CURRENT DEVELOPMENTS

PUBLIC INTERNATIONAL LAW

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I. IMMUNITY OF STATE OFFICIALS FROM THE CRIMINAL JURISDICTION OF A FOREIGN STATE

Abstract In *Khurts Bat*, the English High Court held that Mr Bat, a Mongolian State official charged with committing municipal crimes on German territory, was not immune from the jurisdiction of German courts and could therefore be extradited to Germany. This article examines the three theories of immunity put forward in that case: (1) special missions immunity, (2) high-ranking official immunity, and (3) State immunity. It focuses on the question of whether State officials charged with municipal crimes may plead immunity *ratione materiae* from the criminal jurisdiction of a foreign State by examining key examples of State practice.

Key words: immunity, personal immunity, special missions, State immunity

I. INTRODUCTION

In *Khurts Bat v Investigating Judge of the German Federal Court*,[1] the English High Court considered whether Mr Bat, a Mongolian State official, could plead immunity and prevent his extradition to Germany for the prosecution of municipal crimes. Mr Bat advanced three alternative theories of immunity: (1) he was on a special mission to the UK (special missions immunity; a special regime of personal immunity); (2) he was a high-ranking official (immunity *ratione personae* of high-ranking officials); and (3) he benefited from the sovereign immunity of Mongolia (immunity *ratione materiae*). The High Court rejected all three grounds for immunity and Mr Bat was extradited to Germany.

Khurts Bat is a rare example of a decision that deals with customary special missions immunity, the extent to which high-ranking official immunity can be applied to civil servants, and whether State officials who allegedly commit crimes on the territory of a foreign State can benefit from the immunity of their State. It is the only judicial authority to examine the relevant State practice and find that State officials cannot benefit from the immunity of their State (immunity *ratione materiae*) to protect them from the criminal

[1] *Khurts Bat v Investigating Judge of the Federal Court of Germany* [2011] EWHC 2029 (Admin) [2012] 3 WLR 180 (*Khurts Bat*).

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jurisdiction of a foreign court. This paper examines whether the conclusions reached by the High Court accurately reflect customary international law. Part II briefly recites the facts of the case and Part III looks at the two grounds of personal immunity advanced before the Magistrate and then re-examined by the High Court. Finally, Part IV examines the immunity *ratione materiae* argument put forward in the High Court by looking at key examples of State practice and *opinio juris*.

II. FACTS OF THE *KHURTS BAT* CASE

Mr Bat, head of the Executive Office of National Security in Mongolia, was wanted by Germany for crimes allegedly committed in May 2003 on French, Belgium and German territory. Specifically, he was alleged to have committed the offences of kidnapping and serious bodily harm as part of a security operation, ordered by the Mongolian government, to seize and return to Mongolia Mr Enkhbat Damiran, a Mongolian national implicated in the assassination of Mr Zorig, the former Mongolian Minister of the Interior.

On 14 May 2003, Mr Bat is alleged to have lured Mr Damiran to a meeting in Le Havre, during which Mr Damiran was kidnapped and taken, after a stopover in Brussels, to the Mongolian embassy in Berlin. Mr Damiran was drugged and imprisoned in the basement flat of the embassy before being moved, on 18 May 2003, to Tegel Airport in Berlin. He was taken through passport control on a diplomatic passport and flown to Ulan Bator in Mongolia. Upon arrival, he was immediately imprisoned and questioned about the assassination of Mr Zorig. Eventually the charges against Mr Damiran were dropped, but he remained in prison and, after recording statements with his lawyer that were broadcast on Mongolian television, was charged with betraying State secrets. Mr Damiran, critically ill, was eventually released on 17 April 2006 and died five days later.[2]

On 30 January 2006, the German Federal Court of Justice issued a domestic arrest warrant for the arrest of Mr Bat. On 9 February 2006, the same Court issued a European Arrest Warrant ('EAW') for the offences of kidnapping and infliction of serious bodily harm,[3] which was certified by the English Serious and Organised Crime Agency ('SOCA') on 13 April 2010. The EAW stated that Mr Bat did not benefit from immunity in the Federal Republic of Germany.

In the lead up to Mr Bat's visit to the UK, several conversations took place between ambassadors, FCO desk officers, entry clearance officers, diplomats, Mongolian and British security officers, and the SOCA concerning whether Mr Bat could be issued a visa, whether he qualified as a diplomat, whether he was entitled to immunity and finally, what Mr Bat intended to do while in the UK. Much of this communication took place in the form of e-mails and notes of meetings. On several occasions, Mongolian officials informed UK officials that Mr Bat would be visiting the UK. The UK officials

[2] G Bönisch and S Röbel, 'Release of Alleged Spy Angers German Investigators' (*Spiegel Online*, 12 October 2011) <http://www.spiegel.de/international/world/mongolian-murder-mystery-release-of-alleged-spy-angers-german-investigators-a-791009.html>.

[3] Both charges are framework offences.

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did not discourage his visit but asked 'when and on what flight he would arrive'.[4] Lord Justice Moses concluded that:

> It is clear that the Mongolian authorities received the impression from the Ambassador that Mr Khurts Bat's visit was for the purpose of establishing direct contact and co-operation between the security agencies of the two countries and that such a visit was encouraged by the Ambassador. It is also apparent that no meetings for that purpose had been arranged and that on a number of occasions the Mongolian authorities were told that meetings with either the Head of the UK National Security Council or his deputy would not be possible.[5]

On 17 September 2010, officers from Scotland Yard's Extradition Squad arrested Mr Bat on board a Russian plane, shortly after it arrived at Heathrow airport. Lord Justice Moses observed that 'he clearly intended to meet officials of the United Kingdom' because he was carrying 'working papers, emblems of his office in Mongolia, small Mongolian gifts, and internet photographs of people he was expecting to meet'.[6] Mr Bat was travelling on a Mongolian diplomatic passport with a business visa.

The following day, Mr Bat was brought before the City of Westminster Magistrates' Court and remanded in custody. On 18 February 2011, District Judge Purdy ordered the extradition of Mr Bat. At this stage, two submissions were made for resisting the extradition:[7]

1. Mr Bat enjoyed customary international law immunity from the jurisdiction of national courts because, at the time of his arrest, he was visiting the UK on a special mission on behalf of the Government of Mongolia, which was consented to, and endorsed by, the UK; *and*
2. Mr Bat enjoyed customary international law immunity because, at the time of his arrest, he was representing his Government as a high-ranking official civil servant.

The magistrate rejected both submissions. Mr Bat subsequently appealed to the High Court and, together with (1) and (2), put forward an additional theory of immunity:

3. The acts committed by him were official acts carried out on the orders of the Government of Mongolia and as such, he is entitled to benefit from the immunity of the State under customary international law, both in Germany and in the UK (immunity *ratione materiae*).

Mr Bat also argued that the extradition proceedings were an abuse of process and filed a separate application for *habeas corpus*. However, the High Court decided it was not necessary to reach a conclusion on this issue.[8] At this stage in the legal process, both the Government of Mongolia and the Foreign and Commonwealth Office intervened in the proceedings.

The High Court rejected all of the appellant's submissions, finding: (i) that there was no special mission; (ii) that Mr Bat was not a sufficiently high-ranking official to benefit from personal immunity; and (iii) that Mr Bat could not take advantage of the immunity of the Mongolian State because 'there is no customary international law which affords . . . [Mr Bat] immunity *ratione materiae*'[9] for municipal criminal offences committed on the territory of the forum State.

[4] *Khurts Bat* (n 1) para 21. [5] ibid. [6] ibid para 20.
[7] *Federal Court of Justice, Germany v Bat Khurts* (District Court, 18 February 2011), paras 11 and 12. [8] *Khurts Bat* (n 1) para 1. [9] ibid para 101.

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III. IMMUNITY *RATIONE PERSONAE*

A. Special Missions Immunity

Neither the UK nor Mongolia had ratified the Convention on Special Missions Immunity 1969.[10] Consequently, *Khurts Bat* is a rare example of a decision that examines the existence and scope of a customary special missions immunity.[11] At the outset, both parties agreed that there was a customary special missions immunity and that it did not include the entire content of the Convention on Special Missions. This is consistent with the general agreement among judges and academics that a form of special missions immunity exists in customary international law.[12]

The two key issues in *Khurts Bat* were (i) whether a letter from the Protocol Directorate of the FCO is conclusive as to the fact that Mr Bat was not on a special mission and (ii) if the letter is not to be regarded as conclusive, whether, as a matter of fact, the UK gave consent to a special mission of which Mr Bat was a member. The importance of establishing consent *prior* to sending an official on what is believed to be a special mission has been acknowledged in the German case of *Tabatabai*[13] and the Austrian case of *Syrian National Immunity*.[14]

In *Khurts Bat*, the High Court began by confirming that a special mission 'performs temporarily those functions ordinarily taken care of by a permanent mission'[15] and consent to the mission 'recognises the special nature of the mission and the status of inviolability and immunity which participation in that special mission confers on the visitors'.[16] Therefore, not every official visit is a special mission and '[n]ot everyone representing their state on a visit of mutual interest is entitled to the inviolability and immunity afforded to participants in a Special Mission.'[17] According to the Court, a special mission is to be viewed as a temporary diplomatic mission with all the features of a diplomatic mission, but for a finite period of time:

> [S]ince the essential question is whether the British Government recognised Mr Bat's visit as a Special Mission with the immunities which flow from such recognition, it seems to me just

[10] UN Convention on Special Missions Convention on Special Missions (adopted 16 December 1969, entered into force 21 June 1985) 1400 UNTS 231. As of September 2012, there are 38 State parties to the Convention.

[11] In March 2011, an *ex parte* application was made for the arrest of the former president of the Soviet Union, Mikhail Gorbachev, for alleged involvement in torture. The application was rejected on the basis that he was on a special mission, although the court did not make a detailed examination of special missions immunity (*Decision Concerning the Request for an Arrest Warrant for* Mikhail Gorbachev (Westminster Magistrates' Court, 30 March 2011)).

[12] Customary special missions immunity has been recognized by a number of national courts, including English District Courts (*Re Bo Xilai* 128 ILR 713; *Re Ehud Barak* (District Court, 29 September 2009)), in the City of Westminster Magistrates' Court (*Re: Gorbachev* (Westminster Magistrates' Court, 30 March 2011) and the Criminal Chamber of the German Federal Supreme Court (*Tabatabai*, 80 ILR 388). For academic opinion: D Akande and S Shah, 'Immunities of State Officials, International Crimes, and Foreign Domestic Courts' (2011) 21 EJIL 821–3; M Paszkowski, 'The Law on Special Missions' (1974) 6 PolishYIL 267–88; C Wickremasinghe, 'Immunities Enjoyed by Officials of States and International Organizations' in M Evans (ed), *International Law* (OUP 2010) 390–2; A Watts, 'The Legal Position in International Law of Heads of States, Heads of Governments and Foreign Ministers' (1994-III) 247 Recueil des Cours 13, 40; A Watts, *The International Law Commission 1949–1998*, (OUP 1999), vol 1, 344–5. For doubt over whether there is a customary special missions immunity, see *USA v Sissoko* (SD Fla, 1997), 121 ILR 599.

[13] 80 ILR 389.

[14] 127 ILR 88.

[15] *Khurts Bat* (n 1) para 26.

[16] ibid para 29.

[17] ibid.

