SOAS University of London

BICL British Institute of International and Comparative Law

Immunity of State Officials from Foreign Criminal Jurisdiction: Lessons from the United Nations War Crimes Commission

Wednesday 16 October 2024 | Roundtable Report

Anthony Wenton | Lydia Kim

British Institute of International and Comparative Law

Mission Statement

The British Institute of International and Comparative Law exists to advance the understanding of international and comparative law, and to promote the rule of law in international affairs.

Vision

To be a leading research institute of international and comparative law and to promote its practical application by the dissemination of research through publications, conferences and discussion.

Table of Contents

Introduction

In the aftermath of the horrors of two world wars and of the Holocaust, States across the world came to the realisation that they had a collective interest in the prevention and punishment of atrocity crimes and that the behaviour of States and their officials had to be governed by an international rule of law. This led to the adoption of the United Nations Charter, which recognises human rights as a fundamental pillar and underpins the framework for maintaining international peace and security, which includes addressing acts of aggression and other atrocity crimes. It marked a paradigm shift in the principles on which international law is based: away from an exclusive focus on the State and the inviolability of the State's domestic jurisdiction to a focus on the rights and responsibilities of individuals and on international law as a tool to serve human interests. International law now increasingly looks through the abstraction of the State to the reality of human beings suffering and the need to also hold individual perpetrators accountable for international crimes.

Beyond the possibility to prosecute alleged perpetrators based on their nationality or the nationality of the victim (active or passive personality jurisdiction) or on the location where the crime was committed (territorial jurisdiction), the principle of universal jurisdiction has developed to permit States to exercise criminal jurisdiction, regardless of where the crime occurred or the nationality of the perpetrator or victim. Universal jurisdiction can be exercised over serious international crimes, including grave breaches of international humanitarian law and atrocity crimes, because these crimes are deemed offensive to the international community as a whole.

However, much debate continues to surround the apparent tension between accountability for international crimes and the well-established immunities accorded to State officials that insulate them from foreign criminal jurisdiction. Most starkly, the purportedly absolute personal immunity and inviolability granted to sitting heads of State, heads of government, foreign ministers, and, potentially, certain other high officials who are deemed to need immunity in order to carry out their functions. This tension has most recently been seen in litigation in France with respect to whether an arrest warrant can be issued by the French courts for President Bashar al-Assad of Syria, for alleged complicity in crimes against humanity and war crimes.

In 2023, the British Institute of International and Comparative Law (BIICL) invited Judge Joanna Korner from the International Criminal Court to give the Annual Grotius Lecture on the topic of head of State immunity. Judge Korner's lecture referenced the fascinating research carried out by SOAS Professor Dan Plesch on the history of the United Nations War Crimes Commission (UNWCC), which

supported Allied States in the 1940s to bring domestic prosecutions against Hitler. Anthony Wenton (BIICL) has since opened an active dialogue with Professor Plesch to discuss his work on the history of this organisation, including his book *Human Rights After Hitler: The Lost History of Prosecuting Axis War Crimes*. Of particular interest is whether the archives of the United Nations War Crimes Commission hold any lessons with respect to the development of immunity law.

The UNWCC was formally established in 1943 to support Allied States to bring legitimate, legally sound prosecutions in their domestic systems, with respect to war crimes, crimes against humanity, and exterminations of Jewish and other populations that would today be classified as crimes of genocide, including by investigating detailed evidence of atrocities perpetrated at concentration camps. The UNWCC comprised eminent lawyers drawn from each of its 17 Member States,[1] including leading visionaries of the day like René Cassin, and was first chaired by Sir Cecil Hurst, a former President of the Permanent Court of International Justice.

Importantly, the UNWCC adopted a rule '**rejecting as irrelevant the doctrines of immunities of heads of State and members of Government, and of acts of State**'.[2] Before the War ended, the UNWCC approved national indictments by its Member States against incumbent foreign officials at all levels of seniority, including Adolf Hitler, then still the sitting head of State of Germany, as well as numerous Gauleiters (Nazi-imposed heads of government with responsibility for various territories annexed into the Reich). The UNWCC also listed these individuals as accused war criminals subject to immediate arrest for trial in the domestic courts of the indicting States. Also highly noteworthy is that, in 1947, the UNWCC endorsed cases brought by Ethiopia against Italian leaders, including two former heads of the Italian government of Ethiopia.

