CURRENT DEVELOPMENTS

PUBLIC INTERNATIONAL LAW

Edited by Colin Warbrick

I. THE GILLON AFFAIR

A. Introduction

This paper examines one recent example of an increasingly common situation: whether or not an individual having immunity under international law operating in a particular national legal sphere can be prosecuted in that national legal system for crimes against international law.

The incident was the confrontation of the Danish Government with the diplomatic immunity of the Israeli Ambassador to Denmark, Carmi Gillon. Mr Gillon was the former head of the Israeli Security Services (GSS), also know as Shin Bet or SHABAK. He held high-ranking positions within the agency from 1988 but was from 1993 firstly Chief of the Headquarters Branch and subsequently Head of the entire operation. The GSS are, among others, responsible for the interrogations of persons detained by Israel on security-related charges and extensive and well-documented allegations of torture and ill-treatment have been made against them.[1] The use of so-called 'moderate physical pressure', which refers to such techniques as restraining in very painful conditions, hooding, sounding loud music for prolonged periods, sleep deprivation for prolonged periods, threats including death threats, violent shaking, and using cold air to chill, was not only practised in the dark but set out in the Landau Commission's guidelines.[2] These guidelines were secret but their content was assumed by the Committee Against Torture (CAT) on the basis of accounts given by NGOs.[3] Its

[1] The Israeli human rights organization B'Tselem, for instance, documented nine cases of torture and ill-treatment in the May-August 1994 period, at a time when Mr Gillon was chief of the GSS's Headquarters Branch, <http://www.btselem.org>.

[2] The Commission was appointed following a decision of the Israeli Government in 1987 to examine the GSS methods of interrogation of terrorist suspects. It examined among others international human rights law standards and determined that in dealing with dangerous terrorists who represent a grave threat to the State of Israel and its citizens, the use of a moderate degree of pressure, including physical pressure, in order to obtain crucial information, is unavoidable under certain circumstances. The Commission recommended that 'moderate physical pressure' be sanctioned in limited cases where the degree of anticipated danger is considerable. See UN Doc AT/C/16/Add.4, paras 31–7. See also excerpts of the official English translation in 23 Is LR (1989) 146, which also contains a symposium on the Commission's Report.

[3] UN Doc A/52/44 paras 257.

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assumptions were proven right when a summary of the Landau Commission's guidelines were made public in January 2000.[4] Despite the secrecy of the rules the CAT concluded in 1994, for the first time ever in such a direct form, that 'moderate physical pressure as a lawful mode of interrogation is completely unacceptable to this Committee'.[5] It further concluded in 1997 that the interrogation method employed by Israel 'constitutes torture as defined in Article 1 of the Convention'.[6] After his appointment as Ambassador to Denmark in 2001, Mr Gillon nonetheless spoke approvingly of the policy of 'moderate physical pressure'. In fact, in an interview with the Danish newspaper *Jyllands Posten*, he stated that he was himself directly implicated in about 100 cases.[7]

Both Israel and Denmark have ratified the Torture Convention,[8] respectively in 1991 and 1987.[9] The Danish authorities were moreover well aware of the allegations made against Mr Gillon when they accepted his credentials on 27 June 2001.[10] The position of the Danish Government was evident from letters sent to the Israeli human rights organizations B'Tselem and The Public Committee Against Torture in Israel.[11] The letters, signed by the Danish Minister of Foreign Affairs, stated that: 'In accordance with diplomatic practice, the Danish Government has no intention to question the decision taken by the Israeli Government on the issue of appointment of a new Israeli ambassador to Denmark.'[12]

After the revelations in the Danish media of Mr Gillon's past, the Danish Government was put under considerable pressure.[13] The legal position of the Danish Government was not entirely clear. The Minister of Justice confirmed in Parliament on 23 July 2001 the obligation under Article 6(1) of the Torture Convention to take into custody or take other legal measures to ensure the presence of any person alleged to have been an accomplice or participated in acts of torture.[14] The Minister further

[4] Following the Israel Supreme Court, Decision of 15 July 1999, HCJ 5100/94, where the Court found that the GSS was not authorized to use certain investigation methods that involved the use of moderate physical pressure, holding that such methods violated Israeli law, while at the same time stating that the defence of necessity might be available for the interrogators under Israeli law. On this later issue see P Gaeta 'May Necessity Be Available as a Defence for Torture in the Interrogation of Suspected Terrorists?' (2004) 2 JICJ 785–94.

[5] UN Doc A/49/44, para 168 (1994).