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> as much a matter for the Executive as recognition of an Ambassador or a member of an Ambassador's staff. . . .[18]

The question of whether consent has been given must therefore be regarded as 'properly the subject of a conclusive statement', which was provided, in this case, by the FCO letter to the District Judge in January 2011, which established that the UK did not consent to the visit of Mr Bat as a special mission.[19] The Court held that consent to a special mission must be given by the receiving State and whether a visit, or what a sending State hopes to achieve by a visit, is capable of constituting a special mission 'is beside the point'.[20] Lord Justice Moses considered that the contentious divergence of opinion between Mongolia and the FCO over whether there was consent—which the mainstream media described as a 'diplomatic war'[21]—illustrated precisely why the courts must not question 'that which the Government chooses to recognise and that which it does not'.[22]

There is no basis for questioning the reasoning of the Court. Although the extent to which the Convention on Special Missions is part of customary international law is disputed, the definition in Article 1 must reflect the general definition, used in several municipal court decisions,[23] of a special mission: 'a temporary mission, representing the state, which is sent by one state to another state *with the consent of the latter* for the purpose of dealing with it on specific questions or of performing in relation to it a specific task'.[24] There is clearly a requirement for consent by the receiving State to the presence of the special mission and the specific task it will perform. In this sense, special missions immunity is 'immunity by agreement', rather than immunity attaching to an office, status or official acts carried out on behalf of a Sate. The basis for special missions immunity lies explicitly in the consent of the receiving State.[25]

Khurts Bat underscored the need for foreign State officials to obtain consent in advance of their visit if they wish to be treated as being part of a special mission with immunity from criminal and civil jurisdiction. A recent example occurred on 6 October 2011, when the English Director of Public Prosecutions declined to issue an arrest warrant for Tzipi Livni, Israeli opposition leader, for alleged involvement in war crimes, relying on a certificate issued by the foreign secretary stipulating that the FCO had consented to her visit as a special mission.[26]

B. Immunity of High-Ranking State Officials

Mr Bat also argued that he benefited from immunity accorded by customary international law to high-ranking State officials. As this immunity attaches to the individual for the duration of his or her office, and prohibits any exercise of criminal

[18] ibid para 37. [19] ibid paras 37–40. [20] ibid para 40.

[21] C Milmo, 'Mongolia declares diplomatic war on Britain over arrested spy' (*The Independent*, 8 January 2011) <http://www.independent.co.uk/news/world/asia/mongolia-declares-diplomatic-war-on-britain-over-arrested-spy-2179155.html>.

[22] *Khurts Bat* (n 1) para 40. [23] See note 12.

[24] Art 1, Convention on Special Missions (n 10) (emphasis added).

[25] Akande and Shah (n 12) 823.

[26] J Foakes, 'Immunity for International Crimes? Developments in the Law on Prosecuting Heads of State in Foreign Courts' (2011) 2011/02 Chatham House International Law Briefing Paper 12.

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jurisdiction by foreign States;[27] '[w]hat is important is not the nature of the alleged activity or when it was carried out, but rather whether the legal process invoked by the foreign state seeks to subject the official to a constraining act of authority at the time when the official was entitled to the immunity.'[28] Although historically rooted in concepts of sovereignty and dignity, today the predominant theoretical basis for this type of immunity is that of functional necessity.[29] It is generally conferred on officials representing the State at the international level in order to allow them to engage in 'international relations': unimpeded travel to, and discussion and cooperation with, foreign States.[30]

It has never really been disputed that serving heads of State,[31] heads of government[32] and diplomats accredited to the receiving State[33] benefit from immunity *ratione personae*. In the *Arrest Warrant* case, the International Court of Justice extended this immunity, on the basis of principle, to include a serving Foreign Minister:

> The Court would observe at the outset that in international law it is firmly established that, as also diplomatic and consular agents, 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.[34]

The ICJ did not refer to any supporting authorities or State practice, but it reasoned that Foreign Ministers are to be granted immunity *ratione personae* to 'ensure the effective performance of their functions on behalf of their respective States'.[35] Their functions include diplomatic activities, representation in international negotiations and inter-governmental meetings, the exercise of which meant that Foreign Ministers are 'frequently required to travel internationally, and thus must be in a position to do so whenever the need should arise'.[36]

It is clear from the words 'such as' that the ICJ did not consider this immunity to apply only to heads of State, heads of government and foreign ministers, but it also did not provide a clear rationale for determining who may be eligible. The English High Court was faced with the question of whether, on the basis of principle, Mr Bat fell within this group of 'high-ranking' State officials. The Foreign Minister is not the only State official required to negotiate international treaties or represent the State at international organizations; countless officials may at some point fulfil these tasks as part of their official function.[37] Accordingly, English District Judges have recognized

[27] Arts 21 and 39 of the Vienna Convention on Diplomatic Relations 1961 (adopted 18 April 1961, entered into force 24 April 1964) 500 UNTS 95 (VCDR); Art 31 of the UN Convention on Special Missions (n 10); *Arrest Warrant of 11 April 2000*, ICJ Reports 2002 p 3, paras 51–55 and 58 (*Arrest Warrant*); and *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v France)*, ICJ Reports 2008, p 177, paras 170, 174.

[28] Akande and Shah (n 12) 819.

[29] Preamble to the VCDR (n 27); *Arrest Warrant case* (n 27), Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal, para 75; Akande and Shah (n 12) 818; Barker, 'State Immunity, Diplomatic Immunity and Act of State: A Triple Protection against Legal Action?' (1998) 47 ICLQ 951; H Fox, *The Law of State Immunity* (2nd edn, OUP 2008) 673; and Wickremasinghe (n 12) 406.

[30] Akande and Shah (n 12), 818; Wickremasinghe (n 12) 406.

[31] *Djibouti v France* (n 27) para 170; *Arrest Warrant* (n 27) para 51.

[32] *Arrest Warrant* (n 27) para 51.

[33] Arts 29 and 31 VCDR (n 27); *Arrest Warrant* (n 27) para 51.

[34] *Arrest Warrant* (n 27) para 51; see also para 53 (emphasis added).

[35] ibid para 53. [36] ibid. [37] Akande and Shah (n 12) 821.

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the immunity of Ministers of Defence[38] and a Minister of Commence.[39] District Judge Pratt reasoned 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, Cultural 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.[40]

Yet, as Akande and Shah have pointed out, these ministers also need to undertake some international travel and often represent their State at the international level.[41]

The ICJ provided some further guidance when it reiterated its reasoning in *Certain Questions of Mutual Judicial Assistance in Criminal Matters (Djibouti v France)*,[42] confirming that officials holding *non-ministerial posts* such as Procureur de la République and Head of National Security did not enjoy immunity as officials occupying high-ranking offices of the State.[43] Consequently, Lord Justice Moses was correct to find that Mr Bat, a non-ministerial high-ranking civil servant, falls outside the narrow circle of officials entitled to immunity *ratione personae*.[44] The District Judge rejected Mr Bat's claim partly on the basis that he was not engaged in foreign affairs,[45] but Lord Justice Moses rightly did not find this convincing. Mr Bat was clearly involved in foreign affairs, but this alone is not enough to fall within the group of individuals entitled to personal immunity: emphasis was placed on 'rank' as well as the function or role of the relevant office.[46]

IV. IMMUNITY *RATIONE MATERIAE*

State immunity is guaranteed in customary international law and precludes foreign courts from exercising jurisdiction in a suit brought against the State itself, an agent of the State or an individual performing an official function of the State.[47] State officials

[38] *Re Mofaz* 128 ILR 709.

[39] *Re Bo Xilai* (n 12).

[40] *Re Mofaz* (n 38) 712.

[41] Akande and Shah (n 12) fn 25, 821. It is normal practice for ministers of Member States of the European Union to participate in the Council of the European Union, which meets in ten different configurations: general affairs, foreign affairs, economic and financial affairs, justice and home affairs, employment, social security and consumer affairs, competitiveness (internal market and industry), transport, agriculture, the environment and education, youth, culture and sport. See: <http://www.consilium.europa.eu/council/council-configurations?lang=en>.

[42] *Djibouti v France* (n 27).

[43] ibid 185–6 and 194.

[44] *Khurts Bat* (n 1) para 61.

[45] *Federal Court of Justice, Germany v Bat Khurts* (n 7) para 12.

[46] *Khurts Bat* (n 1) para 62.

[47] *Jurisdictional Immunities of the State (Germany v Italy: Greece Intervening)*, Judgment of 3 February 2012 (Jurisdictional Immunities of the State), paras 56–57 <http://www.icj-cij.org/docket/files/143/16883.pdf>; *Arrest Warrant case* (n 27) 20–1; *Holland v Lampen-Wolfe* (2000) 119 ILR 367, 378; *Distomo Massacre* (2000) 129 ILR 516; *Al-Adsani v UK* (2002) 34 EHRR 11, para 56; *Ferrini v Federal Republic of Germany* (2004) 128 ILR 663–4; and *Jones v Saudi Arabia* (2007) 1 AC 270, 291 and 306; and see Yearbook of the International Law Commission, 1980, Vol II (2) 147, para 26. That the immunity of State officials is designed to prevent the circumvention of the immunity of the State through proceedings against the individual is well known: see, for example, *Twycross v Drefus* (1877) 5 Ch 605; *Zoernsch v Waldock and another* [1964] 2 All ER 256, 266; *Propend Finance Pty Ltd v Sing*, (1997) 111 ILR 611, 669; and *Chuidian v Philippine National Bank*, 912 F 2d 1095, 1101 (9th Cir. 1990).

may therefore *benefit* from the immunity of their State for acts committed on its behalf. This is known as functional immunity or immunity *ratione materiae* because the immunity is said to 'attach' to the official acts of the individual and not to his or her status.[48] However, this description can be misleading. A State official can only benefit from the immunity of his or her State where the State is the proper defendant in the proceedings.[49] Accordingly, '[t]he logical steps for disposing of the case are for the forum court to strike out the action against the State official as against the wrong defendant and simultaneously to decline jurisdiction against the foreign State on the basis of its immunity from that jurisdiction.'[50] The immunity belongs to the State as a legal entity, which alone may invoke or waive its right to protection from the jurisdiction of foreign courts (although a foreign court may be required to consider the immunity of the State *proprio motu*).[51]

While historically the immunity of the State from civil and criminal jurisdiction was absolute, in the mid-twentieth century there was a shift by several domestic courts towards a restrictive doctrine of State immunity.[52] The precise contours of this restrictive doctrine are not always clear, but many common-law States have national legislation that sets out when a State may plead immunity[53] and national courts have often had the opportunity to define the limits of its application.[54] This led to the recognition of restrictive State immunity as a rule of customary international law.[55]

This State practice involves the civil jurisdiction of foreign courts. The shift from absolute to restricted immunity occurred in part because of a general acceptance 'by forum State courts that there was no juridical obstacle to holding liable the artificial person of a foreign State for activities *de jure gestionis*'.[56] Adjustments were made to ensure that domestic civil proceedings against States respected the equal and independent status of the foreign State: certain remedies such as injunctions and orders of specific performance were prohibited. Fox views these adjustments as having 'imitated the international law of state responsibility by making the remedy one of reparation, not punishment'.[57]

The civil liability of States in domestic courts has not been extended to criminal liability. Both the US and UK statutes on immunity deal with State immunity from criminal prosecution 'as more of a matter of substantive incapacity and the inapplicability of the penal code of one state in respect of the acts of another state, rather than attributable to a procedural defect.'[58] Fox has observed that the exercise of criminal jurisdiction over another State infringes the international law requirements of equality and non-intervention: '[i]t seeks to make another State subject to penal codes

[48] *Church of Scientology* (1978) 65 ILR 193, 198; *Prosecutor v Blăskić* (1997) 110 ILR 607, 707; *Schmidt v Home Secretary* (1997) 2 IR 121; *United States of America v Friedland* (1999) 120 ILR 417, 450; and *Pinochet (No 3)* (2000) 1 AC 147, 269, 285–286. But cf *Samantar v Yousuf* (2010) 130 S Ct 2278, 2286–7, 2289. For an examination of cases from different jurisdictions, see Tomonori, 'The Individual as Beneficiary of State Immunity: Problems of the Attribution of *Ultra Vires* Conduct' (2001) 29(4) DenvJIntlL&Pol 101.

[49] Douglas, 'State Immunity for the Acts of State Officials' (2012) BYIL online 29 May.

[50] ibid.

[51] Fox (n 29) 102–3.

[52] J Crawford, 'International Law and Foreign Sovereigns: Distinguishing Immune Transactions' (1983) 54 BYIL 75–118 and *The Schooner Exchange v McFaddon* (1812) 11 US 116.

