

## IMMUNITY *RATIONE MATERIAE* OF FOREIGN STATE OFFICIALS BEFORE RWANDAN COURTS

### Abstract

*The article seeks to determine when, as a matter of international law, foreign state officials should be granted immunity *ratione materiae* when they are sued in civil and criminal proceedings in Rwanda. It also investigates the questions as to whether this immunity can be waived by the state on behalf of which the official performed the impugned act, whether this immunity should also apply when a foreign state official is on Rwandan territory on holidays or private visit and, finally, which officials deserve to be accorded this immunity.*

**Key words:** *Immunity, *ratione materiae*, functional immunity, Rwandan courts*

### 1. Introduction

There exists no legislation in Rwanda that governs the issue of foreign state officials' immunity *ratione materiae* before Rwandan civil and criminal courts. Yet, when a rule of international law is established, domestic law cannot be invoked as a justification for a breach of such a rule.<sup>1</sup> Therefore, the absence of legislation on this important aspect of international relations does not mean that immunities may not be pleaded before Rwandan courts. This article is aimed to provide Rwandan judges with guidelines on how to approach the issue if it were raised before the courts, both civil and criminal. Specifically, the article seeks to determine when, as a matter of international law, foreign state officials should be accorded immunity *ratione materiae* when they are sued in civil and criminal proceedings in Rwandan courts. The article also investigates the questions as to whether this immunity can be waived by the state on behalf of which the official performed the impugned act, whether this immunity should also apply when a foreign state official is on Rwandan territory on holidays or private visit and, finally, the question as to which officials this immunity should be granted. Before doing so, it is appropriate to first distinguish between two types of immunities that may be claimed by state officials before the courts of foreign states.

### 2. Two immunities of state officials from the jurisdiction of foreign states

Two types of immunity may apply to states' individual officials. First, there is immunity *ratione materiae* which applies to acts performed in an official capacity (i.e., on behalf of the state).<sup>2</sup> The rationale of this type of immunity is that actions against states' agents in respect of their official acts are essentially proceedings against the state on behalf of which they committed the impugned acts.<sup>3</sup> As a British court once said,<sup>4</sup> '[A] foreign sovereign government [...] can only act through agents, and the immunity to which it is entitled in respect of its acts would be illusory unless it extended also to its agents in respect of acts done by them on its behalf.'<sup>5</sup> Functional immunity is thus grounded in the view that if one state would adjudicate upon the conduct of another state, through the proceedings against the official who carried out the act that would

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<sup>1</sup>Inter-American Court of Human Rights, *Case of Almonacid-Arellano et al v. Chile*, Judgment (26 September 2006), para 125: '[a]ccording to international law, the obligations that it imposes must be honoured in good faith and domestic laws cannot be invoked to justify their violation'. See also Independent International Fact-Finding Mission on the Conflict in Georgia, 'Report', Vol II (September 2009), accessed at <http://www.ceiig.ch/Report.html> (visited 23 July 2016), p. 288: 'Domestic law can in principle not be invoked as a justification for a breach of an international legal rule'. With regard to the observation and respect of international treaties, this rule is captured in article 26 of the 1969 Vienna Convention on the Law of Treaties (U.N.T.S. 331).

<sup>2</sup>J Dugard *International Law: A South African Perspective*, 4th ed (Juta, 2011), at 253 and A Steynberg *et al. Criminal Law in South Africa* (Oxford University Press Southern Africa, 2012), at 579.

<sup>3</sup>See DP Stewart, 'The Immunity of State Officials under the UN Convention on Jurisdictional Immunities of States and Their Property' *Vanderbilt Journal of Transnational Law* (2011) 1047, at 1056.

<sup>4</sup>*Zoersch v Waldoek* [1964] 1 WLR 675 692. For a similar statement by a court see *Chuidian v Philippine National Bank* 912 F 2d 1095 1101 (29 August 1990): 'it is generally recognized that a suit against an individual acting in his official capacity is the practical equivalent of a suit against the sovereign directly'. Available online at <https://www.casetext.com/case/chuidian-v-philippine-nat-bank-3#.Uzxc96LsW7A> (visited 2 August 2016).

<sup>5</sup> See also R Cryer *et al. An Introduction to International Criminal Law and Procedure* 2<sup>nd</sup> ed (Cambridge University Press, 2010), at 533: 'If a State could bring criminal proceedings against the individual officials who carried out official functions of another State, the State would be doing indirectly what it cannot do directly, namely, acting as the arbiter of the conduct of another State'.

conflict with the principle of state equality. An equal has no power over an equal.<sup>6</sup> It therefore prevents a state's courts from indirectly exercising jurisdiction over acts of foreign states through proceedings against state officials who carry out states' activities.<sup>7</sup>

In other words, immunity *ratione materiae* functions as a jurisdictional or procedural defence by preventing circumvention of the immunity of a state through proceedings brought against officials acting on its behalf.<sup>8</sup> For this reason, immunity *ratione materiae* (also known as subject-matter immunity or functional immunity) continues to apply even once the official has left office.<sup>9</sup> On the other hand, immunity *ratione personae*, or personal immunity, attaches to a limited category of officials by virtue of their particular role in representing the state abroad, for example heads of state or heads of government, ministers and diplomats.<sup>10</sup> In contrast to functional immunity, personal immunity is absolute.<sup>11</sup> It provides complete immunity of the person of certain office holders while they carry out representative functions.<sup>12</sup> It prohibits the exercise of jurisdiction not only in cases involving the acts of these individuals in their official capacity but also in cases involving private acts.<sup>13</sup> It also applies whether or not the act in question was carried out at a time when the official is in office or before entry to office.<sup>14</sup> Conversely, since this type of immunity is connected with the position occupied by the official in government service, it is of a temporary character and ceases when he or she leaves that post.<sup>15</sup> It is this type of immunity which was referred to by the ICJ in the *Arrest Warrant* case, when the Court stated that: 'in international law it is firmly established that [...] certain holders of high-ranking office in a State, such as the Head of State, the Head of Government and Minister for Foreign Affairs, enjoy immunities from jurisdiction in other States, both civil and criminal'.<sup>16</sup> This paper is only concerned with immunity *ratione materiae* and, accordingly, the rest of the discussions will only focus on this type of immunity.

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<sup>6</sup> S Knushel 'State Immunity and the Promise of Jus Cogens' 2011 *Northwestern Journal of International Human Rights* (2011) 149, at 150 and EH Franey Immunity, Individuals and International Law: Which Individuals are Immune from the Jurisdiction of National Courts under International Law? (PhD thesis London School of Economics 2009), at 16. See also Cryer et al. *supra* note 5, at 533: 'Functional immunity protects conduct carried out on behalf of a State. It is linked to the maxim that a State may not sit in judgment on the policies and actions of another State, since they are both sovereign and equal'.

<sup>7</sup> D Akande 'International Law Immunities and the International Criminal Court' 98 *American Journal of International Law* (2004) 407, at 427. See also ILC 'Second report on immunity of State officials from foreign criminal jurisdiction by Roman Anatolevich Kolodkin, Special Rapporteur' UN Doc A/CN.4/631 (10 June 2010), at 58: 'State officials enjoy immunity *ratione materiae* from foreign criminal jurisdiction, i.e. immunity in respect of acts performed in an official capacity, since these acts are acts of the State which they serve itself'.

