminal legal systems. This problem is particularly evident especially for those who adhere to the rigid rules of the principle of territoriality.[684]

Sweden, during the early drafts of the Convention, said that the extra-territorial or 'universal' jurisdiction was of key importance because it reduced the ability of torturers being held individually responsible, from fleeing to other foreign states.[685] However, the only exception to this can be found under Article 5(1)(c) of the CAT[686] in the passive nationality principle. This is where states enjoy the discretionary power to decide whether or not to apply it. [687]

3.2.2.2 Article 5(2) CAT

Article 5(2) of the CAT says that:

> Each State party shall take such measures as may be necessary to establish its jurisdiction over such offences in cases where the alleged offender is present in any territory under its jurisdiction.

[682] See: Burgers and Danelius (n 524) 131.; Nowak and Buchinger (n 528) 254.; Manfred Nowak, Moritz Birk and Tiphanie Crittin, 'The Obama Administration and obligations under the Convention Against Torture' [2011] 20 Transnational Law and Contemporary Problems 33, 35.; Brody and Ratner (n 485) 266.
[683] Rodley and Pollard (n 655) 129.
[684] ibid
[685] Burgers and Danelius (n 524) 57.
[686] Convention against Torture, Art 5(1)(3) states that: "When the victim was a national of that State if that State considers it appropriate".
[687] Nowak and Buchinger (n 528) 254-255.

This provision requires states to exercise criminal jurisdictions over all other offences of torture.[688] This includes those outside its territory, to nationals of other states.[689] Therefore, this Article, for the first time in a human rights treaty, established the obligation for states party to establish universal jurisdiction.[690] This would include trying all cases where an alleged torturer is present in any territory under their jurisdiction.[691] A similarity can therefore be found between Article 5(2) of the CAT and Article 31(3) of the Vienna Convention on Diplomatic Relations.[692]

Article 5(2) of the CAT requires states to take the necessary legislative measures to establish jurisdiction and to take specific steps in order to bring suspected torturers to justice. [693]

3.2.2.2.1 Necessary Legislative Measures to Establish Jurisdiction

This means that states must take necessary actions in their domestic criminal laws to comply with the principles laid down in Article 5.[694] It relates back to one of the issues that the House of Lords had to deal with in the *Pinochet (No.3)* case. The question is whether conventional application is necessary before the UK can establish jurisdiction. Most of the Law Lords held that the conventional application was required, with the exception of Lord Millett, who said that no conventional application was necessary.[695] The conventional application means that a state must have enacted domestic legislation to give it the power to exercise jurisdiction over alleged offences of torture. In the UK, it has enacted the SIA. However, in the *Pinochet (No.3)* case, the jurisdiction issue was decided by the majority based on the CAT rather than traditional CIL. Their Lordships relied on the CJA which brought into effect the jurisdiction provision of the CAT. The effect of the CJA is that it makes an international crime, such as torture, part of the UK legal system. As a consequence, the UK is under an obligation to extradite the alleged offender to another state if required.

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[688] Rodley and Pollard (n 655) 130.
[689] ibid
[690] Nowak and Buchinger (n 528) 254.
[691] ibid
[692] Vienna Convention on Diplomatic Relations 1961,
[693] Nowak and Buchinger (n 528) 254-255.
[694] ibid 254.; See also: Roger O'Keefe, 'The grave breaches regime and universal jurisdiction' [2009] 7 Journal of International Criminal Justice 811, 827.
[695] The *Pinochet (No 3)* case [180f] (Lord Millett).

Furthermore, it can be argued that Article 5(2) of the CAT provides no obstacle to the application concerning the immunity for former heads of state. Extra-territorial prosecution can only occur in cases where immunity *ratione materiae* would ordinarily be applicable.[696] Thus, the CAT limits the offence of torture to acts committed in an official capacity.[697] This has been supported, for example, by Lord Saville in the *Pinochet case* whereby his Lordship said that the application of immunity *ratione materiae* would deprive the objective of Article 5 of the CAT.[698] Nevertheless, it is important to note that the Law Lords used the jurisdiction provisions under Article 5 of the CAT to great effect since all three of the states party to the proceedings were signatories to the CAT.[699] As a result, the so-called universal jurisdiction was carried out in relation to the *aut dedere aut judicare* dictum.[700]

Moreover, another question that needs addressing here is whether immunity is only withdrawn for systematic torture, that is to say, for a crime against humanity. The Law Lords were divided on this issue. Lords Browne-Wilkinson, Hutton, Saville and Phillips were all silent about it. Lord Hope and Lord Millett reasoned that immunity should only be withdrawn for systematic torture.[701] Lord Goff, the minority and dissenting judge, argued that immunity should not be withdrawn for systematic torture.[702] This corresponded with the earlier decision by Lord Slynn in *Pinochet (No.1)* who said that "the fact even that an act is recognised as a crime under international law does not mean that the Courts of all States have jurisdiction to try it".[703]

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[696] The *Pinochet (No 3)* case [169g] (Lord Saville). His Lordship explained that: "So far as these countries at least are concerned it seems to me that from that date these state parties are in agreement with each other that the immunity *ratione materiae* of their former heads of state cannot be claimed in cases of alleged official torture".

[697] Dapo Akande and Sangeeta Shah, 'Immunities of state officials, international crimes, and foreign domestic courts' [2010] 21 European Journal of International Law 815, 842.

[698] The *Pinochet (No 3)* case [169g] (Lord Saville).

[699] The *Pinochet (No 3)* case [109e] (Lord Browne-Wilkinson).

[700] The *Pinochet (No 3*) case [110j] (Lord Browne-Wilkinson).

[701] See: The *Pinochet (No 3)* case [145c] (Lord Hope).

[702] The *Pinochet (No 3)* case [128a] (Lord Goff).

[703] *Regina v Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (No.1)* [1998] 4 All ER 897 (House of Lords) 914. See also: Gabriel Bottini, 'Universal Jurisdiction after the Creation of the International Criminal Court' [2004] 36 International Law and Politics 503, 545.

The *Pinochet (No.3)* case can be distinguished from the case of *Hissene Habré* [704] which involved Article 5(2) of CAT. This case concerned a government's resistance to implement its obligation under the CAT to establish universal jurisdiction.[705] The Committee found that Senegal had violated Article 5(2) of the CAT in failing to take the necessary legislative measures to establish the legal possibility for Senegalese courts to exercise universal jurisdiction.[706] The Committee also found that Senegal had violated its obligations under Article 7 of the CAT, that is, *aut dedere aut iudicare*.[707] Due to the fact that some countries are reluctant to establish universal jurisdiction as in the *Habré* case, it has been suggested that the former dictator of Chad should be tried by an African member state such as: Senegal, Chad or any other African country. The *Habré* case was an example of where governments and courts try to avoid universal jurisdiction for fear of its political implications.[708] The Committee argued that a state party:

> could not invoke the complexity of its judicial proceedings or other reasons stemming from domestic law to justify its failure to comply with [the extradite or try] obligations under the Convention.[709]

Therefore, it was suggested that a state party was obliged to prosecute *Habré* for alleged acts of torture.[710] However, the obligation to not prosecute can be considered only if there is insufficient evidence to prosecute.[711]

3.2.2.2.2 The Role of the Administrative and Judicial Authorities of States

This is where the administrative and judicial authorities of states must take specific steps in order to bring suspected torturers to justice.[712] It is said that criminal investigations should be initiated as soon as the authorities of a state party have sufficient information to assume that an act of torture has been committed in any territory under its jurisdiction either by one of its nationals or against one of its

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[704] *Hissene Habre* [2000] 125 International Law Reports International Law Reports 569 (Court of Appeal of Dakar) , *Guengueng et al v Senegal (181/01)* [2006] CAT/C/36/D/181/2001 [9.7].
[705] See also: Nowak and Buchinger (n 528) 289. ; See also: Reed Brody, 'The Prosecution of Hissein Habre: An "African Pinochet"' [2001] 35 New England Law Review 321, 321.
[706] *Guengueng et al v Senegal (181/01)* [2006] CAT/C/36/D/181/2001, [27].; Nowak and Buchinger (n 528) 290.
[707] *Suleymane Guengueng v Senegal* [2006] Comm. 181/2001 (U.N.Doc.A/61/44, 160), para 7.17. ; Nowak and Buchinger (n 528) 290.
[708] Nowak and Buchinger (n 528) 291.
[709] *Guengueng et al v Senegal (181/01)* [2006] CAT/C/36/D/181/2001 para.9.8.
[710] Ed Bates, 'State Immunity for torture' [2007] 7 Human Rights Law Review 651, 674.
[711] ibid
[712] Nowak and Buchinger (n 528) 255.

nationals.[713] Ingelse argued that the wording of Article 5(2) of the CAT only required states to establish jurisdiction where at least one of the states have jurisdiction on the basis of territory; nationality of the perpetrator; or nationality of the victim.[714]

According to Lord Browne-Wilkinson in the *Pinochet (No.3)* case, the point about the CAT was not to create a new international crime, but to provide an international system where international criminal torturers would not go unpunished.[715] It ensures that national legal systems must ensure that they have strong enforcement mechanisms, usually in the form of domestic legislations, to perform the jurisdiction power, or right to hear a case involving alleged perpetrators of torture. Essentially, the aim is to prevent alleged torturers from having a safe haven for their crimes. The *Pinochet (No.3)* case, through the reasoning of the majority opinions, seemed to adhere to the objective of the CAT.

To sum up, the combined effect of the interpretation of Articles 1 and 5 of the CAT by the House of Lords in the *Pinochet (No.3)* case had served to remove immunity *ratione materiae* for former heads of state. Article 1 of the CAT defines torture. Nevertheless, the definition of torture under Article 1 of CAT seems to be ambiguous and problematic when considered alone. However, when it is used in combination with Article 5 of CAT, it provides a much stronger enforcement mechanism to ensure that alleged torturers cannot have safe haven for their criminal acts. Article 5(2) of the CAT sets out that states party should establish universal jurisdiction over torture in cases where the alleged offender is present in its territory.[716] The judgment in the *Pinochet (No.3)* case best illustrated this where immunity *ratione materiae* was abrogated as a result.

Conclusion

This Chapter principally discussed the efficiency of the CAT in dealing with the residue issue of immunity *ratione materiae* for former heads of state. It started by analysing the judgments offered in the *Pinochet (No.3)* case. This case was significant as it was the first time that a domestic court refused immunity *ratione*

[713] Nowak and Buchinger (n 528) 255.
[714] Rodley and Pollard (n 655) 130.
[715] The *Pinochet (No 3)* case [109g] (Lord Browne-Wilkinson).
[716] Nowak and Buchinger (n 528) .318.

materiae to a former head of state.[717] The judgment of the *Pinochet (No.3)* case has triggered criticism as the majority Law Lords decided the immunity in the case based on the CAT instead of CIL rules on immunity. This was because the CAT was generally silent on the immunity issue.[718] Lord Goff, in his dissenting judgment, correctly noted this vital fact.[719] The outcome of the case would have been different had one of the parties to the proceedings not been a signatory to the CAT.

The chapter then proceeded to analyse whether the CAT could really have an impact on the law of head of state immunity notwithstanding the fact that it was silent on the issue. This thesis has identified two treaty provisions under the CAT which might be relevant for the debate relating to the immunity issue. They were Articles 1 and 5 of the CAT. The former related to the definition of torture whereas the latter concerned the extensive jurisdiction provision. It has been argued that these two Articles can help in the argument of whether immunity *ratione materiae* should be abrogated for former heads of state. Thus, the wordings of these two Articles have been investigated.

However, the most important point that this chapter has discussed is whether Articles 1 and 5 of the CAT have become CIL. This claim sought to expand on the point suggested by Lord Goff, that the CAT was silent on this type of immunity. If the CAT had become CIL, then it would have solved the dilemma over whether the CAT did not apply to non-signatories.

The two relevant provisions under the CAT had to be interpreted to see if they had any impact on the law of head of state immunity. This was achieved through treaty interpretation under Article 31(3)(c) of the VCLT. Upon close examination, the definition of Article 1 is less than perfect. Not only is the definition of torture under Article 1 of the CAT problematic, but it has also proved to be difficult to apply to cases regarding former heads of state in terms of immunity *ratione materiae*. On the other hand, Article 5 of CAT, which deals with jurisdiction factors, proves to be more convincing. This is because the extensive scope of jurisdiction, that is to say, universal jurisdiction, can cover a variety of situations. It has been submitted in this

[717] Roth (n 401) 43.
[718] Peter Burns and Sean McBurney, 'Impunity and the United Nations Convention against Torture: A Shadow play without an ending?' in Craig M Scott (ed), *Torture as tort* (Hart Publishing 2001) 285.
[719] ibid 285.

chapter that the combined effect of these two Articles appears to have removed immunity *ratione materiae* for former heads of state. However, this view has received some criticism.

Therefore, one way of proving that the CAT really could abrogate immunity *ratione materiae* for former heads of state would be to suggest that it had become CIL. Chapter Four will provide the evidence of *opinio juris* supporting both Articles 1 and 5 of the CAT - that they have indeed become CIL and can restrict the residue of immunity for former heads of state who have allegedly committed acts of torture. The result will be achieved through the sliding scale theory and by focusing on the *opinio juris* element. This is due to the fact that, if there is a general consensus by the international community that the prohibition of torture and the universal jurisdiction provision are widely accepted, then it would be fair to say that these contributed to the formation of a new CIL.

Chapter Four

The Evidence of *opinio juris* indicating that Articles 1 and 5 of the CAT have become CIL

The implications of the *Pinochet (No.3)* opinions on the law of immunity *ratione materiae* have been scrutinised in the previous chapter. The main focus of this chapter is to provide evidence of the subjective element - *opinio juris* - which asserts that Articles 1 and 5 of the CAT have become CIL. The consequence of this is that it will arguably remove immunity *ratione materiae* from the alleged acts of torture by former heads of state and heads of government.

In recent years, some commentators have suggested a modern conception of the formation of CIL that abandons the traditional approach to its formation.[720] This is due to the fact that the traditional approach to the formation of CIL requires both elements of state practice and *opinio juris*.[721] State practice means, "any act or statement by a State from which views about customary law can be inferred".[722] *Opinio juris*, on the other hand, means that the state practice must be accepted as law, and its usage followed out of a sense of obligation.[723] In other words, the states concerned must feel that they are conforming to what amounts to a legal obligation.[724] Nonetheless, it has been argued that substantial changes of the two

[720] See: Anthea Elizabeth Roberts, 'Traditional and modern approaches to customary international law: A reconciliation' [2001] 95 American Journal of International Law 757, 757-791.; J P Kelly, 'The twilight of customary international law' [2000] 40 Virginia Journal of International Law 449, 449-543.

[721]Noora Arajarvi, *The changing nature of customary international law: methods of interpreting the concepts of custom in international criminal tribunals*,(Routledge 2014) 23-24; John Finnis, *Natural law and natural rights*,(2nd edn, Oxford University Press 2011) 238; David Bederman, *Custom as a source of law*,(Cambridge University Press 2010) 144; John Tasioulas, 'Customary international law and the quiet for global justice', in Amanda Perreau-Saussine and James Bernard Murphy (ed), *The nature of customary law: Legal, historical and philosophical perspectives* (Cambridge University Press 2007) 313 ;Anthony D'Amato, 'Trashing customary international law' [1987] 81 American Journal of International law 101, 101-102.

[722] Michael Akehurst, 'Custom as a Source of International Law' [1974-1975] 47 British Yearbook of International Law 1, 53.. See also: McCorquodale and Dixon (n 15) 25; Lepard (n 291) 218. .

[723] Bin Cheng, 'Opinio juris: a key concept in international law that is much misunderstood', in Sienho Yee and Wang Tieya (ed), *International law in the post-cold war world: Essays in memory of Li Haopei* (Routledge 2001) 60.; Larry May, *Crimes against humanity : a normative account*,(Cambridge University Press 2005) 53.

[724] Gennadij Michajlovic Danilenko, 'The theory of customary international law' [1988] 31 German Yearbook of International Law 9, 32.

elements (state practice and *opinio juris*) have taken place.[725] Some believe that the *opinio juris* has assumed prime significance.[726] This is because *opinio juris* is said to be used for declaratory purposes on the existence of customary law which arises independently.[727] Therefore, it is this argument of the weight of *opinio juris* on the formation of a new custom that this chapter will focus on instead of the more rigid process under the traditional way.

The sliding scale theory will be utilised as a more modern device to show that Articles 1 and 5 of CAT have generally been accepted by the international community as custom. Through the accumulation of the evidence of *opinio juris*, this chapter will demonstrate that Articles 1 and 5 of the CAT are potentially new CIL. The reason for adapting the sliding scale approach for the discussion is that it is more flexible than the traditional method as stipulated by the *North Sea Continental Shelf* cases.[728] This view has been supported in the *Paquete Habana* case where the US Supreme Court recognised that the traditional method of formation of CIL could take decades to develop.[729] Besides, the traditional process of the formation of CIL would make it impossible for new customary rules to develop.[730] The controversial sliding scale theory is not the traditional approach for the formation of a new custom. However, it will be argued that, notwithstanding its limitation, the sliding scale theory by Kirgis is well designed to support the methodological approach in this thesis. This means that provided there is strong evidence in favour of one of the elements of formation of CIL, that is to say, either state practice or *opinio juris*, then it would be adequate to claim that a new CIL has been formed.[731] It will be shown that despite the fact that the sliding scale theory is not the most accepted theory, it is nevertheless a well constructed technique to support the methodology of this thesis. Therefore, by focusing on the *opinio juris* rather than the state practice element, this

[725] Igor Lukashuk, 'Customary norms in contemporary international law', in Jerzy Makarczyk (ed), *Theory of international law at the threshold of the 21st century: Essays in honour of Krzysztof Skubiszewski* (Kluwer Law International 1996) 508.
[726] ibid
[727] Olufemi Elias, 'The nature of the subjective element in customary international law' [1995] 44 International and Comparative Law Quarterly 501, 502.
[728] The traditional method of the formation of new custom, under the *North Sea Continental Shelf* cases, required the presence of consistent State practices and *opinio juris.*
[729] *The Paquete Habana* [1900] 175 175 677 (US Supreme Court) 686-700.
[730] Joseph Kunz, 'The nature of customary international law' [1953] 47 American journal of International law 662, 667.
[731] Noora Arajarvi, *The changing nature of customary international law: methods of interpreting the concepts of custom in international criminal tribunals*,(Routledge 2014) 24.; Lepard (n 291) 25.

chapter seeks to provide a contrasting evaluation regarding the formation of new CIL through Kirgis's sliding scale theory.

Thus, the main aim of this chapter is to prove that there is adequate evidence of *opinio juris* to support the claim that Articles 1 and 5 of the CAT have become custom, and subsequently removed immunity *ratione materiae* from alleged acts of torture. On the other hand, some have suggested that the method of the formation of CIL, especially in the area of human rights and international humanitarian law, is different from the traditional method under international law.[732] Therefore, it has been argued that it would allow *opinio juris* to play a major role in the formation of CIL compared with the traditional method which requires both consistent state practice and *opinio juris*.[733] Nonetheless, this chapter will challenge this claim and present a counter-argument.

