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Abstract

In so far as diplomats are concerned, their immunity from legal process arises under customary international law and treaty law (i.e., the Vienna Convention on Diplomatic Relations,' the Vienna Convention on Consular Relations,2 and the New York Convention on Special Missions' (or "New York Convention")). All three conventions state in their preliminaries that diplomatic immunity and privilege arise from international custom and that their function is not to benefit individuals, but to ensure the smooth and efficient performance of their duties in the interest of comity and of friendly relations between sovereign nations.

ESSAYS

THE FUNCTION OF STATE AND DIPLOMATIC PRIVILEGES AND IMMUNITIES IN INTERNATIONAL COOPERATION IN CRIMINAL MATTERS: THE POSITION IN SWITZERLAND

*Paul Gully-Hart**

Privileges and immunities apply to different categories of persons (*i.e.,* persons performing official acts, diplomats, and heads of state). In addition, states, government agencies, and corporate entities acting on behalf of, or to the benefit of, nations also enjoy immunity within certain limits.

Persons performing official acts by reason of their official capacity or functions may be immune from the judicial and administrative processes of their own state, the state where they are performing such recognized official acts, or in any state where their official acts have effect. Such immunity is usually afforded by the law of the state on behalf of which those persons are acting.

In so far as diplomats are concerned, their immunity from legal process arises under customary international law and treaty law (*i.e.,* the Vienna Convention on Diplomatic Relations,[1] the Vienna Convention on Consular Relations,[2] and the New York Convention on Special Missions[3] (or "New York Convention")). All three conventions state in their preliminaries that diplomatic immunity and privilege arise from international custom and that their function is not to benefit individuals, but to ensure the smooth and efficient performance of their duties in the interest of comity and of friendly relations between sovereign nations.

To claim diplomatic immunity under the Vienna Conven-

* Partner, Schellenberg Wittmer. All translations are provided by the author.

1. Vienna Convention on Diplomatic Relations, Apr. 18, 1961, 500 U.N.T.S. 95.

2. Vienna Convention on Consular Relations, Apr. 24, 1963, 596 U.N.T.S. 261.

3. Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons including Diplomatic Agents (New York Convention), Dec. 14, 1973, 28 U.S.T. 1975, 1035 U.N.T.S. 167.

tion on Diplomatic Relations, a person must be a "diplomatic agent"—that is "the Head of the Mission or a member of the diplomatic staff of the Mission." Such persons must present themselves prior to their appointment and acceptance of their appointment, after which time they are accredited and put on the list of diplomatic persons held by the receiving state.

Other persons protected by special immunity are heads of state and their relatives (to which should be added heads of government and their relatives). Whereas diplomatic immunity is adequately regulated by the two Vienna Conventions and the New York Convention, the international status of heads of state is not clearly defined by treaty law. The New York Convention only considers that status to the extent that the head of state and his relatives are officially visiting another state.

The immunity of heads of state is governed by customary international law supplemented by domestic law. It is common knowledge that a head of state is totally immune from the process of criminal law. Nevertheless, international law has progressively imposed personal responsibility on high-ranking officials (including heads of state) for universal crimes, such as grave violations of human rights or the law of war. It may be assumed that immunity for diplomats and heads of state from prosecution for international crimes is now in the process of being settled after much legal debate. The Nuremberg[4] and Tokyo[5] War Crime trials prosecuted persons who could have been deemed excludable from prosecution, since they fell in the "immunised" category and established the principle of non-immunity of heads of state in accordance with the precedent established in Article 227 of the Treaty of Versailles,[6] which provided the basis of the prosecution of Kaiser Wilhelm II. As stated by Sir Arthur Watts:

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4. Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis Powers and Charter of the International Military Tribunal, Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 280 (entered into force Aug. 8, 1945), annexed to the Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, Aug. 8, 1945, 82 U.N.T.S. 279.

5. Charter of the International Military Tribunal for the Far East, Special Proclamation by the Supreme Commander for the Allied Powers at Tokyo, Jan. 19, 1946, T.I.A.S. No. 1589, *reprinted in* 4 TREATIES AND OTHER INT'L AGREEMENTS OF THE UNITED STATES OF AMERICA 27 (1946).

