

## SHORTER ARTICLES, COMMENTS AND NOTES

### THE RESOLUTION OF THE INSTITUTE OF INTERNATIONAL LAW ON THE IMMUNITIES OF HEADS OF STATE AND GOVERNMENT

A pressing issue of the day requiring authoritative resolution is whether public officials when in office carrying out their official functions may be prosecuted by the courts of other countries for alleged international crimes. Objection has been made, though not by the Danish Government, to a new ambassador appointed by the State of Israel, taking up his appointment as head of the Israeli diplomatic mission in Copenhagen, on the ground of his implication in war crimes. Recently, criminal proceedings were brought in the French courts against Colonel Ghadaffi as the serving Head of the State of Libya for complicity in acts of terrorism resulting in the destruction of a French civil aircraft and death of all its passengers. Writing critically of the Lords' decision in the *Pinochet* case, Henry Kissinger talks of the tyranny of judges replacing that of government, of prosecutorial discretion without accountability and warns that 'historically the dictatorship of the virtuous has often led to inquisitions and witch hunts'.

Central to the exercise of jurisdiction over claims increasingly brought in national courts against public officials are the questions of when and by what type of suit may one proceed against a serving or former Head of State. The adoption, then, on 26 August 2001 of the Resolution on 'The Immunities from Jurisdiction and Execution of Heads of State and Heads of Government in International Law' by the Institut de droit international at its Vancouver meeting is well timed and should help to establish a set of rules, based on state practice, to assist national courts in determining whether they have jurisdiction to entertain claims.

In preparing his proposals for the Resolution the Rapporteur, Professor Joe Verhoeven of the Catholic University Louvain (UCL) conducted an exhaustive review of state practice on the subject, and where points of detail arise reference to his preliminary report is strongly recommended. The policy of the Rapporteur and the members of the 13th committee of the Institut in preparing the draft resolution was twofold; first, to facilitate and protect international communication between governments and to that end to provide for the Head of State, as the principal representative of the State, such special treatment as necessary for the exercise of the functions and the fulfilment of the responsibilities of a Head of State in an independent and effective manner; and secondly, to restrict such immunities to the minimum necessary to that representative role so as to leave the Head of State subject to private law in the same way as a private person and so as not to deprive creditors and other private persons of legal remedies against the holder of the office of Head of State.<sup>1</sup> In the course of the discussions on the draft Resolution at the Institut's Vancouver meeting, a third head of policy was recognised—that the immunities conferred on the Head of State should not permit the misappropriation of the assets of the State which he or she represents and to require States to provide mutual assistance in the restitution of such assets to the State to whom they belong.

<sup>1</sup> 13th Commission, Preliminary Report of Rapporteur para 16, ADI 2001, I-Vancouver.

To achieve these purposes, which were broadly set out in the preamble, the Resolution was divided into three sections dealing first with serving Heads of State, secondly, former Heads of State no longer in office, and thirdly, Heads of Government who are stated to enjoy the same inviolability and immunity from jurisdiction afforded under the Resolution to the Head of State.<sup>2</sup> Authority in many countries, such as Belgium, Canada and the UK, is vested in the Head of Government, rather than the monarch or president who serves as a ceremonial Head of State and it is, therefore, logical that the Head of Government, as the prime representative of the State, should enjoy the immunities set out in the Resolution. In its original form, and having regard to the special position which the Minister of Foreign Affairs enjoys in the signature of treaties under Article 7 of the 1969 Vienna Convention on Treaties, the draft conferred similar immunities upon a serving Minister of Foreign Affairs. But it was concluded that in modern practice other ministers and members of the government, such as the Finance Minister, represented to equal or greater extent the State in international matters. It was accordingly decided to limit the beneficiaries of the Resolution to the central figure, whether of Government or of State in a country.<sup>3</sup>