In order to achieve this, this chapter will centre on examining evidence of *opinio juris*, such as the United Nations General Assembly Resolutions (hereafter 'UNGA Resolutions'), and the Committee against Torture (hereafter the 'Committee').[734] As a result, it will be submitted that this evidence points in favour of Articles 1 and 5 of the CAT becoming custom, and therefore restricts immunity *ratione materiae* for former heads of state and government officials.

This chapter consists of two main sections. The first section explains the sliding scale theory argument, where it places more emphasis on one of the elements to suggest that a new CIL has been formed. In addition, the meaning and the implication of the *opinio juris* element will be explained. The second part of the chapter centres specifically on evidence of *opinio juris*, which includes UNGA Resolutions, and the Committee that matches the understanding of Articles 1 and 5 of the CAT. This evidence will support the claim that a strong presence of an *opinio juris* element can lead to the formation of a new custom, and subsequently restrict immunity *ratione materiae* for alleged acts of torture.

[732] Theodor Meron, *The Humanization of international law*,(Martinus Nijhoff Publishers 2006) 370.
[733] Jan Wouters and Cedric Ryngaert, Institute of International Law 'The Impact of Human Rights and International Humanitarian Law on the Process of the Formation of Customary International law', (Working Paper No 121-February 2009) 3.
[734] Vos (n 347) 193.

4.1 The Sliding Scale Theory and the *Opinio juris* element

4.1.1 Sliding Scale Theory

Kirgis has suggested that the traditional approach of requiring both state practice and *opinio juris* as found in *North Sea Continental Shelf* cases should be viewed as interchangeable along a sliding scale.[735] The explanation of how the sliding scale works is worth quoting in full here:

> On the sliding scale, very frequent, consistent state practice establishes a customary rule without much (or any) affirmative showing of an *opinio juris*, so long as it is not negated by evidence of non-normative intent. As the frequency and consistency of the practice decline in any series of cases, a stronger showing of an *opinio juris* is required. At the other end of the scale, a clearly demonstrated *opinio juris* establishes a customary rule without much (or any) affirmative showing that governments are consistently behaving in accordance with the asserted rule.[736]

In other words, it put forward the view that the requirements of state practice and *opinio juris* should be rationalised on a sliding scale.[737] This has been confirmed in the *Nicaragua* case where the ICJ adopted the view that "the elements of custom [are] not [regarded] as fixed and mutually exclusive, but as interchangeable along a sliding scale".[738]

Moreover, Kirgis explains that the conflict between state practice and *opinio juris* depends on the importance of the activity in question and the reasonableness of the rule concerned.[739] On the point regarding the *opinio juris* element, Kirgis added that:

> Exactly how much state practice will substitute for an affirmative showing of an *opinio juris*, and how clear a showing will substitute for consistent behaviour, depends on the activity in question and on the reasonableness of the asserted customary rule … The more *destabilising* or *morally* distasteful the activity – for example, the offensive use of force or the deprivation of fundamental human rights – the more readily international decision makers will substitute one element for the other, provided that the asserted restrictive rule seems reasonable.[740]

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[735] Frederic Kirgis, 'Custom on a sliding scale' [1987] 81 American Journal of International law 146, 149.

[736] Ibid; Arajarvi (n 731) 24; Rein Mullerson, 'The interplay of objective and subjective elements in customary law', in Karel Wellens (ed), *International law: theory and practice Essays in honour of Eric Suy* (Martinus Nijhoff Publishers 1998) 171.

[737] Kirgis (n 735) 149

[738] Ibid; John Tasioulas, 'Customary international law and the quiet for global justice', in Amanda Perreau-Saussine and James Bernard Murphy (ed), *The nature of customary law: Legal, historical and philosophical perspectives* (Cambridge University Press 2007) 325.

[739] Kirgis (n) 149 ibid

[740] ibid See also: Bruno Simma and Phillip Alston, 'The sources of human rights law: custom, jus cogens, and general principles' [1988-1989] 12 Australian Yearbook of International Law 82, 96.

Therefore, the sliding scale theory suggests that if the available evidence of state practices is consistent, then it will be adequate to substitute the *opinio juris* element on the sliding scale. Similarly, if there is compelling evidence to suggest that states do not approve of certain behaviour, then custom may still be formed notwithstanding the inconsistency of the state practice. Thus, the sliding scale theory effectively creates two scenarios. On the one hand, if there are consistent and frequent state practices, then an *opinio juris* requirement may be relied upon less. On the other hand, if the state practices are not consistent, more weight will be put on the *opinio juris* element. It is this latter claim, which emphasises *opinio juris*, which this chapter seeks to demonstrate, and to claim that Articles 1 and 5 of CAT have become CIL and subsequently restrict immunity for heads of state and government officials.

Advocates in favour of the *opinio juris* element over state practice for the formation of CIL say that a lower standard of practice may be tolerated for customs with a strong moral content. This is because violations of ideal standards are expected.[741] It has been said that a court may be less exacting in requiring state practice and *opinio juris* elements in cases dealing with important moral issues.[742]

Cheng mentioned the process of "instant customary international law" in his 1965 article on the UN Resolution on Outer Space when passed by the unanimous vote of member states.[743] He suggested that prolonged state practices were unnecessary and not needed provided that the relevant states clearly established their *opinio juris* through, for example, their votes on UNGA Resolutions.[744] The meaning of *opinio juris* and what constitutes the subjective element will be explored next.

[741] Oscar Schachter, 'Entangled treaty and custom', in Yoram Dinstein (ed), *International law at a time of perplexity* 1989) 735. ;Oscar Schacter, 'New custom: power, opinio juris and contrary practice', in Jerzy Makarczy (ed), *Theory of international law at the threshold of the 21st century: Essays in honour of Krzysztof Skubiszewski* 1996) 539. ; Roberts (n 720) 790.
[742] Roberts (n 720) 760.
[743] Bin Cheng, 'United Nations Resolutions on Outer Space: "Instant" International Customary Law' [1965] 5 Indian Journal of International Law 23, 35.; Michael P Scharf, *Customary international law in times of fundamental change: Recognizing Grotian moments*,(Cambridge University Press 2013) 8.
[744] Bin Cheng 'Instant International Customary Law' (n 743) 36.

4.1.2 The *Opinio Juris* element on the formation of CIL

Opinio juris (*opinio juris sive necessitatis*) means the "belief" held by states that the practice in question is obligatory by virtue of a rule of law requiring it.[745] In the *North Sea Continental Shelf* cases, the ICJ explained the *opinio juris* requirement in the traditional approach:

> [it] must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it … The States concerned must therefore feel that they are conforming to what amounts to a legal obligation.[746]

The ICJ in the *Nicaragua* case further clarified the *opinio juris* requirement:

> *opinio juris* may, though with all due caution, be deduced from, inter alia, the attitude of the Parties and the attitude of States towards certain General Assembly resolutions … The effect of consent to the text of such resolutions cannot be understood as merely that of a "reiteration or elucidation" of the treaty commitment undertaken in the Charter. On the contrary, it may be understood as an acceptance of the validity of the rule or set of rules declared by the resolution by themselves.[747]

4.1.3 UNGA Resolutions as a source of *opinio juris*

Some view the UNGA Resolutions not as practice, but as evidence of *opinio juris*.[748] In addition, it is believed that international judicial decisions can lead to evidence of state practice and *opinio juris* for establishing CIL. The ILC has given some examples of sources which provide CIL. They are: treaties, decisions of national and international courts, national legislation, opinions of national legal advisors, diplomatic correspondence and practice of international organisations.[749] This chapter concentrates on examples of treaties to establish whether they can contribute to the findings that Articles 1 and 5 of the CAT have indeed become CIL.

In the *Nicaragua* case, the ICJ reached the outcome of the case regarding Articles 1 and 3 of the Geneva Conventions by primarily looking at *opinio juris* instead of state

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[745] Schachter 'New Custom: Power, Opinion juris and contrary practice' (n741) 531; Boas (n 319) 81.
[746] *North Sea Continental Shelf Cases* [1969] 41 ILR 29 (ICJ) 44.; Hugh Thirlway, *The Sources of international law*,(Oxford University Press 2014) 57; Boas (n 319) 82.
[747] *Nicaragua v US (Military and Paramilitary Activities in and against Nicaragua)* [1986] 76 ILR 349 (ICJ) [188].; Boas (n 319) 86.
[748] Jorg Kammerhofer, 'Orthodox generalists and political activists ', in Matthew Happold (ed), *International law in a multipolar world* (Routledge 2012) 148 ;Jason Beckett, 'Customary International Law', in Basak Cali (ed), *International Law for International Relations* (OUP 2010) ; Ba sak Cali, *International law for international relations*,(Oxford University Press 2010) 130.
[749] International Law Commission, ILC 'Report of the ILC to the General Assembly', (1957) U. N. Doc.A/CN.4/Ser.A/1950/Add.1, 364 367-372.

practices.[750] The effect of the *Nicaragua* case is that it contributed to the recognition that resolutions can play an important role in the formation *opinio juris*.[751] The ICJ expressly confirmed the importance of the subjective element by saying that:

> they must also be such or be carried out in such a way, as to be evidence a belief that this practice is rendered obligatory by the existence of a rule of law requiring it. The need for such a belief, i.e., the existence of a subjective element, is implicit in the very notion of the *opinio juris sive necessitatis*.[752]

It is fair to say that the decision of the *Nicaragua* case led to the strengthening of the position of UNGA Resolutions as an appropriate mechanism for creating customary norms.[753] In other words, resolutions which have been adopted by unanimous decisions of the UNGA could have a creative role in the formation of new custom.[754] This is because the UNGA has become entitled to speak in the name of all the states of the world, and its decisions have become the decisions of the world community.[755]

The ICJ explained in the 'Legality of the Threat or Use of Nuclear Weapons Advisory Opinion' that:

> The General Assembly Resolutions, even if they are not binding, may sometimes have normative value. They can, in certain circumstances, provide evidence important for establishing the existence of a rule or the emergence of an *opinio juris.* To establish whether this is true of a given General Assembly Resolution, it is necessary to look at its content and the conditions of its adoption; it is also necessary to see whether an *opinio juris* exists as to its normative character. Or a series of resolutions may show the gradual evolution of the *opinio juris* required for the establishment of a new rule.[756]

Moreover, the view that UNGA Resolutions are evidence of emergent customary rules has been supported by the US domestic courts as well as international tribunals.[757] For example, the decision in *Siderman de Blake v Republic of*

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[750] *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v US)* [1986] Rep 14 ICJ 135 (ICJ) [218]-[220].
[751] Stephen Donaghue, 'Normative habits, genuine beliefs and evolving law: Nicaragua and the theory of customary international law' [1995] 16 Australian Yearbook of International Law 327, 341.
[752] *North Sea Continental Shelf Cases* [1969] 41 ILR 29 (ICJ) 44, [77].
[753] Lukashuk (n 725) 498.
[754] Schachter 'New custom: power, opinio juris and contrary practice' (n 741) 532.
[755] Louis Sohn, 'Enhancing the role of the General Assembly of the United Nations in crystallizing international law', in Jerzy Makarczyk (ed), *Theory of international law at the threshold of the 21st century* (Kluwer Law International 1996) 555.
[756] *Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion)* [1996] ICJ Reports 226 (ICJ Reports) [70].; Scharf (n 743) 54.
[757] Examples of some cases include: *Filartiga v Pena-Irala* [1980] 630 F.2d 876 (US Circuit Court of Appeals (2nd Circuit)) 883; *Jafari v Islamic Republic of Iran* [N.D. III 1982] (539 F.Supp. 209) 215;

Argentina, confirmed that "a resolution of the General Assembly of the United Nations … is a powerful and authoritative statement of the customary international law of human rights".[758]

In addition, it has been said that under certain circumstances UNGA Resolutions can "declare existing customs [or] crystallise emerging customs".[759] This is supported by the US Department of State, where it explained that:

> General Assembly resolutions are regarded as recommendations to Member States of the United Nations. To the extent, which is exceptional, that such resolutions are meant to be declaratory of international law, are adopted with the support of all members, and are observed by the practice of States, such resolutions are evidence of customary international law on a particular subject matter.[760]

However, the ICJ explained that whether a particular UNGA Resolution should be treated as evidence of a new rule of CIL would depend on its "content and the conditions of its adoption".[761] For example, one of the main considerations is a vote's outcome.[762] Moreover, the position of important players relative to the subject matter of the resolution is also vital.[763]

As far as the vote outcome is concerned, the important decisions of the UNGA have become enforceable throughout the world, provided that they have been adopted unanimously or by consensus.[764] This means that at least a two-thirds majority is required for a substantive decision.[765] In the *Eichmann* Case, the Israeli Supreme Court said in relation to the UNGA Resolution 95(1) that:

> if fifty-eight nations [i.e. all members of the UN at the time] unanimously agree on a statement of existing law, it would seem that such a declaration would be all but

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Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v US) [1986] Rep 14 ICJ 135 (ICJ) , *Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion)* [1996] ICJ Reports 226 (ICJ Reports) 254-255; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* [2004] 136 (ICJ) Advisory Opinion, 17.

[758] *Siderman de Blake v Republic of Argentina* [1992] 965 F.2d 699 (US 9th Circuit Court of Appeals) 719.

[759] Roberts (n 720) 758.

[760] D.J. Harris, *Cases and materials on international law*,(5th edn, Sweet & Maxwell 1998) 62.

[761] *Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion)* [1996] ICJ Reports 226 (ICJ Reports) 254-255, [70].

[762] ibid

[763] See: *In re Agent Orange Product Liability Litigation* [2005] (373 F. Suppe 2d 7) 126-127.

[764] Sohn (n 755) 556.

[765] ibid 557.

> conclusive evidence of such a rule, and agreement by a large majority would have great value in determining what is existing law.[766]

In relation to the 'content and condition of its adoption', it has been suggested that certain UNGA Resolutions do have normative legal force due to the wide and consistent support they attract from a large number of states.[767] It can be submitted that it is very likely that most states will vote in favour of the 'content and condition' of a Resolution relating to human rights. However, whether states will follow their treaty obligations strictly is another more problematic question relating to enforcement. It is believed that the content of the resolutions and the responses of states to them are what gives them legal effect.[768] An example of this is the Declaration on the Granting of Independence to Colonial Territories and People (UNGA Res 1514) 1960.

UN Resolutions fall into two areas under international law. The first type concerns 'force and intervention', and the second category involves 'other human rights'.[769] The former may involve, for example, how the Resolutions can provide an extra enforcement mechanism on the issue of jurisdiction for torture. This can be related back to the Commission against Torture which was created by the UNGA Resolution 39/46 in relation to the enactment of the CAT. Two cases heard by the Committee in relation to Article 5 of the CAT will be dealt with in this chapter. These cases are important for the discussion mainly because they concerned heads of state and the impact of the jurisdiction provision under Article 5 of the CAT. One of the cases was about an extradition claim for Pinochet which related back to the earlier discussion as to whether the CAT can have an impact on the law of head of state immunity. The other example given relates to the case of Questions Relating to the obligation to prosecute or extradite (Belgium v Senegal) (hereafter the '*Hissène Habré* case).[770] The Commission had to deal with Article 5 of the CAT in that case. Both of the cases illustrate that the failure by states to exercise jurisdiction can lead to a breach of obligations under the CAT.

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[766] Quoted in: *Attorney-General of Israel v Eichmann* [1962] 36 ILR 277 (Israeli Supreme Court) [11].
[767] Beckett (n 748) 130.
[768] ibid
[769] Schachter 'New custom: power, opinio juris and contrary practice' (n 741) 534.
[770] *Questions Relating to the obligation to prosecute or extradite (Belgium v Senegal)* [2012] General List No 144 ICJ (ICJ)

The second category of resolutions relates to 'other human rights'. This means resolutions which have been created for the purpose of protecting human rights. The next section will illustrate the evidence of *opinio juris* supporting Articles 1 and 5 of the CAT. These will include: UNGA resolutions.

4.2 Evidence of *opinio juris* in Article 1 of the CAT

This section explores the evidence of *opinio juris* which supports the view that Article 1 of CAT has become CIL. It can be recalled that Article 1 of the CAT provides the definition of torture. One of the examples of evidence of *opinio juris* supporting the definition of torture can be seen in the UNGA Resolution (7 March 2013) - 'Torture and other cruel, inhuman or degrading treatment or punishment'.[771] In its Preamble, the Resolution reaffirmed that "no one shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment". It also reaffirmed the definition of torture as contained in Article 1 of the CAT:

> the prohibition of torture is a peremptory norm of international law and that international, regional and domestic courts have held the prohibition of cruel, inhuman or degrading treatment or punishment to be customary international law.

Paragraph 1 of the Resolution "condemns all forms of torture and other cruel, inhuman or degrading treatment or punishment".[772] Furthermore, paragraph 2 emphasises that: "States must take persistent, determined and effective measures to prevent and combat all acts of torture".[773] These two paragraphs from the Resolution show that all forms of torture are outlawed. The effect of the prohibition of torture is that states will have to take all necessary measures to reduce the acts of torture. It can be suggested that the 2012 Resolution is not something new. This is because few resolutions have been passed prior to the current resolution. In terms of the wording of the Resolution - the definition of torture and the mechanism to combat it, they can be traced back to previous resolutions, such as: Resolution 3059 [1973],[774]

[771] United Nations General Assembly, United Nations General Assembly 'Resolution adopted by the General Assembly on 20 December 2012 (on the report of the Third Committee A/67/457/Add.1) Torture and other cruel, inhuman or degrading treatment or punishment', (7 March 2013) A/RES/67/161 .
[772] ibid [1].
[773] ibid,[2].
[774] UN GA Resolution, 'Question of torture and other cruel, inhuman or degrading treatment or punishment', (1973) A/RES/3059 (XXVIII) 1) Rejects any form of torture and other cruel, inhuman or degrading treatment of punishment

Resolution 3452 [1973][775] and Resolution 3453 [1975][776]. These Resolutions generally reflected the aims of the Charter of the Nuremberg Tribunal. Furthermore, it can be suggested that Resolutions 66/150 was based on Resolution 95(1) 1946.[777]

4.2.1 Evidence of *opinio juris* for Article 5 CAT

Article 5 of the CAT creates an obligation on states to establish jurisdiction over the offences of torture. The evidence of *opinio juris,* which suggests that the universal jurisdiction under the CAT has become CIL, and that this consequently restricts immunity *ratione materiae* for former heads of state will be discussed in this section. Paragraph 20 of Resolution 67/161 (2013) calls for:

> States parties to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment to fulfil their obligation to submit for prosecution or extradite those alleged to have committed acts of torture, and encourages other States to do likewise, bearing in mind the need to fight impunity.[778]

This corresponds with Article 5 of the CAT which obliges states to establish jurisdiction over offences of torture. Nonetheless, the wording in Resolution 67/161 places more emphasis on states exercising their obligations to extradite or prosecute alleged torturers in order to combat impunity. The argument here is that the 2013 Resolution further strengthens the responsibility placed on states to exercise their jurisdiction rights, and more importantly to ensure that impunity for alleged torturers is tackled. This notion is supported by Resolution 3(1) 1946, as it suggests that states should take all necessary measures to arrest war criminals.[779] The same approach was reaffirmed in 1973 in Resolution 3074 (XXVIII).[780] As far as the evidence of *opinio juris* on the subject of extensive jurisdiction provisions under Article 5 of the

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[775] UN GA Resolution 3452, 'Declaration on the Protection of All Persons from Being Subjected to Torture and other cruel, Inhuman or Degrading Treatment or Punishment', (1975) A/RES/3452 (XXX) See: Article 1 for the definition of torture and Article 4 which required States "to take necessary measure to prevent torture". In other words, States had to exercise jurisdiction for acts of torture in their territories.