6. Treaty of the Peace between the Allied and Associated Powers and Germany, June 28, 1919, art. 227, 2 Bevans, S. Treaty Doc. No. 66-49, *reproduced in* 13 AM. J. INT'L L., No. 3, Supplement: Official Documents, 151 (July 1919).

> While generally the international law . . . does not directly involve obligations on individuals personally, that is not always appropriate, particularly for acts of such seriousness that they constitute nor merely international wrongs (in the broad sense of a civil wrong) but rather international crimes which offend against the public order of the international community . . . . It can no longer be doubted that as a matter of general customary international law a Head of State will personally be liable to be called to account if there is sufficient evidence that he authorised or perpetrated such serious international crimes.[7]

This is the position also taken by the House of Lords in its Pinochet II judgement,[8] for "[h]ow can it be for international law purposes an official function to do something which international law itself prohibits and criminalises?"[9]

In addition to individuals, states themselves enjoy immunity in accordance with international custom. In the absence of treaty law—save the European Convention on the Immunity of States,[10] which has only been ratified by a small number of European states—the extent to which a foreign nation (or its government agencies and corporate entities) may rely on the doctrine of sovereignty to claim immunity from legal process will depend very much on domestic law.

Since the beginning of the twentieth century, the Swiss Federal Tribunal, which is Switzerland's Supreme Court, has held consistently that state sovereignty is relative and not absolute. Immunity may only be claimed by a foreign state acting pursuant to its sovereign powers (*jure imperii*). Most contractual, commercial, trading, and financial arrangements involving a foreign state (*jure gestionis*) are not covered by sovereign immunity.[11]

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7. Sir Arthur Watts, *The Legal Position in International Law of Heads of States, Heads of Governments and Foreign Ministers*, 247 RECUEIL DE COUR DE L'ACADÉMIE DE DROIT INTERNATIONAL 1, 82-4 (1995); *see also* JEAN SALMON, MANUEL DE DROIT DIPLOMATIQUE 591 (1996).

8. Regina v. Bartle and the Commissioner of Police for the Metropolis and others Ex parte Pinochet, 38 I.L.M. 581 (H.L. 1999).

9. *Id.* at 594.

10. European Convention on State Immunity, May 16, 1972, 11 I.L.M. 470.

11. *See, e.g.*, Jean-François Egli, *L'immunité de Juridiction et d'Exécution des Etats Etrangers et de Leurs Agents dans la Jurisprudence du Tribunal Fédéral, in* CENTENAIRE DE LA LOI FÉDÉRALE SUR LA POURSUITE POUR DETTES ET FAILLITE 202 (L. Dalleves et al. eds., 1989); Christian Dominice, *Immunités de Juridiction et d'Exécution des Etats et Chefs d'état Etrangers, in* LES FICHES JURIDIQUES SUISSES 934 (1942).

The nature of the transaction—and not its finality—will determine whether it falls within the ambit of sovereign immunity. There is abundant case law on this subject.[12] If a foreign state is not immune to the process of the Swiss Courts, then it is not immune to the enforcement of a final and binding judgement arising from that process.[13]

Nevertheless, enforcement will be denied if the assets subjected to the debt collection procedure are allocated to the performance of public duties. The concept of "allocation to public duties" has been broadly interpreted.[14] Measures of compulsion, including the lifting of banking secrecy, are therefore permissible to ensure the enforcement of judgements involving foreign states in respect to claims for which immunity has been denied.

Whereas state immunity with respect to civil and commercial claims is relative, immunity of a head of state from criminal prosecution or investigation is absolute. The Swiss Federal Tribunal has clearly acknowledged this rule:

> At all times international customary law has afforded Heads of state and their relatives the privileges of personal unviolability and immunity from the process of criminal law . . . . Contrary to immunity in civil proceedings which has always

12. Federal case law considers the following activities to be included in state sovereignty (*jure imperii*): a public loan designed to carry out public functions that are the subject of a Treaty between two states; tasks performed by the armed forces, including the destruction of a foreign aircraft flying without authorization over the state's territory; nationalization and expropriation; and the attribution to the state of objects of historical or archaeological significance. Federal case law considers the following to be excluded from state sovereignty (*jure gestionis*): funds borrowed by the central bank of a foreign state on the financial markets; works designed to build or overhaul a building designed to be used by a foreign embassy; certain employment contracts; rental agreements, even if the premises are designed to be used by the diplomatic mission of a foreign state; brokerage agreements, even if the main contract is relevant to state sovereignty; a stock purchase agreement affecting a company carrying out official functions on behalf of a foreign state.

