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SCSL-2003-01-I
(406 - 609)

SPECIAL COURT FOR SIERRA LEONE
FREETOWN, SIERRA LEONE

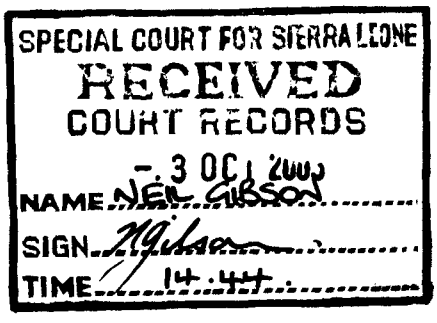
CASE NO. SCSL-03-1

IN THE APPEALS CHAMBER

Before: Judge Geoffrey Robertson, QC, President
Judge Emmanuel O. Ayoola
Judge Galaga King
Judge Renate Winter

Registrar: Mr. Robin Vincent

Date filed: 3rd October 2003



THE PROSECUTOR

Against

CHARLES GHANKAY TAYLOR also known as
CHARLES GHANKAY MACARTHUR DAPKANA TAYLOR - APPLICANT

APPLICANT'S AUTHORITIES FILED PURSUANT TO THE DIRECTION ON FILING AUTHORITIES ISSUED ON THE 26TH DAY OF SEPTEMBER 2003 BY JUDGE GELAGA KING THE PRE-HEARING JUDGE OF THE APPEALS CHAMBER OF THE SPECIAL COURT FOR SIERRA LEONE

Office of the Prosecutor:

Mr. David Crane, Prosecutor
Mr. Desmond de Silva, QC, Deputy Prosecutor
Mr. Walter Marcus-Jones, Senior Appellate Counsel
Mr. Chris Staker, Senior Appellate Counsel
Mr. Abdul Tejan-Cole, Appellate Counsel
Ms. Mora Johnson, Appellate Intern
Luc Côté, Chief of Prosecutions
Robert Petit, Senior Trial Counsel
Paul Flynn, Trial Counsel

Applicant's Counsel

Terence Michael Terry

SPECIAL COURT FOR SIERRA LEONE
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The Applicant files herewith the authorities required to be filed by the "Direction on Filing Authorities" issued by the Pre-Hearing Judge on the 26th of September 2003.

Freetown, 3rd October, 2003

For the Defence

for Terence Michael Terry
Counsel for the Applicant herein

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CASE CONCERNING THE ARREST WARRANT OF 11 APRIL 2000

(DEMOCRATIC REPUBLIC OF THE CONGO *v.* BELGIUM)

Facts of the case — Issue by a Belgian investigating magistrate of "an international arrest warrant in absentia*" against the incumbent Minister for Foreign Affairs of the Congo, alleging grave breaches of the Geneva Conventions of 1949 and of the Additional Protocols thereto and crimes against humanity — International circulation of arrest warrant through Interpol — Person concerned subsequently ceasing to hold office as Minister for Foreign Affairs.*

* *

First objection of Belgium — Jurisdiction of the Court — Statute of the Court, Article 36, paragraph 2 — Existence of a "legal dispute" between the Parties at the time of filing of the Application instituting proceedings — Events subsequent to the filing of the Application do not deprive the Court of jurisdiction.

Second objection of Belgium — Mootness — Fact that the person concerned had ceased to hold office as Minister for Foreign Affairs does not put an end to the dispute between the Parties and does not deprive the Application of its object.

Third objection of Belgium — Admissibility — Facts underlying the Application instituting proceedings not changed in a way that transformed the dispute originally brought before the Court into another which is different in character.

Fourth objection of Belgium — Admissibility — Congo not acting in the context of protection of one of its nationals — Inapplicability of rules relating to exhaustion of local remedies.

Subsidiary argument of Belgium — Non ultra petita *rule — Claim in Application instituting proceedings that Belgium's claim to exercise a universal jurisdiction in issuing the arrest warrant is contrary to international law — Claim not made in final submissions of the Congo — Court unable to rule on that question in the operative part of its Judgment but not prevented from dealing with certain aspects of the question in the reasoning of its Judgment.*

* *

Immunity from criminal jurisdiction in other States and also inviolability of an incumbent Minister for Foreign Affairs — Vienna Convention on Diplomatic Relations of 18 April 1961, preamble, Article 32 — Vienna Convention on Consular Relations of 24 April 1963 — New York Convention on Special Missions of 8 December 1969, Article 21, paragraph 2 — Customary international law rules — Nature of the functions exercised by a Minister for Foreign Affairs — Functions such that, throughout the duration of his or her office, a Minister for Foreign Affairs when abroad enjoys full immunity from criminal jurisdiction and inviolability — No distinction in this context between acts performed in an "official" capacity and those claimed to have been performed in a "private capacity".

No exception to immunity from criminal jurisdiction and inviolability where an incumbent Minister for Foreign Affairs suspected of having committed war crimes or crimes against humanity — Distinction between jurisdiction of national courts and jurisdictional immunities — Distinction between immunity from jurisdiction and impunity.