<sup>8</sup> I Bantekas and S Nash *International Criminal Law*, 2<sup>nd</sup> ed (Cavendish, 2003), at 168; D Akande and S Shah 'Immunities of State Officials, International Crimes and Foreign Domestic Courts' 2011 *European Journal of International Law* 815, at 827; C Wickremasinghe 'Immunities Enjoyed by Officials of States and International Organizations' in MD Evans (ed) *International Law* (Oxford University Press, 2003) 387, at 403 and J Foakes, 'Immunity for International Crimes? Developments in the Law on Prosecuting Heads of State in Foreign Courts' (2011), available online at [http://www.chathamhouse.org/sites/default/files/public/Research/International%20Law/bp1111\\_foakes.pdf](http://www.chathamhouse.org/sites/default/files/public/Research/International%20Law/bp1111_foakes.pdf) (visited 13 July 2016), at 8: 'The main effect of such immunity is to prevent litigants from seeking to circumvent the rules on state immunity by taking action against the individuals carrying out the business of the state'.

<sup>9</sup> Akande and Shah, *supra* note 8, at 827; Wickremasinghe, *supra* note 8, at 390; S Markovich 'Balancing State Sovereignty and Human Rights: Are There Exceptions in International Law to the Immunity Rules for State Officials?' *Potentia* (2009) 57, at 59 and R Cryer et al. *supra* note 5, at 534.

<sup>10</sup> Redress, 'Immunity v Accountability' (2005), available at [http://www.redress.org/downloads/publications/Immunity\\_v\\_Accountability.pdf](http://www.redress.org/downloads/publications/Immunity_v_Accountability.pdf) (visited 1 August 2016), at 9.

<sup>11</sup> C Gevers 'Immunity and the Implementation Legislation in South Africa, Kenya and Uganda', available online at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1975788&download=yes](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1975788&download=yes) (visited 5 August 2016), at 3.

<sup>12</sup> Cryer et al. *supra* note 5, at 533.

<sup>13</sup> Steynberg et al. *supra* note 2, at 579; Akande and Shah, *supra* note 1, at 819 and Knushel, *supra* note 6, at 151. See also Wickremasinghe, *supra* note 8, at 389: 'These immunities are often wide enough to cover both the official and the private acts of such office-holders, since interference with the performance of the official functions of such a person can result from the subjection of either type of act to the jurisdiction of the receiving State (e.g., if a diplomat is arrested he is unlikely to be able to perform his official functions whatever the reason for his arrest)'.

<sup>14</sup> *Democratic Republic of The Congo v Belgium Case Concerning The Arrest Warrant of 11 April 2000* Judgement 2002 ICJ 3 (14 February 2002) paras 54–55. Hereafter referred to as the *Arrest Warrant* case.

<sup>15</sup> Markovich, *supra* note 9, at 59; Wickremasinghe, *supra* note 8, at 390; Steynberg et al., *supra* note 2, at 579 and Bantekas and Nash, *supra* note 8, at 169.

<sup>16</sup> *Arrest Warrant* case, para 51.

### 3. When does immunity *ratione materiae* apply?

#### Immunity *ratione materiae* before civil courts

There seems to be an established principle in international law that persons who act on behalf of states must be accorded immunity *ratione materiae* in the civil courts of foreign states. One case in which this immunity was upheld is the American case of *Herbage v Meese*.<sup>17</sup> In this case, Mr Herbage, a British citizen, had been extradited from the UK to the USA where he was charged with offences of fraud and deception. Herbage, however, proceeded to sue a number of UK officials who had taken a part in the extradition process alleging a number of irregularities in the process that led to his arrest and extradition.

Among other things, Mr Herbage alleged that the defendants conspired to violate his due process rights by falsely (and knowingly) stating that the United States had made a valid 'provisional request' for his extradition, a necessary prerequisite to such extradition. It was on the basis of this request that a London magistrate had issued the provisional warrant under which he was arrested in England. Because that basis was false, Herbage claimed, his constitutional rights had been violated and, for relief, Herbage sought, among other things, an order for compensatory damages.<sup>18</sup> The British defendants argued that they were entitled to immunity as officials of a foreign state. Mr. Herbage asserted that he was not suing a foreign sovereign, but suing the British defendants, solely, in their individual capacity. The court found that the actions complained of were ones that the British officials could have taken only in their official capacities, they were acting as law enforcement officers, and that functional immunity covered these officials, for: '[S]ince the activity complained of is governmental in nature and performed by officials of that government, this Court does not have jurisdiction over a foreign sovereign'.<sup>19</sup> This case illustrates the rule that, with regard to civil jurisdiction, if a state is immune then the official who acted on the behalf of that state is also immune.<sup>20</sup> This is also not altered by the fact that the state's act giving rise to the claim of immunity *ratione materiae* before the civil courts of foreign states is unlawful under international law.<sup>21</sup> In *Bouzari v Iran*<sup>22</sup> for example, the Ontario Superior Court of Justice dismissed a claim for damages arising from allegations of torture brought against the Islamic Republic of Iran on the basis that allowing such a claim would be inconsistent with customary international law.<sup>23</sup> The Court stressed that 'while international law may someday evolve to include a further exception for acts of torture, it does not do so now'.<sup>24</sup> This view<sup>25</sup> has been endorsed by the European Court of Human Rights (ECHR) in *Al-Adsani v UK*<sup>26</sup> where the court held that:

[N]otwithstanding the special character of the prohibition of torture in international law, the Court is unable to discern in the international instruments, judicial authorities or other materials before it any firm basis for concluding that, as a matter of

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<sup>17</sup> *Herbage v Meese* Civ A No 89-0645 747 F Supp 60 (20 Decembre 1990), available online at [http://www.leagle.com/get\\_cited/747%20F.Supp.%2060](http://www.leagle.com/get_cited/747%20F.Supp.%2060) (visited 10 July 2016).

<sup>18</sup> *Herbage v Meese* Civ A No 89-0645 747 F Supp 63.

<sup>19</sup> *Herbage v Meese* Civ A No 89-0645 747 F Supp 67.

<sup>20</sup> Franey, *supra* note 6, at 173.

<sup>21</sup> BB Jia, 'The Immunity of State Officials for International Crimes Revisited' 10 *Journal of International Criminal Justice* (2012) 1303, at 1314-1315.

<sup>22</sup> 2002 OJ No 1624 Court File No 00-CV-201372 (1 May 2002), available online at <http://www.cci.ca/uploads/Bouzari-Superior%20Court%20of%20Justice.pdf> (visited 2 August 2016).

<sup>23</sup> *Bouzari v Iran* 2002 OJ No 1624 Court File No 00-CV-201372 (1 May 2002) para 73: 'Therefore, the decisions of state courts, international tribunals, and state legislation do not support the conclusion that there is a general state practice which provides an exception from state immunity for acts of torture committed outside the forum state. As a result, there is no conflict between the Canadian State Immunity Act as written, with its limited exceptions, and customary international law. Indeed, the Canadian Act, in its present form, is consistent with current norms of customary international law [...] Were I to accept the suggestion of the plaintiff and find such an exception, not only would I be interpreting the legislation incorrectly, but also, in Mr. Greenwood's view, putting Canada in violation of customary international law. Therefore, the action is barred by s 3 of the Act [...]'

<sup>24</sup> *Bouzari v Iran* 2002 OJ No 1624 Court File No 00-CV-201372 (1 May 2002) para 73.

<sup>25</sup> For arguments against this view, see C Forcese 'De-immunizing Torture: Reconciling Human Rights and State Immunity' (2007) *McGill Law Journal* 127-169. See also Dugard, *supra* note 2, at 256: 'Foreign states are not immune from litigation in respect of international crimes by virtue of any fundamental sovereign right, but because states, for reasons of policy and comity, decline to exercise jurisdiction'.