[53] For several examples, see n 121.

[54] See notes 47 and 48 for examples.

[55] *Jurisdictional Immunities of the State* (n 47) paras 55–56.

[56] Fox (n 29) 92.

[57] ibid.

[58] ibid 91–2.

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based on moral guilt; and it seeks to apply its criminal law to regulate the public governmental activity of the foreign State.'[59]

This is also reflected at the international level, where it has been accepted that international law does not criminalize the conduct of States.[60] In its *Report on State Responsibility*, the International Law Commission recorded disagreement among States as to whether a State could commit an international crime.[61] As a result, draft Article 19, which would have established international crimes of a State, was removed from the Draft Articles on State Responsibility.[62] The international responsibility of the State does not therefore distinguish between civil and criminal responsibility: 'it is a single undifferentiated concept of responsibility'.[63]

As a consequence of the inapplicability of criminal law to States, with the exception of the Untied States, every State with immunity legislation expressly excludes immunity from criminal jurisdiction.[64] The UN Convention on Immunity also excludes criminal proceedings from its ambit.[65] The remaining two States with immunity legislation—America and Israel—and the European Convention on State Immunity, omit any reference to immunity from criminal jurisdiction, reflecting the implied understanding that States are not subject to municipal criminal law.

If State officials can only benefit from the immunity of their State where the State, by operation of law, is the proper defendant in the proceedings, then it follows that State officials cannot benefit from the immunity of their State if the law also recognizes them as personally responsible. At the international level, States have recognized that individuals may be responsible for international crimes and their conduct may engage the international responsibility of their State. State officials often cannot plead immunity

[59] ibid 87.

[60] As noted by the International Court of Justice in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* ICJ Reports 2007, p 43, para 170ff; and *Prosecutor v Blăskić* (n 48) 698.

[61] Report of the International Law Commission on the work of its fiftieth session, 20 April – 12 June and 27 July – 14 August 1998, *Official Records of the General Assembly, Fifty-third session, Supplement No 10* (A/53/10), printed in the Yearbook of the International Law Commission (1998) vol II(2), paras 275–6.

[62] See commentary to art 12, paras 5–7 of the ILC Articles on Responsibility of States for Internationally Wrongful Acts of 2001, appended to GA Res 56/83, 12 December 2001; and Special Rapporteur's Fourth Report on State Responsibility, 31 Match 2001 (A/CN.4/517), para 46.

[63] J Crawford, *Brownlie's Principles of Public International Law* (2012) 542. For the absence of any differentiation, see art 12, ILC Articles on Responsibility of States for Internationally Wrongful Acts, ibid. See also J Crawford and S Olleson, 'The Nature and Forms of International Responsibility', in Evans (ed) *International Law* (2010) 450; and Douglas (n 49) 22.

[64] Argentina Law No 24/488 (Statute on the Immunity of Foreign States before Argentine Tribunals) 1995 (Argentina); States Immunities Act 1985, section 3(1) (Australia); State Immunity Act 1982, (Canada); Israel Foreign State Immunity Law 2008, section 2 (Israel); Act on the Civil Jurisdiction of Japan with respect to a Foreign State 2009, Article 1 (Japan); State Immunity Ordinance 1981, section 17(2)(b) (Pakistan); State Immunity Act 1979, section 19(2)(b) (Singapore); Foreign States Immunities Act 1981, section 2(3) (South Africa); and State Immunity Act 1978, section 16(4) (UK). The US Foreign Sovereign Immunities Act 1976, 28 USC section 1605 does not contain a provision on immunity from criminal jurisdiction.

[65] United Nations Convention on Jurisdictional Immunities of States and Their Property (adopted 2 December 2004, opened for signature 16 December 2004) (2005) 44 ILM 803, Art 2(e). The European Convention on State Immunity of 16 May 1972, 74 ETS, 74 UNTS 1495, contains no explicit provision on immunity from criminal jurisdiction.

where they are charged with international crimes and brought before an international tribunal.[66]

At the domestic level, the international responsibility of the State under international law does not make the State the proper defendant in domestic proceedings. Nevertheless, the domestic practice of States in relation to the prosecution of State officials is not uniform. Some prosecutors have considered State immunity at the stage of deciding whether to prosecute; in other examples of practice, a plea of immunity before a judicial authority has been successfully upheld. There are also examples in which immunity has not been upheld, both in respect of international crimes (*Pinochet No 3* based on the Convention Against Torture) and municipal offences *(Rainbow Warrior*). Finally, there are examples—notably involving foreign spies—where immunity has simply not been raised. In *Khurts Bat*, the English High Court was asked to consider whether Mr Bat could benefit from Mongolia's immunity in respect of municipal crimes committed in Germany; it concluded that as a matter of customary international law, a State official is not entitled to benefit from State immunity before the court of the forum State. The following examines the decision in *Khurts Bat* in the light of key examples of State practice.

A. Denial of Immunity in Khurts Bat

Lord Justice Moses took as his starting point the decision of the House of Lords in *Pinochet (No 3)*. Two of the alleged charges in *Pinochet*—murder and conspiracy to murder—were committed in Spain, and a Spanish court was seeking to assert territorial jurisdiction over these criminal acts. The High Court found that all of the Law Lords, with the exception of Lord Millett and Lord Phillips, agreed that Pinochet had immunity from prosecution in Spain for offences committed on Spanish territory, if they were committed as 'part of Pinochet's public authority as Head of State'.[67]

Nevertheless, Lord Justice Moses was not convinced that the Judges had properly considered the matter in *Pinochet (No 3)* and found that '[t]he issue of immunity in relation to charges of murder and conspiracy to murder [crimes alleged to have been committed on Spanish territory, the forum State] appears to have merited no detailed analysis in the light of the conclusion that there was no immunity for former Heads of State for crimes of torture or conspiracy to torture…'.[68] The Court later stated that '[d]espite the view of the majority of the House of Lords in *Pinochet (No 3)* that the former Head of State would have immunity from prosecution for murder and conspiracy to murder in Spain, I believe it is open to this court to have regard to the evidence of state practice which has emerged *since* the decision in that case.'[69]

There are two relevant concerns with the *Pinochet (No 3)* judgment: first, the issue of State immunity for municipal crimes committed on the territory of the forum State was not given any detailed consideration by the Lords; and second, even if the majority ruling was correct in 1999, subsequent State practice may mean this ruling is no longer tenable and no longer reflects customary international law. When reviewing the evidence of State practice that had emerged since the *Pinochet* case, the Court relied

[66] *Arrest Warrant case* (n 27) 25; *Prosecutor v Taylor* (2004) 128 ILR 239, 264; and D Akande, 'International Law Immunities and the International Criminal Court' (2004) 98(3) AJIL 417.

[67] *Khurts Bat* (n 1) para 81.

[68] ibid para 75.

[69] ibid para 99 (emphasis added).

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heavily on the academic work of Dr Franey.[70] Lord Justice Moses endorsed her view of the State practice and her conclusion 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…'.[71] The Court noted that Special Rapporteur Kolodin, who is charged with undertaking the International Law Commission project into immunity of State officials from foreign criminal jurisdiction, supported her view.[72]

The Court briefly discussed some of the key authorities in this area, namely the *Caroline* situation and the *McLeod* case, the *Rainbow Warrior* incident, the *Blaškić* case and the 2008 Cyprus-Israel incident. The Court rejected the *Caroline* situation as 'a poor guide to modern State practice',[73] and found the *Rainbow Warrior* supported the proposition that immunity is not afforded to State officials when they commit criminal acts in the territory of the forum State. It also rejected the well-known statement by the Appeals Chamber of the International Tribunal for the Former Yugoslavia in *Blaškić*[74] as an authority for immunity, finding that its statement of the law was not supported by adequate authority. Finally, the Court cited the work of Special Rapporteur Kolodin, in particular, his conclusion that 'in such a situation there are sufficient grounds to talk of an absence of immunity',[75] and if a State official 'is not only acting illegally but is present in the state territory illegally, then it is fairly difficult to assert immunity. Examples … include espionage, acts of sabotage, kidnapping etc.'.[76]

Although acknowledging that not all authorities went in the same direction, Lord Justice Moses was nevertheless:

> persuaded by the full and cogent analysis of Dr Franey, supported by Special Rapporteur Kolodkin, that the appellant does not enjoy immunity by reason of his conduct as an official of the Government of Mongolia from prosecution in Germany and, accordingly, does not enjoy immunity from extradition in the United Kingdom. It seems to me the fact that, in recent years, States have not claimed immunity is just as much evidence of the absence of State practice as those cases where immunity is claimed but denied by the forum state.[77]

The Court did not consider whether Mr Bat was entitled to immunity from criminal jurisdiction before English courts as a separate question to whether Mr Bat was entitled to immunity before German courts.

B. Key Examples of State Practice

This section examines key examples of State practice involving the prosecution of State officials for criminal offences in foreign State courts. State practice is not uniform in its approach to the question. Some States and courts have referred to the 'non-answerability principle' or the 'non-responsibility principle', and others simply refer to State immunity in general or immunity *ratione materiae* specifically, without distinguishing

[70] E Franey, *Immunity, Individuals and International Law: Which Individuals Are Immune from the Jurisdiction of National Courts under International Law* (LAP Lambert Academic Publishing, 2011).
[71] Franey ibid 284, cited in *Khurts Bat* (n 1) para 95.
[72] *Khurts Bat* (n 1) para 96.
[73] ibid para 99.
[74] *Prosecutor v Tihomir Blaškić*, Objection to the Issue of a Subpoena *Duces Tecum*, para 38.
[75] Kolodkin, *Second Report to the International Law Commission on Immunity of State Officials from Foreign Criminal Jurisdiction* (International Law Commission, 62nd Session, Geneva 2010 A/CN.4/631) para 59.
[76] ibid.
[77] *Khurts Bat* (n 1) para 99.

between civil and criminal proceedings. With the exception of *Pinochet No 3* (and, of course, *Khurts Bat*), State practice involves the adjudicative jurisdiction of a State over conduct that took place on its territory. For the purposes of this study, State practice has been divided into two groups: (i) where the forum State has declined to prosecute the official or has recognized the non-answerability of the official; and (ii) where the forum State has asserted its right to prosecute.

1. State practice where individuals have not been held personally liable

(1) England/United States: *The Caroline Affair/the McLeod Case* [c. 1840][78] is, as has been pointed out in *Khurts Bat*[79] and by several commentators,[80] a difficult and confusing example of State practice. During the 1837 Canadian Rebellion, American sympathizers supplied the Canadian rebels with money, provisions and arms via the *SS Caroline*. On 29 December 1837, British forces captured the *Caroline* while it was docked at Fort Schlosser on the US side of the border. The vessel was set on fire, cut loose from the dock, and towed into the current of the river where it eventually descended the Nigeria falls.[81] Two Americans were killed during the operation.[82]

The incident strained relations between Britain and the United States and sparked a long trail of diplomatic correspondence. The US regarded the incident as causing 'the most painful emotions of surprise and regret', and demanded that Britain provide appropriate reparation.[83] In contrast, Britain claimed to be acting with the necessity of self-defence:

> The piratical character of the steam boat 'Caroline' and the necessity of self-defence and self-preservation, under which Her Majesty's subjects acted in destroying that vessel, would seem to be sufficiently established. At the time when the event happened, the ordinary laws of the United States were not enforced within the frontier district of the State of New York. The authority of the law was overborne, publickly, by piratical violence.[84]

Negotiations between the two States intensified when, in 1840, Alexander McLeod was arrested while visiting New York, on the charges of murder and arson in connection with the destruction of the *Caroline*.[85] On 13 December 1840, Fox, the British Minister at Washington, wrote to the American Secretary of State, Forsyth, to explain that McLeod was acting on orders from the British State and should not be held personally accountable for any loss. The US did not provide Britain with a favourable response, but in March 1841, there was a change of administration in the United States and the new Secretary of State, Webster, wrote to the Attorney General in the following terms:

> [I]t raises a question entirely public and political, a question between independent nations; and . . . individuals connected in it cannot be arrested and tried before the ordinary tribunals, as for the violation of municipal law. If the attack on the *Caroline* was unjustifiable, as this

[78] Jennings, 'The *Caroline* and *McLeod* Cases' (1938) 32 AJIL 82; and *The People v McLeod* 1 Hill (NY) 375.
[79] *Khurts Bat* (n 1) para 86.
[80] Franey (n 70) 204–10; Fox (n 29) 95–7; R Van Alebeek, *The Immunity of States and Their Officials in International Criminal Law and International Human Rights Law* (OUP 2008) 108–10.
[81] Jennings (n 78) 84.
[82] Amos Durfee and the cabin boy, known as 'little Billy', who was shot while attempting to leave the vessel: ibid 84.
[83] ibid 85.
[84] ibid.
[85] ibid 85 and 93.

