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Précis Paper

Immunity of Heads of State and Government Officials

A discussion of the different levels of immunity afforded to heads of state and government officials.

Discussion Includes

- State and diplomatic immunity
- Head of state
- Immunity of state officials in criminal proceedings of a foreign state
- Diplomatic immunity
- Future implications

Précis Paper

Immunity of Heads of State and Government Officials

In this edition of BenchTV, Dr. Alison Pert (Adjunct Senior Lecturer – University of Sydney) and Dr. Jacqueline Mowbray (Associate Professor – University of Sydney, NSW) discuss state immunity in both civil and criminal proceedings, and diplomatic immunity in relation to the exploitation of private domestic servants.

State and diplomatic immunity

1. State and diplomatic immunity are both very old, firmly established principles of international law and they are closely related. State immunity refers to the immunity of a foreign state from the jurisdiction of the courts of the foreign state. It is variously termed state immunity, sovereign immunity, foreign state immunity, or foreign sovereign immunity.

2. When it applies, state immunity is a procedural bar. The courts have no jurisdiction to entertain proceedings against a foreign state or its representatives in that forum. While its application is wholly domestic, it derives from the fundamental principle of international law that all states are sovereign and equal; no one state can exercise its power of dominion over another without its consent.

3. There are differences from state to state in the extent to which that immunity is recognised in their courts. Some states recognise absolute immunity, meaning the state cannot be sued for anything. Other states adopt the restrictive doctrine where there are exceptions meaning the state would not be immune in those instances, for example in commercial proceedings or for non-governmental acts.

4. There is currently no widely accepted treaty that sets out these rules, and there are only about 15 or so states that have legislation on foreign state immunity. Diplomatic immunity on the other hand is well settled and codified in the *Vienna Convention on Diplomatic Relations 1961* ('Vienna Convention'). The only 4 United Nations states that are not party to this convention are South Sudan, Palau, Solomon Islands and Vanuatu. With 191 parties, the convention is almost universally accepted in the international community.

5. The *Vienna Convention* has detailed rules about the rights and responsibilities of sending and receiving states in the field of diplomatic relations generally. There is a particular provision in Article 31 which states that a diplomat is immune from all criminal proceedings in the receiving state, and has almost complete immunity from civil proceedings.

6. This paper will discuss the following:

a. Whether a head of state can be sued in a foreign court for acts done in a private capacity in civil proceedings
b. The immunity of an ordinary state official of any rank of seniority from criminal proceedings in a foreign state
c. Diplomatic immunity – the problem of people trafficking and the exploitation of private domestic servants in diplomatic households

Head of state

7. When considering the immunity of a head of state it is useful to use Donald Trump as an example. The sheer extent of Donald Trump's business empire means that it is likely that someone, somewhere, will or may want to bring an action against him arising out of these business ventures. The question is, if he were sued overseas in a foreign court, would he be entitled to a foreign state immunity as the head of state? There are not many states that have legislation on foreign state immunity, even fewer mention the head of state specifically, and even fewer again mention private acts of a head of state. Even international law says virtually nothing about this particular issue.

8. In the case of *Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v Belgium)* [2002] ICJ 1, a serving Minister for Foreign Affairs was served with criminal proceedings; an arrest warrant issued by Belgium. The whole of the case was about whether that person was immune from criminal suit. In the course of the judgment, the Court made passing comment about absolute immunity from civil proceedings as well as criminal, but did not go on to explain it.

9. In his 2010 entry into the *Max Planck Encyclopedia of Public International Law* titled 'Head of State', Sir Arthur Watts argued that the head of state probably has the same immunity as an ambassador in post under Article 31 of the *Vienna Convention*. This effectively means there is no immunity for private acts, but probably only while the head of state is in the forum state on official business.

10. In 2001 the International Law Institute concluded that there was no immunity for private acts, but even then, no court action could actually begin against the head of state while he or she was in the forum state on official business.

11. It can be said there are two ways to approach this issue of immunity of a head of state for private acts: as a matter of principle, or to approach it as a matter of functional necessity. Approaching from a matter of principle, the par in parem rule means that one state cannot exercise any jurisdiction over another. The head of state personifies the state, so there should be complete immunity. From a functional approach, we must consider whether we are trying

to ensure that legal proceedings do not interfere with the performance of the head of state's functions.

12. From the pure principled perspective, logically there would be no exceptions at all, either both states' and their sovereign are equal and deserving of absolute respect, or they are not. However, there are exceptions in the legislation such as in the UK and Australia where private commercial activities are not exempt or immune; this seems to be accepted by the wider international community, or at least not challenged.

13. Scholars Fox and Webb argue that immunity is granted by reason of status, not function, so logically there should be no distinction between public and private acts. In short, according to this approach a head of state is either personally immune or they are not, and there can logically be no such thing as partial personal immunity.

14. In customary international law the immunities accorded to a minister for foreign affairs are not granted for their personal benefit, but to ensure effective performance of their functions on behalf of their respective states. It is argued by some that the immunity of the person against any act or authority of another state protects that person from hindrance in the performance of their functions, and for that reason there should be no distinction drawn between acts done in an official capacity, or in a private capacity. It is a question of the degree of hindrance or impedance on their ability to perform their functions. The noninterference with official functions approach was heavily relied on in the International Court of Justice in the *Arrest Warrant of 11 April 2000* case to justify the immunity of a foreign minister.