[6] UN Doc A/52/44 para 257 (1997).

[7] Jyllands Posten *Ny Ambassadør: Tortur er Nødvendigt* July 9 2001. Mr Gillon later modified this number to 20–30, Berlingske Tidende *Ambassadørens forsvarstale* 15 Sept 2001.

[8] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1986).

[9] The Danish Penal Code (Straffeloven) was specially amended by Act No. 322 of June 1986 in fulfillment of the requirements as to jurisdiction flowing from article 5 of the Torture Convention. Cf UN Doc CAT/C/5/Add.4, para 19.

[10] 2000–01 § 20 question (S 3279), available at; http://www.ft.dk/Samling/20001/spor_sv/S3279.htm>

[11] Both organizations send letters advising the Danish Government not to accept Mr Gillon's nomination.

[12] On file with the author.

[13] For the internal debate see the list of articles from the Danish media available at <http://www.menneskeret.dk/tema/tortur> and for external pressure see eg press statement from B'Tselem of June 17 2001 available at <http://www.btselem.org/English/Press_Releases/2001/010617.asp>; letter to the Danish Minister of Foreign Affairs from Human Rights Watch of July 18 2001 available at <http://www.org/english/docs/2001/07/19/denmar311.htm> public statement from Amnesty International of 14 Aug 2001, AI Index MDE 15/074/2001.

[14] 2000–01 s 20 question (S 3230), available at <http://www.ft.dk/Samling/20001/spor_sv/S3230.htm>

confirmed that the Torture Convention provides no exception to this obligation.[15] These statements were given with the qualification that no consideration had been given to other international obligations, ie diplomatic immunity. However, in a note to the press on 25 July 2001, the Minister of Justice, stated that:

> It is the assessment of the Ministry of Foreign Affairs, that the special provisions of the Vienna Convention on Diplomatic Relations as special rules for diplomatic representatives will supersede the general rules contained in the UN Torture Convention. The Vienna Convention will, in other words, impede the arrest and criminal prosecution of a diplomatic representative in this country.[16]

The Minister of Justice, who agreed with this assessment, thereby laid to rest speculation that had flourished in the press that Ambassador Gillon might be arrested upon arrival.[17] In addition, such a statement by the Minister of Justice has a significant effect under Danish law. To understand this one has to make some further elaborations on the Danish criminal legal system.

The Danish criminal system is accusatorial and judges have no powers to initiate cases *ex officio*. Prosecution can only be performed by the prosecution service (*Anklagemyndigheden*).[18] The police are part of the prosecution service and it is normally for the chief constable of the police belonging to the competent territorial district to initiate criminal proceedings.[19] The police are also in charge of the investigations and evidence gathering. In order to safeguard impartiality in the administration of justice the Danish Administration of Justice Act provides for a so-called 'objective principle'.[20] This principle obligates the police to conduct their investigations objectively and is regarded as a fundamental procedural safeguard under Danish law.[21] This entails, among other things, that before initiating any case the police must have a reasonable presumption that the case can lead to a conviction.[22] In addition, the prosecution service, including the chiefs of police, are under the authority of the Minister of Justice, who has far-reaching powers to instruct the prosecution in general or to intervene in specific cases.[23] A statement by the Minister of Justice according to which diplomatic immunity prevails over the crime of torture therefore indirectly bars any prosecutor from ever bringing a case to court. This is so because the statement establishes a *prima facie* assumption that the case will not lead to a conviction and it would

[15] 2001–01 s 20 question (S 3231), available at <http://www.ft.dk/Samling/20001/spor_sv/S3231.htm>

[16] Author's own translation, original Danish text on file. Reported in BBC News 'Sharon "preparing war crime defence"' (26 July 2001) available at <http://news.bbc.co.uk/1/hi/world/middle_east/1458169.stm>.

[17] See for instance Copenhagen Post *Gillon may be arrested* 29 July 2001 available at <http://www.cphpost.dk/get/62358.html>

[18] The Danish Administration of Justice Act (Retsplejeloven) ss 96 and 719, with the possibility of private initiated prosecution in accordance with ss 720 (2), 725–7, cf generally H Gammeltoft-Hansen *Strafferetspleje I* (Copenhagen Jurist—og Økonomforbundets forlag 1998) ch 7.

[19] The Danish Administration of Justice Act (Retsplejeloven) s 719.

[20] ibid s 96(2).

[21] See E Smith *Straffeproces: Grundlæggende regler og principper* (5th edn Forlaget Thomson Copenhagen 2003) ch I, 3.2.