> Government has asserted, the law which has been violated is the law of nations, and the redress which is to be sought is the redress authorized, in such cases, by the provisions of that code. . . .
>
> . . . That an individual forming part of a public force and acting under the authority of his Government, is not to be held answerable, as a private trespasser or malefactor, is a principle of public international law sanctioned by the usages of all civilized nations, and which the Government of the United States has no inclination to dispute.[86]

There was also a concern that the owner of the *Caroline* might pursue a civil action against McLeod and so Webster added:

> But whether the process be criminal or civil, the fact of having acted under public authority, and in obedience to the orders of lawful superiors, must be regarded as a valid defence; otherwise, individuals would be holden responsible for injuries resulting from the acts of Government, and even from the operation of public war.[87]

These instructions were copied to Mr Fox. Although Webster had instructed the Attorney General that McLeod should not be arrested and tried by a national court for following orders of the British State, there was no available legal machinery permitting the United States to interfere with the judicial processes of an individual state. The New York Statute made it unlawful 'for any district attorney to enter a *nolle prosequi* upon any indictment, or in any other way to discontinue or abandon the same, without the leave of the court having jurisdiction to try the offence charged, entered in its minutes'.[88] Frustrated at the delay in responding to his situation, McLeod rejected the opportunity to appeal to the Federal Court and requested a trial by jury. At the trial he was acquitted due to a lack of evidence proving he was present at the destruction of the Caroline. When he was finally released in October 1841, he had spent 12 months in prison.[89]

After McLeod's release, the incident was again discussed between the British Foreign Secretary, Lord Ashburton, and US Secretary of State Webster. Lord Ashburton, in a letter dated 28 July 1842, inquired as to whether 'the Government of The United States is now in a condition to secure in effect and in practice, the principle which has never been denied in argument, that individuals acting under legitimate authority are not personally responsible for executing the orders of their Government'.[90] He claimed that:

> Individuals have been made personally liable for acts under the avowed authority of their Government; and there are now many brave men exposed to personal consequences for no other cause than having served their country. That this is contrary to every principle of international law it is useless for me to insist.[91]

Webster replied acknowledging and accepting the points made by Lord Ashburton and apologizing for the delay in releasing McLeod.[92] The matter was subsequently brought before the US Congress, which on 29 August 1842, enacted a Statute providing 'for immediate transfer of jurisdiction to the courts of the United States in all cases where any persons, citizens, or subjects of a foreign state, and domiciled therein, should be

[86] Mr Webster to Mr Crittenden, Washington, 15 March 1841, 29 British and Foreign State Papers 1139; cited in part by Jennings: ibid, 94.
[87] ibid.
[88] 2 RS 609, para 54 (2d ed), cited in ibid 95.
[89] Jennings (n 78) 95.
[90] Lord Ashburton to Mr Webster, 28 July 1842, 30 British & Foreign State Papers 195; cited by Jennings: ibid, 95.
[91] ibid.
[92] 30 British and Foreign State Papers 201.

held in custody on account of any act done under the commission, order, or sanction of any foreign state or sovereignty.'[93]

McLeod later attempted to obtain compensation for his imprisonment and trial. The British Law Officers, the advice of which was sought by the British Government in order to assess the merits of McLeod's claim, reiterated that McLeod should not have been held responsible for the destruction of the Caroline:

> The Principle of International Law – that an individual doing a hostile act authorized and ratified by the government of which he is a member cannot be held individually answerable as a private trespasser or Malefactor, but that the act becomes one for which the State to which he belongs is in such case alone responsible, is a principle too well established to be now controverted . . .
>
> . . . In direct violation of this principle McLeod was imprisoned for 12 months and brought to trial as a criminal, notwithstanding the most distinct information to the Government of the United States by the Government of this Country that the act in respect of which Mr. McLeod was called upon to answer had been done by the authority of the British Government.[94]

The British and US correspondence, as well as the Law Officer's Opinion, clearly advances the principle that State officers should not be held criminally responsible for official acts performed on the territory of the forum State.[95] Some commentators have suggested that although this conclusion might be reached on the basis of the correspondence, McLeod was not released from the jurisdiction of the court on this basis: he was acquitted only after a full trial.[96] While this is technically correct, the issue of McLeod's responsibility was not presented by Britain to New York or to the New York Supreme Court, but rather, to the administration of the United States. Britain dealt with the United States as a single entity and it was the lack of available legal machinery that prevented the federal administration from releasing McLeod on the basis that he was not personally responsible. The US Secretary of State could instruct the Attorney General, but the Attorney General could not interfere in the judicial proceedings of the individual American states.

Mr Webster and the Law Officers' justified the exclusion of Mr Macleod's personal responsibility on the basis that his conduct was an act of the State. Does the *Caroline Affair/McLeod Case* represent customary international law today? First, as Fox has pointed out, the rationale of non-answerability does not 'fit situations whether the personal liability of the official revives on waiver or consent of the foreign State to municipal criminal proceedings or of espionage where municipal courts immediately impose criminal liability'.[97] Indeed, as the cases discussed in this paper attest, the personal liability of the official subsists even though he was acting on behalf of the State.

Second, the facts of this case arose in the context of a dispute between British-governed Canada and the United States over the law of neutrality, with the UK arguing that its acts were necessary for 'self-defence'. As Hyde explained in 1945, '[i]f McLeod was, according to the law of nations, exempt from the jurisdiction of

[93] Jennings (n 78) 96. The full text of the Statue is reproduced in 30 British and Foreign State Papers 202–3.

[94] A McNair, *International Law Opinions*, vol 2 (CUP 1956) 230. Reprinted in Jennings (n 78) 97.

[95] Van Alebeek (n 80) 108.

[96] Tomonori (n 48) 102.

[97] Fox (n 29) 97.

that State [New York], it was because the violation of its territory by a British force had been justified on grounds of self-defence, and the attending circumstances had satisfied the demands of the legal principle which Mr. Webster had himself tersely enunciated.'[98]

If the same facts materialized today, McLeod would be treated as a lawful enemy combatant under the law of armed conflict and would not be prosecuted for the 'mere act of fighting', provided he observed the laws and customs of war.[99] Lawful combatants are not held personally responsible under the domestic law of the enemy State for acts of warfare that would otherwise amount to murder, non-fatal offences against the person or destruction of property. The *Caroline Affair/McLeod Case* therefore supports the proposition that State officials are not to be held responsible for carrying out a State function on the territory of another State during an international armed conflict. This example of State practice is still relevant today, but in a modified form; individuals are not personally liable for acts committed in the course of military fighting, so long as they observe the applicable rules and customs of armed conflict.

(2) England: *Pinochet (No 3)* (1999)[100] involved an extradition request for the Chilean General for the prosecution of several municipal and international crimes. Two of the charges in the second provisional arrest warrant were for murder and conspiracy to commit murder in Spain, the requesting State.[101] Five of the seven judges took as their starting point the fact that Pinochet would be immune from criminal jurisdiction for municipal crimes committed on Spanish—i.e. forum State—territory, if they were carried out as public acts. Lord Goff explained that,

> There can be no doubt that the immunity of a Head of State, whether *ratione personae* or *ratione materiae*, applies to both civil and criminal proceedings . . . one Sovereign State does not adjudicate on the conduct of another. This principle applies as between States, and the Head of a State is entitled to the same immunity as the State itself, as are the diplomatic representatives of the State. That the principle applies in criminal proceedings is reflected in the Act of 1978, in that there is no equivalent provision in Part III of the Act to s.16(4) which provides that Part I does not apply to criminal proceedings.[102]

Lord Hutton agreed: 'in general under customary international law a former head of state does enjoy immunity from criminal proceedings in other countries in respect of what he did in his official capacity as head of state. This form of immunity is known as immunity ratione materiae.'[103] Lord Hope adopted a similar approach,[104] but Lord Brown-Wilkinson was more cautious in his opinion:

> As to the charges of murder and conspiracy to murder, no one has advanced any reason why the ordinary rules of immunity should not apply and Senator Pinochet is entitled to such immunity.[105]

[98] C Hyde, *International Law Chiefly as Interpreted and Applied by the United States*, vol 1 (2nd rev edn, Boston 1945) 822; see also 820–1.

[99] K Ipsen, 'Combatants and Non-Combatants' in D Fleck (ed), *The Handbook of Humanitarian Law of Armed Conflict* (2nd edn, OUP 2008) 82; Akande and Shah (n 12) 826; Franey (n 70) 86; and Van Alebeek (n 80) 127. Van Alebeek has pointed out that the principle of non-personal responsibility is limited to 'acts performed in the context of the exercise of state authority under international law', such as when States are engaged in boundary disputes or armed conflict: Van Alebeek (n 80) 127 and fn 88.

[100] See n 27.

[101] *Pinochet (No 3)* (n 48) charges 2 and 9, 240D.

[102] ibid 210E–F.

[103] ibid 265G.

[104] ibid 241G–H.

[105] ibid 205G–H.

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Lord Phillips and Lord Millett took a contrary view, as acknowledged by Lord Justice Moses in *Khurts Bat*.[106] Lord Millett explained that:

> I can deal with the charges of conspiracy to murder quite shortly. The offences are alleged to have taken place in the Requesting State. The plea of immunity *ratione materiae* is not available in respect of an offence committed in the Forum State, whether this be England or Spain.[107]

Lord Phillips was not 'aware of any custom which would have protected from criminal process a visiting official of a foreign State who was not a member of a Special Mission had he the temerity to commit a criminal offence in the pursuance of some official function.'[108] On the face of it, the majority of judges in *Pinochet (No 3)* appeared to support the proposition—albeit *obiter*—that Pinochet was immune from criminal jurisdiction in respect of municipal crimes committed on Spanish territory.

Ultimately, however, the Lords did not provide substantial reasoning to support their conclusions. This was disappointing, especially given the submissions of Professor Greenwood (as he then was) on behalf of Spain:

> My Lords, we submit that this starting-point [that General Pinochet must have immunity from criminal jurisdiction] is wrong. It is, first of all, a starting point of quite extraordinary breadth . . . it would mean that for well over a century states have been wrongly trying foreign spies, people who in their own territory commit on behalf of other states, murders, attacks, abduction of people, sabotage, acts of that kind . . . the fact that Dr Collins could not take us to a single case of an offence committed in the territory of State A by an official of State B in which State B successfully asserted immunity, does not actually suggest that perhaps this is a case of the whole regiment being out of step except Albert. There is, in fact, no immunity to assert.[109]

Professor Greenwood invited the court to consider the issue of a State official committing a public act amounting to a municipal crime in the territory of the forum State, but aside from the statements quoted above, there is no discussion in the final judgment. Lord Millet, in his exchange with Professor Greenwood, did highlight an important consideration for immunity from criminal jurisdiction:

> Speaking for myself, I cannot see how State A can claim immunity for criminal acts done in State B, the forum state, because the most important exercise of sovereignty must be the maintenance of law and order in your own state. That must override anything except ratione personae, must it not?[110]

To which Professor Greenwood replied:

> Yes, my Lord . . . a central feature of [Dr Collins] analysis of the policy lying behind immunity is the principle that one state should not intervene in the internal affairs of another but there is no possible way in which a state can claim that it was a matter of its own internal affairs that its operatives had gone and killed somebody in the territory of another state. It is the state where the offence took place whose internal affairs have been interfered with in violation of international law, and that would be true whether the offence took place in the forum state or in a third country.[111]

Although a State might claim that conduct performed in a foreign State is part of its internal affairs, it cannot claim it to be exclusively a matter of its internal affairs. Two important propositions are raised in this exchange between Lord Millett and

[106] *Khurts Bat* (n 1) paras 79–80.
[107] *Pinochet (No 3)* (48) 277C.
[108] ibid 283A.
[109] Transcript from *Pinochet (No 3)* ibid., cited in Franey (n 70) 9–12.
[110] ibid 11.
[111] ibid 12.