In all, the Commission assisted States to bring charges against 36,000 individuals, resulting in 10,000 convictions in almost 2,000 domestic trials.

---

[1] 16 original States: Australia, Belgium, Canada, China, Czechoslovakia, France, Greece, India, Luxembourg, the Netherlands, New Zealand, Norway, Poland, the United Kingdom, the United States of America, and Yugoslavia. Later joined by Denmark as a 17th Member State, after its liberation from Nazi occupation in 1945.

[2] UNWCC, *History of the United Nations War Crimes Commission and the Development of the Laws of War* (HM Stationery Office 1948) 268–269.

The UNWCC was disbanded in 1948 and its archives were sealed for many decades.[3] Consequently, international law developed largely in ignorance of the significant precedents the Commission had set. BIICL seeks to correct this gap in legal history; explore whether lessons learned from the UNWCC could impact the development of contemporary immunities law; and consider the viability and potential value of establishing similar commissions to support national prosecutions of international crimes today.

In furtherance of these objectives, BIICL hosted an expert roundtable on 16 October 2024 for an initial exploratory discussion on the topic 'Immunity of State Officials from Foreign Criminal Jurisdiction: Lessons from the United Nations War Crimes Commission'.

This roundtable was convened by Anthony Wenton (BIICL) and Dan Plesch (SOAS).
Participants included:
Kristin Hausler (BIICL),
Zahraa Kapasi (SOAS),
Anna Khalfoui (Open Society Foundations),
Lydia Kim (BIICL),
Judge Joanna Korner (International Criminal Court),
Dr Steve Kostas (Open Society Foundations),
Dr Miguel Lemos (University of Coimbra),
Sir Howard Morrison (Independent Adviser to Ukraine Prosecutor General),
Prof Martins Paparinskis (University College London/UN International Law Commission).

To allow for a free exchange of ideas, the views and arguments outlined in this report are not directly attributed to any individual participants.

We are grateful to SOAS University of London for sponsoring this event.

---

[3] It is important to note that the UNWCC was not disbanded because its work was complete. Indeed, at the time the Commission ceased operating in 1948 it was considering cases for prosecution at the same rate as it had done in 1946 and 1947, i.e. there was no shortage of new suspects (see D Plesch, *Human Rights After Hitler: The Lost History of Prosecuting Axis War Crimes* (Georgetown University Press 2017) 179). Various reasons have been advanced for the decision to disband the UNWCC, prominent among these is the decision by US policymakers to switch from a focus on hunting and prosecuting Nazis and collaborators to a focus on the threat posed by the USSR and the need to rebuild and stabilise Germany quickly in anticipation of war with the USSR (see C Simpson, 'Shutting Down the United Nations War Crimes Commission' (2014) 25 Criminal Law Forum 133, 137).

Topic 1: Can the UNWCC findings and practice be reconciled with/ distinguished from the ICJ *Arrest Warrant Case*?

ICJ findings

The roundtable experts first discussed the *Arrest Warrant Case*, in which the ICJ held 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.'

In addition to absolute immunity from prosecution by foreign States, the Court held that, while in office, such officials also enjoy complete personal inviolability, meaning they cannot be arrested, detained, or prosecuted by foreign States. This immunity applies to acts performed in their official capacity *and* acts performed in their private capacity. This is regardless of whether the acts were performed before or during their term in office.

Importantly, the Court found that this absolute personal immunity applies even to international crimes. The ICJ examined State practice, including national legislation and judgments of national courts; the legal instruments creating the various international criminal tribunals; and case law from the International Criminal Tribunal for the former Yugoslavia (ICTY) and from the Nuremberg and Tokyo Tribunals. The Court concluded that it was

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

Consequently, the ICJ held that Belgium had breached the immunity and inviolability enjoyed by the Foreign Affairs Minister of the Democratic Republic of the Congo by issuing an international arrest warrant against him with respect to allegations of war crimes and crimes against humanity. The Court, therefore, ordered Belgium to cancel the arrest warrant.