15. The threat of litigation can affect a senior official's decision whether or not to travel to a foreign country. The question is whether there is really that much difference between civil and criminal immunity so as to justify lifting immunity just for civil proceedings.

16. These questions cry out for a considered definitive answer from a body like the International Law Commission or an international court or tribunal, like the International Court of Justice. Dr. Pert suggests that there may be two options for this issue. One option is to say that there should be complete immunity from all proceedings while the head of state is in office, whether criminal or civil, or public or private acts, but once the head of state leaves office then they should only retain immunity for what they did in their public capacity while they are in office.

17. The alternative is to say that there should be no immunity at all for private or commercial acts, whether from civil or criminal proceedings, if they became relevant because the head of state has chosen to enter the marketplace as It were and should abide by the rules of the marketplace. This also raises that perhaps there should be no immunity if the question arises from international crimes.

Immunity of state official in criminal proceedings of a foreign state

18. The next issue is whether, and if so, the extent to which an ordinary state official of any rank is immune from criminal proceedings of a foreign state. The issue is not specifically dealt with either in international law or in domestic law.

19. The *'Enrica Lexie' Incident, Italy v India* (2015) case, which is still ongoing, involves Italian marines that were posted on board Italian merchant vessels to protect them against piracy, particularly in the Indian Ocean. They were performing governmental functions and they mistakenly thought the vessel was under attack by pirates, and they fired and killed what turned out to be two Indian fishermen. India is asserting the right to prosecute and that there is no immunity, while Italy is asserting that they are entitled to foreign state immunity. This case displays the complete diversity of opinion.

20. In 2011 the United Kingdom courts held in the *Khurts Bat* case that customary international law does not recognise immunity from criminal proceedings where the crime is committed in the territory of the forum state.

21. The question to be asked is whether there should be immunity at all. Should criminal immunity be refused because somehow a criminal act is more intrusive on the sovereignty of the forum state? These questions do not seem to be resolved in theory, and if you do not resolve them in theory it is difficult to know how to approach them in practice.

22. All of these immunities are reciprocal, therefore allowing exceptions does risk state officials and diplomats when it comes to diplomatic immunity in another state. In recognizing the risk of malicious prosecutions, Dr. Pert suggests that perhaps there should not be any exceptions to immunity where it is asserted at all, except for international crimes.

<u>Diplomatic immunity</u>

23. The particular question in this regard is about the immunity of diplomats when domestic servants are employed in diplomatic households. In the case of *Reyes v Al-Malki & Anor* [2017] UKSC 61, the Appellant, Ms. Reyes, was a Philippine National and was brought to the UK by Mr. Al-Malki and his wife to work for them. Mr. Al-Malki was, at the time, a diplomat in the Saudi Arabian Embassy in London.

24. Ms. Reyes alleges that she was promised a proper salary and conditions, but upon arrival Al-Malki maltreated her, requiring her to work excessive hours, did not provide proper accommodation, confiscated her passport, prevented her from leaving the house and did not pay her anything. After 3 months, Ms. Reyes escaped and was helped by a charity to bring a case against Mr. Al-Malki in which she claimed race discrimination and unpaid wages.

25. The assertion of diplomatic immunity was initially unsuccessful because the employment tribunal held that one of the relevant exceptions to immunity in the *Vienna Convention* applied. The case went on to the Employment Appeal Tribunal and then the Court of Appeal which held that Mr. Al-Malki was entitled to diplomatic immunity.

26. On appeal to the UK Supreme Court, Ms. Reyes appeal was successful but on a different ground. The Supreme Court unanimously held that since, by then, Mr. Al-Malki had left his post, he was only entitled to residual immunity set out in Article 39 of the *Vienna Convention on Diplomatic Relations* (1961). This Article provides that when a diplomat's functions have come to an end, their privileges and immunities cease when they leave the country, but they retain immunity forever in respect of official acts done in the course of their diplomatic functions.

27. Al-Malki argued his official functions included the employment of domestic staff. The Supreme Court acknowledged that official functions of an individual diplomat would extend to a wide variety of incidental functions necessary to the performance of the general functions of a diplomatic mission. Whether they are incidental or direct, a diplomatic agent's official functions are those that he performs for, and on behalf of, the sending state. The test is whether the relevant activity was a part of those functions.

28. The Court concluded that on any view, Mr. Al-Malki's official functions could not have extended to employing domestic staff to do things like cooking, cleaning, helping with children, etc. as these things were not done for or on behalf of Saudi Arabia.

29. The Supreme Court dealt with residual immunity briefly, explaining that the question of immunity falls to be determined not when the proceedings are commenced, but at the time of the hearing. Diplomatic immunity is a procedural immunity, so an action against somebody who might be entitled to diplomatic immunity is not a nullity, it is just liable to be dismissed if immunity is established. That position can change in the course of proceedings, for example the sending state may waive the immunity, or the diplomat might leave and become entitled only to the much narrower residual immunity.