[22] ibid ch I, 3.2 and IV, 3.

[23] The Danish Administration of Justice Act (Retsplejeloven) ss 98 and 719, cf H Gammeltoft-Hansen above n 17, ch 7.B.5.

therefore be against the law even to initiate the investigations according to the objective principle.[24]

It is evident that there is an inherent clash between the two obligations, ie the obligation to ensure the inviolability and criminal immunity of the diplomatic agent and the obligation to secure, investigate and possibly prosecute the alleged torture offender.[25] However, Israel was not likely to withdraw its nomination and a decision had to be made.[26]

When Ambassador Gillon arrived in Denmark on 15 August 2001 there were police in the airport. They were, however, not there to arrest Ambassador Gillon but to protect him from demonstrators. In fact, on 3 September 2001 the chief of police of Gentofte, the district in which the Israeli embassy is situated, announced that the application for his prosecution had been rejected. The decision not to take legal action was based on a legal opinion from the Ministry of Foreign Affairs.[27] The opinion stated, inter alia, that any conflict of obligations had to be solved by interpretation in the light of the object and purpose of the conventions, taking into account any relevant rule of international law applicable in the relationship between the parties. In doing so the legal opinion argues that the Vienna Convention on Diplomatic Relations (VCDR) is older and more widely ratified than the Torture Convention and it expresses a codification of customary international law. If, therefore, it had been the intention of the drafters that the Torture Convention should apply to persons with diplomatic immunity then this would have been clearly stated, as was the case with the statutes of the ad hoc Tribunals for the Former Republic of Yugoslavia and Rwanda and the Statute for the International Criminal Court. On the basis of these considerations the legal opinion concludes that the VCDR rules on diplomatic immunity take precedence over the Torture Convention. Subsequently, Ambassador Gillon left Denmark in August 2003, two years after the allegations of his involvement in torture. Ambassador David Walzer replaced him in September 2004. In the meantime Adviad Ivri, who was an adviser in the Israeli embassy, served as acting ambassador.

B. Compliance with the applicable law

There are evidently some flaws in both the reasoning and the examples that led to the

[24] Cf concurring opinion of the Director of Public Prosecution (Rigsadvokat) Henning Fode, Berlingske Tidende *Ambassadørens forsvarstale* 15 Aug 2001.

[25] Vienna Convention on Diplomatic Relations (1961) Art 29: 'The person of a diplomatic agent shall be inviolable. He shall not be liable to any form of arrest or detention. The receiving State shall treat him with due respect and shall take all appropriate steps to prevent any attack on his person, freedom or dignity.' Art 31(1): 'A diplomatic agent shall enjoy immunity from the criminal jurisdiction of the receiving State.' United Nations Torture Convention (1986) Art 6(1): 'Upon being satisfied, after an examination of information available to it, that the circumstances so warrant, any State Party in whose territory a person alleged to have committed any offence referred to in article 4 is present shall take him into custody or take other legal measures to ensure his presence.' Art 6(2): 'Such State shall immediately make a preliminary inquiry into the facts.' Art 7: 'The State Party in the territory under whose jurisdiction a person alleged to have committed any offence referred to in article 4 is found shall in the cases contemplated in article 5, if it does not extradite him, submit the case to its competent authorities for the purpose of prosecution.'

[26] See Israel Cabinet Communiqué of 31 July 2001 Doc no. 2001073100.

[27] On file with the author. Reported in the *Copenhagen Post* (Copenhagen Denmark 11 Sept2001), available at <http://www.cphpost.dk/get/62571.html>.

conclusion of the Danish Government. Technically, however, the Danish authorities complied with their obligations under the Torture Convention. This is so because Article 6(1) of the Torture Convention only obliged States to take persons into custody where the 'circumstances so warrant' thereby providing States with a considerable margin of appreciation on the matter.[28] Under Danish law, the normal preconditions to take a person into custody are both a possible minimum threshold of penalty and, alternatively, the possibility of escape, the repetition of offences or the obstruction of the investigations.[29] The requirements were not fulfilled in the present case. In this respect therefore Denmark did not breach Article 6(1) of the Torture Convention, although it is uncertain whether Denmark complied with its obligation under Article 6(2) to 'make a immediate preliminary inquiry into the facts'. This obligation, however, seems to be related to the potential prosecution and since the case was not rejected on the basis of lacking evidence one could pragmatically reject it as insignificant to the present case.[30] In addition, Article 7 of the Torture Convention does not oblige States to prosecute but merely to 'submit the case to its competent authorities for the purpose of prosecution'. The wording of Article 7 of the Torture Convention is similar to that of Article 7 of the 1970 Convention for the Suppression of Unlawful Seizure of Aircraft, which was the first convention to introduce the principle of *aut dedere aut judicare*,[31] and also to other so-called anti-terrorism conventions.[32] There is a broad consensus among commentators that the principle of *aut dedere aut judicare* requires that the respective authorities take their decisions, in regard to prosecution, in the same manner as in other cases of offences of a serious nature.[33] Thus, the Torture Convention does not require mandatory prosecution, although it is subject to general requirements of good faith.[34] It was not, strictly speaking, the 'State' who submitted the case to the prosecution service, since the request for prosecution was brought by a group of civilians, but the case was nevertheless presented to the 'competent authorities'.