#### I. IMMUNITY FROM CRIMINAL JURISDICTION

Under Section I, serving Heads of State and Government enjoy for the period of their office personal inviolability and absolute immunity from criminal jurisdiction. Under Section II a former Head of State or Government enjoys no such inviolability nor immunity from criminal jurisdiction except in respect of acts which are performed in the exercise of official functions, but it is expressly stated that he may be prosecuted for acts constituting a crime under international law or misappropriation of the State's assets or resources. Article 2 thus firmly draws a distinction between a serving Head and a former Head in respect of the commission of international crimes. It authoritatively states that a Head of State cannot be prosecuted for any crime regardless of its gravity. This does not mean he cannot be prosecuted for an international crime before an international tribunal or indeed in the national courts of his own State; the Nuremberg ruling that men not States commit crimes still holds good. There is an express article, Article 11, stating that nothing in the Resolution detracts from the jurisdiction of international criminal tribunals or that of the International Criminal Court when it comes into force. Article 2, by declaring the absolute immunity from criminal jurisdiction of national courts of Heads of State or of Government, should put an end to the bringing of criminal proceedings against serving officials. It is supported by the most recent state practice. In March 2001 the French Cour de Cassation overruled a lower court and held Colonel Ghadaffi as Head of the Libyan Arab Jamahariya immune in respect of alleged complicity in acts of terrorism leading to murder and destruction on 19 September of a French civilian aircraft over the desert. The Court stated:

<sup>2</sup> But not necessarily immunity from execution. There being little state practice on the point, the Resolution leaves the matter unregulated Art 15(1) second sentence providing: 'This provision is without prejudice to any immunity from execution of a Head of Government.'

<sup>3</sup> No immunity is given to a member of the family of the Head of State or of Government or to members of his suite but they may be afforded special treatment as a matter of comity or as a member of a special mission accompanying a Head abroad. Art 5.

la coutume internationale s'oppose à ce que les chefs d'Etats en exercice puissent, en l'absence de dispositions internationales contraires s'imposent aux parties concernées, faire l'objet de poursuite devant les juridictions pénales d'un Etat étranger.<sup>4</sup>

However, the granting of such immunity from criminal jurisdiction of a serving Head for official acts is not preserved in its entirety when he vacates office. The established distinction between acts *ratione personae* and *ratione materiae* was preserved in the first draft of the Resolution so as to confer immunity from criminal jurisdiction on a former Head of State for all acts performed in exercise of official functions.<sup>5</sup> But the committee considered that the approval demonstrated in legal circles for the decision in *Pinochet No 3*, if not for the reasoning set out in its support, required the making of an exception to the *ratione materiae* rule in the case of the commission of international crimes. Consequently Article 13, while stating that a former Head enjoys no immunity from jurisdiction in criminal, civil or administrative proceedings except for acts performed in the exercise of official functions, adds an express reservation. The second sentence states:

Nevertheless, he or she may be prosecuted and tried when the acts alleged constitute a crime under international law, or when they are performed exclusively to satisfy a personal interest, or when they constitute a misappropriation of the State's assets and resources.

Jurists and the judgments in the *Pinochet* case are divided on whether a killing or torture committed for State purposes can be categorised as an act performed in exercise of official functions. The above provision side-steps this issue by being deliberately worded so as to leave undetermined whether the acts for which prosecution is permitted are to be construed as performed within or outside the official functions of a Head of State.<sup>6</sup> The international crimes for which criminal prosecution of a former Head is permitted are not specified; reference to general international criminal law will be necessary here. The introduction of the new offence of misappropriation of a State's assets is examined below.

## II. PRESENCE OF THE HEAD WITHIN THE TERRITORY OF ANOTHER STATE

A central question in formulating the immunity from civil jurisdiction and execution enjoyed by serving Heads of State or Government was the relevance to their grant of

<sup>4</sup> Arrêt no 1414, 13 Mar 2001, Cass Crim, 1 at 2. The Court added: 'en l'état du droit international, le crime dénoncé, qu'elle qu'en soit la gravité, ne relève pas des exceptions au principe de l'immunité des chefs d'États étrangers en exercice', *ibid*, at 3. In reliance on this statement of the French court, Zappala argues that, while rejecting terrorism as a crime of sufficient gravity to remove immunity, the French court implicitly acknowledged that there were some international crimes for which no functional immunity *ratione materiae* could be accorded. Zappala includes among these crimes crimes against humanity, genocide, torture and war crimes. S Zappala, 'Do Heads of State in Office enjoy immunity from jurisdiction of international crimes? The *Gaddafi Case* before the French Cour de Cassation' *EJIL*, 12 (2001) 595.