<sup>26</sup> *Al-Adsani v The United Kingdom* ECHR Application No 35763/97 (21 November 2001), available online at [http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-59885#{%22itemid%22:\[%22001-59885%22\]}](http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-59885#{%22itemid%22:[%22001-59885%22]}) (visited 2 August 2016).

international law, a State no longer enjoys immunity from civil suit in the courts of another State where acts of torture are alleged.<sup>27</sup>

In the light of the foregoing, it must be concluded that, as a matter of international law, foreign states' officials must be granted immunity *ratione materiae* before Rwandan civil courts. Whether this immunity must also be granted in criminal cases, in particular serious crimes under international law, is discussed next.

### Immunity *ratione materiae* before criminal courts

#### Introduction

A survey of literature and decisions of national courts reveals that immunity *ratione materiae* does not apply before the criminal courts of foreign states which have jurisdiction over a crime. Furthermore, state practice suggests that these crimes include not only those committed against a direct interest or citizen of the forum state,<sup>28</sup> but also international crimes with no substantial link with the prosecuting state.<sup>29</sup> In order to clearly and exhaustively argue this point the state practice relating to both ordinary and international crimes will be explored.

#### Ordinary crimes

A survey of state practice indicates that when state agents are prosecuted for engaging in criminal activities on behalf of their states against the interests of foreign states, immunity *ratione materiae* has never been accepted before the national courts of the prosecuting states. Such cases include those relating to terrorism, kidnapping and espionage. These cases are discussed hereunder.

#### Terrorism

A well-known case of international terrorism is the so-called *Lockerbie* case.<sup>30</sup> In this case, two members of the Libyan Intelligence Service were prosecuted for offences of terrorism, which had been committed on behalf of the state of Libya. On 21 December 1988 Pan Am Flight 103 was en route from London to New York when it exploded in mid-air over the village of Lockerbie in Scotland. Hundreds of people were killed. The investigation established that a bomb, contained in a radio-cassette player, had been detonated automatically and caused the explosion.<sup>31</sup>

On 13 November 1991 warrants were issued for the arrest of two Libyans, Abdelbasset al-Megrahi and Ali Fhimah, on charges of conspiracy to murder, murder and breaches of the UK *Aircraft Security Act* 1982. The charges alleged that the conspiracy to blow up the aircraft, and the actions performed in furtherance of that conspiracy, were Libyan State policy and officially sanctioned. Investigations established that the two defendants committed the crimes as members of the Libyan Intelligence Services, and that their acts were official actions performed by state officials in the execution of state policy.<sup>32</sup>

The issue of immunity did not arise at all. The US and UK requested Libya to extradite the two suspects,<sup>33</sup> and the UN Security Council supported this request, saying that it was:

[D]eeply concerned over the results of investigations, which implicate officials of the Libyan Government and [...] Recalling the statement made on 30 December 1988 by the President of the Council on behalf of the members of the Council strongly

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<sup>27</sup> *Al-Adsani v The United Kingdom* ECHR Application No 35763/97 (21 November 2001) para 61. See also para 66: 'The Court, while noting the growing recognition of the overriding importance of the prohibition of torture, does not accordingly find it established that there is yet acceptance in international law of the proposition that States are not entitled to immunity in respect of civil claims for damages for alleged torture committed outside the forum State'.

<sup>28</sup> See 3.2.2 below.

<sup>29</sup> See 3.2.3 below.

<sup>30</sup> *Her Majesty's Advocate v Abdelbaset Ali Mohamed Al Megrahi and Al Amin Khalifa Fhima* The High Court of Justiciary Case No 1475/99 (30 January 2001), available online at <http://www.scotcourts.gov.uk/docs/sc---lockerbie/lockerbiejudgement.pdf?sfvrsn=2> (visited 5 August 2016).

<sup>31</sup> Franey, *supra* note 6, at 208.

<sup>32</sup> Franey, *supra* note 6, at 208.

<sup>33</sup> Franey, *supra* note 6, at 208.

condemning the destruction of Pan Am flight 103 and calling on all States to assist in the apprehension and prosecution of those responsible for this criminal act.<sup>34</sup>

More significantly, Libya could have claimed that neither the British or American courts had jurisdiction, on the basis that the allegations concerned actions of a sovereign state, which were immune from the jurisdiction of foreign states, but did not do so. Instead Libya said that it would consider trying the men itself.<sup>35</sup> After years of negotiations a Scottish Court was convened in The Netherlands. At no stage in these proceedings did Libya assert that the court did not have jurisdiction to try the allegations because of state immunity and neither of the defendants raised as a defence that the actions alleged were the actions of the Libyan state, and that they were therefore entitled to a jurisdictional defence of immunity *ratione materiae*. On 31 January 2001 the court convicted Mr al-Megrahi of murder.<sup>36</sup> The *Lockerbie* case is thus a clear example of state agents being accused and convicted of committing crimes on the orders of their state, and being held liable as individuals for the criminal conduct.<sup>37</sup>

## Kidnapping

### A. England-Nigeria

On 5 July 1984 British anti-terrorist police officers foiled an attempt to kidnap a certain Umaru Dikko, a former Nigerian Transport Minister, at Stansted Airport in London.<sup>38</sup> Mr Umaru Dikko, accused of stealing millions of dollars from the Nigerian state, had been anaesthetised into unconsciousness and hidden in a crate in the hold of a Nigeria Airways Boeing 707 which was heading to Nigeria.<sup>39</sup> Nigeria was implicated in this offence.<sup>40</sup> The accredited Nigerian diplomats implicated in the matter could not be prosecuted on the basis of the immunity *ratione personae*.<sup>41</sup> They were only expelled from the UK. Four other men, however, were arrested and tried in connection with the attempted kidnapping.<sup>42</sup> Mr Yusufu, one of the four men charged with the kidnapping, was travelling on a Nigerian diplomatic passport (but had never been accredited as a diplomat in the UK and could not plead diplomatic immunity).<sup>43</sup> Although Mr Yusufu was carrying out the kidnapping on behalf of the Nigerian state, he was not accorded immunity *ratione materiae*, and neither did Nigeria at any stage of the proceedings claim that Mr Yusufu was entitled to it.<sup>44</sup>

### B. Italy-USA

In 2003, Hassan Nasr, an Egyptian national suspected of being involved in terrorism, was kidnapped on the streets of Milan, Italy by CIA agents and then transferred to Egypt where he was allegedly tortured by Egyptian secret services.<sup>45</sup> On 9 November 2009, the 23 CIA officers involved in the incident were tried by an Italian court *in absentia*, convicted of kidnapping and sentenced to terms of imprisonment ranging between five and eight years.<sup>46</sup> On 19 September 2012, the Italian Court of Cassation upheld the

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<sup>34</sup> Para 5 and 6 UN SC Resolution 731(1992) of 21 January 1992.

<sup>35</sup> Franey *supra* note 6, at 208-209.

<sup>36</sup> *Her Majesty's Advocate v Abdelbaset Ali Mohamed Al Megrahi and Al Amin Khalifa Fhima* The High Court of Justiciary Case No 1475/99 (30 Jan 2001) para 89. The second accused, Mr Fhima, was found not guilty and released. See para 85 of the same judgment.

<sup>37</sup> Franey, *supra* note 6, at 210.

<sup>38</sup> Franey, *supra* note 6, at 218.

<sup>39</sup> Under art 27(3) of the Vienna Convention, a 'diplomatic bag' cannot be opened. However, to qualify as such, the bag in question must be 'clearly marked'. In the *Dikko* case, the UK authorities justified their action on the argument that the crate used in the attempted abduction lacked 'visible external marks'. This kept the opening of the crate within the bounds of the Convention. RM Wallace *International Law* 4<sup>th</sup>ed (Sweet & Maxwell 2002), at 128.