C. Torture Convention versus Convention on Diplomatic Relations

The question, however, still remains as to what to make of the statement by the Danish authorities that the obligations of the VCDR take precedence over the obligations

[28] Cf JH Burgers and H 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 Dordrecht 1988) 134.

[29] The Danish Administration of Justice Act (Retsplejeloven), s 762 (1).

[30] Cf JH Burgers and H Danelius, above n 28 at 135.

[31] B Cheng *International Legal Instruments to Safeguard International Air Transport—The Conventions of Tokyo, the Hague, Montreal, and a New Instrument Concerning Unlawful Violence at International Airports, Aviation Security* (International Institute of Air and Space Law The Hague 1997) 33.

[32] Art 7 of the 1970 Convention for the Suppression of Unlawful Seizure of Aircrafts, Art 7 of the 1971 Convention of Unlawful Acts against the safety of Civil Aviation, Art 7 of the 1973 Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons including Diplomatic Agents, and Art 8 of the 1979 International Convention against the Taking of Hostages.

[33] D Costello 'International terrorism and the development of the principle of Aut Dedere Aut Judicare' (1975) 10 J Int'l L & Econ 487, Burgers and Danelius, above n 28 at 137.

[34] Vienna Convention on the Law of Treaties (1969), Art 27.

entailed in the Torture Convention. This statement seems to imply a 'conflict of norms'.[35] This is so because even though Article 7 of the Torture Convention is not a prescriptive norm, (ie imposing an obligation on the respective State to prosecute), it must nevertheless be read as a permissive norm, (ie granting a right to prosecute). However this permissive norm, if effectuated, could lead to the breach of the obligation of the VCDR, granting criminal immunity to diplomatic agents. In other words, where the precondition for a conflict exists, ie overlap *ratione materiae*, *personae* and *temporis*, there is a conflict in the applicable law.[36] This is so unless the respective provisions are either interpreted as not being mutually exclusive or that there exists some form of hierarchy of norms. In this respect, the reasons offered by the Danish authorities for not arresting and prosecuting Ambassador Gillon are not a satisfactory reply to assertions made from other sides.

Generally a treaty is to be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty and in accordance with its aim and object.[37] There are three so-called schools of interpretation.[38] The Danish Government seems to have relied mostly on the 'intentions' school, first of all emphasizing that the parties to VCDR codified some of the oldest established rules of diplomatic law, ie inviolability and criminal immunity.[39] On the basis of this they seem to understand that, failing the existence of a permissive rule to the contrary, limitations to diplomatic immunity in the VCDR cannot be inferred.[40] This position might find some support in the preparatory work. In the words of Burgers and Danelius:

> Under international law, there may be certain limited exceptions to this rule (to establish jurisdiction over offences of torture) eg in regard to foreign diplomats, foreign troops, parliament members or other categories benefiting from special immunities, and such immunities may be accepted insofar as they apply to criminal acts in general and are not unduly extensive.[41]

In this way the provisions of the Torture Convention can be interpreted as only referring to persons who do not possess immunity, thereby avoiding any conflict. However, if this is the case then there was no need for the Danish Government to cite the principle of *lex specialis derogates lex generalis*, a principle which has an uncertain meaning and standing under international law and which furthermore only applies in the event of a conflict that cannot be solved by interpretation.[42] Before resort to the principle of *lex specialis* there should also be some reasons stated for abandoning the more

[35] For the definition of the term 'conflict of norms', see J Pauwelyn *Conflict of Norms in Public International Law: How WTO Law Relates to other Rules of International Law* (CUP Cambridge 2003) 166 ff.

[36] Neither of the conventions in question contains any explicit conflict clause.

[37] Vienna Convention on the Law of Treaties (1969), Art 31.