Issuing of arrest warrant intended to enable the arrest on Belgian territory of an incumbent Minister for Foreign Affairs — Mere issuing of warrant a failure to respect the immunity and inviolability of Minister for Foreign Affairs — Purpose of the international circulation of the arrest warrant to establish a legal basis for the arrest of Minister for Foreign Affairs abroad and his subsequent extradition to Belgium — International circulation of the warrant a failure to respect the immunity and inviolability of Minister for Foreign Affairs.

* *

Remedies sought by the Congo — Finding by the Court of international responsibility of Belgium making good the moral injury complained of by the Congo — Belgium required by means of its own choosing to cancel the warrant in question and so inform the authorities to whom it was circulated.

JUDGMENT

Present: *President* GUILLAUME; *Vice-President* SHI; *Judges* ODA, RANJEVA, HERCZEGH, FLEISCHHAUER, KOROMA, VERESHCHETIN, HIGGINS, PARRA-ARANGUREN, KOOIJMANS, REZEK, AL-KHASAWNEH, BUERGENTHAL; *Judges* ad hoc BULA-BULA, VAN DEN WYNGAERT; *Registrar* COUVREUR.

In the case concerning the arrest warrant of 11 April 2000,

between

the Democratic Republic of the Congo,

represented by

H.E. Mr. Jacques Masangu-a-Mwanza, Ambassador Extraordinary and Plenipotentiary of the Democratic Republic of the Congo to the Kingdom of the Netherlands,

as Agent;

H.E. Mr. Ngele Masudi, Minister of Justice and Keeper of the Seals,

Maître Kosisaka Kombe, Legal Adviser to the Presidency of the Republic,

Mr. François Rigaux, Professor Emeritus at the Catholic University of Louvain,

Ms Monique Chemillier-Gendreau, Professor at the University of Paris VII (Denis Diderot),

Mr. Pierre d'Argent, *Chargé de cours*, Catholic University of Louvain,

Mr. Moka N'Golo, *Bâtonnier*,

Mr. Djeina Wembou, Professor at the University of Abidjan,

as Counsel and Advocates;

Mr. Mazyambo Makengo, Legal Adviser to the Ministry of Justice,

as Counsellor,

and

the Kingdom of Belgium,

represented by

Mr. Jan Devadder, Director-General, Legal Matters, Ministry of Foreign Affairs,

as Agent;

Mr. Eric David, Professor of Public International Law, *Université libre de Bruxelles*,

Mr. Daniel Bethlehem, Barrister, Bar of England and Wales, Fellow of Clare Hall and Deputy Director of the Lauterpacht Research Centre for International Law, University of Cambridge,

as Counsel and Advocates;

H.E. Baron Olivier Gillès de Pélichy, Permanent Representative of the Kingdom of Belgium to the Organization for the Prohibition of Chemical Weapons, responsible for relations with the International Court of Justice,

Mr. Claude Debrulle, Director-General, Criminal Legislation and Human Rights, Ministry of Justice,

Mr. Pierre Morlet, Advocate-General, Brussels *Cour d'Appel*,

Mr. Wouter Detavernier, Deputy Counsellor, Directorate-General Legal Matters, Ministry of Foreign Affairs,

Mr. Rodney Neufeld, Research Associate, Lauterpacht Research Centre for International Law, University of Cambridge,

Mr. Tom Vanderhaeghe, Assistant at the *Université libre de Bruxelles*,

THE COURT,

composed as above,

after deliberation,

delivers the following Judgment:

1. On 17 October 2000 the Democratic Republic of the Congo (hereinafter referred to as "the Congo") filed in the Registry of the Court an Application instituting proceedings against the Kingdom of Belgium (hereinafter referred to as "Belgium") in respect of a dispute concerning an "international arrest warrant issued on 11 April 2000 by a Belgian investigating judge . . . against the Minister for Foreign Affairs in office of the Democratic Republic of the Congo, Mr. Abdulaye Yerodia Ndombasi".

In that Application the Congo contended that Belgium had violated the "principle that a State may not exercise its authority on the territory of another State", the "principle of sovereign equality among all Members of the United Nations, as laid down in Article 2, paragraph 1, of the Charter of the United Nations", as well as "the diplomatic immunity of the Minister for Foreign Affairs of a sovereign State, as recognized by the jurisprudence of the Court and following from Article 41, paragraph 2, of the Vienna Convention of 18 April 1961 on Diplomatic Relations".

In order to found the Court's jurisdiction the Congo invoked in the aforementioned Application the fact that "Belgium ha[d] accepted the jurisdiction of the Court and, in so far as may be required, the [aforementioned] Application signifie[d] acceptance of that jurisdiction by the Democratic Republic of the Congo".

2. Pursuant to Article 40, paragraph 2, of the Statute, the Application was forthwith communicated to the Government of Belgium by the Registrar; and, in accordance with paragraph 3 of that Article, all States entitled to appear before the Court were notified of the Application.

3. Since the Court included upon the Bench no judge of the nationality of either of the Parties, each Party proceeded to exercise the right conferred by Article 31, paragraph 3, of the Statute to choose a judge *ad hoc* to sit in the case; the Congo chose Mr. Sayeman Bula-Bula, and Belgium Ms Christine Van den Wyngaert.

