



**British Institute of
International and
Comparative Law**

The Position of Heads of State and Senior
Officials in International Law
Arthur Watts public international law
seminar series sponsored by Volterra Fietta

Thursday 23 January 2014



Summary Report of Event

On 23rd January 2014, the British Institute of International and Comparative Law (BIICL) hosted the event 'The Position of Heads of State and other Senior Officials in International Law', as part of the Arthur Watts public international law seminar series, sponsored by Volterra Fietta. The panel was chaired by Dame Rosalyn Higgins DBE QC, president of BIICL, and was composed of two speakers, Joanne Foakes (Chatham House) and Dr Philippa Webb (King's College London). Lady Hazel Fox CMG QC was present as Guest of Honour.

Jill Barrett, the Institute's Arthur Watts Senior Research Fellow in Public International Law, introduced the event. She recalled that it was Sir Arthur Watts who, in his 1994 Hague lectures, pioneered the study of the position of Heads of State, Heads of Government and Foreign Ministers in international law as a discreet subject, recognising that their personal immunities are distinct from the immunities of the state. She went on to mention that Joanne Foakes worked alongside him in the Foreign and Commonwealth Office, as well as updating his writings in the *Max Planck Encyclopedia of International Law*. Joanne's own comprehensive work on this subject is about to be published as a book. Lady Hazel Fox was then announced as Guest of Honour, for many reasons to be revealed later by Dame Rosalyn, not least the recent publication of the third edition of her leading book on State Immunity, co-authored with Dr Philippa Webb. Jill Barrett introduced Dame Rosalyn Higgins as chair, highlighting her work at the International Court of Justice (ICJ), where she was President of the Court, as well as her professorships at the University of Kent and the London School of Economics, and her expertise in the theory and practice of immunities.

Dame Rosalyn Higgins started by affirming the importance of Sir Arthur Watts' monograph on immunities of Heads of States and Heads of Government. She then went on to highlight current issues in this domain: criminal responsibility of Heads of States, the relationship between immunities and recognition, and more generally the difficulty of ascertaining the rules of Customary International Law (CIL) in this area.

Joanne Foakes mentioned the foresight of Sir Arthur Watts regarding this subject, seen at the time as very narrow and specialised. The trend identified by Sir Arthur Watts showed increased international activity for Heads of State and State officials, rendering immunities an important practical concern. International law no longer being the exclusive preserve of states, it is made to respond to the demands of non-state actors with their own agenda and interests, including increased accountability for human rights and humanitarian law violations.

Ms Foakes then focused on the question of immunity *ratione personae*. She presented two theories: the theory of functional necessity, as emphasized by the ICJ in the *Arrest Warrant* case¹, which seems now to dominate, and the more antiquated theory based upon the inherent dignity and majesty of Heads of States and their close identification with the State itself. This follows from

¹ *Case concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v Belgium)* [2002] ICJ Rep 3

the idea that CIL grants immunity to Heads of State as the embodiment of sovereignty, thus correlating immunity with questions of non-interference and state equality. This idea of dignity also resurfaces in the dissenting opinion of Judge de Cara in *France v Congo* before the ICJ², focusing on the damage to dignity suffered by the Congolese Head of State.

Whilst personal immunity for Heads of State is well established, practice regarding Heads of Governments and Foreign Ministers has been less developed. The ICJ in *Arrest Warrant* confirmed that all three enjoy personal inviolability whilst leaving open the question of whether this could extend to other officials. The judgment has attracted considerable criticism and State practice in this regard is scarce.

Unlike Heads of State, Heads of Government are not symbolic of States. The ICJ relied on practical considerations in supporting the grant of immunity to Foreign Ministers (and by implication Heads of Government), considering that immunity is required for carrying out official functions, including travels to represent the State, and communication with other State representatives.

However, Ms Foakes suggested that it is difficult to rely on these arguments to support differentiation between Foreign Ministers and other ministers; as ministers of defence or international trade are also called on to represent the State abroad. State practice is inconsistent on this point, and the International Law Commission (ILC), in light of divided opinions on this issue, resorted to a compromise in article 3 of its draft articles adopted in 2013³. The article only mentions personal immunity for Heads of States, Heads of Governments and Foreign Ministers.