[776] General Assembly, 'Torture and other cruel, inhuman or degrading treatment or punishment inrelation to detention and imprisonment', (1975) A/RES/3453 (XXX) See: Articles 1 and 2(a).

[777] UN General Assembly, 'Affirmation of the Principles of International Law recognised by the Charter of Nuremberg Tribunal', (1946) 95(1) .

[778] UN General Assembly, UN GA 'Resolution adopted by the General Assembly [on the report of the Third Committee (A/66/462/Add.1)]', (27 March 2012) A/Res/66/150, para 19.

[779] UN General Assembly, 'Extradition and Punishment of War Criminals', (1946) Resolution 3(1)

[780] UN General Assembly, 'Principles of international cooperation in the detection, arrest, extradition and punishment of persons guilty of war crimes and crimes against humanity', (1973) Resolution 3074 (XXVIII) Para 1 states that: War crimes and crimes against humanity, wherever they are committed, shall be subject to investigation and the persons against whom there is evidence that they have committed such crimes shall be subjected to tracing, arrest, trial and, if found guilty, to punishment.

CAT is concerned, it can be suggested that Resolution 67/161, together with other previous Resolutions, signified that there is a strong proposition that Article 5 of CAT may have become a new CIL. This is because all these Resolutions essentially had one similar objective which is that jurisdiction is exercisable for acts of torture.

The next section will deal with the other category of Resolutions which deals with force and intervention. It can be suggested that the Committee is one of the organisations created by the UN together with the CAT. As a result, the findings by the Committee supplement the idea that the failure by states to exercise jurisdictions for alleged perpetrators of torture are not accepted. Two relevant cases heard by the Committee are worth discussing here in more detail as both of them involved, to a certain extent, heads of state. The finding by the Committee will shed some light on the importance of compliance by states party to their treaty obligation under Article 5 of the CAT. The consequence of this is that if the Committee finds that the obligation by states party to exercising jurisdiction under Article 5 of the CAT is not strictly followed, it would lead to breaches of their commitment to the CAT.

4.2.1.1 Jurisprudence by the Committee against Torture

The Committee was set up by the UN as a mechanism dedicated to monitoring the implementation of the CAT.[781] The Committee is established in accordance with Article 17 of the CAT. [782] The main function of the Committee, therefore, is to ensure that the CAT is observed and implemented properly. Moreover, Article 22 of the CAT grants rights to individuals, who are most likely to be victims of torture, to lodge complaints directly to the Committee.[783] For example, victims of torture can ask the Committee to explain issues of jurisdiction as stipulated by Article 5 of the CAT. It is submitted that the Committee may play a vital role in enabling victims of torture to obtain a platform when it comes to setting up a trial. Nevertheless, it has

[781] The Commission is one of the three mechanisms which has been created by the UN to tackle the prevention of torture. The other two mechanisms dedicated to the eradication of torture are: the UN Special Rapporteur on Torture and UN Voluntary Fund for Victims of Torture. For more discussions about these mechanisms see: Winston P.Nagan and Lucie Atkins, 'The International law of torture: From universal proscription to effective application and enforcement' [2001] 14 Harvard Human Rights Journal 87, 103-108.

[782] Apart from giving the relevant authority to set up the Committee, Article 17 of the CAT also explains the functions of the Committee in general.

[783] See: The Convention against Torture 1984, Art 22(1).

been criticised because a State has to first accept the competence of the Committee in order for it to have some effect.[784]

The following cases by the Commission are relevant to the discussion of Article 5 of the CAT as they involve the enforcement mechanism regarding jurisdiction issues. Notwithstanding that these claims were brought against states rather than directly against heads of state, the findings by the Commission were useful in order to examine the impact of how states dealt with their obligations and compliance under Article 5 of the CAT to exercise jurisdictions. In addition, they will present a clearer picture as to the impact of Article 5 of the CAT on states, and whether violation of it will constitute a breach of a possible CIL.

In the *Marcos Roitman Rosenmann v Spain* case, a group of alleged torture victims filed a complaint, in July 1996, requesting that criminal proceedings be opened against the former Chilean Head of State, General Augusto Pinochet, for alleged violations of human rights committed in Chile between September 1973 and March 1990.[785] The alleged violations included those listed in Articles 1, 2, 4 and 16 of the CAT. Marcos Roitman Rosenmann, a Spanish citizen of Chilean origin and residing in Madrid, claimed that he was subjected to torture during the coup d'etat of September 1973.[786] He subsequently appeared and gave testimony before the Audiencia Nacional in Spain as a witness to torture in Chile.[787]

The background facts about Pinochet were mentioned in the previous chapter. Here, the complainant raised the issue that Spain had violated the extraterritorial jurisdiction over crimes committed against Spanish citizens anywhere in the world.[788] The torture victims argued that Spain had the right to request the extradition of General Pinochet from the UK, so that he could be tried before a Spanish court for crimes committed against Spanish citizens in Chile.[789] On 24th January 2000, the Audiencia Nacional informed the Spanish Ministry for Foreign Affairs of its intention to appeal in case the extradition was not granted.[790] It is

[784] Nagan and Atkins (n 781) 104.
[785] *Marcos Roitman Rosenmann v Spain* [2002] Comm. 176/2000 (U.N. Doc. A/57/44, at 176 (CAT 2002)) [2.1].
[786] ibid [1].
[787] ibid [2.1].
[788] ibid [2.3].
[789] ibid
[790] ibid [2.7].

important to note that the claimant was not involved as a victim or as a civil party to the proceedings.[791] Instead, he acted only in the capacity as a witness.[792] Spain argued that the CAT did not impose upon any state the exclusive or preferential competence to try a person accused of torture.[793] Therefore, it was questionable whether there was a preferential competence for Spain to try a Chilean citizen for crimes committed in Chile.[794]

The Committee considered that the interpretation of national laws were within the competence of the tribunals of states parties.[795] Accordingly, the Committee was not in a position to make a finding with regard to the application or an interpretation of Spanish law in matters of extradition.[796] Furthermore, the Committee explained that since the complainant contended that Spain was in breach of an obligation under the CAT to investigate fully and prosecute alleged acts of torture falling within its jurisdiction, he would have to be personally and directly affected by the alleged breach in question in order to pursue the extradition proceedings further.[797]

Moreover, the Commission raised the issue about states party possessing extraterritorial jurisdiction over acts of torture committed against its nationals. It recalled that one of the aims of the CAT was to avoid any impunity to persons who have committed acts of torture.[798] The Commission reiterated that the state party law should conform with Article 5(1)(c) of the CAT. The Commission observed that while the CAT imposed an obligation to bring to trial a person who was alleged to have committed torture, Articles 8 and 9 of the CAT did not impose any obligation to seek an extradition, or to insist on its procurement in the event of a refusal.[799] The Commission reached the conclusion that the claim was inadmissible.

In *Suleymane Guengueng v Senegal*, the claimants were all Chadian nationals who were living in Chad. They claimed that Senegal had violated Article 5(2) and Article 7 of the CAT.[800] The facts of the case were that the complainants were allegedly

[791] ibid [4.2].
[792] ibid
[793] ibid [4.6].
[794] ibid
[795] ibid [6.2].
[796] ibid [6.2].
[797] ibid [6.4].
[798] ibid [6.7].
[799] ibid [6.7].
[800] *Suleymane Guengueng v Senegal* [2006] Comm. 181/2001 (U.N.Doc.A/61/44, 160) para 1.1.

tortured by agents of the Chadian State under President Hissène Habré. The alleged incidents happened between 1982 and 1990 during the Habré regime.[801] The claimants submitted to the Committee a detailed description of the torture and other forms of ill-treatment which they had suffered.[802]

Another case involves Hissène Habré who, as a head of state, allegedly carried out acts of torture.[803] The issue of the violation of Article 5(2) of the CAT was brought to the Commission. The complainants argued that Senegal had not adopted any legislation relating to Article 5(2) of the CAT.[804] The Court of Cassation defended this by saying that, "the presence in Senegal of Habré cannot in itself justify the proceedings".[805] The claimants argued that it was in fact the presence of the alleged offender in Senegalese territory which had constituted the breach of Article 5 of the CAT to exercise jurisdiction.[806] The Commission reached the conclusion by saying that the state party (Senegal) had not fulfilled its obligations under Article 5(2) of the Convention. It explained that Article 5(2) of the CAT obliged a state party to adopt the necessary measures, including a legislative measure to establish its jurisdiction over acts of torture. Article 26 of the Vienna Convention set out the obligation for parties to perform their obligations under international treaties by ratifying the CAT within 15 years.[807] However, Senegal did not do so.[808] The next chapter will consider whether decisions by international courts can affect judgments by national courts by using *Habré* as an example.

Both of these cases, which were heard by the Committee, provided some contrasting findings. On the one hand, the objective of the CAT is to avoid impunity for alleged perpetrators of torture. On the other hand, states party are obliged to fulfil their obligations under CAT by ratifying the treaty so that the jurisdiction provision under Article 5 is enforceable. In the claim brought against Spain in the first example, the Committee reaffirmed that the aim of the CAT was to avoid impunity. However, in that case, the Committee held that despite the CAT's intention to bring alleged

[801] ibid [2.1].
[802] ibid
[803] The details of the case will be mentioned in more detail in Chapter Five.
[804] *Suleymane Guengueng v Senegal* [2006] Comm. 181/2001 (U.N.Doc.A/61/44, 160) [3.2].
[805] ibid[2.7].
[806] ibid [3.4].
[807] ibid [8.8].
[808] ibid [10].

torture perpetrators to justice, it did not see a state party's obligation to extradite under Article 8[809] and 9[810] of the CAT. The Committee's decision raises some dilemmas. As far as Article 5 of the CAT is concerned, it obligates states to establish jurisdiction over the offences of torture. Moreover, Article 8 of the CAT obliges states to ensure that extradition is available for torturers. It can be submitted that the findings by the Committee, that states did not have an obligation to extradite torturers under Articles 8 and 9 went directly against those in Article 5 of the CAT, which obliges states to establish jurisdiction over offences of torture. It makes one wonder whether States are under any obligation to exercise jurisdiction or not as required under Article 5 of the CAT.

The findings of the Committee in the first case can be contrasted with the ones concerning Senegal. The Committee held that Senegal has breached its treaty obligation by not ratifying the CAT within the 15 year time limit to fulfil its obligation under Article 5(2) of the CAT. In this case, the failure by Senegal to ratify the CAT has consequently led to it being unable to exercise jurisdiction under Article 5(2) of the CAT over Habré. The Committee's decision pointed to the fact that states parties must comply with their treaty obligations to ratify the CAT within the time limit. Failure to ratify the CAT resulted in Article 5(2) of the CAT being unenforceable. The interesting question here is whether member states are still required to exercise jurisdiction under Article 5 of the CAT, provided that they have ratified the treaty to try alleged perpetrators of torture. If Article 5 of the CAT becomes CIL, then this problem will be solved rather easily since CIL is directly applicable to states without the need to consider *prima facie* ratification.

Conclusion

This chapter has demonstrated that the evidence of *opinio juris* with regard to Articles 1 and 5 of the CAT showed strong consensus for the definition of torture and the extensive jurisdiction provisions to become CIL respectively. The focus on the subjective element of *opinio juris* was used in place of the state practice element

[809] See: Article 8 of CAT which deals with the obligation to ensure that extradition is available for torturers.

[810] See: Article 9 of CAT which concerns with the obligation for states parties to afford one another assistance in connection with criminal proceedings in respect of torture, including supply of evidence.

to propose that a new CIL could be formed. The sliding scale theory by Kirgis was utilised to help the debate over the formation of new CIL for the CAT.[811]

Therefore, the finding that Articles 1 and 5 of the CAT have become CIL was fulfilled by the sliding scale theory analysis. It can be recalled that the sliding scale theory put more focus on one of the elements required for the formation of a new CIL.[812] One reason for relying on the sliding scale argument was that the issue in question, which related to the entitlement of immunity privileges for former heads of state, is a controversial one. It was this problem which led to the strategy to rely on this less conventional method of formation of new CIL in relation to the CAT. This has been supported by Kirgis who has suggested that the importance of the act in question and the accuracy of the legal rule in question were contributing factors.[813]

This chapter continued by examining the relevant evidence of *opinio juris* for both Articles 1 and 5 of the CAT. This included various UNGA Resolutions.[814] In the Eichmann case, the Israeli Supreme Court stated that:

> "if fifty-eight nations unanimously agree on a statement of existing law, it would seem that such a declaration would be all but conclusive evidence of such a rule, and agreement by a large majority would have great value in determing what is existing law".[815]

Furthermore, the jurisprudence by the Committee were also considered. This chapter has submitted that the definition of torture contained under Article 1 of the CAT corresponded, to a certain extent to the UNGA Resolutions. Accordingly, former heads of state should not be accorded the residual immunity *ratione materiae* for their alleged acts of torture. The impact of arguing that Article 1 of the CAT has become CIL is that it will be applied to any states irrespective of them being

[811] Frederic Kirgis, 'Custom on a sliding scale' [1987] 81 American Journal of International law 146, 149.
[812] ibid 149.
[813] ibid 149. Kirgis said that: "[t]he more destabilising or morally distasteful the activity – for example, the offensive use of force or the deprivation of fundamental human rights – the more readily international decision makers will substitute one element for the other, provided that the asserted restrictive rule seems reasonable".
[814] Schard (n 743) 57-58. See also: Maurice Mendelson, 'The Formation of customary international law' [1998] 272 Recueil des Cours 155, 386. He gave an example of General Assembly Resolution 95(1) endorsing the Nuremberg Principles.
[815] *Attorney-General of Israel v Eichmann* [1962] 36 ILR 277 (Israeli Supreme Court) [11].

signatories to the CAT. This will create a universal perception of the notion of the definition of torture.

The evidence of *opinio juris*, supporting that Article 5 of the CAT has become CIL has been easier to ascertain. These have mostly included the UNGA Resolutions, as well as the jurisprudence from the Committee. The repercussions of the evidence by the international tribunals have shown that the alleged offences of acts of torture have usually led to the implementation of extensive jurisdiction.

Through the evidence of UNGA Resolutions, it can be submitted that there is a strong consensus by the international community for the condemnation of the acts of torture, which has resulted in the exercise of the universal jurisdiction. In other words, the extensive jurisdiction provision under Article 5 of the CAT has echoed the fundamental agreement on the general prohibition of torture which led to the exercise of jurisdiction. Apart from the UNGA Resolutions, the jurisprudence by the Committee further reinforced the consensus that signatories to the CAT were obliged to exercise jurisdiction for alleged acts of torture. The Committee's findings brought the enforcement mechanism of the CAT into practice. It ensured that states carried out their obligations under the CAT to establish jurisdiction over the offences of torture as stipulated under Article 5 of the CAT.

The evidence of *opinio juris* supporting that Articles 1 and 5 of the CAT have become CIL proved that they contributed to the formation of a new CIL direction. The consequence of this is that the residual immunity *ratione materiae* for heads of state and some heads of government could be removed. Nevertheless, this observation is argued to be successful under the sliding scale debate. However, the method of formation of CIL, relying merely on the *opinio juris* element is nonetheless debatable and controversial. In the next chapter, a critical evaluation will be made to show that Articles 1 and 5 of the CAT have potentially become CIL. It will show that the requirement of the state practice element can be reduced in the context of the formation of CIL for the protection of human rights. This analysis will be approached from a theoretical angle - the way that international courts and *ad hoc* tribunals can influence the decisions of domestic courts through their interpretation of the definition of torture as well as the scope of the jurisdiction provision; and the role of domestic courts in interpreting and safeguarding international law standards.

Chapter 5

An Alternative Approach to the Argument on the Formation of CIL

The previous chapter examined the evidence of *opinio juris* in relation to the possibility of Articles 1 and 5 of the CAT becoming CIL. This has been debated by Kirgis under the sliding scale theory. This chapter seeks to investigate whether Articles 1 and 5 of the CAT have become CIL through other approaches. Since Chapter Four has brought together all relevant evidence of *opinio juris* for each of the articles of the CAT, this chapter will analyse cases which have been decided after the *Pinochet (No.3)* case that appear to be evidence of the willingness of states to abrogate immunity *ratione materiae* for heads of state and other senior government officials.

Based on the examination of national and international courts after the *Pinochet (No.3)* case, there is an increasing trend towards the abrogation of immunity *ratione materiae* for former heads of state and other state officials. It is a matter of contention whether this can be interpreted as a sign that Articles 1 and 5 of the CAT have become CIL. If this is true then immunity *ratione materiae* will be automatically removed from former heads of state who have allegedly committed acts of torture, violating *jus cogens* norms.

This chapter consists of three sections. The first section discusses three cases that were heard after *Pinochet (No.3)*, namely those involving Bat Khurts, Khaled Nezzar and Hissène Habré. The former two cases were decided by domestic courts and the latter by the ICJ. These cases are significant because they may be considered as evidence that the law has moved on since the *Pinochet (No.3)* case and that Articles 1 and 5 of the CAT may have become CIL. The second section suggests that international courts may influence national courts with regard to the issue of head of state immunity, in particular, on reaching the decision of the application of immunity *ratione materiae*. Chapter Five considers the jurisprudence of other courts in not applying the CAT, but which may have influenced other international tribunals such as the ICTY and the ICTR in their understanding of the definition of torture as well as the jurisdiction. For instance: the ICJ, the ICTY, and the European Court of

Human Rights have all stated that the UNGA Resolution confirms the principles of the Nuremberg Charter and judgments as an authoritative declaration of CIL.[816] Evidence from the statutes of the international tribunals therefore, shows that there is an increasing tendency to favour the definition of torture and the scope of extensive jurisdiction under CAT. Notwithstanding that international courts and tribunals are set up under different legal mechanisms, their judgments can influence the decision making of national courts. Therefore, they are relevant to the discussion because they depict the wider consensus by the international community on the issues relating to the understanding of the definition of torture and the extensive jurisdictions. The third section proposes that national courts interpret international law and contribute to the development of international law. This, in turn, can be put forward as evidence of the increasing willingness of states to abrogate on the issue of immunity *ratione materiae*.

Through a different approach, as illustrated by the use of the three cases and analysis, this chapter will argue that there is an increasing trend towards the removal of immunity *ratione materiae* both at the international and domestic levels. This is strong evidence to suggest that Articles 1 and 5 of the CAT may have potentially become CIL.

5.1 Recent Cases Developments

It is important to note from the outset that the *Khurts Bat* and *Khaled Nezzar* cases were both decided by national courts. On the other hand, the *Hissène Habré* case was decided by the ICJ. Nevertheless, the latter is directly relevant to the discussion here as there are similarities between it and the *Pinochet (No.3)* case. This is because parties to the case are signatories to the CAT and it has ramifications on the immunity *ratione materiae* issue.