[38] On treaty interpretation, see generally G Fitzmaurice 'The Law and Procedure of the International Court of Justice: Treaty Interpretation and Certain other Treaty Points' (1951) 28 BYIL 1.

[39] See E Denza *Diplomatic Law* (2nd edn Clarendon Press Oxford 1998) 210.

[40] For a similar views see *R v Bow Street Stipendiary Magistrate and others, ex parte Pinochet Ugarte,* (No. 3), in (1999) 2 All ER 97, Lord Goff of Chieveley.

[41] JH Burgers and H Danelius, above n 28 at 131. There are, however some uncertainties to this statement. First, because it on the face of the texts only refers to territorial jurisdiction under Art 5(1)(a) and, secondly, because it does not seem to distinguish between international and domestic immunity.

[42] Pauwelyn, above n 36 at 385.

established principle of *lex posterier derogate legi priori*.[43] The requirement for the application of the *lex posterier* principle is that the instruments must relate to the same subject matter, which refers to a genuine conflict, ie overlap *ratione materiae*.[44] This requirement is arguably fulfilled in this specific incident. A second requirement, for the application of the *lex posterier* principle is that the treaties have to be successive in time. This is sometimes explained by an analogy to domestic law and the 'legislative intent', ie that the later treaty is an expression of the latest legislative intent that changes earlier law.[45] The relevant time in question is that of the adoption or conclusion. This leads to the finding that the rules of the VCDR only apply to the extent that its provisions are compatible with those of the Torture Convention.[46] This is a feasible conclusion to the problem but it has yet to be accepted. The argumentation of the Danish Government also neglects to take into account that the drafters of the Torture Convention also codified an already existing norm.[47] There are furthermore other means of interpretation that have to be taken into account. Firstly, one has to look at the natural 'meaning of the text'.[48] This does not, however, solve the problem, as there seems to be no reconciliation of the respective obligations on the basis of the natural understanding of their wording.[49] With regard to the 'aim and object', this is generally a vague and ill-defined concept.[50] It does, however, seem fair to infer that the aim and object of the VCDR is to ensure the workability of the international system. In the words of Eileen Denza: 'Diplomatic law in a sense constitutes the procedural framework for the construction of international law and international relations.'[51] The Torture Convention on the other hand has as its objective the protection of human rights. The aim, as with all other human rights instruments, is to preserve human dignity.[52] Both are valuable aims and they should not be mutually exclusive.

Another important rule of interpretation is that any relevant rule of international law applicable in the relations between the parties shall be taken into account.[53] There are several issues here that should be examined. One should consider whether there exists

[43] Vienna Convention on the Law of Treaties (1961), Art 30(3) and 30(4)(a).

[44] Pauwelyn, above n 36 at 367.

[45] ibid 368.

[46] Vienna Convention on the Law of Treaties (1969), Art 30(4)(a) in conjunction with 30(3).

[47] Burgers and Danelius, above n 28 at 1.

[48] Vienna Convention on the Law of Treaties (1969), Article 31(1). See *Territorial Dispute (Libyan Arab Jamahiririya/Chad)* Judgment, ICJ Reports 1994 at 6 para 40; *Oil Platforms (Islamic Republic of Iran v United States of America)* Preliminary Objections, Judgment, ICJ Reports 1996 at 803 para 23; *Kasikili/Sedudu Island (Botswana/Namibia)* Judgment, ICJ Reports 1999 at 1045 para 18.

[49] If one accepts, first, that Ambassador Gillon was a 'public official or other person acting in a official capacity' in accordance with Art 1(1) of the Torture Convention and, secondly, that the duty to exercise jurisdiction in accordance with Art 5(2) of the Torture Convention is not dependant on a prior refusal of an extradition request, see Burgers and Danelius, above n 28 at 133.

[50] M Fitzmaurice in M D Evans (ed) *International law* (Oxford University Press Oxford 2003) 189.

[51] E Denza *Diplomatic Law: A Commentary on the VCDR* (Clarendon Press Oxford 1998) 1. For the value attributed to immunity to ensure the workability of the relations between States see ICJ, *U.S. Diplomatic and Consular Staff in the Tehran case* (Provisional measures), ICJ Reports 1979, para. 38 and ICJ, *U.S. Diplomatic and Consular Staff in the Tehran case* (Judgment), ICJ Reports 1980, para. 92

[52] Burgers and Danelius, above n 28 at *5*.