The significance of the armed conflict context

It was accepted that the ICJ's judgment constitutes a highly authoritative statement on the immunities accorded to sitting heads of State, heads of government, and foreign ministers. Therefore, consideration was given to whether the practice of the UNWCC could be reconciled with the ICJ's findings and thus harmoniously integrated into contemporary law. In particular, the participants discussed the importance of the contexts in which the UNWCC and the ICJ were operating.

Whereas, in the *Arrest Warrant Case*, the ICJ was addressing the application of immunity in time of peace, the UNWCC was established in the context of an international armed conflict. It is against this armed conflict backdrop that the UNWCC concluded that States that were victims of armed attack could prosecute the leaders of aggressor States with respect to crimes committed on the former's territory. The notion that victim States can exercise criminal jurisdiction over leaders of aggressor States arguably coheres with other rules of international humanitarian law (IHL).

Even if one accepts that in peacetime heads of State, heads of government and foreign ministers are not only immune from prosecution but also enjoy personal inviolability (in the sense that they cannot be arrested or detained); such immunities do not seem to apply in the same way in an armed conflict situation. It was argued during the roundtable that the head of an aggressor State who is also commander in chief of the armed forces, and who directly participates in the hostilities by orchestrating military operations, can lawfully be targeted with (potentially lethal) force. This may be so even where the commander in chief is a civilian, given that under Article 51(3) of Additional Protocol I to the Geneva Conventions, civilians are protected from attack '*unless and for such time as they take a direct part in hostilities*'. The ICRC's Interpretive Guidance on the conception of 'direct participation in hostilities' also seems to support the view that a commander in chief who is exercising effective operational command over the armed forces can be lawfully targeted. Therefore, clearly, inviolability does not always apply in the armed conflict context. Furthermore, under the Fourth Geneva Convention, during an international armed conflict, any civilian, including officials of any level, can be detained for imperative reasons of security and subject to assigned residence or internment. Arguably, if such extreme measures are lawful then the victim State must be able to take the less extreme measure of bringing legal proceedings against the leaders of an aggressor State.

This view was supported by the UNWCC, which endorsed the findings of a predecessor body, the International Commission for Penal Reconstruction and Development. This forerunner to the UNWCC was established in 1941 by nine occupied European States (Belgium, Czechoslovakia, France, Greece, Luxemburg, the Netherlands, Norway, Poland, and Yugoslavia) at the University of Cambridge and produced a comprehensive report on rules and procedure governing 'crimes committed against international public order':

> 'In a questionnaire submitted to its members, the Commission [for Penal Reconstruction and Development] requested their opinion as to the "immunity of a head of State and of other State officials". Answers were received from eight members of different nationalities. The majority declared that in the field of war crimes no such immunity could be accepted. With particular reference to the Axis powers, the argument was used that in such regimes the head of State had concentrated all powers in his own hands, and that consequently the doctrine of immunity had no justification. Another argument was that immunity was an accepted principle in time of peace, for reasons of expediency and courtesy vital to peaceful intercourse between nations, but that it ceased to exist in time of war and could not be maintained for the benefit of the aggressor. The practice of making and detaining heads of State and other State administrators prisoners, such as in the case of Napoleon I, Napoleon III, King Leopold of Belgium and Rudolf Hess, were also invoked as evidence that immunity did not exist in war time.'[4]

One roundtable participant noted that many more historical examples could be added to this list, as it had been assumed in the UK and in many other jurisdictions for centuries that, during a conflict, heads of State could be captured, made prisoners of war and tried for war crimes.

It was further noted that this interpretation of head of State immunity has clear implications for the Russia/Ukraine situation, because Ukraine as a victim State is in a similar position to the Member States of the UNWCC. It is therefore arguable that Ukraine could today bring prosecutions against leaders of the Russian State in Ukrainian domestic courts, just as UNWCC Member States were able to issue indictments against Hitler.