<sup>40</sup> Franey, *supra* note 6, at 219.

<sup>41</sup> On the distinction between immunity *ratione materiae* and immunity *ratione personae*, see 3(A) above.

<sup>42</sup> *R v Lambeth Justices ex-parte Yusufu* 1985 reproduced in *Criminal Law Review* 510.

<sup>43</sup> Franey, *supra* note 6, at 219.

<sup>44</sup> Franey, *supra* note 5, at 219.

<sup>45</sup> Foakes, *supra* note 8, at 12.

<sup>46</sup> C Schimizzi 'Italy judge convicts 23 former CIA agents in rendition trial' <http://jurist.org/paperchase/2009/11/italy-judge-convicts-23-former-cia.php> (visited 30 July 2016).

convictions.<sup>47</sup> This is another case which illustrates that immunity *ratione materiae* does not apply in criminal cases.

### Espionage

Cases of espionage reported in the media further suggest that no immunity *ratione materiae* is accorded to foreign state officials who engage in criminal activities against other states. One of the famous cases of this kind took place in China in 1967. George Watt, a British engineer was arrested on charges of espionage in China in September 1968.<sup>48</sup> On 15 March 1968 Mr Watt was sentenced to three years' imprisonment for espionage.<sup>49</sup> This case indicates that although espionage is an 'official' act in the sense that it is conducted on the behalf of states, it is not regarded as an act which a state can claim to perform in the exercise of its sovereignty and which is immune from the criminal jurisdiction of the foreign victim state.<sup>50</sup>

### International crimes

From what has been said above with respect to ordinary crimes, it seems that there should be little doubt that international crimes cannot be immune from scrutiny by criminal courts of foreign states.<sup>51</sup> Indeed, considerable support can be drawn from state practice to maintain the proposition that state officials can be held accountable before the criminal courts of foreign states for crimes against international law. Evidence of state practice in this regard can be drawn from the various treaties proscribing international crimes, as well as in the statutes and jurisprudence of national and international criminal tribunals to the effect that no defence of immunity *ratione materiae* is available in case of crimes against international law. These treaties, conventions and judicial decisions are discussed below.

### International conventions

#### *The Geneva Conventions of 1949*

The first,<sup>52</sup> second,<sup>53</sup> third<sup>54</sup> and fourth<sup>55</sup> Geneva Conventions of 1949, and their Additional Protocols,<sup>56</sup> constitute the body of international humanitarian law that regulates the conduct of armed conflict and seeks to limit its effects. They protect people who are not taking part in the hostilities (civilians, health workers and aid workers) and those who are no longer participating in the hostilities, such as wounded, sick and shipwrecked soldiers and prisoners of war. These conventions classify some of the violations of their provisions as 'grave breaches' and provide that such breaches are punishable by all member states under the principle of universal jurisdiction.<sup>57</sup> Each Member state is under an obligation to search for persons alleged

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<sup>47</sup> J Votava 'Italy high court upholds sentences of 23 former CIA agents in rendition case' <http://jurist.org/paperchase/2012/09/italy-high-court-upholds-sentences-of-23-former-cia-agents-in-rendition-case.php> (30 September 2013).

<sup>48</sup> Taiwan Today 'What's Happening on the Mainland' <http://taiwantoday.tw/ct.asp?xItem=150250&CtNode=103> (visited 20 July 2016).

<sup>49</sup> JA Cohen 'The Personal Security of Businessmen and Trade Representatives' in VH Li *Law and Politics in China's Foreign Trade* (University of Washington Press 1977) 287, at 288.

<sup>50</sup> Franey, *supra* note 6, at 207.

<sup>51</sup> See also A Bianchi 'Immunity versus Human Rights: The Pinochet Case' 10 *European Journal of International Law* (1999) 237, at 265. See also S Zappalà 'Do Heads of State in Office Enjoy Immunity from Jurisdiction for International Crimes: The Ghaddafi Case before the French Court of Cassation' (2001) *European Journal of International Law* 595, at 159 and M Reiman 'A Human Rights Exception to Sovereign Immunity: Some Thoughts on *Prinz v Federal Republic of Germany*' 16 *Michigan Journal of International Law* (1995) 403, at 421.

<sup>52</sup> Geneva Convention (I) for the Amelioration of the Condition of Wounded and Sick in Armed Forces in the Field (1949).

<sup>53</sup> Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (1949).

<sup>54</sup> Geneva Convention (III) Relative to the Treatment of Prisoners of War (1949).

<sup>55</sup> Geneva Convention (IV) Relative to the Treatment of Prisoners of War (1949).

<sup>56</sup> Protocol (I) Additional to the Geneva Conventions; Protocol (II) Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (1977); Protocol (III) Additional to the Geneva Conventions of 12 August 1949, and relating to the Adoption of an Additional Distinctive Emblem (2005).

<sup>57</sup> Article 50 of Geneva Convention I which relates to the wounded and sick in armed forces in the field, and article 51 of Geneva Convention II which relates to the wounded, sick and shipwrecked in armed forces at sea define the acts as 'wilful killing, torture or inhumane treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly'. Article 130 of Geneva Convention III which relates to prisoners of

to have committed such grave breaches who are present on its territory and to bring such persons, regardless of their nationality, before its own courts, unless that state chooses to hand them over for trial to another Member state which is willing to prosecute.<sup>58</sup> Although all the alleged perpetrators would be state officials, in that they would be members of the armed forces of the states, immunity is not referred to at all in these conventions. This means that member states to these conventions sought to exclude international crimes from the realm of immunity *ratione materiae*.<sup>59</sup>

### ***The Torture Convention of 1984***

Article 1 of the Torture Convention<sup>60</sup> defines torture as any act by which severe pain or suffering is intentionally inflicted on a person ‘when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity’.

Thus, from the very definition of torture, the official status of the torturer is a fundamental element of the offence.<sup>61</sup> Since the Torture Convention creates universal jurisdiction<sup>62</sup> over the crime of torture, it is evident that in adopting it, states parties intended to create a world where no torturer can evade justice for the mere reason that he was acting on behalf of a sovereign state.<sup>63</sup>

### ***The Apartheid Convention***

Another multilateral convention that provides support to the argument that immunity *ratione materiae* cannot be invoked as a bar to criminal proceedings against a person who is accused of an international crime in the courts of foreign states is the International Convention on the Suppression and Punishment of the Crime of Apartheid (hereinafter referred to as Apartheid Convention).<sup>64</sup> This Convention provides universal jurisdiction<sup>65</sup> over the crime of apartheid and provides that criminal responsibility shall apply to:

individuals, members of organizations and institutions and representatives of the State, whether residing in the territory of the State in which the acts are perpetrated or in some other State, whenever they:

- a. Commit, participate in, directly incite or conspire in the commission of the acts mentioned in article II of the present Convention;
- b. Directly abet, encourage or co-operate in the commission of the crime of apartheid.

By providing universal jurisdiction and including the ‘representatives of the state’ among the persons that may be held criminally accountable for the crime of apartheid, the Apartheid Convention, just like the other

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war defines the acts as ‘wilful killing, torture or inhumane treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, compelling a prisoner of war to serve in the forces of the hostile Power, or wilfully depriving a prisoner of war of the rights of fair and regular trial prescribed in the Convention’, and article 147 of Geneva Convention IV which relates to civilians defines the acts as ‘wilful killing, torture or inhumane treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, unlawful deportation or transfer or unlawful confinement of a protected person, compelling a protected person to serve in the forces of a hostile Power, or wilfully depriving a protected person of the rights of fair and regular trial prescribed in the present Convention, taking hostages and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly’.