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Professor Greenwood. First, a State official may violate both the municipal law of the forum State *and* the rules of international law by carrying out an official function on territory of the forum State, and these violations are treated separately. The criminal or civil offence may result in individual criminal or civil liability, while a violation of international law attributed to the State may engage its international responsibility. A State official may also be present on the territory of the forum State legally, but then proceed to commit a criminal (or civil) offence.

The International Law Commission Special Rapporteur Kolodin reached the conclusion that if a State official is present on the territory of the forum State and performs an act that amounts to a criminal offence, but does so with the consent of the forum State, he/she may be able to invoke immunity *ratione materiae*. In contrast, 'there are situations where not only the activity but also the very presence of the foreign official in the territory of the state exercising jurisdiction takes place without the consent of the state'.[112] In these situations, it is unlikely that the State official will be able to enjoy immunity. Van Alebeek also considers that it is significant, for the establishment of individual responsibility, 'whether a particular act in fact constitutes a violation of the national law of the state whose territorial sovereignty has been violated or whether only an interstate norm has been violated'.[113]

The second point emerging from the exchange between Lord Millett and Professor Greenwood concerns the relationship between the maintenance of law and order and the preservation and exercise of State sovereignty. The most important jurisdiction for a State is territorial, and criminal jurisdiction during peacetime is nearly always territorial. Exceptions to this rule involve the capture of lawful combatants and the management of an occupied territory, both of which occur during an international armed conflict. The argument raised by Professor Greenwood does not therefore conflict with the *Caroline/ McLeod* case or other similar examples of State practice.

That territorial jurisdiction can justifiably supersede State immunity is also generally considered to reflect the restrictive doctrine of immunity from civil jurisdiction.[114] The UK State Immunity Act 1978, for example, does not confer immunity on States in respect of contracts of employment *made in the United Kingdom* or where the work is to be *wholly or partly performed there*;[115] death, personal injury, damage or loss of tangible property caused by an act or omission *in the United Kingdom*;[116] any interest of the State in, or its possession or use of, immovable property *in the United Kingdom*;[117] and in respect of proceedings in relation to its membership of a corporation, unincorporated body or partnership, which is *incorporated or constituted under the law of the United Kingdom* or is controlled or has its principal place of business *in the*

[112] Kolodkin (n 75) para 82.

[113] Van Alebeek (n 80) 129.

[114] Although the ICJ in *Jurisdictional Immunities of the State* (n 47), para 64 et seq, did not explicitly endorse or reject the territorial tort exception, but did cite national practice providing for the exception (see n 121), which suggests that the exception does not form part of general international law. The Court limited its discussion to State practice concerning acts committed by the armed forces of a State on the territory of another in the course of an armed conflict (72–78). It did, however, note and accept that 'the notion that State immunity does not extend to civil proceedings in respect of acts committed on the territory of the forum State causing death, personal injury or damage to property originated in cases concerning road traffic accidents and other "insurable risks".' (64).

[115] UK State Immunity Act (n 64), section 4 (emphasis added).

[116] ibid section 5 (emphasis added).

[117] ibid section 6 (emphasis added).

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United Kingdom.[118] The European and the United Nations Conventions on immunity,[119] and, as was noted by the ICJ, all but one of the national immunity acts enacted since 1976 exclude State immunity for torts occasioning death, personal injury or damage to property occurring on the territory of the forum State.[120]

If the restrictive doctrine of State immunity recognizes that certain acts performed on the territory of the forum State—such as death and personal injury—are not covered by the personal immunity of the State, it is logical to follow this principle through to the immunity of State officials from criminal jurisdiction, especially as the maintenance of law and order is considered 'the most important exercise of sovereignty'.

(3) International Criminal Tribunal for the former Yugoslavia ('ICTY'): *Prosecutor v Blaškić* (1997)[121] concerned, *inter alia*, a challenge to the legality of a compulsory order given by the Tribunal to Croatian State officials to produce various official documents. The Appeals Chamber ruled that the Tribunal could not issue subpoenas or other binding orders to State officials acting in their official capacity, because:

> . . . [s]uch officials are mere instruments of a State and their official action can only be attributed to the State. They cannot be the subject of sanctions or penalties for conduct that is not private 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'. This is a well-established rule of customary international law going back to the eighteenth and nineteenth centuries, restated many times since.[122]

The Appeals Chamber relied on the *Caroline Affair*/*McLeod Case*, the *Rainbow Warrior* case and the *Eichmann* trial in support of this statement. However, it is not clear that any of these examples of State practice adequately support the conclusion reached by the Chamber.

The *Caroline Affair*, as discussed above, is an example of State practice involving the principle of non-personal responsibility in the context of international armed conflict. The principle of non-personal responsibility was not recognized by the court that dealt with Mr McLeod,[123] and was only recognized by the courts of individual American states after a specific US statutory enactment.[124]

The use of the *Rainbow Warrior* as authority in support of the general rule of non-answerability of State officials is misleading. It is true that France 'adopted a position

[118] ibid section 8 (emphasis added).

[119] European Convention (n 65), art 11 and UN Convention (n 65), art 12. See also *Jurisdictional Immunities of the State* (n 47) para 66 et seq.

[120] *Jurisdictional Immunities of the State* (n 47) para 70; Argentina Law No. 24/488 (n 64), art 2 (e) (Argentina); Foreign States Immunities Act 1985 (n 64) section 13 (Australia); State Immunity Act 1985 (n 64) section 6 (Canada); Israel Foreign State Immunity Law 2008 (n 64) section 5 (Israel); Act on the Civil Jurisdiction of Japan with respect to a Foreign State 2009 (n 64) art 10 (Japan); State Immunity Act 1985 (n 64) section 7 (Singapore); Foreign States Immunities Act 1981 (n 64) section 6 (South Africa); State Immunity Act 1978 (n 64) section 5 (UK); and Foreign Sovereign Immunities Act (n 64) (a)(5) (US). The Pakistan State Immunity Ordinance 1981 (n 64) is the only State immunity act that does not contain a comparable provision.

[121] *Prosecutor v Blaškić* IT-95-14, Judgment on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997.

[122] *Blaškić*, Objection to the Issue of a Subpoena Duces Tecum (n 74) para 38.

[123] *The People v McLeod* (n 78).

[124] *Horn v Mitchell* (1916) 232 Fed Reporter 818 Cir Ct of Appeals.

based on that rule' in respect of its arrested agents, but France did not plead immunity before the New Zealand Court. In addition, both officers pleaded guilty to manslaughter without raising State immunity. Indeed, it was the rejection of this principle by New Zealand that led to the referral of the situation to the UN Secretary-General,[125] who hardly supported the principle by ruling that the French agents should remain imprisoned, albeit on an isolated island under French jurisdiction.

Finally, the *Eichmann* case concerned the act of State doctrine, not the application of State immunity from criminal jurisdiction. Eichmann argued that his actions were carried out within the framework of the anti-Jewish decrees of the Nazi-regime and that he was acting in accordance with law. The Court, he argued, was not permitted to look behind the laws because a foreign court is not capable of adjudicating on actions taken by a State in its own territory. It was held that the act of State doctrine was limited when applied to international crimes because international law provided for individual criminal responsibility.[126]

(4) France/United States (2007): in November 2007, a Paris District Prosecutor dismissed a complaint against Donald Rumsfeld, former US Secretary State of Defence, alleging that he was responsible for acts of torture in detention centres in Guantanamo Bay and Abu Ghraib. The reason given for the dismissal was that Rumsfeld had continuing immunity 'for acts performed in the exercise of his functions [as former Secretary of State for Defence]'.[127] It is likely that the dismissal of the complaint by a Prosecutor signalled a political, rather than legal, course of action.

(5) Italy: *Lozano v Italy* (2008):[128] on 4 March 2005, a US solider, Mr Lozano, stationed at a checkpoint outside Baghdad airport, killed an Italian intelligence officer and two Italian nationals. Italian prosecutors charged him with both voluntary and attempted homicide. Mr Lozano claimed he was entitled to immunity because, in performing his duties, he was an 'organ' of the United States.[129] The Italian Court of Cassation held that the rule on immunity *ratione materiae* was 'simply a corollary to the customary international rule establishing the immunity of a State from the jurisdiction of a foreign State in relation to *acta iure imperii* of its organs.'[130] Relying on the principle that each State is free to determine its internal structure and to choose who may act on its behalf as organs of the State, the Court held that acts performed by State organs must be considered the exercise of a State function and therefore to be attributed to the State. Accordingly, only the State could be held responsible for these acts, not the individual or the organ of the State.[131]

The facts of the case—the vehicle rapidly approaching the checkpoint, the high alert of soldiers due to the arrival of the US ambassador, the sustained terrorist attacks

[125] H Fox, 'Some Aspects of Immunity from Criminal Jurisdiction of the State and Its Officials: The *Blaškić* Case', in L Vohrah et al. (eds), *Man's Inhumanity to Man* (Kluwer Law International 2003), 305.
[126] Franey (n 70) 215.
[127] See FIDH, 'France in Violation of Law Grants Donald Rumsfeld Immunity, Dismisses Torture Complaint' (FIDH, 27 November 2007) <http://www.fidh.org/france-in-violation-of-law-grants-donald-rumsfeld,4932>.
[128] *Lozano v Italy*, Appeal Judgment, Case No 31171/2008; ILDC 1085 (IT 2008).
[129] ibid para 4, H1.
[130] ibid para 5, H3.
[131] ibid para 5, H3.

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suffered by the checkpoint, the fact the incident occurred at night, the isolated nature of the act—meant the conduct did not amount to a war crime.[132] The Court explained:

> No criminal jurisdiction exists on the part of the Italian state nor on the part of the territorial State, but rather jurisdiction belongs exclusively to the USA, the State sending the military personnel taking part in the Multinational Force in Iraq, in application of the customary international law principle of 'functional immunity' or immunity *ratione materiae* of the individual, acting as an organ of the foreign State, from the criminal jurisdiction of another State, due to acts carried out *iure imperii* in the exercise of the duties and functions ascribed to him or her: a principle which cannot be departed from, in the case in point, due to the absence, in the circumstances and intentions of the disputed acts, of the characteristics if a 'grave violation' of international humanitarian law, with particular regard to the fact that in the actual case the acts committed did not amount to a 'crime against humanity' or 'war crime'.[133]

The Italian Court considered the rule of immunity *ratione materiae* as the logical extension of State immunity. Accordingly, it upheld the distinction between *acta jure imperii* and *acta jure gestionis* applicable in State immunity to immunity of State organs. It is not entirely clear why the Court maintained this distinction. If the rationale for immunity *ratione materiae* is that acts performed by State organs in an official capacity are acts of the State, why is it necessary to distinguish between *acta jure imperii* and *gestionis*? If an organ of the State performs the acts in the exercise of their official functions, they are attributed to the State for the purposes of State immunity and there is no need to draw this distinction. The Court did not appear to distinguish between State immunity from foreign *civil* jurisdiction and immunity *ratione materiae* of State organs from foreign criminal jurisdiction.[134] It is not, therefore, a clear example of State practice and *opinio juris* on which to draw a conclusion about customary international law.