[53] Vienna Convention on the Law of Treaties (1969), Art 31(3)(c).

a customary obligation on States to prosecute persons responsible for international crimes.[54] There is, however, no significant State practice to support such a contention. The argument of an existing customary obligation to prosecute the authors of international crimes does therefore not seem sustainable at present.[55] One also has to take into consideration a possible hierarchy of international norms. It is too large a subject to enter into but one could mention the *Soering* case as a good example of an occasion where a human rights obligation was given superiority over a conflicting obligation, ie the obligation to extradite.[56] Most human rights instruments prohibit torture.[57] The positive obligations deriving from this are in the present case uncertain. In *Sevtap Veznedarodlu v Turkey* the European Court of Human Rights pronounced:

> [the] Convention requires by implication that there should be an effective official investigation capable of leading to the identification and *punishment* of those responsible . . . If this were not the case, the general legal prohibition of torture and inhuman and degrading treatment and punishment, despite its fundamental importance, would be ineffective . . . [58]

In the *Al-Adsani* case, however, the Court said that the United Kingdom was not bound to provide a civil remedy for torture committed outside the forum State.[59] There are several important differences one has to take into account when comparing *Al-Adsani* with the present case. Firstly, the present incident concerns criminal proceedings and not, as in *Al-Adsani*, the request for a civil remedy. Secondly, in the *Al-Adsani* case there was no widespread or systematic practice that could bring it into the sphere of crimes against humanity.[60] It is therefore still uncertain whether the right to an effective remedy provides for an obligation upon States to ensure criminal prosecution in cases of extraterritorial torture. A different possibility is to apply the principle of effectiveness. The majority of the Law Lords in the *Pinochet* case solved a similar problem essentially basing their reasoning on the principle of effectiveness.[61] They argued that although the Torture Convention did not remove the immunity of State officials, it could not sensibly be read as allowing it to continue.[62] The decision sets a very narrow precedent because it is the official nature of the torture act which creates the crime and coincides with the reach of immunity *ratione materiae*.[63] It does not therefore neces-

[54] In the *Gaddafi* case the preamble of the Rome Statute was cited as evidence of the existing customary obligation to prosecute persons responsible for international crimes expressing the intent of the international community see *Gaddafi* 125 ILR June 2003 at 462. For comments on the case see S Zappalà 'Do Heads of State in Office Enjoy Immunity from Jurisdiction for International Crimes? The *Ghaddafi* case before the French Cour de Cassation' (2001) 12 EJIL 595–613.

[55] A Cassese *International Law* (OUP Oxford 2001) 264.

[56] *Soering v United Kingdom* Judgment of 7 July 1989, Series A No 161

[57] See Art 5 of the Universal Declaration of Human Rights and Art 7 of the International Covenant on Civil and Political Rights.

[58] *Sevtap Veznedarodlu v Turkey* (App 32357/96) Judgment of 11 Apr 2000 para 32 emphasis added.

[59] *Al-Adsani v the United Kingdom* (App 35763/97) Judgment of 21 Nov 2001 para 56.

[60] For torture as a crime against humanity, see Cassese *International Criminal Law* (OUP Oxford 2003) 77.

[61] *R v Bow Street Stipendiary Magistrate and others, ex parte Pinochet Ugarte, House of Lords* Judgment of 24 Mar 1999, in (1999) 2 All ER 97.

[62] C Warbrick, EM Sagado, and N Goodwin 'The *Pinochet* Cases in the United Kingdom' (1999) 2 YB Int'l Hum L 109.

[63] *R v Bow Street Stipendiary Magistrate and others, ex parte Pinochet Ugarte, House of Lords* Judgment of 24 Mar 1999, in (1999) 2 All ER 97, Lord Millet at 178j-179a, and Lord Phillips at 190h-j.