---

[4] International Commission for Penal Reconstruction and Development report, cited in *History of the United Nations War Crimes Commission and the Development of the Laws of War* (HM Stationery Office 1948) 266.

It was also noted that the International Law Commission (ILC) considered the relevance of international humanitarian law during its second reading of the Draft Articles on Immunity of State Officials from Foreign Criminal Jurisdiction. The argument was raised in connection with Draft Article 1, paragraph 2, which excludes special rules of international law on immunities from the scope of the Draft Articles:

> 'The present draft articles are without prejudice to the immunity from criminal jurisdiction enjoyed under special rules of international law, in particular by persons connected with diplomatic missions, consular posts, special missions, international organizations and military forces of a State.'

Some ILC members in plenary discussions suggested that IHL provides for such a specialised immunities regime that should be excluded. However, this was not something that was picked up by the ILC drafting committee. Interestingly, it was noted that the Russian Federation accepted in a written comment on the Draft Articles that immunity did not apply to the prosecution of war crimes between belligerent parties. It will be interesting to see if this issue is revisited in 2025 as part of the ILC's consideration of Draft Article 7, which specifically states that immunity *ratione materiae* does not apply to war crimes.

Topic 2: Does customary international law recognise exceptions to immunity with respect to international crimes?

Customary international law excluding immunity *ratione personae*

The roundtable recalled again that, with respect to foreign domestic courts, the ICJ was 'unable to deduce … under customary international law any form of exception to the rule according immunity from criminal jurisdiction' for sitting heads of State, heads of government and foreign ministers, even with respect to international crimes. The roundtable therefore considered whether such an exception could now be found, particularly in light of the UNWCC practice, which was not addressed by the ICJ.

As a preliminary matter, it was noted that there is substantial support in international practice for the view that incumbent heads of State, heads of government, and foreign ministers are not entitled to immunity from prosecution before international criminal courts. Indeed, the ICJ in the *Arrest Warrant Case* recognised that such officials might be prosecuted before 'certain international criminal courts, where they have jurisdiction'. The question for the roundtable was rather whether customary international law recognises an exception to immunity before foreign *domestic* courts, when these officials are accused of international crimes. In other words, has international law reached a point where immunity does not apply to international crimes?

Various authorities were adduced by roundtable participants that may support the proposition that there is an exception to personal immunity with respect to international crimes, regardless of whether the court is national or international.

As noted, the UNWCC concluded that immunity was not a bar to domestic prosecution of any official up to head of State level and we now know that Hitler himself was an indicted war criminal before his death:

> 'the Commission and its Committee on Facts and Evidence adopted the rule of placing such persons on war criminals lists, and consequently of rejecting as irrelevant the doctrines of immunity of heads of State and members of Government, and of acts of State. Upon charges presented by various nations, Hitler was placed on the Lists of War Criminals on several occasions, and so were other high State administrators, such as Mussolini. The number of such accused persons increased in the course

> of time, and separate Lists of major arch criminals were issued to deal exclusively with State administrators and other high officials'.[5]

It was further noted that various instruments at the end of WWII excluded immunity. Particularly noteworthy was Control Council Law No 10 concerning the Punishment of Persons Guilty of War Crimes, Crimes against Peace and against Humanity. The Control Order authorised each of the occupying powers in Germany to establish tribunals under their own national laws and to arrest, charge and put on trial anyone suspected of committing these crimes. It was the general policy of Britain, France and the United States to send their indictments to the UNWCC for approval before going to trial.

With respect to immunities, the Control Order stipulated that 'The official position of any person, whether as Head of State or as a responsible official in a Government Department, does not free him from responsibility for a crime or entitle him to mitigation of punishment.' A number of high officials, including a Minister for Foreign Affairs, were prosecuted in these trials, with the UNWCC commenting that 'The trial of all these high officials is conducted on the basis of the rule that they do not enjoy immunity and cannot claim impunity on account of having acted in the course of their official functions.'[6]

Reference was also made to the Charter of the Nuremberg Tribunal, the Nuremberg judgment, and Principle III of the International Law Commission's Nuremberg Principles (affirmed by the UN General Assembly), all of which excluded immunities and there was no indication that the lack of immunity only applied to international tribunals. Echoing Article 7 of the Nuremberg Charter, Principle III of the Nuremberg Principles states that

> 'The fact that a person who committed an act which constitutes a crime under international law acted as Head of State or responsible Government official does not relieve him from responsibility under international law.'