2. State practice where state officials have been found criminally liable

(1) Acts of espionage: there have been several instances where States have prosecuted individuals for espionage and other clandestine activities committed on behalf of their State.[135] According to Fox, it is generally accepted that in times of peace, an act of espionage is a violation of international law and the victim State is entitled, in international law, to prosecute the individual spies.[136] It is 'unusual in these cases for the sending state to admit that the spying was undertaken on its behalf and it may therefore be that these cases constituted no exception to the general rule [of immunity from criminal jurisdiction]; because the sending state makes no claim that the spying was committed on its behalf, the victim state may treat the act as committed outside the agent's official functions and accordingly prosecute.'[137]

However, there have been some cases where an individual has been prosecuted for espionage despite the State acknowledging responsibility for the acts.[138] It is not clear

[132] ibid para 7, H5.
[133] ibid para 8.
[134] ibid A4.
[135] See I De Lupis, 'Foreign Warships and Immunity for Espionage' (1984) 78 AJIL 61, 69; O Lissitzyn, 'The Treatment of Aerial Intruders in Recent Practice and International Law' (1953) 47 AJIL 565, fn 30; Fox (n 29) 96; Franey (n 70) 272; *Blaškić* (n 48) para 41.
[136] Fox (n 29) 96.
[137] ibid.
[138] For example, *Francis Gary Powers* case, Hearing before the Senate Committee on Foreign Relations, 86th Congress, 2d Session 175 (1960); see also The Avalon Project, 'Foreign Relations

from State practice and *opinio juris* whether States acknowledge a genuine exception to immunity from criminal jurisdiction for espionage or whether these cases are simply the result of a rule that does not recognize the immunity *ratione materiae* of State officials who commit *any* crime on the territory of the forum State.

There are two key examples of State practice involving espionage that are often discussed in the context of immunity from criminal jurisdiction. First, in November 2006, Alexander Litvinenko, a British citizen who used to work as a Russian KGB and FSB officer, was poisoned with the radioactive isotope polonium-210 while in London. On 22 May 2007, the Director of Public Prosecutions announced that he would prosecute Andrei Lugovoy, a former KGB officer, with the murder of Mr Litvinenko.[139] A warrant was issued for his arrest in England, but Russia refused to extradite him on the ground that it does not extradite its own citizens. Consequently, four Russian diplomats were expelled by Britain, which led to four British diplomats being expelled from Russia.[140] At no stage did Andrei Lugovoy or Russia invoke a claim of State immunity.

The second example of State practice is the incident between Cyprus and Israel (2008). Two Israeli intelligence officers were imprisoned for approaching a prohibited military zone in Cyprus. Despite Israel entering into considerable negotiations to retrieve its Mossad agents, neither the Israeli government nor the State officials or their lawyers suggested they were entitled to immunity.[141] Israel did not deny the officials were its agents or that they were acting on orders of the State. It also accepted that their activities were contrary to Cypriot law, with the Israeli Prime Minister claiming that Israel would do everything to bring them home 'in accordance with the laws of Cyprus'.[142] Given the alleged criminal offence involving collecting information, this case clearly falls under the exception for espionage.

(2) Germany: *Staschynskij* (1962) involved the prosecution of a KGB agent who, in 1959, killed two political exiles in Munich. The German *Bundesgerichtshof* acknowledged he was acting on the orders of his superiors but nevertheless convicted him of murder.[143] Although, according to Van Alebeek, 'the court did not explicitly state that it did not recognize the cloak of foreign state authority for unauthorized acts on its territory',[144] but rather:

> The fact that the orders had been given by a *foreign* state seemed irrelevant. The individual responsibility of Staschynskij was approached as a question as to the possible scope of the cloak of state authority in general.[145]

Furthermore, the 'fact that he acted under orders of the Soviet government and in particular under their pressure and with fear of reprisals if he failed to obey, was considered ground to mitigate the punishment.'[146]

of the United States May–July 1960' <http://avalon.law.yale.edu/20th_century/vx147.asp>. See also *Rainbow Warrior* (n 148 and discussion below), which concerned the prosecution by New Zealand of two French agents. Although note discussion below; this authority is controversial and may be broader than the exception relating to spies. For a list of cases, see Franey (n 70) 265–72.

[139] Franey (n 70) 254. [140] ibid 255. [141] ibid 220. [142] ibid 218.

[143] The *Staschynskij* Case, 18 Entscheidungen des Bundesgerichtshof in Strafsachen 87 (Federal Republic of Germany, Bundesgerichtshof, 1962), partly cited in Van Alebeek (n 80) 125 and 130. [144] Van Alebeek (n 80) 130.

[145] ibid. [146] ibid fn 98.

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(3) France/New Zealand: *Rainbow Warrior* (1985) is a controversial authority, which has been used to support and to reject the proposition that State officials acting on official orders are not answerable for criminal acts perpetrated on the territory of the forum State.[147] In 1985, French agents destroyed a Greenpeace vessel called the *Rainbow Warrior* while it was docked at Auckland Harbour, killing a Dutch photographer. The vessel was due to leave the port to protest against French nuclear testing in the Pacific Ocean.

Two French agents were convicted in New Zealand for complicity in manslaughter and wilful damage to a ship, which resulted in tense diplomatic negotiations between the two States. France acknowledged responsibility for the operation and offered reparation for the harm it caused, but only if its agents were released. New Zealand had no intention of releasing the agents, claiming they had authority to prosecute them for their criminal acts notwithstanding the French apology. The matter was eventually referred to the UN Secretary-General for a resolution.[148] France, aggrieved that its operatives were being detained by New Zealand, submitted the following statement in its memorandum:

> France is ready to assume, as regards New Zealand and the victims of the incident, all responsibilities, incumbent upon it, in place of the persons having acted on its behalf, as done, for example, by the British Government in respect of the United States Government when the vessel 'Caroline' was destroyed by a British commando unit . . . .[149]

New Zealand rejected this proposition and argued that 'superior orders' is not a defence in international law or in numerous municipal legal systems.[150] The Secretary-General avoided direct discussion of the personal responsibility of the two agents and/or their immunity, but he did rule that they were to be held in a French military facility on an isolated island outside Europe for at least three years.[151] As Van Alebeek has pointed out, this 'does not – to put it mildly – *support* the thesis that no such responsibility arises in respect of acts of this kind.'[152]

Lord Justice Moses criticized the Tribunal judgment in *Blaškić* for relying on the *Rainbow Warrior* case for the proposition that immunity *ratione materiae* is afforded to State officials who commit crimes on the territory of another State. The ICTY emphasized the French claim that its agents should not be held responsible for carrying out the orders of the French State, but it did not take full account of the position adopted by New Zealand and the ruling of the UN Secretary-General.

Lord Justice Moses appears to have suggested that the rejection of the non-personal responsibility principle in the *Rainbow Warrior* case has 'replaced' the authority of the *Caroline Affair*/*McLeod Case*.[153] Franey supports this conclusion, stating that '[it] is state practice which demonstrates that state officials have individual criminal liability for offences which they commit on the territory of another state, at the behest of their state and whilst on duty.'[154] However, although both cases concern the unauthorized exercise

[147] See *Blaškić*, Objection to the Issue of a Subpoena Duces Tecum (n 74) para 38 and *Khurts Bat* (n 1) para 89.
[148] United Nations Secretary-General, Ruling on *Rainbow Warrior* Affair between France and New Zealand (1986), (1987) 26 ILM 1346ff (UN-SG Ruling).
[149] ibid 1366. [150] ibid 1351 and 1357. [151] ibid 1346 and 1369–70.
[152] Van Alebeek (n 80) 126 (emphasis in original).
[153] *Khurts Bat* (n 1) paras 89–91, 99, citing with approval Franey (n 70) 210–14.
[154] Franey (n 70) 214.

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of public authority of one State on the territory of another, the *Caroline Affair* took place in the context of international armed conflict whereas *Rainbow Warrior* is concerned with clandestine agents operating in peacetime. As has been explained above, international humanitarian law now governs the personal liability of State officials operating on the territory of a foreign State during an international armed conflict. Thus, the *Rainbow Warrior* case has not displaced the *Caroline Affair* as authoritative State practice; it is distinguished by the fact that it relates to agents operating in peacetime.

(4) England: *R v Lambeth Justices, ex parte Yusufu* (1985).[155] Mr Yusufu was charged with the kidnapping of a former Nigerian politician. He sought a declaration that he was a diplomat and therefore entitled to diplomatic immunity. Several other individuals involved in the incident were properly accredited diplomats and could therefore benefit from their diplomatic immunity. Mr Yusufu, however, was not accredited as a diplomat and was consequently denied both diplomatic immunity and immunity *ratione materiae.*

(5) Scotland/Libya: *The Lockerbie Case* (2003).[156] On 21 December 1988, a bomb on board Pan Am Flight 103 exploded over the Scottish town of Lockerbie killing 259 people on board and 11 people on the ground. Soon after the incident, a Scottish Sheriff issued arrest warrants for two Libyan officials believed to be working on behalf of the Libyan intelligence service.[157] Libya refused to surrender its officials, referring to the lack of extradition treaty between the countries and the provision in Libyan law that prohibits the extradition of its nationals. However, it did make arrangements to try the officials under the terms of the Montreal Convention; it placed the officials under house arrest and appointing a Supreme Court Judge as an examining magistrate.

The British and American governments protested against this decision and insisted that the officials be tried in a court outside Libya. Consequently, Libya filed a case with the International Court of Justice seeking a declaration that the UK and US were in breach of their obligations under the Montreal Convention.[158] Libya did not argue that its officials were entitled to benefit from its personal immunity. On 10 September 2003, the case was removed from the docket of the Court at the joint request of the parties.[159]

After years of tense and difficult negotiations, pronouncements by the UN Security Council and international sanctions against Libya, a Scottish Court was convened in The Netherlands, to which the officials surrendered themselves.[160] Neither Libya nor its officials claimed that the officials were entitled to State immunity from criminal jurisdiction or that they could not be held answerable for conduct that amounted to an act of State. On 31 January 2001, the Scottish court acquitted one official and convicted Mr al-Megrahi of murder and sentenced him to life imprisonment.

[155] [1985] *Criminal Law Review* 510.
[156] Noted in detail by Franey (n 70) 244–8.
[157] ibid 245.
[158] *Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v United Kingdom; Libyan Arab Jamahiriya v United States of America)*, General List Nos 88 and 89 (3 March 1992); *Provisional Measures*, Orders of 14 April 1993, ICJ Reports 1992, pp 3, 114; and *Preliminary Objections*, Judgment, ICJ Reports 1998, pp 9, 115.
[159] ibid Order of 10 September 2003, Nos 88 and 89.
[160] On 5 April 1999.

Franey concludes that '[t]his is state practice by the UK which prosecuted, the USA which supported the prosecutions, all the states on the Security Council, and Libya which did not claim immunity.'[161] However, it is not clear what rule of customary law, if any, this State practice and *opino juris* supports. Libya did not assert State immunity on behalf of its officials, which according to the ICJ is a necessary precondition to relying on this type of immunity.[162] It is not entirely clear whether Libya believed immunity was not available or whether it had impliedly waived immunity by accepting the judicial arrangements and surrendering the accused for trial. No other party—including the UN Security Council—referred to the immunity of the officials, but this may have been the result of a political, rather than legal, position. Furthermore, the international outrage and the involvement of international actors effectively 'internationalized' the incident, which may have had an impact—at least politically—on the negotiations and the question of immunity.[163]

(6) Italy: *Public Prosecutor v Adler* (2010). Twenty-six Central Intelligence Officers were charged with the abduction of Nasr Osama Mustafa Hassan (known as Abu Omar) in Milan in 2003.[164] In June 2007, a criminal trial commenced against the agents, seven representatives of the Italian military intelligence agency, and an agent belonging to a special Carabinieri unit. All the US officials were tried and convicted *in absentia*, and in September 2012, the Italian Court of Cassation upheld the guilty verdicts.[165] The Italian Government has not requested their extradition.[166]

Among the CIA agents were three members of the US diplomatic staff and two members of the US consular staff in Italy.[167] One of the agents, de Sousa, was a consular agent at the time of the abduction, but her consular position had since expired. The Judge in Milan rejected her claim of immunity on the basis that abduction could not form part of her consular functions. The Judge did not explicitly consider whether she enjoyed immunity *ratione materiae* as a CIA agent, and the United States Government did not invoke immunity before the court for either the diplomatic or consular agents. De Sousa subsequently filed an appeal in a US Court, in which she asked a US Judge to order the US Government to formally invoke diplomatic and consular immunity on her behalf.[168] On 5 January 2012, the Judge dismissed her claim, noting that 'the plaintiff seeks to challenge an essentially discretionary policy decision of the United States

[161] Franey (n 70) 247–8.