sarily follow that immunity *ratione personae* would yield to this interpretation because this kind of immunity still leaves the Torture Convention with a field of operation.[64] The ratification of the Torture Convention could, however, be interpreted more broadly, as a form of waiver, because States parties agree that other State parties can exercise jurisdiction over alleged official tortures found within their territories.[65] The elaborations in the *Pinochet* case are not directly applicable to the present incident because they dealt with immunity *ratione materiae* based on customary international law, whereas the present incident deals with immunity *ratione personae* based on treaty law. Immunity, however, is a right of the State and can as such be waived by it. Therefore, in the perspective of implied waiver there is no difference between immunity *ratione materiae* or *personae,* regardless of the source of the respective immunity. The International Court of Justice implied in the *Arrest Warrant* case that immunity *ratione personae* could be waived by treaty.[66] The Court made an express reference to Article 27(2) of the Rome Statute as a circumstance where the absolute immunity enjoyed by an incumbent or former Ministers of Foreign Affairs does not represent a bar to criminal prosecution before certain international criminal courts.[67] Despite the fact that the Rome Statute establishes an international court, it is nevertheless still based on a treaty and one cannot therefore reach any other conclusion than that immunity can be waived by treaty. The *Pinochet* precedent is therefore still valid and there is no reason why national courts may not hear proceedings against even the most mighty of violators of international criminal law so long as the national legislation is based on a ground binding on the other State.[68] The threshold for establishing such a waiver is nevertheless high. The mere obligation on a State to extend its national jurisdiction to cover international crimes combined with an obligation to 'search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and [to] bring such persons, regardless of their nationality, before its own courts' is not enough.[69] The waiver has to be expressed or implied in such a way that it leaves no other possible interpretation. It is worthwhile noticing that it made no difference to the ICJ that the crimes in question in the *Arrest Warrant* case were either war crimes or crimes against humanity.[70] This is further sustained in regard to immunity *ratione personae* by such cases as *Pinochet*,[71] *Fidel Castro*[72] and *Ghaddafi*.[73]

[64] Vienna Convention on Diplomatic Relations (1961) Art 39(2).

[65] See *R v Bow Street Stipendiary Magistrate and others, ex parte Pinochet Ugarte, House of Lords* Judgment of 24 Mar 1999, in (1999) 2 All ER 97, Lord Brown-Wilkinson at 169f-g.

[66] ICJ *Case concerning the Arrest Warrant of 11 April 2000* (*Democratic Republic of Congo v Belgium*) 14 Feb 2002.

[67] ibid para 61.

[68] Warbrick, Sagado, and Goodwin, above n 62, 115.

[69] ICJ *Case concerning the Arrest Warrant of 11 April 2000* (*Democratic Republic of Congo v. Belgium*) 14 Feb 2002, para 59, and Geneva Convention IV Relative to the Protection of Civilians in the Time of War (1949) Art 146.

[70] ICJ *Case concerning the Arrest Warrant of 11 April 2000* (*Democratic Republic of Congo v. Belgium*) 14 Feb 2002 para 58.

[71] See eg Speech of Lord Browne Wilkinson, in *R v Bow Street Stipendiary Magistrate and others, ex parte Pinochet Ugarte, House of Lords*, Judgment of 24 Mar 1999, in (1999) 2 All ER 97, at 112–15. See also speeches of Lord Hope of Craighead at 145–52, Lord Saville of Newdigate at 169–70, Lord Millet at 171–91, and Lord Phillips of Worth Matravers at 181–90.

[72] See Audiencia Nacional Order (*auto*) of 4 March 1999 (no. 1999/2723).

[73] See French text in RGDIP (2001) at 474. For comments see S Zappala *Do Heads of State in*

The last resort to solve this apparent conflict is the concept of *jus cogens*. If one accepts that the prohibition on torture is a peremptory norm, then it might be argued that this norm would necessarily trump any other rule of international law, even immunity.[74] The concept of *jus cogens* is, however, still developing and it has yet to be demonstrated in State practice that one consequence of the status of a *jus cogens* rule is to supersede claims of diplomatic immunity of a person accused of breaching the respective norm. The International Law Commission's Working Group on Jurisdictional Immunities of States and their Property found in 1999 that national courts had in some cases shown sympathy for the argument that States are not entitled to plead immunity where there has been a violation of human rights norms with the character of *jus cogens*, but that in most cases the plea of sovereign immunity had succeeded.[75] It is interesting in this perspective that the ICJ did not find it necessary to comment on this aspect in the *Arrest Warrant* case.[76] In fact, the ICJ has never relied on the concept of *jus cogens* at all.[77]

D. Conclusion

In conclusion, the Danish authorities should not so categorically have rejected the possibility of proceeding against Ambassador Gillon for acts of torture on the basis of the Torture Convention. If they had done so, they could have taken the law a step beyond *Pinochet* to include immunity *ratione personae*. It is important to emphasize that the right to do so depends upon the fact that both Denmark and Israel were parties to the Torture Convention. One could construe an argument that when the Danish authorities accepted Ambassador Gillon's credentials then they also forfeited any right to take criminal legal action. On the other hand, for a State to intentionally allow a well-known alleged perpetrator of torture to enter into its territory and subsequently shield him from any criminal prosecution seems not to abide by the principle of *pacta sunt servanda*, even though one technically could argue that no specific obligation was breached.[78] This is especially so given the fact that Denmark had the right to refuse

Office Enjoy Immunity from Jurisdiction for International Crimes? The Ghaddafi Case Before the French Cour de Cassation (2001) 595-612.