4. On 17 October 2000, the day on which the Application was filed, the Government of the Congo also filed in the Registry of the Court a request for the indication of a provisional measure based on Article 41 of the Statute of the Court. At the hearings on that request, Belgium, for its part, asked that the case be removed from the List.

By Order of 8 December 2000 the Court, on the one hand, rejected Belgium's request that the case be removed from the List and, on the other, held that the circumstances, as they then presented themselves to the Court, were not such as to require the exercise of its power under Article 41 of the Statute to indicate provisional measures. In the same Order, the Court also held that "it [was] desirable that the issues before the Court should be determined as soon as possible" and that "it [was] therefore appropriate to ensure that a decision on the Congo's Application be reached with all expedition".

5. By Order of 13 December 2000, the President of the Court, taking account of the agreement of the Parties as expressed at a meeting held with their Agents on 8 December 2000, fixed time-limits for the filing of a Memorial by the Congo and of a Counter-Memorial by Belgium, addressing both issues of jurisdiction and admissibility and the merits. By Orders of 14 March 2001 and 12 April 2001, these time-limits, taking account of the reasons given by the Congo and the agreement of the Parties, were successively extended. The Memorial of the Congo was filed on 16 May 2001 within the time-limit thus finally prescribed.

6. By Order of 27 June 2001, the Court, on the one hand, rejected a request by Belgium for authorization, in derogation from the previous Orders of the President of the Court, to submit preliminary objections involving suspension of the proceedings on the merits and, on the other, extended the time-limit prescribed in the Order of 12 April 2001 for the filing by Belgium of a Counter-Memorial addressing both questions of jurisdiction and admissibility and the merits. The Counter-Memorial of Belgium was filed on 28 September 2001 within the time-limit thus extended.

7. Pursuant to Article 53, paragraph 2, of the Rules, the Court, after ascertaining the views of the Parties, decided that copies of the pleadings and documents annexed would be made available to the public at the opening of the oral proceedings.

8. Public hearings were held from 15 to 19 October 2001, at which the Court heard the oral arguments and replies of:

For the Congo: H.E. Mr. Jacques Masangu-a-Mwanza,
H.E. Mr. Ngele Masudi,
Maître Kosisaka Kombe,
Mr. François Rigaux,
Ms Monique Chemillier-Gendreau,
Mr. Pierre d'Argent.

For Belgium: Mr. Jan Devadder,
Mr. Daniel Bethlehem,
Mr. Eric David.

9. At the hearings, Members of the Court put questions to Belgium, to which replies were given orally or in writing, in accordance with Article 61, paragraph 4, of the Rules of Court. The Congo provided its written comments on the reply that was given in writing to one of these questions, pursuant to Article 72 of the Rules of Court.

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10. In its Application, the Congo formulated the decision requested in the following terms:

> "The Court is requested to declare that the Kingdom of Belgium shall annul the international arrest warrant issued on 11 April 2000 by a Belgian investigating judge, Mr. Vandermeersch, of the Brussels *tribunal de première instance* against the Minister for Foreign Affairs in office of the Democratic Republic of the Congo, Mr. Abdulaye Yerodia Ndombasi, seeking his provisional detention pending a request for extradition to Belgium for alleged crimes constituting 'serious violations of international humanitarian law', that warrant having been circulated by the judge to all States, including the Democratic Republic of the Congo, which received it on 12 July 2000."

11. In the course of the written proceedings, the following submissions were presented by the Parties:

On behalf of the Government of the Congo,

in the Memorial:

> "In light of the facts and arguments set out above, the Government of the Democratic Republic of the Congo requests the Court to adjudge and declare that:
>
> 1. by issuing and internationally circulating the arrest warrant of 11 April 2000 against Mr. Abdulaye Yerodia Ndombasi, Belgium committed a violation in regard to the DRC of the rule of customary international law concerning the absolute inviolability and immunity from criminal process of incumbent foreign ministers;
>
> 2. a formal finding by the Court of the unlawfulness of that act constitutes an appropriate form of satisfaction, providing reparation for the consequent moral injury to the DRC;

3. the violation of international law underlying the issue and international circulation of the arrest warrant of 11 April 2000 precludes any State, including Belgium, from executing it;

4. Belgium shall be required to recall and cancel the arrest warrant of 11 April 2000 and to inform the foreign authorities to whom the warrant was circulated that, following the Court's Judgment, Belgium renounces its request for their co-operation in executing the unlawful warrant."

On behalf of the Government of Belgium,

in the Counter-Memorial:

"For the reasons stated in Part II of this Counter-Memorial, Belgium requests the Court, as a preliminary matter, to adjudge and declare that the Court lacks jurisdiction in this case and/or that the application by the Democratic Republic of the Congo against Belgium is inadmissible.

If, contrary to the preceding submission, the Court concludes that it does have jurisdiction in this case and that the application by the Democratic Republic of the Congo is admissible, Belgium requests the Court to reject the submissions of the Democratic Republic of the Congo on the merits of the case and to dismiss the application."