[162] See discussion of *Djibouti v France* (n 27).

[163] In this context, see the impact of the UN Security Council on immunity of officials before international tribunals has received considerable discussion after the Security Council referred Darfur to the ICC, which subsequently issued an arrest warrant for sitting head of State, President Al-Bashir: see, for example, D Akande, 'The Legal Nature of Security Council Referrals to the ICC and its Impact on Al Bashir's Immunities' (2009) 7(2) JICL 333, who discusses the legal nature of Security Council referrals to the ICC and their impact on the immunity of State officials.

[164] *Public Prosecutor v Adler*, First instance judgment, No 12428/09; ILDC 1492 (IT 2010).

[165] BBC News, 'Italy upholds verdict on CIA agents in rendition case' (BBC Online, 19 September 2012) <http://www.bbc.co.uk/news/world-europe-19653566>.

[166] *Alder* (n 164) para F2; see also N O'Leary, 'Italy court upholds "rendition" convictions on ex-CIA agents' (Reuters, 19 September 2012) <http://www.reuters.com/article/2012/09/19/us-italy-usa-rendition-verdict-idUSBRE88I13320120919>.

[167] *Alder* (n 164) para F3.

[168] *Sabrina de Sousa v Department of State* (United States District Court for the District of Columbia, No 9, 13 May 2009).

regarding whether to assert immunity for that employee in a foreign nation. This type of claim presents a political question that this Court cannot answer.'[169]

The Italian Judge in *Adler* explained that the protection of consular officials is 'always within the limits of international law . . . within these limits, naturally, is the principle of the sovereignty of the host state that cannot allow on its territory the use of force by a foreign State that is outside every control of the political and judicial authorities'.[170] Gaeta has suggested that the question of immunity *ratione materiae* would depend *inter alia* on whether Italy had given consent for the operation to take place on its territory.[171] In the absence of consent, 'the territorial State would have no obligation under international law to recognize any functional immunity to the foreign agent who acted on its territory'.[172]

The ILC Special Rapporteur has rightly noted that based on available knowledge of the case, 'it cannot be said with certainty that failure by the State of the official to invoke immunity in these cases was the reason that immunity was denied.'[173]

(7) International Court of Justice: *Djibouti v France*.[174] In its oral pleadings, Djibouti initially argued that the *procureur de la République* and the Head of National Security benefited from 'functional immunity, or *ratione materiae*', which it claimed was the only category of immunity available to these officials:[175]

> For Djibouti, it is a principle of international law that a person cannot be held as individually criminally liable for acts performed as an organ of state, and while there may be certain exceptions to that rule, there is no doubt as to its applicability in the present case.[176]

Djibouti made no other submissions on the matter and the Court did not address the substantive law of immunity *ratione materiae*. However, it did explain that the 'State which seeks to claim immunity for one of its State organs is expected to notify the authorities of the other State'[177] in order to ensure that it can respect any entitlement to immunity and avoid engaging its own international responsibility. In addition, 'the State notifying a foreign court that judicial process should not proceed, for reasons of immunity, against its State organs, is assuming responsibility for any internationally wrongful act in issue committed by such organs.[178]

C. Analysis of the Legal Principles

It is clear that the preceding State practice does not all point in the same direction. Nevertheless, the examination does indicate that a State official cannot plead immunity from the criminal jurisdiction of the forum State if he/she has committed an offence on

[169] ibid.
[170] Jurist, 'Italian judge denies immunity claim of CIA agent accused in kidnapping plot' (29 November 2005), cited in Franey (n 70) 259.
[171] Gaeta, 'Extraordinary renditions e immunità dalla giurisdizione penale degli agenti di Stati esteri: il caso Abu Omar' (2006) 89 *Rivista di diritto internazionale* 126–30.
[172] Memorandum by the International Law Commission Secretariat, 'Immunity of State officials from foreign criminal jurisdiction' (31 March 2008, A/CN.4/596); and Gaeta (n 171) 127–8.
[173] International Law Commission, *Third report on immunity of State officials from foreign criminal jurisdiction. By Roman Anatolevich Kolodkin, Special Rapporteur* (24 May 2011), A/CN.4/646, fn 117.
[174] *Djibouti v France* (n 27) 177.
[175] ibid para 185.
[176] ibid.
[177] ibid para 196.
[178] ibid.

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its territory without the permission of the local sovereign. The State practice supporting immunity does not carry as much weight as that which denies immunity. The *Caroline Affair/McLeod Case*, for example, can now be explained by the exclusive competence of international law during international armed conflict. The support for immunity from municipal crimes in *Pinochet No 3* was not universal among the Lords and suffers from a lack of detailed analysis, as well as subsequent and contrary State practice. *Prosecutor v Blaškić* is a dubious example of State practice because its support for immunity is based on practice that does not clearly support the proposition that State officials are entitled to immunity *ratione materiae* from criminal jurisdiction. Finally, the reasoning of the Italian Court in *Lozano v Italy* does not distinguish immunity from *civil* jurisdiction from immunity from *criminal* jurisdiction.

By contrast, State practice supporting the denial of immunity is more consistent. Several States—Cyprus, England, France, Germany, Italy, New Zealand and Scotland, to name a few, have sought to either prosecute officials who have committed crimes on its territory or have not raised an objection to this practice.[179] This examination supports the analysis of Moses LJ in *Khurts Bat*, in which he weighed the value of historic practice supporting non-responsibility with more recent examples of States denying immunity. Although this analysis is not entirely accurate—*Rainbow Warrior* did not, as such, 'replace' the *Caroline Affair/McLeod Case*, but deals with a slightly different situation—the preceding examination of State practice does confirm the conclusion of the High Court.

It is possible to identify two principles that explain the rationale behind the State practice denying immunity as well as the recognition of non-responsibility in the *Caroline Affair*: (1) the principle of jurisdictional priority of the forum State over conduct committed within its territory; and (2) the principle that the State is not, by operation of law, the proper defendant in the proceedings *except* where the exclusive competence of international law is recognized. It is for these two reasons that immunity, in principle, should be denied in cases where State officials are brought before courts for domestic and international crimes.

1. The rationale supporting the state practice

a) Jurisdictional priority of the forum state

The denial of immunity recognizes the jurisdictional priority of the territory in which the crime occurred over claims of individual non-responsibility by a foreign State. The ILC Special Rapporteur on immunity has endorsed this principle in the following terms:

> The priority of jurisdiction of the State in whose territory a crime has been perpetrated over immunity may hypothetically be supported by the factor that, in accordance with the principle of sovereignty, a State has absolute and supreme power and jurisdiction in its own territory.[180]

Crawford has further explained that:

> Deliberately to cause harm or damage on the territory of another State by an act of 'public policy' is, in the absence of some special exception, a plain violation of international law,

[179] For further examples, see Franey (n 70) 244–81.
[180] Kolodkin (n 75) para 81.

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> whether the harm is caused by assassination or invasion. The exercise of local jurisdiction in such cases is an assertion of the forum's right, acknowledged by international law, to deal with the consequences of unlawful acts on its territory.[181]

There are at least two important 'special exceptions' to this principle: consent of the local sovereign and the exclusive competence of international law.

First, if a State consents to the 'presence and activity of a foreign official in its territory', it consents 'in advance to the immunity of that person, in connection with his official activity.'[182] Conversely, if a State has not given its consent to the presence of, and the operation by, a State office within its territory, the 'person is not only acting illegally but is present in the State territory illegally', which provides 'sufficient grounds for assuming that the official does not enjoy immunity *ratione materiae* from the jurisdiction of that State'.[183] This reflects the approach taken by courts in relation to the immunity of foreign armed forces present on the territory of the forum State with its consent. In this situation, consent has been held to act as 'an implied promise, that while necessarily within it, and demeaning herself [the armed forces] in a friendly manner, she should be exempt from the jurisdiction of the country'.[184]

The second exception relates to the exclusive competence of international law to govern a situation, such as during an international armed conflict, where lawful combatants acting in compliance with international humanitarian law are immune from the local criminal jurisdiction of the State. Van Alebeek has suggested that this rule of non- (or limited-) responsibility applies where officials are exercising State authority under international law to the *exclusion* of national law.[185] For example, in contrast to the agents in the *Rainbow Warrior* case, McLeod and his fellow officers were 'exercising state authority under international law' because the UK engaged in an international armed conflict:

> The conviction of McLeod for murder and arson ignored the exclusive applicability of international law to the facts of the case as well as the non-personal responsibility of state officials for acts within the context of the exercise of state authority under international law.[186]

By contrast, the violation of New Zealand's sovereignty in *Rainbow Warrior* 'did not however *supersede* the applicability of national law to the incident.'[187] In other words, 'so long as national law is applicable to the facts of the case . . . it cannot be said that the state official has acted within the context of the exercise of state authority under international law.'[188] If an official does act with the authority of the State under international law, 'the qualification of the act under national law loses its relevance.'[189] States exercise their authority under international law when they engage in international armed conflict.[190]

The responsibility of an official operating in the territory of a foreign State therefore depends on (a) whether the conduct falls within the *exclusive* competence of international law, such that only an interstate norm is violated; or (b) if it is not within the exclusive competence of international law, but an interstate norm is violated,

[181] Crawford (n 52) 111.
[182] Kolodkin (n 75) para 85.
[183] ibid para 85; see also the Memorandum by the ILC Secretariat (n 172) para 163; Van Alebeek (n 80) 129; and Gaeta (172) 127–8.
[184] *The Schooner Exchange v McFadden* (n 52) 147.
[185] Van Alebeek (n 80) 127–8.
[186] ibid 128.
[187] ibid.
[188] ibid.
[189] ibid 127.
[190] ibid.

whether a corresponding national law has been violated. Consequently, '[i]f only interstate norms have been violated the individual state officials may not be punished for their behavior. In this context states necessarily exercise authority under international law.'[191] Van Alebeek admits that the distinction 'entails a slippery slope' and that it may be difficult to apply in hard cases.[192]

b) The state is not recognized as the proper defendant in proceedings

It is well known that the immunity of the State should not be circumvented by proceedings against State officials. As Douglas has pointed out, the role of immunity *ratione materiae* in civil proceedings is often misunderstood: its invocation does not provide immunity for the individual, but for the State as a corporate entity. The State official only benefits from State immunity because the State is recognized as the proper defendant/respondent in proceedings.[193] The immunity of the State in civil proceedings does not *substitute* or *exclude* the personal responsibility of the individual; rather, by pleading immunity, the State acknowledges that the act is, in law, its own. Conversely, the State is never recognized as the proper defendant in criminal proceedings:[194] States are not subject to the municipal laws of the State and the invocation of State responsibility in international law does not make the State the proper defendant in domestic criminal proceedings. States can agree to exclude the rules of national law—and have done so for international armed conflict—but this is a 'special exception' to the general rule.

2. Rationale for denying immunity before the courts of third states

These principles provide the rationale for denying immunity when brought before the courts of the State in which the crime took place, but can State officials plead immunity before the courts of third States? There are two situations where a foreign State official charged with committing a criminal offence in another State may be brought before the court of a third State:

(a) Where the third State exercises jurisdiction pursuant to an extradition agreement.
(b) Where customary international law or an international treaty permits the third State to exercise universal prescriptive jurisdiction over the extra-territorial conduct.[195]

Khurts Bat and *Pinochet No 3* are examples of extradition cases, and *Pinochet No. 3* illustrates the exercise of universal criminal jurisdiction over extra-territorial conduct.