5.1.1 *Khurts Bat*

The first case concerned whether Bat Khurts, the Head of the Executive Office of National Security in Mongolia, could plead immunity and thus prevent his extradition to Germany for the prosecution of municipal crimes. Khurts was wanted by Germany for crimes allegedly committed in May 2003 in French, Belgian and

[816] See: *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* [2004] 136 (ICJ) ; *Prosecutor v Tadic* [1995] (Appeal Chamber, ICTY) Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, 140.

German territories. He was alleged to have been involved in the kidnapping, imprisonment and questioning of a Mongolian national. On 30 January 2006, the German Federal Court of Justice issued a domestic arrest warrant. A European arrest warrant (hereafter 'EAW') was also issued by the same court on 9 February 2006. The EAW stated that Khurts was not entitled to immunity in Germany. When Khurts travelled to the UK on 17 September 2010, officers from Scotland Yard's Extradition Squad arrested him onboard a Russian plane. He was brought before the City of Westminster Magistrates' Court. On 18 February 2011, District Judge Purdy ordered his extradition. However, Khurts raised two submissions about the extradition. Firstly, he argued that he enjoyed immunity *ratione personae* under CIL from the jurisdiction of national courts. This was because he was visiting the UK on a special mission on behalf of Mongolia when he was arrested. Secondly, he enjoyed immunity under CIL because he was representing his government as a high-ranking official civil servant. However, the City of Westminster Magistrates' Court rejected both these submissions.

Khurts next appealed to the High Court and argued that the acts he committed were official acts. Hence, they were carried out pursuant to the orders of the government of Mongolia. He claimed that he was entitled to immunity *ratione materiae* both in Germany and the UK. In addition, the government of Mongolia claimed before the English court that he was "entitled to immunity from criminal prosecution in Germany *ratione materiae*".[817] The UK High Court (Administrative Court) had to consider whether Khurts:

> as an official acting on behalf of the Government of Mongolia is entitled to immunity from criminal prosecution in Germany ratione materiae, that is, entitled to immunity by virtue of his actions on behalf of that State as opposed to his status, i.e., ratione personae.[818]

Judge Purdy held that the Head of the Executive Office of National Security Mongolia did not benefit from immunity *ratione personae* since he was not "of ministerial rank or above", nor was he engaged in foreign affairs.[819] Once again, the High Court rejected all of his submissions and found that there was no "special

[817] *Khurts Bat v Investigating Judge of the Federal Court of Germany* [2011] 3 WLR EWHC 2029 180 ((Admin)), para 63.
[818] ibid
[819] *Federal Court of Justice Germany v Bat Khurts (City of Westminster Magistrates' Court)* [2011], para 12.

mission" and he was not a sufficiently high-ranking official to benefit from personal immunity or immunity *ratione personae*.[820] Furthermore, he could not take advantage of the functional immunity of the Mongolian state because "there is no customary international law which affords immunity *ratione materiae* for municipal criminal offences committed in the territory of the forum state".[821]

At a domestic level, the *Khurts Bat* decision is one of the significant cases since *Pinochet (No.3)*. The court held that the immunity *ratione materiae* privilege of Khurts, a senior security officer of the Mongolian government, did not provide a bar to the execution of a EAW issued by a federal German court in respect of the abduction and serious bodily injury of another Mongolian national committed by Khurts in France and Germany.[822]

The *Khurts Bat* decision can be distinguished from the *Arrest Warrant* case which concerned the immunity of high-ranking government official. The British court had to consider the case on the basis of the principle laid down in the *Arrest Warrant* case to determine whether Khurts fell within the group of 'high-ranking' state officials. In the past, English district judges have recognised immunity of ministers of defence[823] and a minister of commerce.[824] In the *Khurts Bat*, District Judge Pratt explained that:

> The function of various Ministers will vary enormously depending upon their sphere of responsibility. I would think it very unlikely that ministerial appointments such as Home Secretary, Employment Minister, Environmental Minister, Culture Media and Sports Minister would automatically acquire a label of State immunity. However, I do believe that the Defence Minister may be a different matter.[825]

The view held by Judge Pratt can also be seen in *Djibouti v France*.[826] This case confirmed that officials holding non-ministerial posts did not enjoy immunity as

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[820] Dinah Shelton, *The Oxford handbook of international human rights law*,(Oxford University Press 2013) 805. Hazel Fox, *The Law of State Immunity*,(3rd edn, Oxford University Press 2013) 568.
[821] *Khurts Bat v Investigating Judge of the Federal Court of Germany* [2011] 3 WLR EWHC 2029 180 ((Admin)), para 101.
[822] ibid; See also: Fox 'The law of state immunity' (n 820) 568); Roger O'Keefe and Christian J. Tams, *The United Nations convention on jurisdictional immunities of states and their property : a commentary*,(Oxford University Press 2013) 224.
[823] Re Mofaz 128 ILR 709.
[824] Re Bo Xilai.
[825] Re Mofaz 712.
[826] *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v France)* [2008] ICJ Reports 177 (ICJ)

officials occupying high-ranking offices of the state.[827] Therefore, Moses LJ found that a non-ministerial high-ranking civil servant fell outside the narrow circle of officials entitled to immunity *ratione personae*.[828] Moses LJ agreed with Franey and said that:

> State officials do not have immunity *ratione materiae* for criminal charges in respect of acts committed on the territory of the forum state, or the territory of a third state, unless that immunity is accorded by a special regime.[829]

The decision in the *Khurts Bat* case by the British court is important because it clarifies the existing law as stipulated by the ICJ in the *Arrest Warrant* case that only serving senior state officials or ministers can enjoy immunity *ratione personae*. The question of what constitutes 'high-ranking' or sufficiently 'senior-ranking' is submitted to be rather subjective. It is a rebuttable assumption to argue that the Head of the Executive Office of National Security of Mongolia is neither a high ranking government official nor a senior civil servant. Nonetheless, the decision of the court has asserted that not all government officials, irrespective of their seniority position, can enjoy immunity *ratione personae* in most cases. The *Khurts Bat* decision further strengthens the law in relation to the exclusivity of the rule on immunity *ratione personae*, that is to say, it is not enjoyed by all serving government officials.

Furthermore, it was explained that Khurts was not considered to be on a special mission in the UK since there was neither evidence of an invitation from the receiving state, nor an acceptance by the sending state, nor an agreed programme of meetings.[830] The British High Court rejected all three grounds for immunity. He was eventually extradited to Germany. *Khurts Bat* was a case which dealt with the customary special missions immunity. It also dealt with the question of whether state officials who have allegedly committed crimes on the territory of a foreign state can benefit from the immunity of their state. This case examined the relevant state practice and found that state officials could not benefit from immunity *ratione materiae* to protect them from the criminal jurisdiction of a foreign court. Therefore,

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[827] ibid, [185]-[186] and [194].
[828] *Khurts Bat v Investigating Judge of the Federal Court of Germany* [2011] 3 WLR EWHC 2029 180 ((Admin)), para 621.
[829] ibid The *Khurts Bat*, [95]. See also: Fox 'The law of state immunity' (n 820) 568.
[830] *Federal Court of Justice Germany v Bat Khurts (City of Westminster Magistrates' Court)* [2011], para 11.

the UK High Court decided that the head of the Mongolian Intelligence Service was not protected by immunity *ratione materiae* either.[831] Moses LJ explained that:

> the question whether Mr Khurts Bat came to the UK on 18 September 2010 on a Special Mission was a question of law for the court to determine but that, in my judgment, was no more than a proper and respectful acknowledgement that the consequences of absence of consent to Mr Khurt's visit as a Special Mission were a matter for the court.[832]

This view is also supported by Special Rapporteur Kolodin of the ILC. Moreover, Moses LJ said that it had not been established that Bat Khurts' visit was a special mission.[833] Moses LJ agreed with the District Judge that Bat Khurts was not immune because much of the evidence on which this relied on was not placed before him.[834] However, it can be submitted that the court ought to have explained in more detail whether a very senior governmental officer would generally enjoy immunity *ratione materiae*. Nonetheless, the decision does not weaken this judgment. One important legal issue from this case is that there is no guarantee that even a very senior government civil servant, such as Bat Khurts, is entitled to immunity *ratione materiae* when entering the territory of a foreign state without consent. It was explained that his job description and his authority, as provided by the government of Mongolia, suggested that his status was as an administrator. Hence, it was nowhere near to the restricted criteria of those associated with high-ranking offices.[835]

As far as immunity is concerned, the High Court stated that:

> It was agreed that whilst not all the rules of customary international law are what might loosely be described as part of the law of England, English courts should apply the rules of customary law relating to immunities and recognise that those rules are a part of or one of the sources of English law.[836]

Furthermore, it has been said that:

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[831] *The Khurts Bat* [83]-[101].
[832] ibid [38].
[833] ibid [45].
[834] ibid [46].
[835] ibid [61].
[836] ibid [22].

> It is for the United Kingdom Government to decide whether to recognise a mission as a Special Mission, just as it is for the Government to decide whether it recognises an individual as a Head of State.[837]

Khurts Bat also raised an interesting point regarding the removal of immunity *ratione materiae* in a so called territorial exception. It has been explained that immunity *ratione materiae* is not enjoyed by a state official who enters the territory of a foreign state without the consent of that state.[838] Moreover, the functional immunity is also not available when the foreign state has no knowledge of the acts and security is breached. The issue that consent is needed when some government officials enter into the territory of another state in order for them to be given immunity *ratione materiae* is arguably a controversial one. It can be submitted that the consent factor will influence and further develop the law relating to immunity privileges. It remains to be seen whether these types of restrictions will generally affect the mobility of some senior or high ranking government officials on overseas visits but it is clear that they will certainly cause tension between states when officials from one state have to disclose their presence every time they visit another state, be it on official or unofficial missions, in order to claim immunity privileges.

It is disputable in this contemporary context whether it is still an area relevant for the implementation of immunity *ratione materiae* for the state concerned to grant immunity *ratione materiae* for government officials when entering another state's territory. This is because the restriction on the immunity *ratione materiae* may affect the diplomatic relationship between the two states and may prevent government officials from carrying out their duties properly. This confirms the view that the scope of application for immunity *ratione materiae* is getting more restricted, just like immunity *ratione personae* whereby only certain senior government officials can enjoy this privilege. It does defeat the purpose of immunity *ratione materiae* which aims to cover the acts of ministers if the acts concerned are carried out on behalf of the government. Nevertheless, this upholds the legal precedent that only a

[837] ibid [34] (Lord Justice Moses). See also para 34 where Brooke LJ referred to the speech of Lord Atkin in the Arantzazu Mendi [1939] AC 256, page 264. Per Lord Atkin: - "…Our Sovereign has to decide whom he will recognise as a fellow Sovereign in the family of States; and the relations of the foreign State with ours in the matter of State immunities must flow from that decision alone".
[838] ibid [90]-[101].

certain group of senior serving government officials may enjoy immunity *ratione personae* as suggested by the ICJ in the *Arrest Warrant* case.[839]

On the other hand, the High Court's judgment did not clarify to say whether Khurts did engage in "foreign affairs" or not.[840] This was argued despite the fact that Khurts might be called a "very senior governmental officer", he was nevertheless not categorised within the exclusive group as laid down under the Arrest Warrant case.[841] Notwithstanding this, the Secretary General of the Mongolian National Security Council, Mr Tsagaandari, said that he had informed Mr Dickson, the Ambassador, that:

> Khurts Bat, Head of the Executive Office, was being sent to London on 13 September, and the purpose of his visit was to meet the Head of the National Security Secretariat of Great Britain so as to exchange views on establishing ties and developing co-operation between the two organisations. Mr Dickson said that he would inform the Foreign and Commonwealth Office about Khurts Bat's visit and gave his full support in helping in arrange the visit.[842]

The *Khurts Bat* case clarified two points. Firstly, it clarified that not all 'senior' government officials are entitled to immunity *ratione personae*. This type of immunity is limited to certain categories of senior state officials as previously held by the ICJ in the *Arrest Warrant* case. The *Khurts Bat* case reaffirms the ICJ's view on the law of immunity. Secondly, it confirms that immunity *ratione materiae* will not be available to those state officials who enter into another state without consent. It creates a new barrier for state officials to claim the functional immunity privileges. Whether this new restriction will cause any diplomatic rows between states will depend on future case law.

5.1.2 *Khaled Nezzar*

The next case concerns the former Algerian Minister of Defence, Khaled Nezzar. On October 2011, Nezzar was stopped and arrested by the Swiss police. He was allegedly responsible for the commission of war crimes during the Algerian internal

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[839] Donald Rothwell, Stuart Kaye and Ruth Davis, *International Law: Cases and Materials with Australian Perspectives*,(Cambridge University Press 2014) 422.; Christian J Tams and James Sloan, *The development of international law by the International Court of Justice*,(Oxford University Press 2013) 119; Fox 'The law of state immunity' (n 820) 559.
[840] Khurts Bat (n) ibid [107].
[841] ibid [108].
[842] ibid [14].

armed conflict.[843] Nezzar was a former general and, in 1988, was the Chief of the Algerian Army. He was later promoted to Chief of Staff and subsequently to Minister of Defence. Two individuals of Algerian origin with refugee status in Switzerland filed criminal complaints against Nezzar, stating that they had been tortured in 1993. Nezzar argued that, as a Minister of Defence, he enjoyed both immunity *ratione personae* and immunity *ratione materiae* for the period between 14 January 1992 and 30 January 1994.

On 1 January 2011, Swiss legislators codified crimes against humanity, war crimes and genocide into their domestic law through the Swiss Criminal Code. However, Nezzar's counsel submitted that these provisions were not applicable to him due to the principle of non-retroactivity in criminal law. The Federal Criminal Court rejected this argument. The defence counsel then argued that under CIL it was necessary for there to be a "strict link" between the accused and the country concerned. The Federal Criminal Court also rejected this argument and took a different approach. It explained that "it is undeniable that there is an explicit trend at the international level to restrict the immunity of a former head of state for crimes contrary to rules of *jus cogens*".[844]

It was also argued that, as a former Minister of Defence of the Republic of Algeria, Nezzar should continue to enjoy immunity privileges from the Swiss authorities for all acts performed in the course of his official duties.[845] This refers to immunity *ratione materiae*. However, on 25 July 2012, the Swiss Federal Criminal Court denied the existence of immunity *ratione materiae* for the former Algerian Minister of Defence accused of war crimes.[846] It is important to note that both Switzerland and Algeria are parties to the Geneva Convention 1949. Therefore, states parties to the Geneva Conventions must investigate and extradite any alleged war crimes perpetrators from their jurisdictions.[847] This means that if a state has information that

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[843] *A (appellant) v Office of the Attorney General of Switzerland* [2012] File No BB.2011.140 (Swiss Federal Criminal Court) This is an unofficial translation version of the case report. The original transcript is in French. See <http://www.trial-ch.org/fileadmin/user_upload/documents/affaires/algeria/Nezzar_Judgm_Eng_translation.pdf >Accessed 22 October 2013.

[844] ibid [5.3.5].

[845] Para E.

[846] *The Khaled Nezzar* case [5.4.3].

[847] See: Article 49 Geneva Convention I; Article 50 Geneva Convention II; Article 129 Geneva Convention III and Article 146 Geneva Convention IV.

a war criminal is present within its territory and jurisdiction, it must investigate the case even when no formal request for extradition has been made. Nezzar could therefore be tried in Switzerland for war crimes.

This decision by the Swiss Court shows the erosion of the doctrine of immunity *ratione materiae*. It strengthens the willingness of domestic courts to abrogate immunity *ratione materiae* as previously shown in *Pinochet (No.3)* and *Khurts Bat*. The Swiss Court's judgment illustrates that domestic courts are beginning to overcome barriers, specifically political ones, to taking perpetrators of international crimes to justice. The Swiss Court justified its decision to remove immunity *ratione materiae* on the fact that both states, Switzerland and Algeria, were signatories to the Geneva Conventions. This fact mirrors the one in *Pinochet (No.3)* where both the UK and Chile are signatories to the CAT. It can be submitted that both the Geneva Conventions and the CAT have shown that they are major international human rights treaties which are able to constrain the application of immunity *ratione materiae* for former heads of state and other senior high ranking government officials at the level of domestic courts.

The decision by the Swiss Court will likely be followed by other domestic courts when the alleged perpetrators of international crimes are found in their domestic jurisdictions. If there is a consistent trend by states to remove residual immunity *ratione materiae*, then it can be submitted that the trend may lead to the crystallisation of the rule of immunity into CIL. Thus, it can be said that the *Nezzar* case further underlines the function of domestic courts to comply with the international standards notwithstanding that they have limited jurisdiction provisions unlike international courts. The latter point will be discussed further in the third section where an analysis will be made of the connection between interpretation by national courts and subsequent enforcement of international laws at the domestic level.