12. At the oral proceedings, the following submissions were presented by the Parties:

On behalf of the Government of the Congo,

"In light of the facts and arguments set out during the written and oral proceedings, the Government of the Democratic Republic of the Congo requests the Court to adjudge and declare that:

1. by issuing and internationally circulating the arrest warrant of 11 April 2000 against Mr. Abdulaye Yerodia Ndombasi, Belgium committed a violation in regard to the Democratic Republic of the Congo of the rule of customary international law concerning the absolute inviolability and immunity from criminal process of incumbent foreign ministers; in so doing, it violated the principle of sovereign equality among States;

2. a formal finding by the Court of the unlawfulness of that act constitutes an appropriate form of satisfaction, providing reparation for the consequent moral injury to the Democratic Republic of the Congo;

3. the violations of international law underlying the issue and international circulation of the arrest warrant of 11 April 2000 preclude any State, including Belgium, from executing it;

4. Belgium shall be required to recall and cancel the arrest warrant of 11 April 2000 and to inform the foreign authorities to whom the warrant was circulated that Belgium renounces its request for their co-operation in executing the unlawful warrant."

On behalf of the Government of Belgium,

"For the reasons stated in the Counter-Memorial of Belgium and in its oral submissions, Belgium requests the Court, as a preliminary matter, to adjudge and declare that the Court lacks jurisdiction in this case and/or that the Application by the Democratic Republic of the Congo against Belgium is inadmissible.

If, contrary to the submissions of Belgium with regard to the Court's jurisdiction and the admissibility of the Application, the Court concludes that it does have jurisdiction in this case and that the Application by the Democratic Republic of the Congo is admissible, Belgium requests the Court to reject the submissions of the Democratic Republic of the Congo on the merits of the case and to dismiss the Application."

*

* *

13. On 11 April 2000 an investigating judge of the Brussels *tribunal de première instance* issued "an international arrest warrant *in absentia*" against Mr. Abdulaye Yerodia Ndombasi, charging him, as perpetrator or co-perpetrator, with offences constituting grave breaches of the Geneva Conventions of 1949 and of the Additional Protocols thereto, and with crimes against humanity.

At the time when the arrest warrant was issued Mr. Yerodia was the Minister for Foreign Affairs of the Congo.

14. The arrest warrant was transmitted to the Congo on 7 June 2000, being received by the Congolese authorities on 12 July 2000. According to Belgium, the warrant was at the same time transmitted to the International Criminal Police Organization (Interpol), an organization whose function is to enhance and facilitate cross-border criminal police co-operation worldwide; through the latter, it was circulated internationally.

15. In the arrest warrant, Mr. Yerodia is accused of having made various speeches inciting racial hatred during the month of August 1998. The crimes with which Mr. Yerodia was charged were punishable in Belgium under the Law of 16 June 1993 "concerning the Punishment of Grave Breaches of the International Geneva Conventions of 12 August 1949 and of Protocols I and II of 8 June 1977 Additional Thereto", as amended by the Law of 19 February 1999 "concerning the Punishment of Serious Violations of International Humanitarian Law" (hereinafter referred to as the "Belgian Law").

Article 7 of the Belgian Law provides that "The Belgian courts shall have jurisdiction in respect of the offences provided for in the present Law, wheresoever they may have been committed". In the present case, according to Belgium, the complaints that initiated the proceedings as a result of which the arrest warrant was issued emanated from 12 individuals all

resident in Belgium, five of whom were of Belgian nationality. It is not contested by Belgium, however, that the alleged acts to which the arrest warrant relates were committed outside Belgian territory, that Mr. Yerodia was not a Belgian national at the time of those acts, and that Mr. Yerodia was not in Belgian territory at the time that the arrest warrant was issued and circulated. That no Belgian nationals were victims of the violence that was said to have resulted from Mr. Yerodia's alleged offences was also uncontested.

Article 5, paragraph 3, of the Belgian Law further provides that "[i]mmunity attaching to the official capacity of a person shall not prevent the application of the present Law".

16. At the hearings, Belgium further claimed that it offered "to entrust the case to the competent authorities [of the Congo] for enquiry and possible prosecution", and referred to a certain number of steps which it claimed to have taken in this regard from September 2000, that is, before the filing of the Application instituting proceedings. The Congo for its part stated the following: "We have scant information concerning the form [of these Belgian proposals]." It added that "these proposals . . . appear to have been made very belatedly, namely *after* an arrest warrant against Mr. Yerodia had been issued."

17. On 17 October 2000, the Congo filed in the Registry an Application instituting the present proceedings (see paragraph 1 above), in which the Court was requested "to declare that the Kingdom of Belgium shall annul the international arrest warrant issued on 11 April 2000". The Congo relied in its Application on two separate legal grounds. First, it claimed that "[t]he *universal jurisdiction* that the Belgian State attributes to itself under Article 7 of the Law in question" constituted a

> "[v]iolation of the principle that a State may not exercise its authority on the territory of another State and of the principle of sovereign equality among all Members of the United Nations, as laid down in Article 2, paragraph 1, of the Charter of the United Nations".