13. Royaume de Grece v. Banque Julius Bar et Cie, 23 I.L.R. 195 (1956).

14. For instance, equipment used for a national railway system is considered to be immune; likewise for the shares of an international company established by treaty and entrusted with the performance of public functions. Two buildings, property of the Spanish Government and designed to be used for social or cultural activities, were also considered immune, and the same conclusion was reached with respect to a National Bureau of Tourism building sponsored by a foreign state. Assets held by a bank are only considered to be immune if they are specifically allocated to public functions. 111 OFFICIAL REPORTER OF THE JUDGMENTS OF THE SWISS FEDERAL TRIBUNAL I-62; 108 *Id.* III-107; 86 *Id.* I-32.

> been held to be relative, immunity from prosecution of a Head of state is total . . . . Heads of state therefore benefit from total immunity in foreign states in respect of any conduct which should ordinarily fall within the jurisdiction of those states regardless of the legal basis of that jurisdiction. This privilege recognised in favour of the highest dignitary of the foreign state is limited on the one hand by the will of that state and, on the other hand, by the duration of the functions of the Head of state.[15]

In a recent, unpublished decision of March 8, 1999,[16] the Federal Tribunal signaled that immunity attaching to an acting head of state may not be absolute after all. In the case at hand, an examining magistrate of the Canton of Geneva, who was investigating allegations of forgery and money laundering pursuant to the execution of letters of rogatory issued by the French Government, disregarded banking secrecy and ordered the seizure of bank records pertaining to an account held by an offshore company for the benefit of the personal adviser, and agent, of the President of Gabon. The adviser himself claimed diplomatic immunity, as he happened to be the spouse of Gabon's ambassador to Switzerland. The magistrate's order was upheld by the Geneva Court and the Federal Tribunal, which considered that immunity of jurisdiction could only have been recognized if the account holder had been a government agency of the Republic of Gabon rather than an offshore corporation. This judgement, however, should be examined cautiously. The Federal Tribunal has very limited powers to review the cantonal decision and the President of Gabon was neither the account

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15. Ferdinand and Imelda Marcos, 115 OFFICIAL REPORTER OF THE JUDGMENTS OF THE SWISS FEDERAL TRIBUNAL 496. Following is the quotation as it appeared in the original text.

> Le droit international coutumier a de tout temps reconnu aux chefs d'Etat—ainsi qu'aux membres de leur famille . . . les privilèges de l'inviolabilité personnelle et de l'immunité de juridiction pénale . . . . Au contraire de l'immunité de juridiction civile, toujours discutée et relativisée, l'immunité de juridiction pénale du chef d'Etat est totale . . . . Les chefs d'Etat bénéficient donc d'une immunité de juridiction totale dans les Etats étrangers pour tous les actes qui tomberaient ordinairement sous la juridiction de ces Etats, quel que soit le critère de rattachement des actes incriminés. Ce privilège, reconnu pour le profit de l'Etat étranger à son plus haut dignitaire, trouve ses limites, d'une part, dans la volonté de cet Etat et, d'autre part, dans la durée des fonctions du Chef d'Etat.

Id.

16. Ref. 1P.631/1998 and 1P.633/1998 (Swiss Federal Tribunal Mar. 8, 1999).

holder, nor the person identified in the bank records as the beneficial owner of the assets held on the account. The Federal Tribunal could safely rely on the principle—widely acknowledged under Swiss Law—that an individual who chooses to interpose a corporate vehicle to shield his identity is bound by the legal appearances that he has himself created. The real issue is whether the Federal Tribunal—exercising full judicial review—would have reached the conclusion that assets that are *de facto* controlled by a head of state are not protected by immunity because of the legal structure that has been put into place.