5.1.3 *Hissène Habré*

The third case is that of Hissène Habré. Despite the fact that the case is still ongoing and is awaiting trial by the Extraordinary African Chambers (EAC) set up in Senegal, the outcome of this case is set to provide a further development to the law of head of state immunity. *Pinochet (No.3)* and *Hissène Habré* share some grounds

where the CAT was involved. The findings by the ICJ in *Hissène Habré* have clarified the obligations placed upon states who are signatories to the CAT.[848]

Habré was the President of the Republic of Chad for eight years.[849] Human rights violations began after he took office in 1982.[850] During his presidency, it was alleged that he committed large-scale violations of human rights.[851] These included: arrests of actual or presumed political opponents, detentions without trial or under inhumane conditions, mistreatment, torture, extrajudicial executions and enforced disappearances.[852] His presidency ended in 1990 when he was overthrown by Idriss Déby Itno. Habré subsequently fled to Senegal and has been living in exile there ever since.[853]

The Chadian victims filed a criminal complaint against Habré in January 2000.[854] After examining the case, the senior investigating judge indicted Habré for "having aided or abetted X … in the commission of crimes against humanity and acts of torture and barbarity".[855] Habré then sought to file an appeal at the Chambre d'accusation of the Dakar Court of Appeal for the proceedings against him, arguing that the courts of Senegal had no jurisdiction.[856] The Chamber of the Court of Appeal found that the investigating judge lacked the necessary jurisdiction and annulled the proceedings against Habré.[857] It was explained that the alleged crimes were committed outside the territory of Senegal by a foreign national against foreign nationals and it would involve the exercise of universal jurisdiction. However, the Senegalese Code of Criminal Procedure did not provide such jurisdiction at that time.[858] Therefore, the Senegalese Court of Cassation dismissed an appeal by the civil claims and held that the investigating judge had no jurisdiction.[859] On 19

[848] The significant of the CAT in relation to the Hissene Habre case has been mentioned in Chapter Four. States parties to the CAT are obliged to comply with their treaty obligations. The view by the Committee against Torture also supported this.
[849] *Questions Relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)* [2012] General List No. 144 (International Court of Justice), para 16.
[850] ibid
[851] ibid
[852] ibid
[853] ibid
[854] ibid [17].
[855] ibid
[856] ibid [18].
[857] ibid
[858] ibid
[859] ibid

September 2005, the Belgian investigating judge issued an international warrant for the arrest of Habré.[860] He was indicted as the perpetrator or co-perpetrator of the acts of torture, genocide, crimes against humanity and war crimes.[861] In a judgment of 25 November 2005, the Chambre d'accusation of the Dakar Court of Appeal ruled on Belgium's extradition request, stating that:

> a court of ordinary law [cannot] extend its jurisdiction to matters relating to the investigation or prosecution of a Head of State for acts allegedly committed in the exercise of his functions.[862]

It was suggested that Habré should be given "jurisdictional immunity" up to the point when he ceased to be the President of the Republic. Therefore, the Dakar Court of Appeal could not "adjudicate the lawfulness of [the] proceedings and the validity of the arrest warrant against a Head of State".[863] Senegal then referred the case to the African Union. The African Union's Assembly of Heads of State and Government, by Decision 127 (VII), decided that the case fell "within the competence of the African Union" and ordered Senegal to ensure that Hissène Habré be tried and prosecuted, on behalf of Africa, by a competent Senegalese court for a fair trial.[864]

The report of the African Union-European Union Technical Ad Hoc Expert Group on the Principle of Universal Jurisdiction steered around the tricky issue by simply stating that:

> those national criminal justice authorities considering exercising universal jurisdiction over persons suspected of serious crimes of international concern are legally bound to take into account all the immunities to which foreign state officials may be entitled under international law and are consequently obliged to refrain from prosecuting those officials entitled to such immunities.[865]

As far as the CAT is concerned, Senegal ratified it on 21 August 1986 without reservation. The CAT became binding on it on 26 June 1987, which was the date of its entry into force. Senegal then passed domestic legislation in 1996 which defined torture as a crime under the Senegalese Penal Code.[866] Belgium, on the other hand, ratified the Convention on 25 June 1999, without reservation, and became bound by

[860] ibid [21].
[861] ibid [21].
[862] ibid [22].
[863] ibid [22].
[864] ibid [23].
[865] Council of European Union, Annex to 8672/1/09/09 REV 1 (2009), Recommendation 8, page 42.
[866] The *Belgium v Senegal* Case, [18].

it on 25 July 1999. Therefore, the CAT is weighted in favour of the victims in that case.[867] On 19 May 2006, the Committee against Torture concluded that Senegal had violated Article 5(2) of the CAT by failing to establish its jurisdiction over extraterritorial torture and had also violated Article 7 of the CAT which says that states parties are under an obligation to extradite or prosecute alleged offenders.[868] Due to the relevant legal backing, the victims strongly believed that they could craft an "African Pinochet" out of the case.[869] The *Hissène Habré* case can certainly be compared to the *Pinochet (No.3)* case because, as far as the ICJ was concerned, there was an expectation of the removal of immunity *ratione materiae* in that case. *Pinochet (No.3)* confirms that the law is proceeding in that direction and this precedent is directly relevant to the discussion here because the HL found that the jurisdiction in that case was due to the UK's ratification and implementation of the CAT. Similarly, Senegal has also ratified the CAT and its Article 1 outlaws acts of torture. It can be submitted that if *Pinochet (No.3)* was the first to consider the immunity issue then that acts as confirmation of the trend that courts are much more willing to abrogate immunity *ratione materiae* following its judgment.

The Senegalese Supreme Court consequently dismissed the case in 2001 for lack of jurisdiction over foreign nationals for extraterritorial crimes.[870] Notwithstanding that Senegal has passed the appropriate legislation to comply with the requirements under Article 5 of the CAT, the Court of Appeal still found insufficient jurisdiction provision. It has been suggested that Article 5 of the CAT has two requirements, namely: "jurisdiction to prescribe" and "jurisdiction to adjudicate".[871] The Court of Appeal found that Senegal had met the first jurisdiction criteria but not the second. This led to the CAT provision being inapplicable in the national courts.[872] The Senegalese Supreme Court explained that the law has to be interpreted as requiring a

[867] Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984, Article 1.
[868] The *Belgium v Senegal* Case, [25].
[869] Dustin Sharp, 'Prosecutions, development, and justice: The Trial of Hissene Habre' [2003] 16 Harvard Human Rights Journal 147, 150-161.
[870] The Belgium v Senegal Case, [18]. For background information about this case see generally: *Hissene Habre* [2000] 125 International Law Reports International Law Reports 569 (Court of Appeal of Dakar)
[871] Stephen Marks, 'The Hissene Habre Case: The Law and Politics of universal jurisdiction', in Stephen Macedo (ed), *Universal jurisdiction: National courts and the prosecution of serious crimes under international law* (University of Pennsylvania Press 2004) . 142.
[872] See: Naomi Roht-Arriaza, *The Pinochet effect: transational justice in the age of human rights*,(University of Pennsylvania Press 2005) 183.

second element in order to establish the jurisdiction provision. In other words, the law must say that the relevant domestic tribunal is competent to adjudicate violations of the CAT.[873] Therefore, it has been advocated that further amendment of Article 669 of the Code of Criminal Procedure is needed in order for the universal jurisdiction provision under Article 5 of the CAT to be fully exercisable.[874] The argument that the second requirement under the CAT is needed, as suggested by the Senegalese court, will cause controversy. Since the CAT is an international treaty and Senegal has enacted a domestic law provision bringing the CAT into effect, the second requirement, as put forward by the Senegalese court, creates a conflict between Senegal's legal obligations under the CAT and how the law ought to be carried out. It can be argued that it should not matter whether the second requirement as suggested by the Senegalese court should be met or not. This is because Senegal has signed the CAT and has ratified the treaty, the extensive jurisdiction provision under Article 5 of the CAT should be applied into Senegalese domestic law. One can argue that the jurisdiction provision under Article 5 of the CAT has been intentionally drafted to be a broad provision. Therefore, the additional second requirement as required by the Senegalese court could be in breach of the CAT provision.

Belgium filed a case against Senegal at the ICJ after the Senegalese Supreme Court held that it had no jurisdiction to try Habré. The ICJ heard arguments about the case between 12 to 21 March 2012 about the fate of the former dictator and ruled that a state must inform a foreign court that the acts belong to the state itself. It also ruled that:

> [t]he State which seeks to claim immunity for one of its State organs is expected to notify the authorities of the other State concerned. This would allow the court of the forum State to ensure that it does not fail to respect any entitlement to immunity and might thereby engage the responsibility of that State.[875]

On 20 July 2012, the ICJ ordered Senegal to prosecute Habré "without further delay" if it did not intend to extradite him.[876] The pre-trial investigation is expected to last 15 months and will potentially be followed by a trial in late 2014 or 2015. If Habré is

[873] Marks (n 871) 142.
[874] ibid 142.
[875] Certain Question of Mutual Assitance in Criminal Matters (Djibouti v France), Judgment, 4 June 2009, ICJ Rep. (2008), [196].
[876] The *Belgium v Senegal* case, [121].

eventually found guilty by the EAC then the judgment of that case will add to and support the findings of *Pinochet (No.3)*. It will also suggest that the CAT poses a significant impact on the removal of immunity *ratione materiae* for former heads of state due to the treaty obligations of the state parties the case. If Habré is found guilty, the Chambers could impose a sentence of up to life imprisonment, depending on the circumstances and the gravity of the crimes. They could also order him to pay a fine or forfeit any of the proceeds, property or assets derived directly or indirectly from the crimes.

Some believe that the dismissal of the case was due to political interference by the Senegalese President, Abdoulaye Wade,[877] and that the failure of the *Habré* litigation shows the vulnerabilities of universal jurisdiction as an instrument of accountability. It also shows that an African country is unable to take a lead role in enforcing international law.[878] The trial of Habré will prove to be important especially as a means of showing the rest of the international community that the African nations can operate a fair legal system to deal with immunity of former heads of state and bring the perpetrators of torture to justice. Moreover, if Habré is successfully brought to trial then it would clarify the law as set down by the *Pinochet (No.3)* precedent. The effect of this will crystallise the significance of the CAT, especially Articles 1 and 5 when dealing with removal of immunity for former heads of state in future cases.

As far as the substantive law on the doctrine of the law of immunity is concerned, Habré is no longer Chad's head of state. Therefore, he does not theoretically enjoy immunity *ratione personae* which is only given to serving heads of state and limited senior serving government ministers. It can be recalled that this particular type of immunity is lost once a high ranking government official or head of state leaves office.[879] When the first type of immunity, *ratione personae*, is not available then the only remaining immunity, *ratione materiae*, will inevitably be raised in the defence submission. This is because a senior government official is entitled to this residual

[877] See: Reed Brody, 'The Prosecution of Hissein Habre: An "African Pinochet"' [2001] 35 New England Law Review 321, 327-331.; Tanaz Moghadam, 'Revitalizing Universal Jurisdiction: Lessons from hybrid tribunals applied to the case of Hissene Habre' [2008] 39 Columbia Human Rights Law Review 471, 474.
[878] Moghadam (n 877) 474.
[879] See generally: O'Keefe and Tams (n 822) 83.

type of immunity provided the acts are official and are carried out in the course of official functions. In other words, immunity *ratione materiae* is given according to the "subject-matter" of the acts concerned. Traditionally, the customary rule of immunity *ratione materiae* was used to safeguard the sovereign equality of states by shielding "acts performed by State officials acting in an official capacity" even after they have left office.[880] Moreover, it aims to prevent foreign states from interfering with sovereign prerogatives and functions to call state officials to account for acts performed in their public capacity.[881]

Besides, in the *Arrest Warrant* case, the ICJ clarified that government ministers who had left office would enjoy some immunities given under international law because certain acts would still be covered.[882] It has been argued by some commentators that under CIL there is an exception which permits foreign states from derogating from the immunity *ratione materiae* rule for acts amounting to international crimes.[883] Hence, they argue that this allows states to exercise jurisdiction over the state official who has performed those unlawful acts under his or her official capacity even without the consent of the state that he or she represented.[884] The idea of restricting immunity *ratione materiae* for low-ranking state officials *prima facie* seems logical. Therefore, one can also argue that the same rationale should be applied for the removal of immunities from former heads of state and other government officials.[885]

It has been stated that the functional immunity does not prevent the exercise of jurisdiction by the Belgian courts against the former head of state of Chad. This is because Chad has waived any residual immunity rights for Habré which he would have otherwise enjoyed in respect of international crimes.[886] In *Prosecutor v Blaskic* it was explained that state officials acting in an official capacity:

> are mere instruments of a State and their official action can only be attributed to the State. They cannot be subject of sanctions or penalties for conduct that is not private

[880] Diane Orentlicher, 'Immunities and amnesties', in Leila Nadya Sadat (ed), *Forging a convention for crimes against humanity* (Cambridge University Press 2011) 204.
[881] Paola Gaeta, 'Ratione materiae Immunities of former heads of State and international crimes: The Hissene Habre Case' [2003] 1 Journal of International Criminal Justice 186, 194.
[882] ibid 189.
[883] ibid
[884] ibid
[885] ibid 190.
[886] Rosanne van Alebeek, 'National courts, international crimes and the functional immunity of state officials' [2012] 59 Netherlands International Law Review 5, 10.

> but undertaken on behalf of a State. In other words, State officials cannot suffer the consequences of wrongful acts which are not attributable to them personally but to the State on whose behalf they act: they enjoy so-called "functional immunity.[887]

In addition, the letter by the Minister of Justice of Chad, dated 7 October 2002, also formally and explicitly removed the residual immunity *ratione materiae* claims to which Habré was entitled to.[888] This letter further supported the view that Habré was not entitled to any immunity privileges. The formal removal by Chad strengthens the prosecution's case against the former head of state and shows that perpetrators of acts of torture will not be protected by the rule of immunity. This removal also goes against the majority of national courts' decisions on immunity *ratione materiae*.[889] It can be submitted that, even if Chad had not formally withdrawn Habré's immunity privileges, the CAT should have an impact on the case due to the definition of torture under Article 1 of the CAT. The impact of this is that any acts of torture go against the customary consensus under international law. The judgment by the ICJ in *Habré* further supports the views in *Pinochet (No.3),* in particular, of the significance of the CAT as an international treaty to safeguard the prohibition of torture.

In the same way as the Genocide Convention,[890] under Article 7 the CAT requires states parties to prosecute or extradite those suspected of such crimes.[891][892] It has been said that judges are usually reluctant to exercise universal jurisdiction due to its political implications and the "general discomfort" felt because of the lack of a connection between the forum state and the accused.[893] More importantly, there is a reluctance to indict high-ranking leaders from the most powerful nations.[894] Nonetheless, it can be argued that the danger of causing "general discomfort" should

[887] Prosecutor v Blaskic, Judgment on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997, [38] (emphasis added).; Joanne Foakes, *The position of heads of state and senior officials in international law*,(Oxford University Press 2014) 137; Matthias Kloth, *Immunities of the right of access to court under Article 6 of the European Convention on Human Rights*,(Nijhoff 2010) 125.
[888] The *Belgium v Senegal* case, [20].
[889] Erika de Wet and Jure Vidmar, *Hierarchy in international law: The Place of human rights*,(Oxford University Press 2012) 139.
[890] The Convention on the Prevention and Punishment of the Crime of Genocide 1948. Luc Reydams, *Universal jurisdiction : international and municipal legal perspectives*,(Oxford University Press 2002)
[891] ibid 62-68.
[892] Moghadam (n 877) 477. See also: Chandra Sriram, 'Revolutions in accountability: New approaches to past abuses' [2003] 19 The American University International Law Review 301, 316.
[893] Anne-Marie Slaughter, 'Defining the limits: Universal jurisdiction and national courts', in Stephen Macedo (ed), *Universal jurisdiction: national courts and the prosecution of serious crimes under international law* (University of Pennsylvania Press 2004) 173.
[894] Moghadam (n 877) 488.

not be of concern in *Habré* because Article 5 of the CAT obligates member states to establish jurisdiction over the offences of torture. Therefore, this extensive jurisdiction provision under Article 5 of the CAT corresponds with the concept of universal jurisdiction under international criminal law. The concept of universal jurisdiction is based on the idea that certain crimes are so serious and contrary to universally recognised norms that all states have an obligation to prosecute the perpetrators.[895]

Notwithstanding the sensitivity of prosecuting and trying heads of state and other senior high-ranking government officials, it can be submitted that this issue would not cause any problems when the CAT, in particular Articles 1 and 5, has become CIL. This is because when these two Articles of the CAT are considered CIL then they will be secured as universal norms. As a result, the perception of causing "general discomfort" would not have been *ab initio* an issue. Moreover, most of the countries are signatories to the CAT and other international human rights conventions. There are 80 signatories and 154 parties to the CAT. Hence, it will be easier for countries to work together on this common ground for the removal of immunity *ratione materiae* as shown in *Pinochet (No.3)*.

Although the main focus of this thesis is on how the national courts have dealt with heads of state who have allegedly committed acts of torture and how they have adjudicated on the immunity issue, it can be said that international courts and *ad hoc* tribunals may influence the judgments of national courts because the relationship between international courts and national courts is becoming increasingly interconnected. It will be seen that the function of international courts can provide standards for developing international law especially in relation to the law of head of state immunity. The following section will explore this argument in more detail.

5.2 Comparative Approach to Immunity Before International Courts

The International Criminal Court (hereafter the 'ICC') is the first permanent international criminal court established to end impunity for the perpetrators of the most serious crimes.[896] The ICC requires states to remove criminal immunity under

[895] ibid 476.

[896] Rome Statute of the International Criminal Court 1998, Preambular paragraph 4.' David Armstrong and Florencia Montal, 'The politics of international criminal justice', in Bruce A Arrigo and Heather Y Bersot (ed), *The Routledge handbook of international crime and justice studies* 2013)

national law from government officials.[897] Therefore, this view expresses the determination to put an end to impunity and "thus to contribute to the prevention of such crimes".[898] Article 27(1) of the Rome Statute states that:

> This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence.

Therefore, the ICC embodies the general consensus in the international community of the urgent need to prosecute acts of genocide, crimes against humanity and war crimes.[899] However, it is important to be cautious and state that there are restrictions with the ICC when dealing with case admissibility.[900] This is because the ICC is set up to "be complementary to national criminal jurisdictions".[901] In other words, the burden to hear cases still falls on the national justice systems. As a result, the ICC is the last resort for hearing cases when states fail to take necessary investigations and prosecutions. Thus, this puts pressure on states to improve their national investigation and prosecution systems. When states hear cases involving incumbent or former heads of state who have allegedly committed acts of torture, the previous decisions by the ICC or other international courts and *ad hoc* tribunals provide guidelines on the adjudication of such cases. In the past, national courts have referred to past judgments of international courts and *ad hoc* tribunals when reaching their judgments. An example of this is the judgment of the ICTY in *Blaskic*, where it was firmly asserted that functional immunity "from national or international jurisdiction was not available in the case of a prosecution for international

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134; Gloria J Browne-Marshall, 'Treaties and international law', in Mangai Natarajan (ed), *International crime and justice* (Cambridge University Press 2011) 348.

[897] Rome Statute of the International Criminal Court 1998, , Preambular paragraph 5. See also: Lijun Yang, 'On the principle of complementarity in the Rome Statute of the International Criminal Court' [2005] 4 Chinese Journal of International Law 121, 129.

[898] The Rome Statute 1998, Preambular paragraph 5.

[899] ibid, Arts 5-8.

[900] The complementary nature of the ICC is beyond the scope of this thesis. This thesis only touches on the possible effect that the ICC has on national courts which may be relied upon on their decision making concerning trials of heads of state.

[901] The Rome Statute 1998, Article 1. Nidal Nabil Jurdi, *The International Criminal Court and National Courts: A Contentious relationship*,(Ashgate 2011) 9;Teresa Maria Moschetta, 'Cooperation between the European Union and the International Criminal Court: Legal bases and opportunities for implementation ', in Mauro Politi and Federica Gioia (ed), *The International Criminal Court and National Jurisdiction* (Ashgate 2008) 126.

crimes".[902] The *Pinochet (No.3)* and the *Khurts Bat* cases best highlight this point. Therefore, it can be submitted that due to the influence of decisions by international courts, domestic courts have been encouraged to develop the international law norms at national levels when deciding cases involving heads of state or other senior government officials that involve immunity issues in order to create a universal standard. For example, if state parties to the CAT follow past precedents of the international courts and agree on the definition of torture under Article 1 of the CAT and the obligation to establish jurisdictions over the crimes of torture as set down in Article 5 of the CAT, this will further strengthen the evidence for the intention to create CIL for both of the CAT Articles.