Secondly, it claimed that "[t]he non-recognition, on the basis of Article 5 . . . of the Belgian Law, of the immunity of a Minister for Foreign Affairs in office" constituted a "[v]iolation of the diplomatic immunity of the Minister for Foreign Affairs of a sovereign State, as recognized by the jurisprudence of the Court and following from Article 41, paragraph 2, of the Vienna Convention of 18 April 1961 on Diplomatic Relations".

18. On the same day that it filed its Application instituting proceedings, the Congo submitted a request to the Court for the indication of a provisional measure under Article 41 of the Statute of the Court. During the hearings devoted to consideration of that request, the Court was informed that in November 2000 a ministerial reshuffle had taken place in the Congo, following which Mr. Yerodia had ceased to hold office as Minister for Foreign Affairs and had been entrusted with the portfolio of Minister of Education. Belgium accordingly claimed that the Congo's Application had become moot and asked the Court, as has already been recalled, to remove the case from the List. By Order of 8 December 2000, the Court rejected both Belgium's submissions to that effect and also the Congo's request for the indication of provisional measures (see paragraph 4 above).

19. From mid-April 2001, with the formation of a new Government in the Congo, Mr. Yerodia ceased to hold the post of Minister of Education. He no longer holds any ministerial office today.

20. On 12 September 2001, the Belgian National Central Bureau of Interpol requested the Interpol General Secretariat to issue a Red Notice in respect of Mr. Yerodia. Such notices concern individuals whose arrest is requested with a view to extradition. On 19 October 2001, at the public sittings held to hear the oral arguments of the Parties in the case, Belgium informed the Court that Interpol had responded on 27 September 2001 with a request for additional information, and that no Red Notice had yet been circulated.

21. Although the Application of the Congo originally advanced two separate legal grounds (see paragraph 17 above), the submissions of the Congo in its Memorial and the final submissions which it presented at the end of the oral proceedings refer only to a violation "in regard to the . . . Congo of the rule of customary international law concerning the absolute inviolability and immunity from criminal process of incumbent foreign ministers" (see paragraphs 11 and 12 above).

*

* *

22. In their written pleadings, and in oral argument, the Parties addressed issues of jurisdiction and admissibility as well as the merits (see paragraphs 5 and 6 above). In this connection, Belgium raised certain objections which the Court will begin by addressing.

* *

23. The first objection presented by Belgium reads as follows:

> "That, in the light of the fact that Mr. Yerodia Ndombasi is no longer either Minister for Foreign Affairs of the [Congo] or a minister occupying any other position in the . . . Government [of the Congo], there is no longer a 'legal dispute' between the Parties within the meaning of this term in the Optional Clause Declarations of the Parties and that the Court accordingly lacks jurisdiction in this case."

24. Belgium does not deny that such a legal dispute existed between the Parties at the time when the Congo filed its Application instituting proceedings, and that the Court was properly seised by that Application. However, it contends that the question is not whether a legal dispute existed at that time, but whether a legal dispute exists at the present time. Belgium refers in this respect *inter alia* to the *Northern Cameroons* case, in which the Court found that it "may pronounce judgment only in connection with concrete cases where there exists at the time of the adjudication an actual controversy involving a conflict of legal interests between the parties" (*I.C.J. Reports 1963*, pp. 33-34), as well as to the *Nuclear Tests* cases *(Australia* v. *France)* and

(New Zealand v. *France)*, in which the Court stated the following: "The Court, as a court of law, is called upon to resolve existing disputes between States . . . The dispute brought before it must therefore continue to exist at the time when the Court makes its decision" (*I.C.J. Reports 1974*, pp. 270-271, para. 55; p. 476, para. 58). Belgium argues that the position of Mr. Yerodia as Minister for Foreign Affairs was central to the Congo's Application instituting proceedings, and emphasizes that there has now been a change of circumstances at the very heart of the case, in view of the fact that Mr. Yerodia was relieved of his position as Minister for Foreign Affairs in November 2000 and that, since 15 April 2001, he has occupied no position in the Government of the Congo (see paragraphs 18 and 19 above). According to Belgium, while there may still be a difference of opinion between the Parties on the scope and content of international law governing the immunities of a Minister for Foreign Affairs, that difference of opinion has now become a matter of abstract, rather than of practical, concern. The result, in Belgium's view, is that the case has become an attempt by the Congo to "[seek] an advisory opinion from the Court", and no longer a "concrete case" involving an "actual controversy" between the Parties, and that the Court accordingly lacks jurisdiction in the case.

25. The Congo rejects this objection of Belgium. It contends that there is indeed a legal dispute between the Parties, in that the Congo claims that the arrest warrant was issued in violation of the immunity of its Minister for Foreign Affairs, that that warrant was unlawful *ab initio*, and that this legal defect persists despite the subsequent changes in the position occupied by the individual concerned, while Belgium maintains that the issue and circulation of the arrest warrant were not contrary to international law. The Congo adds that the termination of Mr. Yerodia's official duties in no way operated to efface the wrongful act and the injury that flowed from it, for which the Congo continues to seek redress.