Ms Foakes then considered the issue of private visits, with far less support in favour of applying immunity - particularly relevant in a context where travels abroad are frequent. However, the rationale in *Arrest Warrant*, which grants immunity on the basis that proceedings would impact on capacity to exercise functions, is equally valid for private visits.

Finally, Ms Foakes addressed the extent to which family members could benefit from immunity. Although they are often granted immunity, she argued that it is difficult to identify whether this stems from CIL or simple courtesy. The question of unaccompanied family members was addressed, with some practice mentioned from the US Courts upholding immunity for unaccompanied spouses. The definition of 'household' contained in the 1961 Vienna Convention has also been subject to scrutiny, with the judgement of the *Apex Global Management* case⁴ not upholding immunity for two members of the royal house of Saudi Arabia. Ms Foakes concluded by highlighting the fragmented State practice on this issue, and difficulties with differentiating CIL and special treatment.

² *Certain Criminal Proceedings in France (Republic of the Congo v France)* [2003] ICJ Rep 102

³ International Law Commission, 'Report of the Sixty-Fifth Session' (6 May-7 June and 8 July- 9 August 2013) UN Doc A/68/10 p49

⁴ *Global Torch Ltd v Apex Global Management Ltd* [2013] EWHC 223

Dr Philippa Webb started with an overview of civil proceedings against a serving Head of State. She made the point that whilst civil law jurisdictions tend to distinguish acts performed in a public capacity from those performed in a private capacity, other jurisdictions such as the UK may not draw such a strict distinction. In the case of victims seeking redress for international crimes, the line between civil and criminal proceedings is not always easy to determine.

Dr Webb then turned to the recent *Jones* decision of the European Court of Human Rights (ECtHR)⁵, regarding allegations of torture in violation of international law. The Court confirmed that State officials were immune from suit in civil proceedings, and looked at whether such immunity violated the claimant's right of access to a court under article 6 of the European Convention on Human Rights. The decision regarding State immunity is unsurprising, and confirms the ICJ's finding in *Jurisdictional Immunities*⁶ that there is no exception to State immunity in CIL for *jus cogens* violations.

Following from this decision, Dr Webb noted a re-alignment of State immunity and the immunity of State officials. The ECtHR points out that an act cannot be carried out by a State itself, but only on its behalf by individuals - as such, State immunity must not be circumvented by bringing proceedings against State officials, thereby including the latter in its definition of 'State'. However, Dr Webb argued that there is potential for autonomous rules for State immunity and for State official immunity; she pointed out that in certain circumstances the scope of the immunity will differ, such as for acts *jure gestionis*.

The *Jones* case further differentiates between civil and criminal proceedings. Whilst the ECtHR in *Jones* is concerned with the risk of claimants circumventing State immunity, Dr Webb made the point civil proceedings would not necessarily implead the State any more than a criminal prosecution on the same facts would, where, according to the ECtHR, the State official would not be immune from prosecution. She cited Professor Keitner, who predicted that the law of immunity may develop along two tracks: on the one hand, the non-recognition of immunity *ratione materiae* for international crimes, and the exclusion of criminal proceedings from the scope of immunity in most states, and on the other hand, the upholding of such immunity in civil proceedings. Dr Webb noted that this civil/criminal distinction is not applicable to certain civil law jurisdictions, where victims can seek reparations in conjunction with criminal proceedings.

Dr Webb pointed out that this is not the last word from the ECtHR, as the case may go to the Grand Chamber. Furthermore, two pending cases in the US and Canada involve the immunity of State officials from civil proceedings and may shed further light on the subject. The situation is in flux, and the recent developments are difficult to reconcile with broader movements for accountability.

⁵ *Jones v UK* App nos.34356/06 and 40528/06 (ECtHR, 14th January 2014)

⁶ *Jurisdictional Immunities of the State (Germany v Italy: Greece intervening)* [2012] ICJ Rep 99

Discussion

In the ensuing discussion, the speakers were asked about the existing exceptions to immunity from civil proceedings (Iain Quirk, Essex Court Chambers). Ms Foakes explained that, in the UK, the three diplomatic exceptions to immunity from civil proceedings were designed for ambassadors, and their application to Heads of States was not without controversy. This raises a broader question about whether exceptions to immunity for Heads of States should include commercial activities worldwide.