Nevertheless, it has been identified that immunities attached to the official capacity of a person do not restrict the ICC from exercising its jurisdiction. The ICC has jurisdiction over crimes such as war crimes.[903] However, one of the disadvantages of the Rome Statute is that it does not make this clear with regard to immunity *ratione materiae*. Having said this, jurisdiction and immunity are two separate issues. Jurisdictional immunity involves a procedural bar; while immunity from criminal responsibility is substantive in nature.[904] In the *Al-Adsani* case, the ECtHR held that "the grant of immunity is to be seen not as qualifying a substantive right but as a procedural bar on the national courts' power to determine the right".[905] Similarly, the ICJ in the *Arrest Warrant* case found that:

> immunity from jurisdiction enjoyed by incumbent Ministers for Foreign Affairs does not mean that they may enjoy impunity in respect of any crimes that they may have committed, irrespective of their gravity. Immunity from criminal jurisdiction and individual criminal responsibility are quite separate concepts. While jurisdictional immunity is procedural in nature, criminal responsibility is a question of substantive law. Jurisdictional immunity may well bar criminal prosecution for a

[902] Prosecutor v Blaskic, Case no IT-95-14, Appeals Chamber, 29 October 1997, [41].; Carrie McDougall, *The crime of aggression under the Rome Statute of the International Criminal Court*,(Cambridge University Press 2013) 323 ;Philippa Webb, 'Human rights and the immunities of state officials', in Erika De Wet (ed), *Hierarchy in international law: The place of human rights* (Oxford University Press 2012) 139.

[903] Elies van Sliedregt and Desislava Stoitchkova, 'International Criminal Law', in Sarah Joseph and Adam McBeth (ed), *Research handbook on International Human Rights Law* 2010) 257.

[904] Roger O'Keefe, 'Jurisdictional Immunities', in Christian J Tams and James Sloan (ed), *The development of international law by the International Court of Justice* (Oxford University Press 2013) 109.; Fox 'The law of state immunity' (n 820) 396.

[905] The *Al-Adsani* case, [48].; Alebeek (n 886) 383-384. See also: *Fogarty v United Kingdom* [2001] (European Court of Human Rights) [25].

> certain period or for certain offences: it cannot exonerate the person to whom it applies from all criminal responsibility.[906]

Hence, even if the ICC has jurisdiction to try perpetrators of serious crimes such as genocide, it still faces a restriction when it comes to immunity *ratione materiae* for former heads of state and other senior government officials. This is because having the necessary jurisdiction to try someone does not necessarily mean immunity *ratione materiae* may be removed from former heads of state or other high ranking government officials as they are separate issues. Nevertheless, as far as the international courts and the *ad hoc* tribunals are concerned, there is a tendency towards the removal of immunity *ratione materiae*. In particular, there is an explicit trend at the international level that the immunity for former heads of state is restricted especially for crimes contrary to rules of *jus cogens*.[907] The establishment of international tribunals, such as the tribunals for the Former Yugoslavia and Rwanda, are examples of the above trend against the prohibition of torture. Former ICTY Judge Cassese has said that:

> It would seem that the Nuremberg model still has much merit. It is logical and consistent for very serious international crimes allegedly perpetrated by leaders to be adjudicated by an international court offering the advantages that will be outlined.[908]

Therefore, previous precedents set by the international courts can help national courts to develop international law with regards to the prohibition of torture and to enforce extensive jurisdiction provisions under the CAT to try perpetrators of acts of torture, especially those involving senior government officials. This will encourage the formation of CIL for Articles 1 and 5 of the CAT. In support of this view, the former ICC President has said that the "Court is also envisaged to play a part in

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[906] *Democratic Republic of Congo v Belgium (Arrest Warrant Case)* [2000] Rep 3 Judge Van den Wyngaert 137 (ICJ) para 60.; Antonio Cassese, Guido Acquaviva and Mary Fan Alex Whiting, *International Criminal Law: Cases & Commentary* (Oxford University Press 2011) 88; Yves Beigbeder, *International Justice against impunity: Progress and new challenges*,(Martinus Nijhoff Publishers 2005) 218.

[907] *A (appellant) v Office of the Attorney General of Switzerland* [2012] File No BB.2011.140 (Swiss Federal Criminal Court), para 5.3.5.

[908] Antonio Cassese, *International Criminal Law*,(Oxford University Press 2003) 354-355. Cassesse continued: "Perhaps a better path for the future might lie in both enhancing the role of national courts for major cases of criminality, and, with regard to other cases, in combining the action of those courts with that not only of national courts but also of other bodies charged with "restorative justice, such as truth and reconciliation commissions". ;Jo Stigen, *The relationship between the International Criminal Court and national jurisdictions: The principle of complementarity*,(Martinus Nijhoff Publishers 2008) 21.

guaranteeing respect for and enforcement of international law".[909] It can be submitted that the progression of international law through international courts provides an incentive for domestic courts to comply with the international consensus when enforcing the CAT and removing immunity *ratione materiae* from high ranking government officials.

From another perspective, in Europe, Article 3 of the European Convention on Human Rights (hereafter 'ECvHR') also focuses on the prohibition of torture amongst other issues.[910] Notwithstanding the fact that this Convention technically only applies to European member states, it may still have an impact in providing a wider picture as to the general norm on the matter regarding the definition of torture (Article 1 CAT) and jurisdiction (Article 5 CAT). The wording of Article 3 ECvHR is relatively short on first inspection. Although the Article itself is very short and does not offer an explanation as to what constitutes torture, it can be suggested that it still provides an implicit indication that it could be a wider legal obligation for other states. This is due to the fact that the ECvHR itself is drafted in terms of the Universal Declaration of Human Rights (hereafter 'UDHR') which was proclaimed by the UNGA on 10th December 1948 as mentioned in its Preamble. The wording of Article 5 of the UDHR has been reproduced in the ECvHR.[911] Therefore, the point regarding the scope of universalism of the ECvHR can be rebutted. It shows that the definition of torture is much wider and to a certain extent, has provided the framework for the drafters of the CAT to expand on the meaning of torture.

Furthermore, the jurisprudence of other courts, in not applying the CAT, may provide a consensus on the definition of torture under the CAT. This is because the decisions by the international tribunals may have been influenced by the CAT. Article 3 of the ECvHR mentioned earlier best illustrates this point. The *ad hoc* tribunals have described the definition of torture under Article 1 of the CAT as a

[909] Address to the United Nations General Assembly by Philippe Kirsch, President of the International Criminal Court, 8 November 2005, 3. http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/2005/Pages/icc%20president%20%20judge%20philippe%20kirsch%20%20addresses%20the%20un%20general%20assembly.aspx Accessed on 18 August 2014.

[910] European Convention on Human Rights 1950, Art 3: No one shall be subjected to torture or to inhuman or degrading treatment or punishment. The Convention itself covers a variety of issues relating to human rights in general.

[911] United Nations, 'Universal Declaration of Human Rights', (1948) , Art 5 states that: No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.

reflection of CIL.[912] In the *Furundzija* case, the Appeal Chamber said that, "there is now general acceptance of the main elements contained in the definition set out in Article 1 of the Torture Convention".[913] A similar view about the customary nature of the definition of torture can also be seen in the *Celebici* case. The Trial Chamber explained in that case that:

> The same international human rights and United Nations instruments that contain the prohibition against torture, also proscribe inhuman treatment. On the strength of this almost universal condemnation of the practice of inhuman treatment, it can be said that its prohibition is a norm of customary international law.[914]

Therefore, the Trial Chamber clarified in the *Celebici* case that the criminal nature of torture, both under customary and conventional law, was indisputable.[915] Besides, it was maintained that the prohibition of torture could be found in most human rights instruments.[916] These have included: the UDHR, the ICCPR and the ECvHR.[917] In the *Celebici* case, the Trial Chamber balanced the definitions of the elements of torture contained in UNGA's Declaration of Torture, the CAT and the Inter-American Convention on Human Rights.[918] The Trial Chamber explained that:

> It may, therefore, be said that the definition of torture contained in the Torture Convention includes the definitions contained in both the Declaration on Torture and the Inter-American Convention and thus reflects a consensus which the Trial Chamber considers to be representative of customary international law.[919]

In other words, the Trial Chamber concluded that, based on the consensus of *opinio juris*, the definition of torture under Article 1 of the CAT was a reflection of CIL. It is important to note that the Trial Chamber reached such a finding purely on the contents of the appropriate international instruments mentioned earlier.

Similarly, in the *Furundzija* case the Trial Chamber maintained that the prohibition of torture had crystallised into CIL due to the fact that it echoed various international

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[912] *Prosecutor v Anto Furundija (IT-98-17/1-A)* [21 July 2000] (Appeal Chamber ICTY), para 111.
[913] ibid See also: The *Furundzija* case, [161]. ; M Delmas Marty, 'Comparative criminal law as a necessary tool for the application of international criminal law', in Antonio Cassese (ed), *The Oxford Companion to International Criminal Justice* 2009) 100 ;Knut Dormann, *Elements of war crimes under the Rome Statute of the International Criminal Court*,(Cambridge University Press 2003) 48
[914] *Prosecutor v Delalic, Mucic, Zdrako; Delic, Hazim and Landzo (Celebici case)* [1998] Trial Chamber Judgment, Case No IT-96-21-T (ICTY), [517].
[915] ibid [452]
[916] ibid
[917] ibid [452]-[453].
[918] ibid [456]-[458].
[919] ibid [459].

instruments.[920] The Trial Chamber based its decision on the large amount of evidence of ratification of those international legal instruments.[921] To illustrate this, the Trial Chamber referred to the judgment of the *Nicaragua* case where it affirmed that Article 3 of the Geneva Convention contained the "corpus of customary international law … applicable both in international and internal armed conflicts".[922] Thus, there was general consensus that the prohibition of torture was now part of CIL in an 'incontrovertible' way.[923] The Chamber also added that states had, under international human rights conventions, the obligation to punish individuals for the perpetration of acts of torture.[924] This arguably related to the universal jurisdiction provision contained under Article 5 of the CAT. Further, the Trial Chamber in the *Furundzija* case recognised that the definition of torture under Article 1 of the CAT corresponded with the definition given under the UNGA's Declaration on Torture.[925] The same definition can also be found in the Inter-American Declaration on Human Rights, which has been applied by several international human rights bodies.[926] It has also been argued that the relevant *opinio juris* was achieved through the adoption of the definition of torture in the UNGA Declaration on Torture.[927] Hence, it can be submitted that the customary nature of the definitions of torture under the ECvHR, the ICTY and the UNGA Resolutions coincide to some considerable degree with the CAT. All this seems to hint at the general consensus from the evidence of Article 1 of the CAT in favour of a customary definition of torture.

In *Prosecutor v Dragoljub Kunarac* (hereafter '*Kunarac*' case), the Trial Chamber questioned the meaning of the prohibition of torture as stated in various international human rights instruments.[928] In other words, it doubted that those legal instruments mirrored the definition of the crime of torture applicable under international criminal law.[929] The Trial Chamber in *Kunarac* maintained that the decisions in *Furundzija*

[920] The *Furundzija* case, [137].
[921] ibid [138].
[922] ibid
[923] ibid [139]
[924] ibid [145]
[925] ibid [111].
[926] ibid [160].
[927] Birgit Schlutter, *Developments in Customary International law: Theory and the practice of the International Court of Justice and the International Ad Hoc Criminal Tribunals for Rwanda and Yugoslavia*,(Martinus Nijhoff Publishers 2010) 210.
[928] *Prosecutor v Dragoljub Kunarac* [2001] Case No IT-96-23--T& IT - 96-23/1- T (ICTY Trial Chamber Judgment), para 470.
[929] ibid

and *Celebici* wrongly referred to Article 1 of the CAT for the definition of torture as the relevant customary law definition of the crime.[930] The Tribunal argued that the definition of torture under Article 1 of the CAT was intended to apply mainly at an inter-state level.[931] As a result, it was suggested that the definition of torture could only be used "as an interpretation aid" in general.[932] This meant that its usage was rather limited for a definition of torture in international humanitarian law.[933] The decision in *Kunarac* illustrated that if the definition of torture was obtained through human rights law alone, then it may not be said to be representative of the "universal" application of the principles.[934] Despite the fact that the *Kunarac* case suggested that the definition of torture could only be used in a limited context, this assumption can be rebutted. This is because the general definition of torture has been widely accepted by the international community with the consensus that the violation of torture should be condemned. This view can be supported by the fact that there is a rich history to the prohibition of torture as indicated by various UNGA Resolutions. It can be submitted that, due to the nature of the criminality of the acts of torture, Article 1 of the CAT will arguably become CIL as the treaty itself has achieved more than half of its ratifications.[935] This reflects the universal consensus on the issue of the prohibition of torture. Higgins, for example, has argued that the issue of the prohibition of torture would not lose its customary nature despite the fact that the majority of states did not engage in contrary practice and withdraw their *opinio juris*.[936]

The repercussions of decisions of international courts together with *ad hoc* tribunals and how they affect national courts have been explored. The next section evaluates the role of domestic courts in interpreting international laws. The discussion will provide the counter-argument, that domestic courts can also play an important role in the development of international law. It will be seen that the decisions by domestic courts can amount to a strong indication for the argument supporting the view on the removal of *immunity ratione materiae*.

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[930] ibid [473]
[931] ibid [482]
[932] ibid
[933] ibid
[934] Schlutter (n 888) 213.
[935] See: < http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-9&chapter=4&lang=en> Accessed 28 December 2012.
[936] Rosalyn Higgins, *Problems and process : international law and how we use it*,(Clarendon Press 1994) 22.

5.3 The Effect of National Courts on Interpreting International Laws

One of the ways of confirming that Articles 1 and 5 of the CAT have become CIL is through a discussion of the role of national courts in interpreting international law. It has been suggested that domestic courts play an important function in the international legal order.[937] This is a proposal as to whether domestic courts are given authority over an international judicial function under international law.[938] It also explores whether domestic courts have the power to assume and exercise that function[939] because the distinctions between international and domestic norms have become blurred.[940] Domestic courts apply international law in a variety of cases.[941] Many international norms are either outward-looking or inward-looking.[942] The inward-looking norms are norms that seek to target the conduct of states within their domestic jurisdictions.[943] In other words, it imposes obligations on states to take certain measures in their domestic jurisdiction, in particular, obligations on their executives who have both legislative and executive functions.[944] Typical examples of areas involved include international criminal law, international humanitarian law and international human rights law.[945]

International norms may have an impact on the domestic legal system.[946] Thus, it is important to establish whether international law is complied with appropriately under domestic courts.[947] A domestic decision following the interpretation or application of an international norm can be seen as a form of enforcement of international law.[948] This is so even if it is simply declaratory.[949] There are ways in which domestic courts enforce international norms notwithstanding that they do not explicitly refer to

[937] Antonios Tzanakopoulos, 'Domestic courts in international law: the international judicial function of national courts' [2011] 34 Loyola of Los Angeles international and comparative law review 133, 134.
[938] ibid, 134.
[939] ibid
[940] ibid, 137
[941] ibid
[942] ibid, 139.
[943] Ibid 138
[944] Antonios Tzanakopoulos, 'Domestic courts in international law: the international judicial function of national courts' [2011] 34 Loyola of Los Angeles international and comparative law review 133, , 140.
[945] ibid, 139.
[946] ibid,142.
[947] ibid, 144.
[948] ibid, 146.
[949] ibid

international law.[950] These include: applying a domestic norm adopted to give effect to an international obligation; interpreting a domestic norm in harmony with an international obligation; and enforcing a domestic rule which has a parallel existence in international law.[951] On the other hand, certain international rules are incorporated immediately, such as: customary norms, international human rights norms, and ratification of international treaties.[952]

One example is the compliance by the signatory states to the CAT to implement the treaty provisions into their domestic laws. It can be suggested that if states parties to the CAT apply or interpret the definition of torture under Article 1 of the CAT and the jurisdiction provision under Article 5 of the CAT into the domestic context to give effect to an international obligation, then this reflects a general acceptance of those international norms. In other words, it echoes the general consensus of the international community on the definition of torture and the universal jurisdiction provision associated under those two CAT articles. For instance, it has been said that crimes against international law do not qualify as official acts for the purposes of the application of immunity *ratione materiae*. This include the reliance on an 'artificial' distinction between the official nature of the act of torture, as defined in the CAT, and the official nature required for qualification of the acts under the functional immunity rule.[953] In the *Pinochet (No.3)* case, Lord Hope said that "the sovereign or governmental acts of one state are not matters upon which the courts of other states will adjudicate".[954] On the other hand, Lord Millett considered the issue to be one relating to the scope of state immunity *ratione materiae*. He described it as:

> a subject matter immunity. It operates to prevent the official and governmental acts of one state from being called into question in proceedings before the courts of another, and only incidentally, confers immunity on the individual.[955]

Moreover, Barker argues that "to deny the official character of such acts would be to remove any liability which the State might have under both international law and

[950] ibid, 147.
[951] ibid
[952] ibid, 142-143.
[953] Alebeek (n 886) 23.
[954] *R v Bow Street Metropolitan Stipendiary Magistrate and others, ex parte Pinochet Ugarte* [1999] 1 ALL ER All England Report 577, para 146.
[955] ibid [171].; Foakes (n 887) 137.

municipal law for the acts of its officials".[956] The *Pinochet (No.3)* case showed that the Law Lords interpreted and brought into effect the purpose of the CAT into the domestic court. One could argue that the judges in the *Pinochet (No.3)* case had to deal with specific legal challenges of proceedings involving former heads of state being brought at the domestic court level. In that case, the Law Lords interpreted international law by saying that all parties to the proceedings were signatories to the CAT, rather than relying on the more uncertain approach of deciding the immunity issue based on the traditional CIL. It can be argued that national courts are in the best position to adjudicate cases involving incumbent or former heads of state and other senior government officials. National courts are usually the starting point of legal proceedings. One can argue that it is better for national courts to decide on the immunity issue because most states are signatories to major international treaties. Those treaties create platforms for domestic courts to interpret international laws at a domestic level and subsequently restrict immunity *ratione materiae* for cases involving alleged acts of torture. Moreover, another advantage of domestic courts deciding cases involving immunity *ratione materiae* is that domestic courts' judgments, which have been created by state organs, can amount to state practice. In addition, the role of domestic courts in interpreting international law is that they can bring the views of international and national courts into the same uniform line, with both shaping the law involving immunity cases.

Another point is that international law questions can be raised and answered at the domestic court level.[957] This gives domestic courts an international judicial function as part of their judicial function to adjudicate disputes and this can subsequently develop the law.[958] An example of this can be seen in *Pinochet (No.3)* and *Khurts Bat*. In the *Khurts Bat*, the HL played a role in expanding the law on the question of whether senior government civil servants could also be entitled to immunity *ratione personae* and immunity *ratione materiae*. It can be said that the HL has developed

[956] Craig Barker, 'The future of former head of state immunity after ex parte Pinochet' [1999] 48 International and Comparative Law Quarterly 937, 943. Cf: Steffen Wirth, 'Immunity for Core crimes? The ICJ's judgment on universal jurisdiction' [2002] 16 Leiden Journal of International Law 491, 891.; Marina Spinedi, 'State responsibility v individual responsibility for international crimes: tertium non datur' [2002] 13 European Journal of International Law 895, 898-899.; David S. Koller, 'Immunities of foreign ministers: Paragraph 61 of the Yerodia Judgment as it pertains to the Security Council and the International Criminal Court' [2004] 20 American University International Law Review 7, 29.
[957] Tzanakopoulos (n 937) 167.
[958] ibid 167.

the criteria on the question of which categories of senior government officials are entitled to the immunity privileges. Therefore, the judgment in the *Khurts Bat* case expanded on the existing criteria as laid down by the ICJ in the *Arrest Warrant* case. One can argue that the domestic courts have provided clarification to existing laws if needed and the law has expanded accordingly. *Khurts Bat* is one example of this.