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26. The Court recalls that, according to its settled jurisprudence, its jurisdiction must be determined at the time that the act instituting proceedings was filed. Thus, if the Court has jurisdiction on the date the case is referred to it, it continues to do so regardless of subsequent events. Such events might lead to a finding that an application has subsequently become moot and to a decision not to proceed to judgment on the merits, but they cannot deprive the Court of jurisdiction (see *Nottebohm, Preliminary Objection, Judgment, I.C.J. Reports 1953*, p. 122; *Right of Passage over Indian Territory, Preliminary Objections, Judgment, I.C.J. Reports 1957*, p. 142; *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya* v. *United Kingdom), Preliminary Objections, Judgment, I.C.J. Reports 1998*, pp. 23-24, para. 38; and *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya* v. *United States of America), Preliminary Objections, Judgment, I.C.J. Reports 1998*, p. 129, para. 37).

27. Article 36, paragraph 2, of the Statute of the Court provides:

> "The States parties to the present Statute may at any time declare that they recognize as compulsory *ipso facto* and without special agreement, in relation to any other State accepting the same obligation, the jurisdiction of the Court in all legal disputes concerning:

(a) the interpretation of a treaty;

(b) any question of international law;

(c) the existence of any fact which, if established, would constitute a breach of an international obligation;

(d) the nature or extent of the reparation to be made for the breach of an international obligation."

On 17 October 2000, the date that the Congo's Application instituting these proceedings was filed, each of the Parties was bound by a declaration of acceptance of compulsory jurisdiction, filed in accordance with the above provision: Belgium by a declaration of 17 June 1958 and the Congo by a declaration of 8 February 1989. Those declarations contained no reservation applicable to the present case.

Moreover, it is not contested by the Parties that at the material time there was a legal dispute between them concerning the international lawfulness of the arrest warrant of 11 April 2000 and the consequences to be drawn if the warrant was unlawful. Such a dispute was clearly a legal dispute within the meaning of the Court's jurisprudence, namely "a disagreement on a point of law or fact, a conflict of legal views or of interests between two persons" in which "the claim of one party is positively opposed by the other" (*Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya* v. *United Kingdom), Preliminary Objections, Judgment, I.C.J. Reports 1998*, p. 17, para. 22; and *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya* v. *United States of America), Preliminary Objections, Judgment, I.C.J. Reports 1998*, pp. 122-123, para. 21).

28. The Court accordingly concludes that at the time that it was seised of the case it had jurisdiction to deal with it, and that it still has such jurisdiction. Belgium's first objection must therefore be rejected.

* *

29. The second objection presented by Belgium is the following:

> "That in the light of the fact that Mr. Yerodia Ndombasi is no longer either Minister for Foreign Affairs of the [Congo] or a minister occupying any other position in the . . . Government [of the Congo], the case is now without object and the Court should accordingly decline to proceed to judgment on the merits of the case."

30. Belgium also relies in support of this objection on the *Northern Cameroons* case, in which the Court considered that it would not be a proper discharge of its duties to proceed further

in a case in which any judgment that the Court might pronounce would be "without object" (*I.C.J. Reports 1963*, p. 38), and on the *Nuclear Tests* cases, in which the Court saw "no reason to allow the continuance of proceedings which it knows are bound to be fruitless" (*I.C.J. Reports 1974*, p. 271, para. 58; p. 477, para. 61). Belgium maintains that the declarations requested by the Congo in its first and second submissions would clearly fall within the principles enunciated by the Court in those cases, since a judgment of the Court on the merits in this case could only be directed towards the clarification of the law in this area for the future, or be designed to reinforce the position of one or other Party. It relies in support of this argument on the fact that the Congo does not allege any material injury and is not seeking compensatory damages. It adds that the issue and transmission of the arrest warrant were not predicated on the ministerial status of the person concerned, that he is no longer a minister, and that the case is accordingly now devoid of object.

31. The Congo contests this argument of Belgium, and emphasizes that the aim of the Congo — to have the disputed arrest warrant annulled and to obtain redress for the moral injury suffered — remains unachieved at the point in time when the Court is called upon to decide the dispute. According to the Congo, in order for the case to have become devoid of object during the proceedings, the cause of the violation of the right would have had to disappear, and the redress sought would have to have been obtained.

*

32. The Court has already affirmed on a number of occasions that events occurring subsequent to the filing of an application may render the application without object such that the Court is not called upon to give a decision thereon (see *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya* v. *United Kingdom), Preliminary Objections, Judgment, I.C.J. Reports 1998*, p. 26, para. 46; and *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya* v. *United States of America), Preliminary Objections, Judgment, I.C.J. Reports 1998*, p. 131, para. 45).

However, it considers that this is not such a case. The change which has occurred in the situation of Mr. Yerodia has not in fact put an end to the dispute between the Parties and has not deprived the Application of its object. The Congo argues that the arrest warrant issued by the Belgian judicial authorities against Mr. Yerodia was and remains unlawful. It asks the Court to hold that the warrant is unlawful, thus providing redress for the moral injury which the warrant allegedly caused to it. The Congo also continues to seek the cancellation of the warrant. For its part, Belgium contends that it did not act in violation of international law and it disputes the Congo's submissions. In the view of the Court, it follows from the foregoing that the Application of the Congo is not now without object and that accordingly the case is not moot. Belgium's second objection must accordingly be rejected.