<sup>58</sup> Article 49 Geneva Convention I; article 50 Geneva Convention II; article 129 Geneva Convention III; and article 146 Geneva Convention IV.

<sup>59</sup> See also Franey, *supra* note 6, at 249.

<sup>60</sup> Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984).

<sup>61</sup> Franey, *supra* note 6, at 250.

<sup>62</sup> Art 5(2) of the Torture Convention provides as follows: ‘Each State Party shall [...] take such measures as may be necessary to establish its jurisdiction over such offences in cases where the alleged offender is present in any territory under its jurisdiction and it does not extradite him pursuant to article 8 to any of the States mentioned in paragraph I of this article’.

<sup>63</sup> Foakes, *supra* note 8, at 10. See also Bantekas and Nash, *supra* note 8, at 171: ‘[s]ince Art 1(1) of the Torture Convention defines torture as an act that can only be inflicted by a public official, the mere invocation of immunity *ratione materiae* would render the Torture Convention redundant. Article 1(1) has to be read, hence, as excluding such immunity’.

<sup>64</sup> Adopted and opened for signature, ratification by General Assembly resolution 3068 (XXVIII) of 30 November 1973.

<sup>65</sup> Art V of the Apartheid Convention: ‘Persons charged with the acts enumerated in article II of the present Convention may be tried by a competent tribunal of any State Party to the Convention which may acquire jurisdiction over the person of the accused or by an international penal tribunal having jurisdiction with respect to those States Parties which shall have accepted its jurisdiction’.

conventions discussed above, implicitly recognised that immunity *ratione materiae* cannot be pleaded as a jurisdictional defence in the courts of foreign states.<sup>66</sup> In fact, since apartheid is by definition always committed as a state policy,<sup>67</sup> and since the state on behalf of which officials carry out the apartheid policy cannot be expected to punish them, it would have been absurd for the member states to this Convention to criminalise apartheid and then provide jurisdictional immunity to state officials accused of apartheid from the courts of foreign states.

## National jurisprudence

### *England-Chile*

State practice in the form of national prosecutions of state officials for international crimes is very recent. The decision of the House of Lords in the *Pinochet* case<sup>68</sup> was the first judgment rendered by a municipal court in which a former head of state was held to be legally accountable for criminal acts against international law (torture) committed while in office.<sup>69</sup> The legal question in this case was whether former Chilean President Augusto Pinochet could claim immunity *ratione materiae* from torture allegations made by a Spanish court and therefore evade extradition to Spain. The House of Lords decided that General Pinochet was not immune from prosecution by Spanish courts for the crimes of torture committed during his time as president of Chile. If immunity *ratione materiae* applied to the crime of torture, the Court said, ‘the whole elaborate structure of universal jurisdiction over torture committed by officials is rendered abortive’.<sup>70</sup> The House of Lords reasoned that since torture is by definition committed by state officials,<sup>71</sup> if immunity *ratione materiae* were to exist in respect of that crime that would render the offence of torture under the Torture Convention ‘null and void’.<sup>72</sup> The court added that:

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<sup>66</sup> CB Murungu Immunity of State Officials and Prosecution of International Crimes of International Crimes in Africa (LLD-thesis University of Pretoria 2011), at 78.

<sup>67</sup> Art 2 of the Apartheid Convention defines the crime of Apartheid as any of: ‘the following inhuman acts committed for the purpose of establishing and maintaining domination by one racial group of persons over any other racial group of persons and systematically oppressing them:

- (a) Denial to a member or members of a racial group or groups of the right to life and liberty of person:
  - (i) By murder of members of a racial group or groups;
  - (ii) By the infliction upon the members of a racial group or groups of serious bodily or mental harm, by the infringement of their freedom or dignity, or by subjecting them to torture or to cruel, inhuman or degrading treatment or punishment;
  - (iii) By arbitrary arrest and illegal imprisonment of the members of a racial group or groups;
- (b) Deliberate imposition on a racial group or groups of living conditions calculated to cause its or their physical destruction in whole or in part;
- (c) Any legislative measures and other measures calculated to prevent a racial group or groups from participation in the political, social, economic and cultural life of the country and the deliberate creation of conditions preventing the full development of such a group or groups, in particular by denying to members of a racial group or groups basic human rights and freedoms, including the right to work, the right to form recognized trade unions, the right to education, the right to leave and to return to their country, the right to a nationality, the right to freedom of movement and residence, the right to freedom of opinion and expression, and the right to freedom of peaceful assembly and association;
- (d) Any measures including legislative measures, designed to divide the population along racial lines by the creation of separate reserves and ghettos for the members of a racial group or groups, the prohibition of mixed marriages among members of various racial groups, the expropriation of landed property belonging to a racial group or groups or to members thereof;
- (e) Exploitation of the labour of the members of a racial group or groups, in particular by submitting them to forced labour;
- (f) Persecution of organizations and persons, by depriving them of fundamental rights and freedoms, because they oppose apartheid’.

<sup>68</sup> *R v Bow Street Stipendiary Magistrate*, ex parte Pinochet Ugarte [1998] 4 All ER 897.

<sup>69</sup> Bianchi, *supra* note 51, at 276.

<sup>70</sup> *R v Bow Street Metropolitan Stipendiary Magistrate*, ex parte Pinochet Ugarte (No 3) [1999] 2 All ER 115.

<sup>71</sup> Torture is defined as a pain or suffering inflicted by or at the instigation of or with the consent or acquiescence of a ‘public official’ or other person acting in an ‘official capacity’. Art 1(1) Torture Convention.

<sup>72</sup> JC Barker, C Warbrick and D McGoldrick ‘The Future of Former Head of State Immunity after ex parte Pinochet’ 48 *International and Comparative Law Quarterly* (1999) 937, at 948.

[T]orture of his own subjects, or of aliens, would not be regarded by international law as a function of a head of State. [...] international law has made plain that certain types of conduct, including torture and hostage taking, are not acceptable conduct on the part of anyone. That applies as much to heads of State, or even more so, as it does to everyone else; the contrary conclusion would make a mockery of international law.<sup>73</sup>

### **Senegal-Chad**

Another example of a former head of state being tried for crimes committed during office is the trial in Senegal of Hissène Habré, the former President of Chad. Habré's rule was marked by widespread atrocities in Chad.<sup>74</sup> Reports indicate that Habré's government was responsible of some 40,000 political murders and systematic incidents of torture.<sup>75</sup> After he was overthrown in 1990, Habré went into exile in Senegal.<sup>76</sup> Senegal took no action against him from 1990 until the filing of the victims' complaint in January 2000. In February of the same year, a Senegalese judge indicted<sup>77</sup> Habré on charges of torture, crimes against humanity, and 'barbaric acts'. However, after political interference by the Senegalese government,<sup>78</sup> an appellate court dismissed the case on the grounds that Senegalese courts lacked jurisdiction to try crimes committed abroad.<sup>79</sup> Some of Habré's victims then filed a case against him in Belgium in November 2000. In 2005, the Belgian authorities indicted Habré on charges of crimes against humanity, war crimes, and torture, and sought his extradition from Senegal. However, Senegal did not honour this request.<sup>80</sup> Instead, Senegal referred the matter to the African Union (AU). The AU Assembly of Heads of state and Government issued Decision 127 (VII)<sup>81</sup> in 2006 deciding that the case falls within the competence of the AU and instructed Senegal to prosecute Habré, but Senegal claimed that it lacked financial resources and requested international financial assistance.<sup>82</sup> Belgium then took the matter before the ICJ.<sup>83</sup> The ICJ determined that under article 7 of the Torture Convention Senegal had an obligation to prosecute or to extradite Mr Habré.<sup>84</sup> The ICJ opined that while extradition was an option, prosecution was an international obligation under the