In more recent times, it was noted that there is ICTY jurisprudence supporting the notion that immunity is excluded for international crimes.[7] In particular, the ICTY Appeals Chamber in *Blaškić* (presided over by Antonio Cassese)

---

[5] UNWCC, *History of the United Nations War Crimes Commission and the Development of the Laws of War* (HM Stationery Office 1948) 269.

[6] UNWCC, *History of the United Nations War Crimes Commission and the Development of the Laws of War* (HM Stationery Office 1948) 273–274.

[7] Noteworthy also that the ICTY was established by Resolution 827 (1993) of the UN Security Council, which was adopted unanimously.

indicated that customary law excludes immunity of any kind for international crimes, whether prosecuted before international or national courts:

> 'The general rule under discussion [protecting in principle the internal organization of each sovereign State] is well established in international law and is based on the sovereign equality of States (*par in parem non habet imperium)*. The few exceptions relate to one particular consequence of the rule. These exceptions arise from the norms of international criminal law prohibiting war crimes, crimes against humanity and genocide. Under these norms, those responsible for such crimes cannot invoke immunity from ***national*** or international jurisdiction even if they perpetrated such crimes while acting in their official capacity.'

It was suggested that these sources point towards the view that it is not the kind of tribunal that determines whether or not immunity applies, but rather whether the crimes being prosecuted are international in nature.

Two roundtable participants further suggested that there may even be some authority for the proposition that heads of State and high officials can be prosecuted for domestic *national* crimes. It was submitted that after WWI, the prevailing opinion in the Netherlands was that the Kaiser could be extradited to the UK pursuant to an extradition treaty for the prosecution of crimes that violated the UK criminal code (i.e. not only for international crimes). It was also noted that in all of the cases brought against Hitler by UNWCC Member States, the practice of the UNWCC was to require States to specify both the international and domestic crimes with which the accused was being charged. The UNWCC therefore appeared to endorse the bilateral prosecution of heads of State and high officials also on the basis of domestic law.

Customary international law excluding immunity *ratione materiae*

The practice and jurisprudence outlined above would also support excluding functional immunity.

The roundtable discussed Draft Article 7 of the ILC's Draft Articles on the Immunity of State Officials from Foreign Criminal Jurisdiction, which states that

> 'Immunity *ratione materiae* from the exercise of foreign criminal jurisdiction shall not apply in respect of the following crimes under international law:
>
> (a) crime of genocide;
> (b) crimes against humanity;
> (c) war crimes;

(d) crime of apartheid;
(e) torture;
(f) enforced disappearance.'

This means that with respect to these international crimes, no State official could be shielded by immunity on the grounds that they were acting in the furtherance of their official functions. This also means that heads of State, heads of government and foreign ministers would have no immunity with respect to these crimes once they have left office.

In relation to Draft Article 7, the question of whether there was an exception from immunities for international crimes divided the ILC members and had to go to a vote, with the majority being of the view that there was such an exception (although some thought that Draft Article 7 represented progressive development rather than codification of customary international law). It is anticipated that an updated report will be published around April or May 2025, and the Special Rapporteur has indicated that they will propose a treaty on the immunity of State officials based on the Draft Articles. It was further noted by the roundtable that the crime of aggression was not referenced in Draft Article 7, which may be increasingly questioned given that there has been significant State practice on that since 2017.