* *

33. The third Belgian objection is put as follows:

> "That the case as it now stands is materially different to that set out in the [Congo]'s Application instituting proceedings and that the Court accordingly lacks jurisdiction in the case and/or that the application is inadmissible."

34. According to Belgium, it would be contrary to legal security and the sound administration of justice for an applicant State to continue proceedings in circumstances in which the factual dimension on which the Application was based has changed fundamentally, since the respondent State would in those circumstances be uncertain, until the very last moment, of the substance of the claims against it. Belgium argues that the prejudice suffered by the respondent State in this situation is analogous to the situation in which an applicant State formulates new claims during the course of the proceedings. It refers to the jurisprudence of the Court holding inadmissible new claims formulated during the course of the proceedings which, had they been entertained, would have transformed the subject of the dispute originally brought before it under the terms of the Application (see *Fisheries Jurisdiction (Spain* v. *Canada), Jurisdiction of the Court, Judgment, I.C.J. Reports 1998*, pp. 447-448, para. 29). In the circumstances, Belgium contends that, if the Congo wishes to maintain its claims, it should be required to initiate proceedings afresh or, at the very least, apply to the Court for permission to amend its initial Application.

35. In response, the Congo denies that there has been a substantial amendment of the terms of its Application, and insists that it has presented no new claim, whether of substance or of form, that would have transformed the subject-matter of the dispute. The Congo maintains that it has done nothing through the various stages in the proceedings but "condense and refine" its claims, as do most States that appear before the Court, and that it is simply making use of the right of parties to amend their submissions until the end of the oral proceedings.

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36. The Court notes that, in accordance with settled jurisprudence, it "cannot, in principle, allow a dispute brought before it by application to be transformed by amendments in the submissions into another dispute which is different in character" (*Société Commerciale de Belgique, Judgment, 1939, P.C.I.J., Series A/B, No. 78*, p. 173; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984*, p. 427, para. 80; see also *Certain Phosphate Lands in Nauru (Nauru* v. *Australia), Preliminary Objections, Judgment, I.C.J. Reports 1992*, pp. 264-267, in particular paras. 69 and 70). However, the Court considers that in the present case the facts underlying the Application have not changed in a way that produced such a transformation in the dispute brought before it. The question submitted to the Court for decision remains whether the issue and circulation of the arrest warrant by the Belgian judicial authorities against a person who was at that time the Minister for Foreign Affairs of the Congo were contrary to international law. The Congo's final submissions arise "directly out of the question which is the subject-matter of that Application" (*Fisheries Jurisdiction (Federal Republic of Germany* v. *Iceland), Merits, Judgment, I.C.J. Reports 1974*, p. 203, para. 72; see also *Temple of Preah Vihear, Merits, Judgment, I.C.J. Reports 1962*, p. 36).

In these circumstances, the Court considers that Belgium cannot validly maintain that the dispute brought before the Court was transformed in a way that affected its ability to prepare its defence, or that the requirements of the sound administration of justice were infringed. Belgium's third objection must accordingly be rejected.

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37. The fourth Belgian objection reads as follows:

> "That, in the light of the new circumstances concerning Mr. Yerodia Ndombasi, the case has assumed the character of an action of diplomatic protection but one in which the individual being protected has failed to exhaust local remedies, and that the Court accordingly lacks jurisdiction in the case and/or that the application is inadmissible."

38. In this respect, Belgium accepts that, when the case was first instituted, the Congo had a direct legal interest in the matter, and was asserting a claim in its own name in respect of the alleged violation by Belgium of the immunity of the Congo's Foreign Minister. However, according to Belgium, the case was radically transformed after the Application was filed, namely on 15 April 2001, when Mr. Yerodia ceased to be a member of the Congolese Government. Belgium maintains that two of the requests made of the Court in the Congo's final submissions in practice now concern the legal effect of an arrest warrant issued against a private citizen of the Congo, and that these issues fall within the realm of an action of diplomatic protection. It adds that the individual concerned has not exhausted all available remedies under Belgian law, a necessary condition before the Congo can espouse the cause of one of its nationals in international proceedings.

39. The Congo, on the other hand, denies that this is an action for diplomatic protection. It maintains that it is bringing these proceedings in the name of the Congolese State, on account of the violation of the immunity of its Minister for Foreign Affairs. The Congo further denies the availability of remedies under Belgian law. It points out in this regard that it is only when the Crown Prosecutor has become seised of the case file and makes submissions to the *Chambre du conseil* that the accused can defend himself before the *Chambre* and seek to have the charge dismissed.

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40. The Court notes that the Congo has never sought to invoke before it Mr. Yerodia's personal rights. It considers that, despite the change in professional situation of Mr. Yerodia, the character of the dispute submitted to the Court by means of the Application has not changed: the dispute still concerns the lawfulness of the arrest warrant issued on 11 April 2000 against a person

who was at the time Minister for Foreign Affairs of the Congo, and the question whether the rights of the Congo have or have not been violated by that warrant. As the Congo is not acting in the context of protection of one of its nationals, Belgium cannot rely upon the rules relating to the exhaustion of local remedies.