<sup>5</sup> Preliminary Report of Rapporteur, *loc cit* para 20.

<sup>6</sup> The inclusion within the reservation of acts performed exclusively to satisfy a personal interest, however, may give rise to problems of construction. The list of prosecutable acts appears to include three categories of totally disparate acts; (1) crimes under international law (2) acts unlawful according to international or municipal law performed exclusively for personal gain and (3) acts which are not an international crime, nor at present in most national laws a municipal offence. The inclusion of (2) acts exclusively for personal gain suggests that generally, acts for mixed purposes may be construed as lying within the performance of official duties,

the presence of the office holder within the territory of another State.<sup>7</sup> Should they depend on the office-holder's mere presence, whether officially or privately as when on holiday within the territory of another State? Or should they be restricted to the occasion of an official visit or more widely to occasions when exercising official functions? The frequency of visits to Brussels and other capitals of Heads of Government of member States of the European Union was cited. And to what extent did execution against personal assets located in another State's territory interfere with the exercise of official functions?

The question was solved by formulating a higher level of protection for the Head when visiting another State's territory than when at home but grading it to take account of the different nature of the immunities conferred. Thus, mere presence within another territory is treated in Article 1 to be sufficient to confer inviolability, freedom from arrest or detention of the Head and an obligation on the receiving State to treat with due respect and take all reasonable steps to prevent infringement of the person, liberty or dignity of the Head; the wording follows closely that conferring personal inviolability on a diplomatic agent in Article 29 of the 1961 Vienna Convention on Diplomatic Relations. Immunity from civil and administrative jurisdiction is generally restricted to acts performed in the exercise of official functions, but when the Head is in the territory of another State in the exercise of official functions no such civil or administrative proceedings may be taken (Article 3).

### III. IMMUNITY FROM EXECUTION OF THE PROPERTY PERSONALLY BELONGING TO A HEAD

The remaining major issue was immunity from execution. The general approach here was that in respect of property personally owned by the Head there should be no immunity; if the property belonged to the State then the State itself would be entitled to immunity from enforcement measures. However, it was recognised that the taking of measures of constraint against his personal property might impede a Head in performance of his official functions. Accordingly Article 4(1) provides that property personally belonging to a Head of State or Government located in the territory of another State shall not be subject to any measure of execution except to give effect to a final judgment rendered against him or her.

This was the sole provision in the first draft of the Resolution relating to execution against the personal property of a serving Head. But in the general debate a strong plea was made for additional safeguards to be introduced to prevent abuse. If there was no restraint prior to final judgment on the disposal by a Head of assets belonging to the State by placing them abroad in an account in his own name, such assets could be misappropriated without hope of recovery. Accordingly in its final adopted form the Resolution states in the fifth paragraph of the preamble:

*Emphasising that these immunities of Heads of State or of Heads of Government should not be understood to allow him or her to misappropriate the assets of a State which they represent, and that all States shall render each other mutual assistance in the recovery of such funds by the State to whom they belong.*

<sup>7</sup> See Cahier, *Le droit diplomatique contemporain* 341; J Salmon *Droit diplomatique* 2nd edn. 599.

Two new paragraphs were adopted in Article 4. Article 4 (2) provides that 'where serious doubt arises as to the legality of the appropriation of a fund or any other assets held by or on behalf of a Head of State [or of Government]', there shall be no immunity barring the taking of provisional measures.

This still left unanswered the question who should take such measures, it being unlikely while the Head is still in office that anyone in the State can, in opposition to the Head, authorise such provisional measures to be taken. To overcome this difficulty, Article 4(3) was adopted which reads:

In conformity with their obligations of cooperation, States should take all appropriate measures to combat illegal practices, in particular to clarify the origin of deposits and dealings in assets and to supply all relevant information in this respect.