Subsequent practice has shown that the view that national courts would increasingly provide a forum for the prosecution of foreign state officials accused of committing international crimes seem optimistic.[959] Van Alebeek suggests that national courts around the world have taken different approaches in comparable cases.[960] Nevertheless, in the *Pinochet (No.3)* case the law relating to head of state immunity has been explored and developed especially in relation to the effect of the CAT to immunity *ratione materiae* for former heads of state. The finding in that case was followed by other cases in the UK, such as the *Khurts Bat* case where the courts came to the conclusion that no immunity *ratione materiae* was available to a senior civil servant. It showed that domestic courts could play a role in furthering the law of immunity *ratione materiae* which related to international law matters.

However, states usually interpret and apply international law "at their own risk".[961] Hence, it is inevitable that their interpretation and application will be challenged.[962] Despite some of the objections which may occur, it can be submitted that provided there is a steady trend, for example, on establishing extensive jurisdiction provision on the offences of torture involving former heads of state or high ranking government officials, then the view of domestic law will prove on the increasing incentive to remove and restrict on *immunity ratione materiae.* The long term effect of this is that new CIL can be formed as a result. Therefore, the domestic courts' decisions can produce both state practice and *opinio juris,* which in turn can create and contribute to the formation of customary norms.[963] This view is supported by the

[959] Alebeek (n 886) 6.
[960] ibid 6.
[961] Alexander Orakhelashvili, *Peremptory norms in international law*,(Oxford University Press 2006) 471.
[962] Tzanakopoulos (n 937) 150.
[963] Hersch Lauterpacht, 'Decisions of municipal courts as a source of international law' [1929] British Yearbook of International Law 65, 85.

ICJ in the *Arrest Warrant* case where it was said that domestic courts could develop the law of immunity through state practices.[964]

The role of the ICC[965] under the Rome Statute is to enforce international criminal law. Under international criminal law, there is an obligation to extradite or prosecute perpetrators of crimes against humanity. The same principle also applies at a domestic level. Some believe, based on this requirement, that international crimes are best dealt with locally - especially if the state concerned is directly affected.[966] In terms of the implementation of Articles 1 and 5 of the CAT, domestic courts of the signatory states have a duty to ensure that the treaty provisions are being ratified and properly implemented. This ensures that the relevant future state practices mirror the international law standards. When the state practices by domestic states are consistent with international norms, *opinio juris* can be assumed due to the fact that states are all united on the general consensus on the prohibition of torture and none provide a safe haven for torture perpetrators. Therefore, this argument offers a strong ground for the proposition that Articles 1 and 5 of the CAT may become CIL through the judgments of domestic courts.

From another angle, there has been a suggestion that domestic court decisions can be considered to be 'judicial decisions' under Article 38(1)(d) of the ICJ Statute.[967] One of the views that has been put forward is that the interpretation by courts constitutes the application of international rule.[968] This is because domestic courts are said to be 'guardian's of the law for both states and the international community.[969] Domestic courts are, therefore, 'agents' of international law development under the supervision of the international courts.[970] If Articles 1 and 5 of the CAT have reached customary law status, then the decisions by domestic courts may fall under the 'judicial decisions' under Article 38(1)(d) of the ICJ Statute. As domestic courts have such

[964] See: The *Arrest Warrant* case, [58]..
[965] See: The Rome Statute 1998, Article 17.
[966] Stigen (n 908) 20.
[967] Antonios Tzanakopoulos, 'Domestic judicial law-making', in Cahterine Brolmann and Yannick Radi (ed), *Research handbook on the theory and practice of international law-making* (Edward Elgar 2013) (forthcoming). See also: Legal Research Paper series, Paper No 75/2013 University of Oxford, 9.
[968] ibid 10.
[969] Yuval Shany, 'No longer a weak department of power? Reflections on the emergence of a new international judiciary' [2009] 20 European Journal of International Law 73, 74-75.
[970] Antonios Tzanakopoulos, (2013), *Domestic Judicial Law-Making*, University of Oxford, 18. Available at http://ssrn.com/abstract=2295410> Accessed on 22 October 2013.

'guardian' roles for interpreting law, the prohibition and eradication of the acts of torture under CAT, for example, should be reflected in the views by domestic courts. The impact of this is that Articles 1 and 5 of the CAT increasingly show signs of becoming CIL especially it comes from a politically and judicially stable states. Nevertheless, one should be cautious as any domestic court decisions that exercise an international judicial function can be overruled by the agreement of other states.[971]

Conclusion

This chapter has examined the development of case law since *Pinochet (No.3)*. The three cases discussed: *Khurts Bat*, *Khaled Nezzar* and *Hissène Habré* have been explored in detail. The significance of these cases is that they provide a clearer understanding of the position of the law relating to head of state immunity post-*Pinochet (No.3)*. The *Khurts Bat* judgment expanded the law as laid down by the ICJ in the *Arrest Warrant* case. It has been made clear that not all 'senior' government officials are entitled to immunity *ratione personae* and immunity *ratione materiae*.[972] The *Khurts Bat* case showed that senior civil servants were not covered by the immunity privileges. Moreover, the court noted that in order to claim the immunity privileges, states must disclose their officials that are present in another state. *Khaled Nezzar* was another case whereby a domestic court refused immunity *ratione materiae* for a former Minister of Defence.[973] Both of these cases upheld the view previously held by the *Pinochet (No.3)* case that former heads of state are not entitled to the residual functional immunity when there were allegations of torture.[974] Comparisons can be drawn between *Hissène Habré* and *Pinochet (No.3)* as all parties were signatories to the CAT. The difference between the two cases is that one was dealt with by a domestic court and the other by the ICJ. It is anticipated that Habré will be convicted when the trial proceeds at the EAC which has been specially set up in Senegal for the hearing. The impact of the EAC decision will be to confirm the previous judgment held by the HL in the *Pinochet (No.3)* case.

[971] Tzanakopoulos (n 937) 163.
[972] Foakes (n 887) 26-27. Fox 'The law of state immunity' (n 820) 568; Shelton (n 820) 805.
[973] Foakes (n 887) 130.
[974] Reed Brody and Michael Ratner, *The Pinochet papers: The case of Augusto Pinochet in Spain and Britain*,(Kluwer Law International 2000) 334

It has been explained that based on the examination of national and international courts after *Pinochet (No.3),* there is a clear trend towards the abrogation of immunity *ratione materiae* for former heads of state. International courts are said to have influenced national courts' decision making regarding international law matters. For example, in the *Khurts Bat* case, the HL illustrated that not all senior government officials were entitled to immunity *ratione materiae.* This judgment reinforced the *Arrest Warrant* case held by the ICJ that only a strict category of senior government officials can enjoy residual immunity *ratione materiae.* The development of international law by the international courts has created guidelines for national courts when deciding cases involving the immunity rights of former heads of state or other senior government officials. The Swiss Court's judgment in the *Khaled Nezzar* case shows that domestic courts are more willing to restrict immunity *ratione materiae* for a former Minister of Defence due to alleged violations of international crimes such as torture.

As far as the influence of international courts and *ad hoc* tribunals are concerned, various jurisprudence have shown that they corresponded in favour of a customary definition of torture under Article 1 of CAT as well as the extensive jurisdiction provision under Article 5 of the CAT. These findings by the international courts also support those contained under various UNGA resolutions shown in Chapter Four earlier. Therefore, the combination of the evidence of UNGA resolutions which can be supported by jurisprudence of international tribunals further reinforced the claim that there is a strong indication that Articles 1 and 5 of the CAT have become CIL despite the lack of state practice requirement.

On the other hand, national courts also have a role to play in interpreting international law, which can eventually lead to the advancement of international law.[975] This is because the decisions by domestic courts can contribute to the view of the restriction of *immunity ratione materiae*. The effect of this is that, if there are consistent and sufficient evidence of a general consensus, there is a strong presumption that it will become a new CIL. The cases discussed earlier in this chapter have shown that domestic courts are increasingly more willing to interpret the law to comply with the general consensus of international law. For example, in

[975] Tzanakopoulos 'Domestic courts in internaitonla law' (n 937) 146.

the *Khaled Nezzar* case the Swiss Court was more prepared to interpret the law to mean that the former Minister of Defence was not entitled to immunity *ratione materiae*, despite the fact that he had previously held a senior ministerial position.[976] It is not only the case that international courts have a role to play in international law matters but it can also be submitted that domestic courts play an important role in the interpretation and development of international law.[977] As a result of this, domestic courts can assist in the formation of new CIL by handling down decisions that comply with the general consensus of international norms. Finally, one can argue that both international and domestic courts complement each other when it comes to the application of international law. This is especially useful in the argument for the formation of new CIL, such as those of Articles 1 and 5 of the CAT.

[976] Foakes (n 887) 130.
[977] Tzanakopoulos 'Domestic courts in international law' (n 937) 134.

Conclusion

The main aim of this thesis was to examine whether the definition of torture and the extensive jurisdiction provisions contained under the CAT had become CIL. This was done to determine whether it has had any impact on the law of head of state immunity. This thesis concludes that both Articles 1 and 5 of the CAT have become CIL. The effect of this is that it abrogates immunity *ratione materiae* for former heads of state and some senior heads of government. The thesis started by explaining the distinction between two essential terms in Chapter One. The basic distinctions between 'jurisdictional immunities of states' and 'immunities of senior State officials' were made. It was noted that the former was not within the scope of discussion for this thesis as it related to procedural bar. This means that a prosecution is barred for a certain period or for certain offences.[978]. In other words, all claims against a State would be barred due to the absolute immunity doctrine. However, absolute immunity has slowly evolved to the doctrine of restricte immunity where it only covers governmental acts or acta jure gestionis.[979] Chapter One briefly clarified this vital contrast in order to understand the two terms.

As far as immunities of senior state officials are concerned, this has been the primary focus of this thesis. Chapter One explained the two doctrines of immunities granted under CIL in detail. They are: immunity *ratione personae* and immunity *ratione materiae*. Immunity *ratione personae* or personal immunity is attached to serving heads of state and some selected senior heads of government.[980] One of the questions that Chapter One addressed was whether this exclusive type of immunity, which usually attached itself to serving heads of state, could be made available to other serving heads of government and other senior state officials. Therefore, the scope of the application of immunity *ratione personae* was one of the questions to be dealt with in Chapter One. Thus, in order to determine who was entitled to immunity *ratione personae*, Chapter One defined the terms heads of state and heads of

[978] *Jurisdictional Immunities of the State (Germany v Italy: Greece Intervening)* [2012] ICJ (ICJ) [100];Carlos Fernandez de Casadevante Romani, *Sovereignty and Interpretation of International Norms*,(Springer 2007) 233.
[979] Matthias Kloth, *Immunities of the right of access to court under Article 6 of the European Convention on Human Rights*,(Nijhoff 2010) 22.
[980] Arthur Watts, 'Legal Position in International Law of Heads of States, Heads of Governments and Foreign Ministers' [1994] 247 Recueil des Cours 9, 13. See also: Hazel Fox, *The law of state immunity*,(2nd edn, Oxford University Press 2008) 666.

government. This was due to the fact that immunity *ratione personae* is status based,[981] and hence the position of the individual was a factor in the application of the personal immunity. Chapter One identified that heads of state were the chief representatives of the states concerned. Moreover, it was conceded that immunity *ratione personae* was absolute for serving heads of state due to the functions attached to them and the necessity to be able to travel abroad on official duties without the fear of prosecution.[982] This would cover even those who have allegedly committed acts of torture provided they were still serving in the government. It can be seen in state practices that states are generally reluctant to remove immunity *ratione personae* for serving heads of state and other senior heads of government due to the doctrine of state sovereignty. This controversial point regarding immunity for serving heads of state, who have allegedly committed acts of torture, was later dealt with in more detail in Chapter Two.

Chapter One then proceeded to determine which other class of senior state officials, apart from serving heads of state, might enjoy the absolute immunity *ratione personae*. This chapter considered the way to identify the immunity position of senior state officials through the judgment of the *Arrest Warrant* case held by the ICJ. It was held in that case that a serving minister for foreign affairs was entitled to immunity from the jurisdiction of other states notwithstanding the allegations of torture. The Court explained that:

> 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.[983]

In relation to this type of immunity privileges, the ICJ explained the criteria in paragraph 53 of its judgment in the *Arrest Warrant* case, which aimed to establish which other class of government officials might enjoy personal immunity.[984] It has been suggested that factors such as: the requirement to travel internationally

[981] See: The *Pinochet (No.3)* case, [171c] (Lord Millett). See also: Diane Orentlichter, 'Immunities and Amnesties', in Leila Nadya Sadat (ed), *Forging a Convention for Crimes Against Humanity* (Cambridge University Press 2011) 203.
[982] See generally: Yitiha Simbeye, *Immunity and international criminal law*,(edn, Ashgate 2004) 113; Yoram Dinstein, *War, Aggression and self-defence*,(5th edn, Cambridge University Press 2011) 159.
[983] *Democratic Republic of the Congo v Belgium* [2000] ICJ (ICJ), para 51.
[984] ibid [53]. The judgment held that: "…He or she is in charge of his or her Government's diplomatic activities and generally acts as its representative in international negotiations and intergovernmental meetings".

frequently; to be in constant need to communicate with the government and representatives of other states; being in charge of a government's diplomatic activities, and attending international negotiations and intergovernmental meetings should all be taken into consideration when determining whether certain government personnel should benefit from the protection of jurisdiction of other courts through immunity *ratione personae* while abroad. Therefore, Chapter One used the ICJ's reasoning in the *Arrest Warrant* case to ascertain which other serving senior state officials could benefit from immunity *ratione personae*. It has been submitted in Chapter One that the class of serving state officials who might enjoy immunity *ratione personae* include: the defence, finance[985], international development and business ministers. This finding was achieved based on the view of the ICJ in paragraph 53 in the *Arrest Warrant* case. The author called this the 'functional justification test' as immunity *ratione personae* was given purely according to the specific function and the position of the serving heads of government. In other words, Chapter One has argued that only select senior serving heads of government can profit from this special type of immunity while abroad on governmental duties. Hence, it would not apply to other lower ranked government ministers and officials. This was because their job functions only required them to deal with domestic matters. Thus, it would be highly unlikely that they were required to have a direct working relationship with other states. This view of restricting the application of immunity *ratione personae* to only serving heads of state and a select few serving heads of government appears to be a reasonable and plausible decision. The fact that immunity *ratione personae* was an exclusive privilege attached according to the status of the government officials would prevent the abuse of this type of immunity. Besides, if immunity *ratione personae* was available to all government ministers, then it would deflect from its purpose of protecting those who really should have protection especially those representing states on governmental and diplomatic affairs. The judgment by the ICJ in the *Arrest Warrant* case confirmed the exclusivity of the position of serving heads of state in terms of their immunity.[986]

[985] This will also cover monetary and treasury roles.

[986] See: Roger O'Keefe and Christian J. Tams, *The United Nations convention on jurisdictional immunities of states and their property : a commentary*,(Oxford University Press 2013) 87; Jonathan Crowe and Kylie Weston-Scheuber, *Principles of International Humanitarian Law*,(Edward Elgar Publishing 2013) 189.

The contention as to whether the qualification of torture, as an international crime, had any bearing on the rule of immunity was considered in Chapter Two. It was evaluated whether immunity could be denied to serving heads of state and other senior heads of government who have allegedly committed acts of torture. The decision by the ECHR in the *Al-Adsani* case was central to this discussion. It was held in that case that the compliance with the prohibition of torture did not necessarily mean the suspension of immunity.[987] Chapter Two strongly disputed the assumption that peremptory norms could overwrite the rule of immunity for serving heads of state. The view that violation of *jus cogens norms* could not abrogate immunity for serving heads of state and some senior heads of government, was achieved through the discussion of the 'normative hierarchy theory'.[988] It was submitted in Chapter Two that, when two corresponding conflicting rules under international law collide, it would be inappropriate for one to trump another equally important rule. In other words, when two international rules have the same status, one cannot trump another as they are on a par. Chapter Two used an analogy between the two Houses of Parliament to clarify this point. More importantly, the ICJ in the *Arrest Warrant* case made it clear that an alleged violation of *jus cogens* norms could not abrogate immunity for serving ministers for foreign affairs, which was absolute.[989] This would apply to serving heads of state and heads of government.[990] The Court reached its finding after examining various state practices and national legislations, and concluded that there was no sufficient ground on the restriction of immunity.[991] The impact of this was that the allegation of torture was not a factor in the limitation of immunity *ratione personae* for serving heads of state and certain heads of government as mentioned earlier.

The position of immunity *ratione personae* for serving heads of state has been ascertained. Chapter Three moved on to the dilemma surrounding the second type of

[987] The *Al-Adsani* case, [66]. Rosanne van Alebeek, *The immunity of states and their officials in international criminal law and international human rights law*,(Oxford University Press 2008) 311; Lorna MacGregor, 'Addressing the relationship between state immunity and jus cogens norms: A Comparative assessment', in Wolfgant Kaleck, Michael Ratner, Tobias Singelnstein and Peter Weiss (ed), *International Prosecution of Human Rights Crimes* (Springer 2007) 80.
[988] Kloth (n 979) 76.
[989] The *Arrest Warrant* case, [58]. Awn Shawkat Al-Khasawneh, 'The International Court of Justice and Human rights', in Scott Sheeran and Nigel Rodley (ed), *Routledge Handbook of International Human Rights Law* (Routledge 2013) 358; MacGregor 'Addressing the relationship between state immunity and jus cogens norms' (n 987) 77.
[990] The *Arrest Warrant* case [53].
[991] ibid [58].

immunity given under CIL, in particular, concerning immunity *ratione materiae* for former heads of state and heads of government who have allegedly committed acts of torture. The judgment by the House of Lords in the *Pinochet (No.3)* case was the pinnacle of this because it removed the residual immunity *ratione materiae* normally given to former heads of state through the CAT.[992]

It was noted in this thesis that the CAT was generally silent on the issue of immunity. Nevertheless, the majority of Law Lords in the *Pinochet (No.3)* case interpreted the CAT to reach the outcome that Pinochet was not entitled to immunity *ratione materiae*, which was normally given to former heads of state and heads of government under the CIL rule.[993] It has been pointed out that all three parties to the proceedings – the United Kingdom, Spain and Chile – were signatories to the CAT and this assisted the House of Lords to reach the decision to abrogate the surplus immunity *ratione materiae* for General Pinochet.[994] The judgment of the *Pinochet (No.3)* case was, without doubt, significant. It showed that the removal of immunity *ratione materiae* for former heads of state had given hope that it was not the purpose or functions of the state to torture people under the law. This was because it would weaken the perception of the rule of law and parliamentary democracy. Moreover, it has sent a warning message to other former heads of state and also contributed to the international jurisprudence concerning crimes against humanity.[995] It is fair to say that the acts of torture usually happened in states which were not rooted in the principles of democracy. In other words, the Pinochet judgment has raised the need for the discussion of a coherent system of international criminal justice.[996] Thus, on the balance of probability, the practice of torture tends to be more widespread in authoritarian states, where their leaders are not elected by its people.