It was acknowledged that Draft Article 7 has been the subject of much animated debate. One participant in the roundtable expressed a strong opinion that the majority of ILC members were correct in identifying an exception to functional immunity where international crimes were concerned. The rationale underpinning functional immunity is that individuals should not be held personally responsible for carrying out the official acts of their State and moreover one State should not be adjudicating on the legality of the official acts of another State. However, this does not chime well with international criminal law today: the whole purpose of international criminal law is to hold individuals accountable for grave international crimes. Furthermore, the development of universal jurisdiction now allows States to adjudicate on the legality of the conduct of foreign State officials and to assert jurisdiction even in cases concerning crimes committed abroad by foreign nationals against foreign nationals.[8]

[8] This is supported, for instance, by the Joint Separate Opinion of Judges Higgins, Buergenthal and Kooijmans in the *Arrest Warrant Case*.

Is immunity the baseline rule?

An alternative view was expressed that the analysis of immunity of State officials may be proceeding from an erroneous premise in assuming that immunity is the default position. Rather than focusing on whether there is a rule of customary international law in favour of an exception, the better approach might be to focus on dispelling the assumption that there is a baseline rule of customary international law in favour of immunity. In this regard, it was suggested that an argument could be made that the methodological assumption that there is a general rule of immunity was essentially invented in the early work of the ILC, and States then unreflectively formed their own thinking and practice around it.

If so, the practice of the UNWCC and its Member States might point more to an argument that immunity is not so firmly entrenched in the long history of international law as is usually thought.

Topic 3: What are the potential implications of the UNWCC for the Assad arrest warrant case?

Background to the Assad case

A landmark universal jurisdiction case was brought in France in 2021 by NGOs and survivors of the chemical weapons attacks in Ghouta. In 2023, on the basis of extensive evidence, French investigating judges issued arrest warrants against four Syrian officials, including President Bashar al-Assad, on charges of crimes against humanity and war crimes. The French prosecutor did not challenge the arrest warrants against three of these officials, but decided to appeal the arrest warrant against Assad on the grounds that it might violate head of State immunity. In June 2024, the Paris Court of Appeal upheld the validity of the arrest warrant, explaining that

> 'the international crimes within the scope of the investigation cannot be considered as part of the official functions of a head of state. Consequently, they are separable from the sovereignty naturally attached to these functions.'

The Court seems to have concluded, therefore, that Assad's alleged actions were so far removed from the functions of a head of State, and the purposes for which immunity applies to a head of State, that immunity was excluded.

Moreover, the Court was concerned that immunity would equate to impunity in the Assad case,

> 'insofar as it seems obvious that Syria will never prosecute Bashar al-Assad for these crimes, that it will never waive the personal immunity of its President, and insofar as no international courts have jurisdiction, Syria not being a party to the Rome Statute, it must be said that the arrest warrant issued against Bashar al-Assad is not tainted by any nullity.'

The decision of the Paris Court of Appeal was subsequently appealed to the French Court of Cassation, which is expected to render a decision in March 2025.

The UNWCC has been highly significant in this litigation. The Open Society Justice Initiative, which participated in the case, submitted evidence to the Paris Court of Appeal of the UNWCC-supported indictments against Hitler by Belgium, Czechoslovakia, and Poland, as well as related scholarship by Professor Dan Plesch, and highlighted how the UNWCC practice had not been addressed by the ICJ in the *Arrest Warrant* judgment. The NGO believe this

evidence was pivotal in persuading the Paris Court of Appeal that head of State immunity is not absolute and should not apply to Assad with respect to international crimes.

Whether the Court of Cassation will uphold the arrest warrant may well, at least in part, depend on the extent to which that Court is also persuaded that the UNWCC precedents cast doubt on the absolute nature of the personal immunity accorded to incumbent heads of State in the ICJ *Arrest Warrant* judgment. In particular, the ICJ's finding that they could not deduce from the relevant customary international law that there exists any exception to this personal immunity.

Can it be argued that the ICJ was not aware of the UNWCC?

The question was raised of whether the ICJ might not have been aware of the UNWCC's work when it issued the *Arrest Warrant* judgment.

The roundtable was not aware of any evidence that the ICJ considered the work of the UNWCC. It was noted that generally there is a lack of awareness of the UNWCC among international lawyers, and that even the judges at the International Criminal Court are not aware of this treasure trove of practice and expert opinion. This lack of awareness may be explained by the fact that the UNWCC archives, including the charge files, were sealed when the UNWCC was closed down in 1948, and were only declassified in 2014, as a result of much effort by Professor Dan Plesch.