What happens when a person enjoying immunity is no longer in function? The legal status of a former ambassador is covered by the Vienna Convention on Diplomatic Relations. Article 39(2) of the Vienna Convention on Diplomatic Relations provides that an ambassador enjoys immunity in relation to his official acts, while he was an official. This limited immunity, *ratione materiae*, is to be contrasted with the former immunity, *ratione personae*, which provides complete immunity to all activities, whether public or private. It appears to be the position at common law that a former head of state enjoys similar immunities, *ratione materiae*, once he ceases to be head of state. He too loses immunity, *ratione personae*, on ceasing to be head of state. Thus, at common law, the position of the former ambassador and the former head of state appears to be much the same; both would enjoy immunity for acts done in performance of their respective functions while in office.

The Swiss courts have not dealt specifically with the same issue. In the case of the former President of the Philippines, the Federal Tribunal rejected a claim that Ferdinand Marcos was entitled to immunity as a former head of state, but his immunity had been specifically waived by the Republic of the Philippines, which had begun litigation in Switzerland to recover or freeze assets that it claimed was the property of the Republic, improperly possessed or controlled by Marcos and his relatives.[17]

A similar conclusion was reached in the case of Jean-Claude Duvalier (Baby Doc),[18] the former "life President" of Haiti. Mr. Duvalier's immunity had also been lifted by the Haitian Government. The Federal Tribunal's ruling in this case starkly contrasts

17. *See supra* note 15

18. Jean-Claude Duvalier, Ref. 1A.58/1989 (Swiss Federal Tribunal Sept. 19, 1989).

with a judgment of the French Cour de Cassation[19] in the same case. The French Cour de Cassation decided that the claims brought by the Republic of Haiti were inadmissible, in so far as the French Courts could not exercise jurisdiction for the purpose of enforcing claims of foreign states based on their public law. It is interesting to note that a U.K. court had granted a worldwide Mareva injunction in aid of the French proceedings under Article 24 of the Brussels Convention on Jurisdiction and the Enforcement of Judgements in Civil and Commercial Matters.[20] The jurisdictional basis of the U.K. order was the choice by the Duvalier family of a U.K. firm of solicitors, which held eleven accounts in their name in various jurisdictions. The Duvalier family was ordered not to deal with assets, wherever situated, which represented the proceeds of the sums claimed in the French proceedings and were further ordered to allow inspection of documents and disclose information relating to their worldwide assets. The injunction was affirmed by the Court of Appeal on account of:

> [T]he plain and admitted intention of the Defendants to move their assets out of the reach of the Courts of Law, coupled with the resources they have obtained and the skill which they have hitherto shown in doing that, and the vast amount of money involved. This case demands international co-operation between all nations.[21]

In light of the recently adopted Organization of Economic Cooperation and Development (or "OECD") Convention on Combating Bribery of Foreign Public Officials in International Business Transactions[22] (or "OECD Convention") and the greater public sensitivity to the issue of recovering stolen property from deposed rulers, the legal battle to curtail personal immunities and privileges is gathering momentum. The OECD

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19. The judgement of the Cour de Cassation was partly based on the 1977 Resolution of the Institut de Droit International, resolving that public law claims should be considered inadmissible if they were related to the exercise of governmental power, unless the subject matter of the claim, the needs of international co-operation, or the interests of the states concerned required a different result. *See* 57 ANNUAIRE DE L'INSTITUT DE DROIT INTERNATIONAL 328 (1977).

20. Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters, Sept. 27, 1968, as amended, O.J. C 189 (1990), 72 U.N.T.S. 147.

21. *See supra* note 19.

22. Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Dec. 17, 1997, S. Treaty Doc. No. 105-43, at v (1998).

Convention aims at reducing the influx of corrupt payments into relevant markets by punishing the active bribe givers as well as by establishing a preventive framework. Consistent with the principal rationale of creating a level-playing field of commerce, it does attempt a consistent global recognition of the public official that should clearly encompass heads of state or of government.

This being said, the OECD Convention so far is limited to covering active corruption of foreign public officials. Other European initiatives go beyond this objective. The Council of Europe has prepared a Criminal Law Convention,[23] adopted in November 1998 by the Council of Ministers, which adopts a very broad notion of corruption, including active and passive domestic bribery of all sorts of officials, transnational bribes, as well as trading in influence. The European Union has enacted four treaties and protocols on the protection of financial interests of the European Community, focused on criminalization of transnational bribery. The European Commission is trying to develop supranational law against corruption under the First Pillar Provisions of Community Law by considering OECD anti-corruption issues, such as tax treatment of bribes and audit rules. Finally, the European Parliament is supporting an initiative to unify criminal law, including transnational and supranational bribery in the context of the European Union, in the form of a *corpus juris*.