According to the critical analysis which has been carried out on the *Pinochet (No.3)* case by the House of Lords, the majority of the Law Lords reasoned that the enactment and ratification of the CAT by states endorsed the fact that perpetrators of

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[992] The *Pinochet (No 3)* case [152] (Lord Hope).
[993] *The Pinochet (No 3)* case [109f] (Lord Browne-Wilkinson).
[994] The *Pinochet (No 3)* case [109f] (Lord Browne-Wilkinson). Xiaodong Yang, *State immunity in international law*,(Cambridge University Press 2012) 436.
[995] Diana Woodhouse, 'The progress of Pinochet through the UK extradition procedure; an analysis of the legal challenges and judicial decisions', in Madeleine Davis (ed), *The Pinochet case: Origins, Progress and Implications* (Institute of Latin American Studies 2003) 106.
[996] ibid

acts of torture should not have safe haven for the crimes of torture that they have allegedly committed.[997] Hence, the application of immunity *ratione materiae* to former heads of state, who have allegedly committed acts of torture, would be untenable in the long run. Chapter Three explored the dilemma that the CAT was generally silent on the issue of immunity. Lord Goff, the dissenting judge in the *Pinochet (No.3)* case raised this significant question.[998] His Lordship argued that, if the CAT had any effect on immunity *ratione materiae*, this point would have been made expressly in the provisions of the Convention.[999] Lord Goff maintained that the "proposed implied term has not been precisely formulated", in relation to the issue associated with immunity *ratione materiae*.[1000]

It has been argued that the opinion held by Lord Goff was valid, but it only revealed half the story. This thesis therefore attempted to expand on this point by considering whether the CAT had become CIL through the 'circularity issue' debate. The outcome of this would eradicate the complication that the CAT was silent on the immunity issue, as CIL, which was directly applicable on states notwithstanding that they were not signatories or had not ratified the CAT. The circularity issue related to the process of examining whether Articles 1 and 5 of the CAT had become CIL. This thesis has submitted that they have indeed become CIL, and that consequently this has abrogated *immunity ratione materiae* for former heads of state. Since the CAT was silent on the immunity issue, Articles 31 and 32 of the VCLT were used in Chapter Three to interpret whether Articles 1 and 5 of the CAT had become CIL. It can be recalled that Articles 31 and 32 of the VCLT were identical to the rules as laid down by CIL.[1001] In other words, Article 31(3)(c) of the VCLT stipulated that, when interpreting a treaty, it should be sensitive to the existing rules of CIL; that is to say, when interpreting the CAT, the existing CIL on the law of immunity must be taken into consideration. This would include national practices. However, it has been submitted in Chapter Three that there were few subsequent decisions by the House of Lords clarifying the judgment of the *Pinochet (No.3)* case, with the exception of

[997] The *Pinochet (No 3)* case [109g] (Lord Browne-Wilkinson).
[998] The *Pinochet (No 3)* case [122c] (Lord Goff).
[999] The *Pinochet (No 3)* case [123g] (Lord Goff).
[1000] The *Pinochet (No 3)* case [122e]-[123a] (Lord Goff).
[1001] For example see: *Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion)* [1996] ICJ Reports 226 (ICJ Reports) [100]. See also: Ulf Linderfalk, *On the interpretation of treaties: the modern international law as expressed in the 1969 Vienna convention on the law of treaties*,(Kluwer Academic Publishers 2007) 239.

the *Jones* case. The *Jones* case has provided confirmation of the removal of immunity *ratione materiae* for former heads of state as suggested in *Pinochet (No.3).*[1002] Nonetheless, it has been argued that the combined effect of Articles 1 and 5 of the CAT did serve to abrogate immunity *ratione materiae* through treaty interpretation. The significance of this is that the opinions in the *Pinochet* (No.3) case have had an impact on the law of head of state immunity especially concerning former heads of state. This has prompted one writer, Woodhouse, to suggest that the impact of the judgments in *Pinochet (No.1)* and *Pinochet (No.3)* are important, and the criticism of the judicial reasonings in *Pinochet (No.3)* should not diminish from its importance.[1003]

Chapter Four resumed the investigation of the 'circular' relationship between the CAT and CIL. Articles 1 and 5 of the CAT had been interpreted in Chapter Three by Articles 31(3)(c) of the VCLT to suggest that they had become CIL, and therefore abrogated the residual immunity *ratione materiae,* which was normally given to former heads of state. However, this claim would not be solid enough as it was a subjective view. Hence, Chapter Four continued by demonstrating the collective evidence of *opinio juris* supporting the fact that Articles 1 and 5 of the CAT had indeed become CIL. This evidence has included the jurisprudence of other courts not applying the CAT. The jurisprudence of the international tribunals and the Committee against Torture proved to be beneficial for the understanding of the definition of torture under Article 1 of the CAT as well as the extensive jurisdiction provision under Article 5 of the CAT.

It has been submitted that the lack of practice along the lines of *Pinochet (No.3)* would not affect the formation of new CIL by the CAT under the sliding scale theory.[1004] Kirgis argued that, if one of the elements was fulfilled, then it would be acceptable to assume that a new CIL had been formed.[1005] Therefore, it weighted one of the elements in favour of the other. In other words, the sliding scale theory

[1002] See: *Jones (Respondent) v Ministry of Interior Al-Mamlaka Al-Arabiya AS Saudiya (the Kingdom of Saudi Arabia) (Appellants)* [2006] 26 UKHL (House of Lords) [81].
[1003] Woodhouse (n 995) 105-106.
[1004] See: Frederic Kirgis, 'Custom on a sliding scale' [1987] 81 American Journal of International law 146, 149.
[1005] Birgit Schlutter, *Developments in Customary International law: Theory and the practice of the International Court of Justice and the International Ad Hoc Criminal Tribunals for Rwanda and Yugoslavia*,(Martinus Nijhoff Publishers 2010) 55.

suggested that if the *opinio juris* element appeared to have more consistency than state practices, then new CIL could be formed.[1006] Chapter Four used the sliding scale theory to support the *opinio juris* aspect on the formation of new CIL. Article 2(b) of the ICTY Statute, Article 3 of the ECvHR, jurisprudence from the international tribunals, and the various UNGA Resolutions were some of the evidence provided in Chapter Four to argue that the definition of torture, as contained under Article 1 of the CAT, matched the general consensus of the definition of torture and the nature of the crime under international law. The challenge of proving that Article 1 of the CAT had become CIL was that the wording in the treaty itself was ambiguous. Nevertheless, it has been argued that the definition of torture under the CAT indicated a strong consensus with other international legal instruments.[1007] As a result, it indicated a compelling view in favour of the customary norm definition of torture. Besides, it has been argued that the impact of the decisions by the international tribunals was noteworthy. Despite the fact that they did not apply the CAT directly, their findings were arguably influenced by the CAT to a certain extent.

As far as the extensive jurisdiction provision under Article 5 of the CAT was concerned, it has been submitted in Chapter Four that the UNGA Resolutions, together with those of the Committee against Torture, led to the persuasive evidence that the extensive jurisdiction under Article 5 of the CAT had become CIL. This was supported by the long-standing consensus that perpetrators of torture would not have a safe haven from their crimes.[1008] In other words, the evidence from the UNGA Resolutions and the findings by the Committee against Torture, which served as an enforcement mechanism to obligate states to establish jurisdiction over the offences of torture, strengthen the argument. Hence, there was a strong sign that the extensive jurisdiction provision under Article 5 of the CAT had become CIL. The significance of this is that immunity *ratione materiae* can be abrogated for former heads of state and some senior heads of government who have allegedly committed acts of torture as jurisdictions can be exercised by other states.

[1006] Brian D Lepard, *Customary international law : a new theory with practical applications*,(Cambridge University Press 2010) 25.
[1007] See: The evidence of *opinio juris* for Article 1 of CAT in Chapter Four.
[1008] Dinah Shelton, *The Oxford handbook of international human rights law*,(Oxford University Press 2013) 804 ;Kimberley N. Trapp, *State responsibility for international terrorism*,(Oxford University Press 2011) 102; Reed Brody and Michael Ratner, *The Pinochet papers: The case of Augusto Pinochet in Spain and Britain*,(Kluwer Law International 2000) 266.

Chapter Five noted the controversy surrounding the question that new CIL could be created based merely on the *opinio juris* element under the sliding scale theory. It has been submitted that the reliance on the subjective element, in the context of the prohibition of torture, further supported that Articles 1 and 5 of the CAT should become CIL. Therefore, Chapter Five supplemented Chapter Four to propose the argument that the two provisions under CAT had become CIL and thus the abrogation of immunity *ratione materiae* for former heads of state and some senior heads of government should follow. Furthermore, Chapter Five analysed cases which had been decided after the *Pinochet (No.3)* case which can be taken as a sign of the willingness states to abrogate immunity *ratione materiae* for heads of state and other senior government state officials. Therefore, this thesis argued the formation of new CIL from another perspective.

The critique of the sliding scale theory provided convincing arguments on the formation of new CIL for the CAT. This was because the requirement of state practice would make the new formation of custom impossible. By focusing on the evidence of the *opinio juris* element under the sliding scale theory, new CIL could be created, rather than relying on the traditional method under the *North Sea Continental Shelf* cases.[1009] The *Nicaragua* case suggested that the element of *opinio juris* could satisfy the lack of conformity of state practice.[1010] Thus, according to the ICJ, new CIL could be formed by relying on the subjective element. This matched the idea behind the sliding scale theory, which this thesis based its discussion on. Equally important, Chapter Five submitted that the CAT, as an international treaty, manifested the *opinio juris* or consensus of states over the notion of the prohibition of torture. The ICJ in the *North Sea Continental Shelf* cases further conceded that in certain circumstances a treaty could become CIL.[1011]

As may have become clear from the previous discussion, this thesis based its findings on the assertion that the collective evidence of *opinio juris* supporting Articles 1 and 5 of the CAT had become CIL. The impact of the Committee against Torture has been noted. It can be submitted that the jurisprudence of the Committee

[1009] *North Sea Continental Shelf Cases (Federal Republic of Germany v Denmark; Federal Republic of Germany v Netherlands) (Merits)* [1969] 41 ILR 29 (ICJ) 44 [77].
[1010] *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v US)* [1986] Rep 14 ICJ 135 (ICJ) para 186.
[1011] *North Sea Continental Shelf Cases (Federal Republic of Germany v Denmark; Federal Republic of Germany v Netherlands) (Merits)* [1969] 41 ILR 29 (ICJ) [71].

against Torture, as shown in Chapter Four, highlighted the general acceptance of Article 5 of the CAT with regard to the obligation upon states to establish jurisdiction over the offences of torture. This view was supported by the fact that the majority of cases, which have been dealt with by the Committee, concerned Article 3 of the CAT, which considered the obligation on states not to return or expel people to countries where they may be subjected to torture. On balance, it seems that the argument that Article 5 of the CAT can result in the formation of new CIL becomes more plausible as there is a general consensus by states to exercise jurisdiction over the offences of torture and the general acceptance of the norm of the elimination of the acts of torture.

The remaining challenge was to argue that the UNGA Resolutions were the opinions of states. It can be argued that notwithstanding that the UNGA Resolutions are not generally considered to be binding, in practice that is not necessarily the case. In the *Legality of the Threat of Nuclear Weapons* case, the ICJ maintained that "it is necessary to look at its content and the conditions of its adoption; it is also necessary to see whether an *opinio juris* exists as to its normative character".[1012] In other words, the content and the purpose of the UNGA Resolutions were paramount in the understanding of the aims of the resolutions. It has been submitted that notwithstanding that the UNGA Resolutions are not generally binding, they do contribute to the normative value for establishing the existence of a rule.

It can be submitted that the evidence of UNGA Resolutions displayed overwhelming consensus by the international community on certain legal issues, such as on the offences of torture. As far as the CAT is concerned, it has attracted more than half of the ratifications of states.[1013] This indicated a strong consensus of the acceptance of the prohibition of acts of torture and the universal jurisdiction provision under Articles 1 and 5 of the CAT. Moreover, it can also be asserted that states would not adopt any UNGA Resolutions or the CAT for the prohibition of torture had they not agreed to such an agreement.

[1012] *Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion)* [1996] ICJ Reports 226 (ICJ Reports), [70].

[1013] See: < http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-9&chapter=4&lang=en> Accessed 17 August 2014.

Finally, existing *opinio juris,* in the forms of UNGA Resolutions, have helped with the interpretation of the CAT. It can be submitted that the reason for justification, that is to say, the strong evidence of one of the elements mentioned in Chapter Four are compelling enough to suggest that the reliance on the *opinio juris* element alone will be sufficient for the recommendation on the formation of new CIL for the CAT, which involved human rights and development.[1014] The method of interpreting the CAT under Article 31(3)(c) of the VCLT has further helped to achieve this objective. Moreover, based on the examination of national and international court decisions after *Pinochet (No.3)* in Chapter Five, it is clear that there is a trend to restrict immunity *ratione materiae* for serving and former heads of state.

Chapter Five discussed how international courts have influenced the decision making of national courts when considering the issue of head of state immunity. This is particularly relevant when reaching the decision on the application of immunity *ratione materiae*. Furthermore, Chapter Five noted the role of national courts in interpreting international law which could arguably contribute to the development of international law of head of state immunity.[1015] It has been suggested that international law questions are best raised and answered at the domestic court level.[1016] This is important when the particular laws relating to head of state immunity are still unclear. Therefore, the functions and roles of domestic courts should not be underestimated. Domestic courts provide their judicial function to adjudicate disputes and this can subsequently develop the law.[1017] Chapter Five illustrated this point by discussing the findings of the *Khurts Bat* and the *Khaled Nezzar* cases in relation to how domestic courts interpreted the law to restrict immunity *ratione materiae.* These are encouraging signs and show that domestic courts are increasingly willing to abrogate the residual immunity *ratione materiae* which coincides with the general consensus of the international community.

Another advantage is that national courts are the best forum and platform to deal with international crimes. Chapter Five showed that most cases involving senior

[1014] Phillipe Sands, 'Treaty, Custom and the Cross-Fertilization of International Law' [1998] 1 Yale Journal of Human Rights and Development Law 85, 87.
[1015] Antonios Tzanakopoulos, 'Domestic courts in international law: the international judicial function of national courts' [2011] 34 Loyola of Los Angeles international and comparative law review 133, 909
[1016] ibid167.
[1017] ibid 167.

government officials started proceedings at a domestic level. Therefore, national courts could provide clarifications on the law of head of state immunity during these trial proceedings. For example, the cases discussed in Chapter Five illustrated that domestic courts are prepared to abrogate immunity *ratione materiae* for senior government officials and this reflected the intention of Articles 1 and 5 of the CAT. The encouragement shown by national courts to interpret the law specifically suggest that there are strong indications that the definition of torture under Article 1 of the CAT and the extensive jurisdiction provision under Article 5 of the CAT have become CIL. This reinforces the views of the Committee that amnesties for the crime of torture are incompatible with the obligation of States parties to the CAT.[1018]

If the argument that the decisions by domestic courts can be considered as 'judicial decisions under Article 38(1)(d) of the ICJ Statute,[1019] then this arguably suggests that the *ratio decidendi* of domestic courts can have an impact on the law of head of state immunity. It indirectly indicates, for instance, that the findings in the *Pinochet (No.3)* case which interpreted an application of international rule under the CAT, is significant. This will create a new precedent not only at the domestic level, but also at an international level. On this theoretical approach, this in turn reflects evidence of the increasing willingness of states to abrogate on the issue of immunity *ratione materiae.* Although it appears that there is a lack of practice along the lines of *Pinochet (No.3),* it can be submitted that the state practice requirement is not needed as there is enough evidence of *opinio juris.* The subjective element on the formation of CIL will be sufficient to show that there are strong indications that Articles 1 and 5 of the CAT have become CIL. Chapter Five provided an alternative explanation that there is an increasing tendency by states to remove immunity *ratione materiae* for senior state officials such as heads of state post the *Pinochet (No.3)* case. This validates the fact that the state practice requirement is not needed when there is general consensus, arguably through the influence of international courts and tribunals as well as the role of domestic courts interpreting international laws. There is an indication that States are now more eager to remove the residual immunity privileges for such senior government officials.

[1018] UN Committee against Torture, UN 'General Comment No 3 (2012) Implementation of article 14 by States parties', (13 December 2012) CAT/C/GC/3, [41].

[1019] Antonios Tzanakopoulos, 'Domestic judicial law-making', in Cahterine Brolmann and Yannick Radi (ed), *Research handbook on the theory and practice of international law-making* (Edward Elgar 2013) (forthcoming). See: Legal Research Paper series, Paper No 75/2013 University of Oxford, 9.

This thesis concluded by arguing that Articles 1 and 5 of the CAT have become CIL, and that this removed the residual immunity *ratione materiae* usually given to former heads of state. It acknowledged that the judgment by the House of Lords in the *Pinochet (No.3)* case has given encouraging signs for the future, that former heads of state and some senior heads of government cannot be shielded by their immunity. The immunity position for serving heads of state and some senior heads of government was said to be absolute due to the fact that they represented their states at an international level. However, the scenario shifted once they have left office as immunity *ratione materiae* would not protect them from the alleged acts of torture. This thesis primarily obtained such a finding through the circularity issue argument. The traditional method of formation of CIL under *North Sea Continental Shelf* cases has failed due to the lack of a consistent state practice criteria. An alternative argument by the modern approach of formation of CIL, under the sliding scale theory, has been considered *in lieu*. Therefore, this thesis centred the discussion that the CAT had become CIL by relying on the *opinio juris* element and the sliding scale theory. It is submitted that there are strong indications that CAT have become CIL with the effect of abrogating immunity *ratione materiae.* All the evidence of *opinio juris* in the discussion included: Committee against Torture and UNGA Resolutions, pointed towards the consensus of the customary nature for the definition of torture (Article 1 of CAT) and the legitimacy of the exercise of universal jurisdictions (Article 5 of CAT). In addition, the jurisprudence of other courts not applying the CAT and yet being influenced by it further supported the understanding of the definition of torture under their respective statutes. These showed strong corresponded evidence for the definitions of torture in favour of a customary definitions. Furthermore, evidence from international courts and treaty bodies have shown that immunities are incompatible with the general duty to investigate and prosecute the acts of torture.[1020]

To sum up, this thesis ventured to provide an alternative legal view on the hypothesis of whether Articles 1 and 5 of the CAT had become CIL through the circularity debate. It argued that those two Articles have successfully become CIL through treaty interpretation and the overwhelming evidence of *opinio juris* supporting that they had become CIL through international consensus. This thesis has provided an

[1020] *Prosecutor v Anto Furundzija* [1998] Case No. IT-95-17/1-T (ICTY, Trial Chamber)

explanation that the requirement of consistent state practice for the formation of CIL is not really needed, provided that there is sufficient evidence of *opinio juris* supporting that Articles 1 and 5 of the CAT had become CIL, which this thesis has demonstrated. The result of this finding will hopefully close the loophole that allows former heads of state to escape from criminal liability for alleged acts of torture that they have committed while they are in office. The removal of residual immunity *ratione materiae* will banish the perception that the rule of immunity is a barrier to justice.

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