As an additional measure to prevent misappropriation, the Institut's Resolution, as mentioned above, expressly listed the offence of misappropriation of a State's assets or resources as one of three types of act where a former Head of State or of Government enjoyed no immunity from criminal proceedings. The inclusion of misappropriation of the State's assets is novel as a ground for prosecution of a former Head of State. At present no such crime is recognised under international law and there seems little prospect of such recognition.<sup>8</sup> The new charge is very loosely defined. It would seem that where it is prosecutable as a municipal offence (and national legislation may be required to make it effective), it is to be read subject to a *de minimis* rule; only misappropriation on a grand scale of State assets will remove the immunity which a Head enjoys in relation to disposals relating to State assets or resources in the exercise of his official functions.

The remaining matters covered by the Resolution are designed to integrate it without ambiguity into the existing international law. There is a useful clarification in Article 7 that waiver is a right of the State and not of the Head, and an exhortation that such waiver of immunity should be made 'where the Head is suspected of having committed crimes of a particularly serious nature, or when the exercise of his or her functions is not likely to be impeded' (Art 7(2)). The Resolution permits unilateral waiver by the State which the Head represents and derogation by agreement of both that State and the forum State to provide reduced immunities. However it forbids conferment of greater immunities than those specified in the Resolution unless they are in conformity with international law (Art 9).

But its treatment of recognition of a Head of State may provide an unintended loophole. The Resolution states that it is without prejudice to the effect of recognition or non-recognition of a foreign State or Government on the application of its provisions (Art 12). It would, therefore, seem possible that a State, by withholding recognition of a person or government as Head or Government respectively of a State could defeat the intention of the Resolution. Article 6, which requires the authorities of another State to afford the immunities in the Resolution 'as soon as that status is known to them,' would not seem to resolve this difficulty, 'that status' presumably being one of a recognised Head.

The Rapporteur in supporting the Resolution always stressed that it was confined to

<sup>8</sup> The final Act of the Rome Conference made no mention of such misappropriation or money laundering and included a resolution referring only terrorism and drug-trafficking to the Review Conference with a view to their future inclusion as crimes within the ICC Statute. See generally N Kofele-Kale, *The International Law of Responsibility for Economic Crime* (1995).

establishing a regime of immunities for Heads of State and of Government in international law. He emphasised that it in no way dealt with the exercise of universal jurisdiction or the responsibility of a Head either in international or municipal law for his or her acts. Article 11<sup>9</sup> was designed to confine the scope of the Resolution to immunities but it proved one of the most difficult to draft in order to ensure every related but different aspect of international law was excluded from the Resolution's ambit.

The Institut meeting in plenary gave full consideration to the Resolution before adopting the final text.<sup>10</sup>

#### IV. CONFORMITY OF THE RESOLUTION WITH EXISTING LAW

To what extent may the Resolution be regarded as representing existing law? From what has been stated above, it is obvious that the provisions relating to misappropriation of State assets, Articles 4.2 and 3 and the removal of immunity from the offence of misappropriation in Article 13, are novel *de lege ferenda* provisions. But what of the rest? The problem here is that there is considerable uncertainty as to the present international law relating to Heads of State and Government. The UK has enacted legislation conferring the privileges and immunities enjoyed by a head of a diplomatic mission on a Head of State, members of his family forming part of his household and his private servants (the State Immunity Act 1978, s 20), and a number of other common law countries have enacted legislation on similar lines. These statutes do not extend such immunities to a Head of Government and, as the decision in *Pinochet* shows, conferment of immunities designed to protect an ambassador when resident in the territory of another State are not necessarily best suited to give the required special treatment to a Head of State or of Government when performing official functions at home in his own State. In US law a Head of State is governed by common law, the FSIA being silent on his position. US courts have extended these common law immunities to a Head of Government and the heir of a sovereign in office.<sup>11</sup> The ILC omitted a Head of State from the scope of its final draft articles on the Jurisdictional Immunities of States and their property. Courts in civil countries differ in their treatment but there is, perhaps, a sense that the absolute nature of the immunities conferred on a Head of State by common law countries is in part a relic of the absolute doctrine of immunity which prevailed for so much longer in the common law.