[74] ICTY, Trial Chamber II, Judgment *Furundzija* IT-95-17/1 'Lasva Valley' of 10 Dec 1998 para 153–7, ICJ *Case concerning the Arrest Warrant of 11 April 2000* (*Democratic Republic of Congo v Belgium*) 14 Feb 2002, Dissenting opinion of Judge Al-Khasawneh, para 7; M Karagiannakis 'State Immunity and Fundamental Human Rights' (1998) LJIN 19–23 19–20 and 41; A Bianci 'Immunity versus Human Rights: The Pinochet Case' (1999) EJIL 262; A Orakhelashvili 'State Immunity and International Public Order' (1999) 42 German YB Intl L 261.

[75] The Working Group cited the following cases in this connection: (United Kingdom) *Al-Adsani v Government of Kuwait* 100 ILR 465 at 471; (New Zealand) *Controller and AuditorGeneral v Sir Ronald Davidson* [1996] 2 NZLR 278, particularly at 290 (per Cooke P); Dissenting Opinion of Justice Wald in (United States); *Princz v Federal Republic of Germany* 26 F 3d 1166 (DC Cir 1994) at 1176–85; *Siderman de Blake v Republic of Argentina* 965 F 2d 699 (9th Cir 1992); *Argentine Republic v Amerada Hess Shipping Corporation* 488 US 428 (1989); *Saudi* Arabia v Nelson 100 ILR 544.

[76] See Counter-Memorial of the Kingdom of Belgium in the *Arrest Warrant* case 28 September 2001, ch 5.

[77] Cf B Simma and P Alston 'The Sources of Human Rights Law: Custom, Jus Cogens and General Principles' (1992) 12 Aust YBIL 88–100.

[78] Vienna Convention on the Law of Treaties (1969) Art 26.

agreement or to declare Ambassador Gillon *personae non grata* under diplomatic law.[79] The case is far from unique and confirms that States still cling to the old values of international law.[80]

JACQUES HARTMANN*

II. CONVENTIONAL WEAPONS: A CLUSTER OF DEVELOPMENTS

A. Outline

The adoption of Protocol V to the UN Convention on Certain Conventional Weapons represents a shift in focus for weapons law towards the long-term after-effects of weapons. This note considers this development.

B. Background

The seemingly endless ingenuity of man's inhumanity to man has long been lamented. As weapons of greater military utility have been developed, so moral and legal arguments have been evolved and deployed against their possession and use. This uneasy relationship has, until relatively recently, been characterized by an inequality between the rapid advance of science and its capabilities and the comparative glacial development of legal constraints.

International humanitarian law has traditionally approached the regulation and control of conventional weapons from two different but complementary directions:[1]

1. *The prohibition of particular weapons:* This approach provides some certainty in that there is little ambiguity as to whether a specific type of weapon is prohibited or not. However, the effects of the prohibitions have been circumvented with the development of weapons which are different in type but possess similar capabilities. One example is the prohibition in the 1899 Hague Declaration 2 Concerning Asphyxiating Gases[2] on the use of '*projectiles the sole object of which is the diffusion of asphyxiating or deleterious gases'*. The adoption of the Geneva Gas Protocol 1925[3] avoided any emphasis on the method of delivery of the gas in order to address this perceived gap.

[79] Vienna Convention on Diplomatic Relations (1961) Art 4(2) and 9.

[80] See C Warbrick 'Immunity and International Crimes Under English Law' (2004) 53 ICLQ 769–74, and the incident involving Major T. R. A. Kohatsu quoted in Cassese, above n 55 at 273.

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[1] See Y Sandoz *Prohibitions or Restrictions on the Use of Certain Conventional Weapons* Extract from International Review of the Red Cross Jan–Feb 1981, which analyses the two approaches and characterizes them as disarmament law and international humanitarian law.

[2] 1899 Hague Declaration 2 Concerning Asphyxiating Gases reproduced in Adam Roberts and Richard Guelff *Documents of the Laws of War* (3rd ed OUP Oxford 2000) 59 et seq. The Declaration focused on the method of delivery of the gas and therefore provided an opportunity for the use of other types of gas-producing weapons in the First World War such as cylinders which circumvented the prohibition (see HMSO British Army *Manual of Military Law Part III*, 1958, at 41, para 111, n 1).

[3] Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or other Gases, and of Bacteriological Methods of Warfare signed 17 June 1925, entered into force 8 Feb 1928.

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