It was also noted that, to the best of the roundtable participants' knowledge, none of the highly-qualified counsel teams that appeared before the ICJ in the *Arrest Warrant Case* referred to the practice of the UNWCC in their arguments on personal immunity. Thus, it was not only the judges in the *Arrest Warrant Case* who did not refer to the UNWCC. This practice and expert opinion was not invoked by the legal teams advocating for the parties involved either.

Would knowledge of the UNWCC have made a difference?

It was noted that the discussion of customary international law in the *Arrest Warrant Case* was fairly brief. It seems at least arguable that the ICJ might have reached a different decision on the existence of customary law exceptions to immunity if it had expanded its analysis to consider the UNWCC practice.

If the ICJ overlooked evidence of State practice which pointed towards there being an exception to personal immunity, the claimants in the Assad case could potentially cast doubt on the rule of customary international law identified in *Arrest Warrant*, and in turn set the stage for the French Court to

form its own view. As noted above, bringing the UNWCC practice to the attention of the Paris Court of Appeal seems to have been highly persuasive there.

It was also noted that the French Court of Cassation's ruling in the *Gaddafi* case implied that there are exceptions to the principle of personal immunity for heads of State. In that case, the Court found that the de facto sitting head of State of Libya was immune from prosecution for charges of complicity in acts of terrorism. However, the Court explained its decision on the basis that

> 'under international law as it stands at present the crime complained of, whatever its gravity, is not covered by ***any of the exceptions to the principle of immunity from jurisdiction for foreign heads of State in office***'.[9]

The implication being that there are international crimes in respect of which immunity is excluded. Presumably, the charges of crimes against humanity and war crimes levelled at Assad would fall within these exceptions. Thus, armed with the UNWCC precedents, the French Court may be amenable to upholding the Assad arrest warrant.

However, a number of challenges were identified. The participants observed that State practice on head of State immunity, while limited, had evolved in a manner consistent with the ICJ's decision. Therefore, even if the ICJ's interpretation of customary international law in *Arrest Warrant* could be challenged because of the failure to consider the UNWCC, this may be of limited import. For example, even though Poland indicted Hitler with the UNWCC's assistance, it has more recently accepted the principle that the personal immunity of heads of State is absolute. Furthermore, the position that international courts are different from domestic courts is one that has largely been adhered to, and the *Arrest Warrant* judgment is generally considered a well-argued decision.

Another challenge is the fact that in the 1940s tribunals were "sloppy" in their use of the term "immunity", usually using it in terms of "liability". The UNWCC may not therefore have been conceiving of immunity in the same way as we do today.

---

[9] The original text reads as follows: 'alors qu'en l'état du droit international, le crime dénoncé, quelle qu'en soit la gravité, ne relève pas des exceptions au principe de l'immunité de juridiction des chefs d'Etat étrangers en exercice'.

More generally, as a practical matter, governments do not want to be in a position where a head of State arrives on their territory and questions are raised regarding immunity. These political concerns might impact the Court's decision on the Assad arrest warrant.

Why did States find it necessary to create international criminal tribunals to prosecute international crimes at the end of WWII?

Another question raised was why did States feel that international criminal tribunals were required to prosecute international crimes in the WWII context? More specifically, was Nuremberg deemed necessary because only an international tribunal could overcome the immunities issues?

The experts at the roundtable were not aware of any evidence indicating that States considered that they needed to create the international court at Nuremberg to overcome immunity. As already noted, it can be argued that customary international law excludes immunity with respect to international crimes based on the nature of the crimes, regardless of whether the tribunal hearing the case is national or international.

The Nuremberg judgment explains that

> 'The principle of International Law, which under certain circumstances protects the representatives of a State, ***cannot be applied to acts which are condemned as criminal by International Law***. The authors of these acts cannot shelter themselves behind their official position in order to be freed from punishment in appropriate proceedings.'