<sup>9</sup> Art 11 provides; '(1) Nothing in this Resolution may be understood to detract from (a) obligations under the Charter of the United Nations; (b) the obligations under the statutes of the international criminal tribunals as well as the obligations, for those States that have become parties thereto, under the Rome Statute for an International Criminal Court; (2) This Resolution is without prejudice to (a) the rules which determine the jurisdiction of a tribunal before which immunity may be raised; (b) the rules which relate to the definition of crimes under international law; (c) the obligations of cooperation incumbent upon States in these matters. (3) Nothing in this Resolution implies nor can be taken to mean that a Head of State enjoys an immunity before an international tribunal with universal or regional jurisdiction.'

<sup>10</sup> In addition to the general debates, every article was individually scrutinised; all were adopted by consensus except Arts 6, 11, and 14. Objection to Arts 6 and 14 was on the technical ground that Art 6 did not strictly apply to a former Head. On 26 Aug the Resolution as a whole was adopted by 31 voting in favour, none against and 6 abstentions.

<sup>11</sup> *Saltany v Reagan and Others* 886 F 2d 438 (DC Cir. 1989) 87 ILR 681; *Kilroy v Windsor* (Civil Action No C-78-291 (1978) 81 ILR 605) (claim relating to treatment of prisoners in Ireland).

Examining more closely the extent of the immunities conferred in the Institut's Resolution, the absolute immunity from criminal jurisdiction and personal inviolability afforded to serving Heads of State in office in Articles 1 and 2 would, as already discussed, appear to be generally in line with current state practice.<sup>12</sup> The removal from a Head of State when he has left office of immunity from criminal jurisdiction for commission of an international crime committed in the course of official functions is uncertain, but is supported by the decision in *Pinochet*, however controversial that decision may be. The UK SIA confers a greater degree of immunity than the Resolution from civil and administrative jurisdiction, such immunity being subject only to the three exceptions allowed in the Vienna Convention for Diplomatic Relations for proceedings relating to private immovable property located in the receiving State, succession and professional or commercial activity carried on in the receiving State.<sup>13</sup> There are decisions in civil law which limit immunity from civil jurisdiction to acts in performance of official functions.<sup>14</sup> There is little authority as to immunity from execution of the private property of a Head of State located abroad. Such as there is relates to process when the Head of State is present in the territory of the State at the time execution is taking place, and here the Resolution is clear. There can be no enforcement measures taken against property belonging to a Head of State when he or she is present in another State in performance of official functions.

Whether or not strictly in accordance with current State practice, on its face the Resolution offers a workable compromise whereby international communication is facilitated but no lasting impunity afforded to officials who commit grave crimes contrary to international law. In doing so it abandons the long accepted distinction between functional and personal immunity. By removing immunity *ratione materiae* from international crimes and misappropriation of State assets, the Resolution may be opening the door to the removal of immunity of the State itself from civil claims for compensation for such wrongful acts, and by affording personal immunity from criminal jurisdiction to Heads of State or of Government even when outside the territory of another State, it may enlarge diplomatic immunities currently based on presence in the forum State. Its' recognition as a clarification of international criminal law will depend on whether it accurately represents current informed opinion as to where the line should be drawn between wrongdoing and functional efficiency.

HAZEL FOX

<sup>12</sup> In addition to the case cited at n 4 above, see *Honecker* BGH 14 Dec (1984) 80 ILR; 365 *Ric Arafat e altro* Foro it (1986) II 279; *Marcos* Swiss Fed Trib, 1 Dec 1989, 102 ILR 201; *Ex parte Pinochet R v Bow Street Metropolitan Stipendiary, ex parte Pinochet Ugarte (Amnesty International Intervening)*, (No 3) [2000] AC 151; [1999] 2 All ER 97.

<sup>13</sup> *Village Holdings SDN BHD v HM the Queen in England* High Court Malaysia, 7 Jan 1097 87 ILR 223 applies the common law strict immunity from civil jurisdiction in relation to the private property of a Head of State.

<sup>14</sup> *Nobili v Charles 1st of Austria* Clunet (1921) 626, AD 1919–22 no 90; *Mobutu and Zaire v Societe Logrine* 31 May 1994 Paris Ct of App., 113 ILR 481; *Marcos* Swiss Fed Trib, 2 Nov 1989, 102 ILR 202.