[191] ibid 130. [192] ibid 128. [193] Douglas (n 49) 7.
[194] Although, in *Application of the Genocide Convention* (n 60) paras 166–167, the ICJ decided that the responsibility of a State may be engaged for acts, which if committed by individuals, would *also* constitute crimes under international law; the international responsibility of the State exists alongside the individual responsibility of the individual carrying out the conduct.
[195] For a discussion of the concept of universal jurisdiction, see O'Keefe, 'Universal Jurisdiction: Clarifying the Basic Concept' (2004) 2 JICL 735–60.

a) Extradition proceedings

The decision in *Khurts Bat* and the *obiter* comments by their Lordships in *Pinochet No 3* conclude that if a defendant cannot claim State immunity before the courts of the territory in which the offence took place, he also cannot claim immunity in extradition proceedings in third States. Mr Bat may therefore be arrested and extradited if he travels to any European country that has implemented the European Arrest Warrant Framework Decision and any other State that has an extradition agreement with Germany. This is no doubt why Mongolia proceeded to fight the case in Germany notwithstanding Mr Bat's administrative release and return to Mongolia.

Does the denial of immunity apply *erga omnes*? Or is there a conflict between two sets of international rules: those establishing the extradition agreement between the forum State and a third State (treaty) and those providing for immunity (customary international law)? The limited State practice suggests that individuals are not immune when—and because—they are brought before the courts of the territory in which they committed the crime. Aside from *Khurts Bat* and *Pinochet No 3*, they say nothing about whether that individual may be extradited to the forum State by a third State.

Nevertheless, there does not appear to be a true conflict of norms. The jurisdiction of the forum State is recognized in respect of its ability to prescribe, adjudicate and enforce legal rules within its territory. The purpose of extradition agreements is to enable States to enforce their local laws while respecting the jurisdiction of foreign States. To put it another way, the rationale for prioritizing the jurisdiction of the forum State over immunity is also, in part, the rationale for extradition agreements. Both situations confirm exclusive State competence over its territory (subject, of course, to international human rights law). The extradition agreement enables States to bring those suspected of violating its rules back within its territorial jurisdiction without violating the exclusive territorial jurisdiction of the foreign State.

Although there is no clear positive rule in either direction, given the purpose of extradition agreements, the priority of the forum State to prescribe the rules that govern its territory, and the lack of a rule that acknowledges the criminal act of a State official to be that of the State itself, there is no true conflict between the denial of immunity and the exercise of criminal jurisdiction of third States pursuant to extradition agreements.

b) Universal jurisdiction

International law may also allow a State to exercise universal jurisdiction over conduct committed by non-nationals, against non-nationals, for violations of international criminal law committed outside the State. States may then use their territorial enforcement jurisdiction to arrest, detain, extradite, prosecute and/or punish these individuals if they are located within their territory. As part of this process, States will often incorporate these international crimes into their domestic criminal laws in accordance with their constitutional law-making processes. This prompts the question: can a State official invoke immunity before domestic courts for international crimes charged on the basis of universal jurisdiction? Logically this question should be answered in the negative: international law clearly recognizes individual responsibility and neither international nor domestic law finds the State to be the proper defendant in criminal proceedings. International law makes the criminal offence a jurisdictional

priority over immunity because it allows States to exercise universal *prescriptive* jurisdiction over the offence.

Nevertheless, the question has generated considerable academic discussion, although comparatively few instances of clear State practice and *opinio juris*. The leading judicial decision in this area is *Pinochet No 3*, in which their Lordships rejected the claim of immunity *ratione materiae* of a former head of State charged with complicity in the international crime of torture because the regime established by the Convention on Torture, which obliges ratifying States to prosecute or extradite individuals suspected of committing torture, cannot 'exist consistently' with immunity.[196] The Court stated that upholding the claim to immunity *ratione materiae* would defeat the purpose of the Convention, which requires States to prosecute or extradite defendants involved in torture.[197] According to the majority, States must have intended the Convention to supersede, through the duty to prosecute cases involving torture, any potential claim to foreign State immunity from criminal jurisdiction.

Following *Pinochet No 3*, there have been only a few instances in which former State officials have been denied immunity *ratione materiae* and prosecuted or charged for international crimes on the basis of extra-territorial or universal jurisdiction. In Belgium, a case was brought against the former Chadian dictator Hissène Habré and Rwandan army major Bernard Ntuyahaga was convicted for offences including war crimes.[198] In 2005, Mauritanian General Ely Ould Dah was convicted *in absentia* by a French court for the offence of torture. The Cour de Cassation explicitly upheld the exercise of jurisdiction under the Convention Against Torture.[199] In The Netherlands, Congolese national Sebastian Nzapali was convicted in 2004 for torture in Kinshasa,[200] and in May 2008, the College of Procurator-General held that Israeli minister Ami Ayalon, a former director of Shin Bet security service could be prosecuted and was not immune from charges of torture, although by the time this decision was reached, Ayalon had left Dutch territory.[201]

In 2005, a former Argentine naval officer, Adolfo Scilingo, was arrested and brought before the Spanish National Court. A panel of three judges found Scilingo guilty of crimes against humanity and torture committed in Argentina.[202] Spain also successfully requested that another Argentine naval officer, Ricardo Cavallo, be extradited from Mexico to stand trial in Spain. However, in 2008, pursuant to a request by Argentina, Cavallo was extradited from Spain to stand trial in Argentina.[203] Judge Santiago Pedraz

[196] *Pinochet (No 3)* (n 48) 266–7.

[197] See, for example, Lord Millett at ibid., 227A–278B.

[198] W Kaleck, 'From Pinochet to Rumsfeld: Universal Jurisdiction in Europe 1998–2008' (2009) 30 MichJIntlL 935; Human Rights Watch, 'The Trial of Hissène Habré: Time Is Running Out for the Victims' (HRW, January 2007) <http://www.hrw.org/en/reports/2007/01/26/trial-hissne-habr>.

[199] J Sulzer, 'Implementing the Principle of Universal Jurisdiction in France' in W Kaleck et al. (eds) *International Prosecution of Human Rights Crimes* (Springer 2007) 127; and Kaleck (n 198) 937.

[200] Kaleck (n 198), 942 and Human Rights Watch, 'Netherlands: Congolese Torturer Convicted' (8 HRW, April 2004) <http://www.hrw.org/en/news/2004/04/07/netherlands-congolese-torturer-convicted> accessed 6 February 2012.

[201] Kaleck (n 198), 944–5.

[202] BBC News, '"Dirty War" Officer Found Guilty' (BBC Online, 19 August 2005) <http://news.bbc.co.uk/1/hi/world/europe/4460871.stm>, cited in Kaleck (n 198) 955.

[203] Kaleck (n 198) 956.

has also issued arrest warrants for former Guatemalan Presidents Rios Montt and Oscar Mejfa Victores, and former Minister of Defense, Anfbal Guevara.[204]

Against these examples are instances where prosecutions were unsuccessful and examples of States declining to prosecute foreign officials.[205] French prosecutors declined to prosecute US Secretary of State Rumsfeld for offences of torture, and German prosecutors declined to prosecute former Chinese president Jiang Zemi, former Uzbek interior minister Zokirjon Almatov, and US Secretary of State Rumsfeld.[206] Furthermore, as Foakes has observed, many cases have experienced evidential difficulties, the death of the defendant or a request by the home State to prosecute the defendant itself.[207] These examples are sometimes ambiguous and/or the issue of immunity has not been explicitly examined. Finally, in some instances 'the home state appears to have waived any immunity or simply failed to raise the issue at all; in other cases internal disorder may have meant that the home State was not in a position to assert immunity or to object to the proceedings on those grounds.'[208]

It is therefore difficult to discern a clear and settled rule of customary international law that expressly denies immunity from the criminal jurisdiction of foreign courts in cases involving international crimes. Nevertheless, three judges in the *Arrest Warrant* case noted that the current trend in international practice suggests that immunity *ratione materiae* is not available for former State officials charged with serious international crimes.[209]

Akande and Shah have suggested that the reasoning in *Pinochet No 3*—that immunity *ratione materiae* cannot coexist with the Convention Against Torture, which provides for extra-territorial jurisdiction over the crime[210]—should be extended to include other international crimes.[211] Thus, 'where extra-territorial jurisdiction exists in respect of an international crime and the rule providing for jurisdiction expressly contemplates prosecution of crimes committed in an official capacity, immunity *ratione materiae* cannot logically co-exist with such a conferment of jurisdiction'.[212] They suggest that '[t]he rule conferring extra-territorial jurisdiction displaces the immunity rule because both ask the domestic court to act in opposite ways and we say the latter in time rule should prevail.'[213] Although they concede that war crimes in non-international armed conflict, crimes against humanity and genocide are 'not practically co-extensive with immunity *ratione materiae*' and as such 'the arguments relating to these crimes are not as strong as those relating to torture, enforced disappearance, or war crimes in an international armed conflict.'[214]

[204] ibid 957.

[205] See generally, Kaleck (n 198). See also the cases discussed above where State officials have not been prosecuted for criminal offences and Foakes (n 26), 10.

[206] ibid 11, fn 58. [207] ibid, 11. [208] ibid.

[209] Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal (n 29), paras 74–75.

[210] See, for example, Lord Phillips in *Pinochet (No 3)* (n 48) 190.

[211] Akande and Shah (n 12) 841–3. [212] ibid 843.

[213] Akande and Shah, 'Immunities of State Officials, International Crimes and Foreign Domestic Courts: A Rejoinder to Alexander Orakhelashvili' (2011) 22(3) EJIL 860–1. For a contrary opinion and a reply see Orakhelashvili, 'Immunities of State Officials, International Crimes, and Foreign Domestic Courts: A Reply to Dapo Akande and Sangeeta Shah' (2011) 22(3) EJIL 849. [214] Akande and Shah (n 12) 846.

This rationale for denying immunity discussed above can also support the argument put forward by Akande and Shah. If international law: (i) prescribes the offence by providing individual responsibility for the conduct and contemplating that State officials may commit the offence; (ii) permits States to exercise territorial adjudicative jurisdiction over the extra-territorial conduct; and (iii) does not consider the State to be the proper defendant in proceedings, then a State official should not be able to plead State immunity. The conferral of jurisdiction does not represent an exception to a rule on immunity; rather, the conferral of jurisdiction confirms there is no special regime granting immunity. For example, during an international armed conflict individuals are not criminally liable in domestic law for conduct that would otherwise amount to a criminal offence *so long as* they comply with international humanitarian law. By definition, international crimes are violations of the rules of international humanitarian law and officials therefore fall outside this exception.

V. CONCLUSION

The decision in *Khurts Bat* engages with critical questions for the law on immunity: the nature and scope of a special mission under customary international law, the seniority and role of individuals entitled to high-ranking official immunity, and the question of whether a State official who commits a municipal crime in the territory of the forum State is entitled to benefit from the immunity of their State. The judgment has provided some limited, but welcome, clarity on the first two issues and has enriched the State practice for each theory of immunity. For State immunity, it has confirmed that in most cases, States will prosecute a State official that has committed a criminal act within their territory regardless of whether they were acting on official orders. Immunity will only be available if a State consents to the presence of, and operation undertaken by, the foreign State official, or where international law governs the situation to the exclusion of national law, such as during an international armed conflict.

By way of a postscript, Mr Bat was granted administrative release in Germany and immediately returned to Mongolia. The case remains active in Germany and both Mr Bat and Mongolia continue to argue that he is entitled to immunity *ratione materiae*. Only a few weeks after his release, the Germany Chancellor Angela Merkel travelled to Mongolia: Germany has insisted there is no link between his release and the planned official visit.[215]

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[215] C Milmo, 'Whitehall anger over Mongolian spy chief release' (*The Independent*, 4 October 2011) <http://www.independent.co.uk/news/world/europe/whitehall-anger-over-mongolian-spy-chief-release-2365165.html>.

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