<sup>73</sup> *R v Bow Street Stipendiary Magistrate*, ex parte Pinochet Ugarte [1998] 4 All ER 939-940. As a result of the ruling by the House of Lords, the Home Secretary authorised extradition, but then the House of Lords set aside its first decision because one of the judges, Lord Hoffman, had failed to disclose that his wife was an unpaid director of Amnesty International, which had been involved in a campaign against the applicant and had been a party in the proceedings, and that could infer either bias or a possible conflict of interest (*R v Bow Street Metropolitan Stipendiary Magistrate*, ex parte Pinochet Ugarte (No 2) [1999] 1 All ER 577). In the third judgment of the House of Lords (*R v Bow Street Metropolitan Stipendiary Magistrate*, ex parte Pinochet Ugarte (No 3) [1999] 2 All ER 97), the first judgment was confirmed. The Court found that: 'If Senator Pinochet behaved as Spain alleged, then the entirety of his conduct was a violation of the norms of international law. He can have no immunity against prosecution for any crime that formed part of that campaign'. *R v Bow Street Metropolitan Stipendiary Magistrate*, ex parte Pinochet Ugarte (No 3) [1999] 2 All ER 190.

<sup>74</sup> Human Rights Watch, *The Case of Hissène Habré before the Extraordinary African Chambers in Senegal: Questions and Answers* (2013), available online at [http://www.hrw.org/sites/default/files/related\\_material/Q&A%20-%20The%20Habre%20case.pdf](http://www.hrw.org/sites/default/files/related_material/Q&A%20-%20The%20Habre%20case.pdf) (visited 26 July 2016), at 1.

<sup>75</sup> Habré's regime periodically targeted various ethnic groups such as the Sara (1984), Hadjerai (1987), Chadian Arabs and the Zaghawa (1989-90), killing and arresting group members en masse when he believed that their leaders posed a threat to his rule. Most abuses were carried out by his notorious Documentation and Security Directorate (DDS), whose directors reported directly to Habré. Human Rights Watch, *supra* note 74, at 1.

<sup>76</sup> Mr Hissène Habré was president of the Republic of Chad from 1982 until he was deposed in 1990 by Idriss Déby Itno, the current president. Human Rights Watch, *supra* note 74, at 1.

<sup>77</sup> Cour d' Appel de Dakar Tribunal Régional Hors Classe de Dakar Cabinet de Mr DembaKandji Juge d' instruction No du Parquet 482 No de l' instruction 13/2000.

<sup>78</sup> Human Rights Watch, *supra* note 74, at 4.

<sup>79</sup> Human Rights Watch 'Senegal Bars Charges Against Ex Chad Dictator' <http://www.hrw.org/news/2001/03/20/senegal-bars-charges-against-ex-chad-dictator> (visited 26 July 2016).

<sup>80</sup> FIDH 'Senegal: Hissène Habré indicted for crimes against humanity, war crimes and torture' <http://www.fidh.org/en/africa/Chad/Hissene-Habre-Case/senegal-hissene-habre-indicted-for-crimes-against-humanity-war-crimes-and-13629> (1 September 2012).

<sup>81</sup> AU Decision on the Hissène Habré Case and the African Union Assembly AU/Dec127 (VII).

<sup>82</sup> See *Belgium v Senegal Questions Relating to the Obligation to Prosecute or Extradite* Judgement 2012 ICJ 422 (20 July 2012) at 23 and 28.

<sup>83</sup> *Belgium v Senegal Questions Relating to the Obligation to Prosecute or Extradite* Judgement 2012 ICJ 422 (20 July 2012), at 95.

<sup>84</sup> Art 7 of the Torture Convention.

Torture Convention, the violation of which is a wrongful act engaging the responsibility of the state.<sup>85</sup> The ICJ also held that neither Senegal's referral of the matter to the AU nor its financial difficulties could justify Senegal's delays in complying with its obligations under the Torture Convention,<sup>86</sup> and, accordingly, ordered Senegal to submit the case of Habré to its authorities for prosecution or otherwise extradite him 'without delay'.<sup>87</sup> Immediately after the ICJ judgment was announced, Senegal started negotiations to create a special court to try Habré. These talks resulted in the creation of a special court for Mr Habré, which came to be known as the 'Extraordinary African Chambers'.<sup>88</sup> The Chambers were created inside the existing court structure of Senegal, namely the *Tribunal Régional Hors Classe de Dakar* and the Dakar Court of Appeals.<sup>89</sup> The purpose of the Chambers is stated in article 1 of its Statute<sup>90</sup> as 'to implement the decision of the African Union concerning the Republic of Senegal's prosecution of international crimes committed in Chad between 7 June 1982 and 1 December 1990, in accordance with Senegal's international commitments'. The Chambers were inaugurated in Dakar on 8 February 2013.<sup>91</sup> On May 30, 2016, Hissène Habré was convicted of crimes against humanity, war crimes, and torture, including sexual violence and rape, and sentenced to life in prison. The case of Hissène Habré is thus a further example pointing to the rule that functional immunity cannot be pleaded as a bar to the universal jurisdiction of foreign states when a state official is accused of international crimes committed in his home state.<sup>92</sup>

### ***Netherlands-DRC***

On 8 April 2004, Mr Sebastien Nzapali, a former officer in the army of the former dictator of Zaire, Mobutu Sese Seko, was convicted of torture committed in the Democratic Republic of the Congo (then Zaire) in 1995 and 1996.<sup>93</sup> He was sentenced to a term of 30 months imprisonment.<sup>94</sup>

This trial, like that of Hissène Habré in Senegal, illustrates the view that criminal acts such as torture cannot be regarded as 'official' acts for which former state officials are immune from the jurisdiction of foreign states.

### ***Belgium-Rwanda***

Another case of a former state official who was tried before domestic courts of a foreign country is Major Bernard Ntuyahaga who, on 5 July 2007, was convicted in Belgium for war crimes and crimes against humanity committed during the 1994 genocide in Rwanda. The charges against Major Bernard Ntuyahaga

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<sup>85</sup> *Belgium v Senegal* Questions Relating to the Obligation to Prosecute or Extradite Judgement 2012 ICJ 422 (20 July 2012), at 95.

<sup>86</sup> *Belgium v Senegal* Questions Relating to the Obligation to Prosecute or Extradite Judgement 2012 ICJ 422 (20 July 2012), at 112.

<sup>87</sup> *Belgium v Senegal* Questions Relating to the Obligation to Prosecute or Extradite Judgement 2012 ICJ 422 (20 July 2012), at 112.

<sup>88</sup> CG Buys 'Belgium v Senegal: The International Court of Justice Affirms the Obligation to Prosecute or Extradite Hissène Habré Under the Convention Against Torture' <http://www.asil.org/insights120911.cfm> (visited 26 July 2016). In November 2012, Senegal and a number of donor countries agreed to a budget of \$ 9.7 million to cover Habré's trial. Commitments were made by: Chad (2 billion CFA francs or US\$3,743,000), the European Union (€2 million), the Netherlands (€1 million), the African Union (US\$1 million), the United States (US\$1 million), Belgium (€500,000), Germany (€500,000), France (€300,000), and Luxembourg (€100,000). Human Rights Watch, *supra* note 74, at 10.