30. The minority on the above issue in the UK Supreme Court held that if Mr. Almaki had still been in post he would have been entitled to immunity because he relied on Article 31 of the *Vienna Convention*. As previously discussed, Article 31 provides for complete immunity from criminal proceedings and almost complete immunity from civil proceedings. The third and relevant exception to this is where a professional or commercial activity is exercised by the diplomatic agent in the receiving state outside his official functions.

31. Ms. Reyes argued that her employment by Mr. Al-Malki was a commercial activity on his part, particularly because she had been brought to the UK in conditions amounting to people trafficking, and Mr. Al-Malki had benefited from that. Lord Sumption disagreed with this and applied the rules on treaty interpretation, concluding that for the purpose of Article 31, commercial activity had to be a regular activity carried on for an income, from which an income was derived, not an occasional or isolated act.

32. Diplomatic immunity like state immunity, is an immunity from jurisdiction, not from liability. Its practical effect is to require the diplomatic agent to be sued in his or her own country, or in respect of nonofficial acts in the receiving state once his or her posting comes to an end. There is no conflict between a rule categorizing specified conduct as wrongful on the one hand and a rule controlling the jurisdiction that may properly be enforced on the other hand.

33. Lord Wilson cast doubt in his obiter statements about the correctness of Lord Sumption's interpretation of commercial activity for a number of reasons. In his reasoning he referred to statistics provided by a UK charity, Kalayaan, which found that between 200 and 250 domestic workers enter the UK every year on diplomatic overseas domestic workers visas, and the proportion of domestic workers who are victims of trafficking is considerably higher in diplomatic households than in other households. It is believed that this is largely because of the perceived immunity leading diplomats to consider that they could exploit this with impunity, meaning this perceived immunity has made trafficking with a view to domestic servitude a low risk, high reward activity for diplomats.

34. Lord Wilson believed it was at least arguable that by employing a trafficked person, a diplomat was participating in the trafficking trade, benefiting financially and therefore engaging in a commercial activity. He believed that 'commercial activity' within Article 31 should now encompass financial benefit from things like people trafficking in this way. He also noted that he could not see any logical reason as to why employment contracts should be excluded from state immunity but not from diplomatic immunity, although noting the law had not yet moved in this direction.

<u>Future implications</u>

35. It is quite likely that an Australian court would look to this case and follow the conclusion relating to Article 39 and residual immunity, being that it does not include employment of domestic staff. However it is doubtful that Australian courts would follow the implied view of Lord Wilson that the term commercial activity should not encompass a new exception to immunity to do with the employment of domestic staff for a diplomat in post.

36. In an independent report produced by the UK Government on overseas domestic work visas (2015), it was recommended that all domestic workers should be, for a diplomatic mission, employed not by an individual diplomat, but by the foreign state concerned. This recommendation was rejected by the UK as it would provide limited assistance in the UK because of the way their legislation is drafted. This would be of limited assistance to a domestic worker in Australia if they were employed by the sending state and not the individual diplomat because in that case, foreign state immunity would apply, not diplomatic immunity. The only other alternative is for the international community to address the issue, perhaps in the form of a protocol to the *Vienna Convention on Diplomatic Relations* (1961) dealing specifically with this issue.

37. Currently we can already see that there is a perceptible move in international law away from impunity, for example through the creation of the International Criminal Court, through to the lifting of state immunity for at least former heads of state for matters like state torture, as seen in the *Pinochet* case (1998). This displays that law reform in the area of diplomatic immunity is not beyond the realms of possibility.

BIOGRAPHY

Dr Alison Pert

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Dr Alison Pert lectures in International Law and the Use of Armed Force at the University of Sydney. Her doctoral thesis on Australia's record as a good international citizen was published by Federation Press in 2014. After her Bar exams in London Alison spent five years working as a government lawyer in Papua New Guinea . She returned to the UK to undertake a Master's Degree at University College, London, specialising in international law. On moving to Canberra she worked in the Attorney-General's Department, working in constitutional, international, and international trade law areas. She then spent several years in private practice, mainly in commercial litigation, maintaining her interest in international law and lecturing in international trade law at ANU. In Sydney she worked in corporate and commercial law at the Commonwealth Bank. She has lectured at the University of Sydney in international law since 2003 and has also lectured in International Law and the Use of Armed Force at Monash University.

Dr Jacqueline Mowbray

Associate Professor – University of Sydney, NSW

Jacqueline joined the University of Sydney Law School in 2008. She is a graduate of the Universities of Queensland (BA LLB (Hons)), Melbourne (LLM) and Cambridge (LLM (Hons) PhD). Jacqueline has practised as a solicitor with Freehills in Melbourne and Barlow Lyde & Gilbert in London, and she teaches on the European Masters program in human rights, which is taught at the University of Sarajevo, Bosnia-Herzegovina. Her particular area of interest is international law and legal theory, with a focus on international human rights law. She is currently working on a number of projects relating to international law and language policy, and the position of linguistic minorities under international law. Jacqueline also teaches in the area of commercial law and international commercial transactions.

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