Another question (Paul Reynolds, University of Westminster) related to the natural injustice of Heads of State being able to instigate civil proceedings against their political opponents. Dr Philippa Webb responded by stating that immunities will always be open to abuse- as recently in Equatorial Guinea, where a President's son was made Vice-President in order to be immune from claims of embezzlement in French courts. Joanne Foakes elaborated on this point, suggesting differences between governments in politically stable areas which are often prepared to raise immunity claims on behalf of officials of former governments, and governments in more volatile areas of the world which may be unwilling to be associated with officials of a former regime.

The speakers were asked for their prognosis of an eventual appeal from the *Jones* decision. Dr Webb started by stating the negative impact of the judgement could be minimized, if the Court found the immunity to be a legitimate and proportionate restriction to the right of access to court contained in article 6, whilst not necessarily representing CIL. Ms Foakes identified a fundamental split following the *Jones* decision, between a traditional view which treats state officials' immunity as an aspect of state immunity, and a more recent approach seeking to differentiate the two.

The question was raised (Jeremy Carver) whether the change in attitude towards Heads of States could affect the manner in which judges consider the notion of family for the purposes of immunity. Ms Foakes suggested that whilst this might impact courtesies and practice, it is uncertain whether it would affect immunities themselves. Dr Webb elaborated on the question of how courts approach the notion of dignity, drawing attention to the *Djibouti v France* case⁷, where the ICJ took a very practical approach, recognising a potential affront to dignity but not requiring an apology, as France claimed the offending conduct was a mistake.

Colin Warbrick (Birmingham Law School) suggested that removing immunities in extraterritorial, civil torture cases might not take the matter very much further forward. In English law, at least, when it came to the merits, it would be necessary to show that the torture was unlawful by the law of the *locus delicti* and, because of national immunity laws for security forces or amnesties, for instance, that might not often be the case for acts of foreign officials. The adoption by national legal systems of a universal choice of law rule to cases alleging extraterritorial torture might be a solution. In response, Ms Foakes and Dame Rosalyn pointed out that courts usually considered immunities first, therefore whether there is a cause of action in the local forum is only a

⁷ *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v France)* [2008] ICJ Rep 177

secondary consideration. Dr Webb referred to the *Hashemi and Kazemi* case in Canada⁸, where one court found that no action was possible in relation to torture having occurred in Iran and which led to the death of the claimant's mother; however the distress experienced by the son was actionable.

It was then asked whether immunity is extended to the property of the individuals (Wan Pun Lung); to which Dr Webb answered that one exception mentioned in the UK law, which has been extended to Heads of State, is that of immovable property in the territory. An expansive notion of immunity of property from execution also exists.

A further question (Lucy Bailey, BBC World Service) related to the mechanism by which the US government can suggest immunities in proceedings, and whether such a decision can be challenged by the courts. Ms Foakes responded by explaining that this constitutes a long standing practice of the US government, and that such decisions are final when it comes to personal immunity, whilst the matter of functional immunity is a subject of dispute between the courts and the executive.

The last question (Sarah Fulton, REDRESS) sought both to clarify whether civil proceedings against a state official are in fact attempting to obtain the assets of the state, as well as emphasize the importance of recognition of wrongdoing, regardless of any awards. In answering, Dr Webb took the opportunity to suggest that as the door for civil proceedings is closing, maybe more emphasis will be placed on other alternative means of compensation.

Dame Rosalyn brought an end to the seminar by paying tribute to Lady Hazel Fox's important contribution to the work of the Institute, in her former roles as Director and Vice-President. Lady Fox had a remarkable vision as to what BIICL could achieve, setting the scene for the interplay between the academic and professional worlds. She transformed the Institute and its reputation. Furthermore, Dame Rosalyn highlighted Lady Fox's great expertise on the topic of immunities, and her book on *The Law of State Immunity*, the third edition of which was co-authored with Dr Philippa Webb.

Marguerite Perin, British Institute of International and Comparative Law, 13th February 2014

⁸ *Islamic Republic of Iran v Hashemi* 2012 QCCA 1449. See Quebec Superior Court Judgment of January 2011.