<sup>89</sup> Art 2 of the Statute. The Chambers have four levels: an Investigative Chamber with four Senegalese investigative judges, an Indicting Chamber of three Senegalese judges, a Trial Chamber, and an Appeals Chamber (art 2 of the Statute). The Trial Chamber and the Appeals Chamber each have two Senegalese judges and a president from another Member State of the African Union (art 11 of the Statute).

<sup>90</sup> Statute of the Extraordinary African Chambers within the Courts of Senegal Created to Prosecute International Crimes Committed in Chad Between 7 June 1982 and 1 December 1990. Unofficial translation by Human Rights Watch. The original name of the Statute in French is '*Statut des Chambres Africaines Extraordinaires au Sein des Juridictions Sénégalaises pour la Poursuite des Crimes Internationaux Commis au Tchad durant la Période du 7 juin 1982 au 1er décembre 1990*'.

<sup>91</sup> Human Rights Watch, *supra* note 74, at 5.

<sup>92</sup> In fact, art 10(4) of the Statute unambiguously provides that the 'official position of an accused, whether as Head of State or Government, or as a responsible government official, shall not relieve him or her of criminal responsibility'. Unofficial translation by Human Rights Watch.

<sup>93</sup> Human Rights Watch Netherlands: Congolese Torturer Convicted <http://www.hrw.org/news/2004/04/07/netherlands-congolese-torturer-convicted> (visited 30 July 2016).

<sup>94</sup> M Simons 'World Briefing/ Europe: The Netherlands: Congo Man Convicted of Torture' <http://www.nytimes.com/2004/04/08/world/world-briefing-europe-the-netherlands-congo-man-convicted-of-torture.html> (visited 30 July 2016).

included the murder of several Belgian peacekeepers and an undetermined number of Rwandan civilians. On 12 December 2007 the *Cour de Cassation* rejected Ntuyahaga's appeal and confirmed his conviction and sentence.<sup>95</sup> This case, like those discussed above, indicates that immunity *ratione materiae* cannot be pleaded when a former state official is charged with international crimes before the courts of foreign states. In the light of the state practice discussed above, it is clear that customary international law is established for the principle that immunity *ratione materiae* cannot be pleaded in case of international crimes.<sup>96</sup> This is a correct position.<sup>97</sup> Immunity *ratione materiae* is justified on three grounds, of which none can apply to international crimes. First, immunity *ratione materiae* is based on the view that all states are equal, and for one state to judge the sovereign actions of another state, that would be an unacceptable act of interference by that state in the affairs of the other state.<sup>98</sup> Given the egregious nature of international crimes, however, these crimes cannot be considered as an internal matter of any country. These crimes are considered as being committed against the international community as a whole and subject to universal jurisdiction of all states.<sup>99</sup> Secondly, immunity *ratione materiae* is justified as necessary to protect states' dignity in that it prevents a foreign state from judging another state's conduct.<sup>100</sup> Nevertheless, since international crimes are prohibited by international law, prosecuting state officials who committed international crimes would not offend the dignity of the state on behalf of which they acted. Dignity would rather require states to refrain from engaging in such activities.<sup>101</sup> Thirdly, this type of immunity is justified as necessary to enable state officials to perform their functions without fear of subsequent prosecution.<sup>102</sup> This justification does not stand either. Far from being a function of a state, the perpetration of international crimes is the opposite of any of the state's functions. States must protect their citizens, not kill them or otherwise seriously violate their rights to the extent prohibited by international law.<sup>103</sup> State officials who commit international crimes are thus rightly held personally accountable by the courts of foreign states.<sup>104</sup>

From the perspective of the perpetrator, the removal of immunity *ratione materiae* in case of serious crimes under international law is also justified because in this area 'individuals have international duties which transcend the national obligations of obedience'.<sup>105</sup> He who commits a serious crime under international law

<sup>95</sup> Track Impunity Always Bernard Ntuyahaga <http://www.trial-ch.org/en/resources/trial-watch/trial-watch/profiles/profile/477/action/show/controller/Profile/tab/legal-procedure.html> (visited 1 August 2016).

<sup>96</sup> See also Murungu, *supra* note 66, at 36: 'Such immunity cannot exist when a person is charged with international crimes either because such acts can never be 'official' or because they violate norms of *jus cogens* and such peremptory norms must prevail over immunity'.

<sup>97</sup> See also Bianchi, *supra* note 51, at 265; S Wirth 'Immunity for Core Crimes? The ICJ's Judgment in the *Congo v. Belgium Case*' *European Journal of International Law* (2002) 877-893, at 888 and Dugard, *supra* note 2, at 253: '[s]uch immunity [*ratione materiae*] does not exist when a person is charged with an international crime either because such acts can never be 'official' or because they violate norms of *jus cogens* and such peremptory norms prevail over immunity'.

<sup>98</sup> Franey, *supra* note 6, at 195 and Steynberg *et al.*, *supra* note 2, at 579.

<sup>99</sup> Cryer *et al.* *supra* note 5, at 542-543: '[t]he State cannot complain that its sovereignty is being restricted or that a policy is being imposed on it, when the prohibited conduct is recognized by all as an international crime'. See also K Henrard 'The Viability of National Amnesties in view of the Increasing Recognition of Individual Criminal Responsibility at International Law' (1999) *Michigan State University Detroit College of Law Journal of International Law* 595, at 612: 'The fact that the official position of a person does not shield him or her from responsibility for the perpetration of severe human rights violations and that state immunity from jurisdiction cannot come to his or her rescue [reflects] an important shift of priorities, namely that more weight is given to key universal humanitarian values and less to the traditional interpretation of state sovereignty'.

<sup>100</sup> Wirth, *supra* note 97, at 888.

<sup>101</sup> Wirth, *supra* note 97, at 888. See also Cryer *et al.* *supra* note 5, at 542: '[f]unctional immunity protects State conduct from scrutiny, but it would be incongruous for international law to protect the very conduct which it criminalizes and for which it imposes duties to prosecute'.

<sup>102</sup> Franey, *supra* note 6, at 195.

<sup>103</sup> Franey, *supra* note 6, at 195. See also UN ESC Study on Amnesty Laws and their Role in the Safeguard and Promotion of Human Rights: Preliminary Report by Mr Louis Joinet, Special Rapporteur UN Doc E/CN.4/Sub.2/1985/16 (1985), at 17: 'Under international law, crimes of this kind are not classed as political offences or, more accurately, the rules of international law, while not denying their political character, preclude the application of various measures of protection available to political offenders'. Emphasis added.

<sup>104</sup> Cryer *et al.* *supra* note 5, at 543. See also Murungu, *supra* note 66, at 91: 'In international law, it is not acceptable that commission of international crimes can qualify as acts performed in official capacity'.

<sup>105</sup> Trial of the German Major War Criminals before the International Military Tribunal Vol I (Nuremberg 1947) 56.

cannot obtain immunity while acting in pursuance of the authority of the state because the state in authorizing such action ‘moves outside its competence under International Law’.<sup>106</sup>

In light of the above considerations, it is concluded that under customary international law, state officials do not enjoy immunity *ratione materiae* from the jurisdiction of foreign states, when they are accused of international crimes.<sup>107</sup> Accordingly, Rwandan courts should not uphold claims of this immunity in these circumstances.