The judgment further states that

> 'The Signatory Powers created this Tribunal, defined the law it was to administer, and made regulations for the proper conduct of the Trial. ***In doing so, they have done together what any one of them might have done singly***'.

In saying that the Allies had done together what any one of them might have done singly, the International Military Tribunal appeared to recognise that any of the Signatory Powers could have brought prosecutions in their national courts for international crimes, including prosecutions against the highest of officials. Immunity was not an obstacle to prosecutions for international crimes before the International Military Tribunal because immunity was not an obstacle to such prosecutions before the national courts of the Signatory Powers. In prosecuting these high officials, the Powers were doing together what any one of them might have done singly. It was further noted by the roundtable participants in this regard that the judges at Nuremberg knew

about the UNWCC and that there had been national indictments issued against officials at all levels of seniority. Indeed, many defendants were delivered to the International Military Tribunal as a consequence of the UNWCC's work investigating evidence, endorsing national indictments, and listing suspects as accused war criminals to be arrested by Allied forces.

Topic 4: Procedural safeguards and the UNWCC as a useful model for today

The roundtable considered the need for procedural safeguards to avoid abusive prosecutions in the wake of immunity exceptions being developed. It was noted that many actors would be motivated to seek prosecutions against world leaders and that the standard for issuing an arrest warrant is often very low. For example, at the International Criminal Court, all that is required are "reasonable grounds to believe" that a person has committed a crime within the jurisdiction of the Court.

With respect to Draft Article 7, the ILC is looking at procedural safeguards and the procedures that would be used to facilitate criminal justice cooperation between States. For example, the ILC has considered that a State that intends to exercise criminal jurisdiction over a foreign official must notify that official's home State, so that the latter has the opportunity to invoke immunity and challenge the proceedings. It has also been proposed that where a State has initiated or intends to initiate criminal proceedings, it should offer to transfer the proceedings to the State of the official, or alternatively to transfer the proceedings to an international criminal tribunal.

The UNWCC model

The UNWCC might provide a valuable model for facilitating fair trials of foreign officials in national courts. A core function of the UNWCC was to assist States to carry out fair trials. The Member States submitted charges to the UNWCC using a template form, which has been likened to a 'traffic ticket', setting out the offences charged, the national and international laws that had been broken, a short statement of facts, supporting documents, a summary of likely defences that could be raised, and an assessment of the prospects of a trial securing a conviction. The UNWCC reviewed each case and made its expert determination of whether or not there was a prima facie case to answer. This process of obtaining the UNWCC's independent approval that there was sufficient evidence and legal basis to justify the charges before proceeding to trial gave domestic proceedings greater legitimacy and was important in preventing abusive proceedings.

Implications of UNWCC for prosecutions *in absentia*

One participant asked whether the practice of the UNWCC was informative in so far as prosecutions *in absentia* were concerned. It was explained that, in general, trials by UNWCC Member States took place with the accused present in court. For example, none of the 700 US trials recorded in the UNWCC archives

were *in absentia*. Similarly, it was noted that neither the ad hoc criminal tribunals nor the ICC had the ability to try individuals *in absentia*.[10]

Interestingly, it is was highlighted that Ukraine's criminal code does permit trials *in absentia* and moreover provides for the crime of aggression. In theory, therefore, the framework exists for President Putin (and other high officials) to be tried for aggression in a domestic Ukrainian court. The UNWCC practice could assist Ukraine to build a convincing argument as to why head of State immunity is not a bar to the exercise of its criminal jurisdiction.

In conclusion, the roundtable participants were unanimous in agreeing that additional research on the practice of the UNWCC and its contemporary relevance should be pursued, especially given its potential influence on immunities law.

[10] Although trials *in absentia* are not unprecedented in international and internationalised criminal tribunals. The Special Tribunal for Lebanon being a prominent example.

Charles Clore House
17 Russell Square
London WC1B 5JP

T 020 7862 5151
E info@biicl.org

www.biicl.org

A company limited by guarantee
Registered in England No. 615025
Registered Charity No. 209425

British Institute of
International and
Comparative Law