Banking secrecy is in the midst of this dispute. Relevant international instruments—which have been briefly reviewed above—are sending clear signals that banking secrecy will not be allowed to stand in the way of the international community's current agenda on fighting worldwide corruption.

Banking secrecy—which is a well-known feature of Swiss Banking Law—can best be described as the protection of the confidential contractual relationship between the bank and its customer, reinforced by a provision of criminal law. This criminal provision makes it an offense to disclose matters pursuant to that confidential relationship, subject to the usual qualifications: disclosure under compulsion of law or by the customer's waiver of secrecy. Immunity is a second layer of privilege, which protects its recipient from the ordinary process of the courts. How

23. Europ. T.S. No. 173.

do these two forms of privilege interface, and why would persons entitled to immunity seek the additional benefit of banking secrecy?

Switzerland offers a unique perspective to the debate on these matters, as a substantial number of acting heads of state or deposed rulers have held, or are still holding, some of their assets in Swiss bank accounts. Most decisions of the Swiss Courts—and more particularly of the Swiss Federal Tribunal (Switzerland's Supreme Court)—deal with assets allegedly plundered by deposed rulers when they were in office. Unsurprisingly, Switzerland has become one of the main fora of the legal warfare waged between former heads of state and law enforcement initiatives, involving countries as diverse as the Democratic Republic of Congo, Haiti, Ivory Coast, Kazakhstan, Mali, Mexico, Nigeria, Pakistan, Philippines, Russia, and Ukraine. In all the cases considered by the Swiss courts, immunity has been waived by foreign states seeking to gain control of assets allegedly misappropriated. Banking secrecy has never been considered as a defense, or a barrier, to the provision of mutual assistance by the Swiss Courts. In spite of obvious political overtones surrounding some of these cases, banking secrecy has been lifted, assets have been seized, and, in a few instances, handed over to the requesting state. Recent developments suggest that even acting heads of state could be identified as targets of investigations piercing their "secret" bank accounts.

The current anti-money laundering guidelines of the Swiss Federal Banking Commission advise Swiss banks to exercise caution in transacting business with foreign dignitaries, referred to somewhat obliquely as "potentates." The opening of an account by a potentate should be cleared at the highest level of management of the bank.

There is little doubt that renewed efforts to establish an "international rule of law" will affect the scope and possibly the nature of individual privileges and immunities. The real issue for the courts will be to perform a fair balancing act to ensure that their process is not open to abuse or manipulation for purely political ends. The stark choice will be to allow claims against persons enjoying immunity or to disallow them on grounds of non-inquiry in the internal affairs of a foreign state. As suggested by Laurence Collins: "To allow such claims might allow foreign Courts to be turned into political instruments. To disal-

low them would be to allow stolen property on an enormous scale to stay in the hands of thieves."[24] Mr. Collins appropriately recommends that international cooperation should prevail, subject to the important valve of public policy. Courts in Switzerland and elsewhere cannot ignore that such proceedings are often driven by political issues that need to be satisfactorily addressed and resolved to prevent abuse. If the claim to assets is based on doubtful evidence, or in manipulation of the law, or made by successors who are themselves likely to engage in misappropriation of state property, "then it would be entirely legitimate for a foreign Court to refuse to adjudicate on the ground that proper evidence cannot be obtained or that there are no appropriate manageable judicial standards for adjudication of the claim."[25]

In other words, the issue confronting scholars, lawyers, and courts alike is whether individual privileges and immunities are likely to follow the same path as state sovereign immunity itself and become relative (*i.e.*, their scope will be determined in accordance with public policy considerations) instead of being enjoyed in the absolute form which has prevailed hitherto.

24. *See* Laurence Collins, *Recovery of Stolen Property from Deposed Rulers*, *in* ETUDES DE DROIT INTERNATIONAL EN L'HONNEUR DE PIERRE LALIVE 221-29 (C. Dominice et al. eds. 1993).

25. *Id.* at 230.