#### 4. May immunity *ratione materiae* be waived by the state on behalf of which the official acted?

It was stated above<sup>108</sup> that immunity *ratione materiae* functions as a jurisdictional or procedural defence by preventing circumvention of the immunity of a state through proceedings brought against officials acting on its behalf.<sup>109</sup> In so doing, some commentators have argued,<sup>110</sup> immunity *ratione materiae* serves at the same time as a ‘substantive defence’<sup>111</sup> for the state official by ensuring that the individual official ‘cannot’<sup>112</sup> be legally held responsible for acts that are in fact the acts of the state on whose behalf the official acted. It is submitted that this view is not correct. Immunity *ratione materiae* does not function as a substantive defence but only as a jurisdictional defence. This is so, because this immunity (just like immunity *ratione personae*) belongs to the state, not the individual and, for this reason, can be waived by the state on behalf of which the individual acted, irrespective of the wishes of the official claiming the immunity.<sup>113</sup> Thus, the existence of functional (and personal) immunity does not mean that there is a lack of ‘substantive legal responsibility’, but rather that a foreign state is ‘procedurally’ prevented from bringing proceedings against the individual perpetrator.<sup>114</sup> If the state chooses to waive his immunity, the official cannot claim immunity himself.<sup>115</sup> The purpose of immunity (both functional and personal) is not to benefit the individual, but the state. Immunity aims to protect official acts (functional immunity) or to facilitate international relations (personal immunity). It is the state which is the real beneficiary of the immunity and, for this reason, the state may waive<sup>116</sup> it, irrespective of the wishes of the person claiming the immunity.<sup>117</sup>

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<sup>106</sup> Trial of the German Major War Criminals before the International Military Tribunal Vol I (Nuremberg 1947) 56.

<sup>107</sup> See also The Institute of International Law ‘Resolution on the Immunity from Jurisdiction of the State and of Persons Who Act on Behalf of the State in case of International Crimes’ (2009) [http://www.idi-ii.org/idiE/resolutionsE/2009\\_naples\\_01\\_en.pdf](http://www.idi-ii.org/idiE/resolutionsE/2009_naples_01_en.pdf) (visited 02 August 2016), article III(1): ‘No immunity from jurisdiction other than personal immunity in accordance with international law applies with regard to international crimes’.

<sup>108</sup> See 3 above.

<sup>109</sup> See also Bantekas and Nash, *supra* note 8, at 168; Akande and Shah, *supra* note 1, at 827 and Wickremasinghe, *supra* note 8, at 403. See further Foakes, *supra* note 8, at 8: ‘The main effect of such immunity is to prevent litigants from seeking to circumvent the rules on state immunity by taking action against the individuals carrying out the business of the state’.

<sup>110</sup> CF Swanepoel ‘Universal Jurisdiction as Procedural Tool to Institute Prosecutions for International Core Crimes’ 32 *Journal for Juridical Science* (2007) 118, at 127 and Akande and Shah, *supra* note 1, at 826.

<sup>111</sup> Akande and Shah, *supra* note 1, at 826. See also A Cassese ‘When May Senior State Officials be Tried for International Crimes? Some Comments on the Congo v Belgium Case’ 13 *European Journal of International Law* (2002) 853, at 863 and Bantekas and Nash, *supra* note 8, at 168.

<sup>112</sup> Swanepoel, *supra* note 110, at 127. See also Zappalà, *supra* note 51, at 155: ‘The consequence is that a public official cannot be held accountable for acts performed in the exercise of an official capacity, as these are to be referred to the State itself’.

<sup>113</sup> Cryer *et al.* *supra* note 5, at 534.

<sup>114</sup> Cryer *et al.* *supra* note 5, at 534.

<sup>115</sup> Wickremasinghe, *supra* note 8, at 406: ‘None of the immunities which have been considered are for the benefit of any particular individual or group of individuals, but rather are for the benefit of the State... which they represent. Thus the sending State [...] can waive any of these immunities, thereby consenting to the jurisdiction of the courts of the receiving State over the official in question. This applies whether the immunity in question is granted *ratione personae* or *ratione materiae*’.

<sup>116</sup> A waiver is the permission given by a State whose official enjoys immunity *ratione personae*, authorizing the State with enforcement jurisdiction to proceed with investigation, arrest and trial of the official concerned. Yitih, *supra* note 4, at 136.

<sup>117</sup> Cryer *et al.* *supra* note 39, at 534 and MC Bassiouni (ed) *International Criminal Law* (Vol III Martinus Nijhoff Publishers), at 62-63. For a contrary view see Steynberg *et al.*, *supra* note 2, at 579, where the authors argue that immunity *ratione materiae* belongs to the individual, not the State and that, accordingly, this immunity cannot be waived by the State to which the official belongs. It is submitted that this view is not correct as it confuses the procedural defence of immunity *ratione materiae* with the substantive defence of ‘official capacity’ (also known as ‘public

### 5. Which officials must be accorded immunity *ratione materiae*?

Another question that needs clarification is which officials must be accorded immunity *ratione materiae* before Rwandan civil courts. The answer to this question lies in the notion and essence of this immunity. As stated earlier,<sup>118</sup> immunity *ratione materiae* is grounded in the notion that states must not interfere with the allegiance that a state official may owe to his state.<sup>119</sup> For that reason, this immunity is enjoyed by all foreign officials, regardless of rank.<sup>120</sup> It extends from the Head of state to the police constable. It must also be granted to both serving state officials as well as to former officials in respect of official acts performed while in office.<sup>121</sup>

### 6. Officials on private visit

The last question that must be considered in relation to the issue of immunity *ratione materiae* of foreign state officials is whether this immunity must be accorded to foreign officials who are on Rwandan territory on holidays or private visit. Again, the answer to this question lies in the justification of immunity *ratione materiae*. Since the purpose of this immunity is to protect the state on behalf of which a state official acted, not the official himself, this immunity is not affected by the purpose of an official's presence in the territory of the state exercising jurisdiction. Irrespective of whether this person is abroad on an official visit or is staying there in a private capacity, he enjoys immunity *ratione materiae* from that state's civil courts in respect of acts performed in his official capacity in his home state.<sup>122</sup> Thus, in accordance with the aforesaid, foreign officials on private visit must be accorded this immunity before Rwandan civil courts.

### 7. Conclusion

From the foregoing, the following conclusions and guidelines are drawn. Firstly, it was found that under customary international law immunity *ratione materiae* only applies in civil cases, not in criminal cases. Secondly, immunity *ratione materiae* must be accorded to all foreign state officials, regardless of rank. Thirdly, immunity *ratione materiae* must be granted regardless of whether the concerned official is still in office or not. Fourthly, immunity *ratione materiae* must be granted regardless of whether the official is on Rwandan territory on official mission or private visit. Lastly, since the immunity belongs to the state, not the official, if the immunity has been waived by the state on behalf of which the official acted, such official should not be accorded immunity.

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authority'. While the latter belongs to the individual official, the former belongs to the State on behalf of which the individual performed the act that forms the basis of the litigation.

<sup>118</sup>See 3 above.

<sup>119</sup>A Cassese *International Criminal Law* (Oxford University Press New York 2003), at 302.

<sup>120</sup>Knushel, *supra* note 6, at 151. See also ILC, *supra* note 7, at 59: 'All serving officials enjoy immunity in respect of acts performed in an official capacity'.

<sup>121</sup>Steynberg *et al.*, *supra* note 2, at 579; Akande and Shah, *supra* note 1, at 827; Wickremasinghe, *supra* note 8, at 390 and Markovich, *supra* note 9, at 59. See also Cryer *et al.* *supra* note 5, at 534: '[f]unctional immunity protects only conduct carried out in the course of the individual's duties, but does not drop away when a person's role comes to an end, since it protects the conduct, not the person'.

<sup>122</sup>ILC, *supra* note 7, at 58.