In any event, the Court recalls that an objection based on non-exhaustion of local remedies relates to the admissibility of the application (see *Interhandel, Preliminary Objections, Judgment, I.C.J. Reports 1959*, p. 26; *Elettronica Sicula S.p.A. (ELSI), Judgment, I.C.J. Reports 1989*, p. 42, para. 49). Under settled jurisprudence, the critical date for determining the admissibility of an application is the date on which it is filed (see *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya* v. *United Kingdom), Preliminary Objections, Judgment, I.C.J. Reports 1998*, pp. 25-26, paras. 43-44; and *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya* v. *United States of America), Preliminary Objections, Judgment, I.C.J. Reports 1998*, pp. 130-131, paras. 42-43). Belgium accepts that, on the date on which the Congo filed the Application instituting proceedings, the Congo had a direct legal interest in the matter, and was asserting a claim in its own name. Belgium's fourth objection must accordingly be rejected.

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41. As a subsidiary argument, Belgium further contends that "[i]n the event that the Court decides that it does have jurisdiction in this case and that the application is admissible, . . . the *non ultra petita* rule operates to limit the jurisdiction of the Court to those issues that are the subject of the [Congo]'s final submissions". Belgium points out that, while the Congo initially advanced a twofold argument, based, on the one hand, on the Belgian judge's lack of jurisdiction, and, on the other, on the immunity from jurisdiction enjoyed by its Minister for Foreign Affairs, the Congo no longer claims in its final submissions that Belgium wrongly conferred upon itself universal jurisdiction *in absentia*. According to Belgium, the Congo now confines itself to arguing that the arrest warrant of 11 April 2000 was unlawful because it violated the immunity from jurisdiction of its Minister for Foreign Affairs, and that the Court consequently cannot rule on the issue of universal jurisdiction in any decision it renders on the merits of the case.

42. The Congo, for its part, states that its interest in bringing these proceedings is to obtain a finding by the Court that it has been the victim of an internationally wrongful act, the question whether this case involves the "exercise of an excessive universal jurisdiction" being in this connection only a secondary consideration. The Congo asserts that any consideration by the Court of the issues of international law raised by universal jurisdiction would be undertaken not at the request of the Congo but, rather, by virtue of the defence strategy adopted by Belgium, which appears to maintain that the exercise of such jurisdiction can "represent a valid counterweight to the observance of immunities".

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43. The Court would recall the well-established principle that "it is the duty of the Court not only to reply to the questions as stated in the final submissions of the parties, but also to abstain from deciding points not included in those submissions" (*Asylum, Judgment, I.C.J. Reports 1950*, p. 402). While the Court is thus not entitled to decide upon questions not asked of it, the *non ultra petita* rule nonetheless cannot preclude the Court from addressing certain legal points in its reasoning. Thus in the present case the Court may not rule, in the operative part of its Judgment, on the question whether the disputed arrest warrant, issued by the Belgian investigating judge in exercise of his purported universal jurisdiction, complied in that regard with the rules and principles of international law governing the jurisdiction of national courts. This does not mean, however, that the Court may not deal with certain aspects of that question in the reasoning of its Judgment, should it deem this necessary or desirable.

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44. The Court concludes from the foregoing that it has jurisdiction to entertain the Congo's Application, that the Application is not without object and that accordingly the case is not moot, and that the Application is admissible. Thus, the Court now turns to the merits of the case.

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45. As indicated above (see paragraphs 41 to 43 above), in its Application instituting these proceedings, the Congo originally challenged the legality of the arrest warrant of 11 April 2000 on two separate grounds: on the one hand, Belgium's claim to exercise a universal jurisdiction and, on the other, the alleged violation of the immunities of the Minister for Foreign Affairs of the Congo then in office. However, in its submissions in its Memorial, and in its final submissions at the close of the oral proceedings, the Congo invokes only the latter ground.

46. As a matter of logic, the second ground should be addressed only once there has been a determination in respect of the first, since it is only where a State has jurisdiction under international law in relation to a particular matter that there can be any question of immunities in regard to the exercise of that jurisdiction. However, in the present case, and in view of the final form of the Congo's submissions, the Court will address first the question whether, assuming that it had jurisdiction under international law to issue and circulate the arrest warrant of 11 April 2000, Belgium in so doing violated the immunities of the then Minister for Foreign Affairs of the Congo.

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47. The Congo maintains that, during his or her term of office, a Minister for Foreign Affairs of a sovereign State is entitled to inviolability and to immunity from criminal process being "absolute or complete", that is to say, they are subject to no exception. Accordingly, the Congo contends that no criminal prosecution may be brought against a Minister for Foreign Affairs in a foreign court as long as he or she remains in office, and that any finding of criminal responsibility by a domestic court in a foreign country, or any act of investigation undertaken with a view to bringing him or her to court, would contravene the principle of immunity from jurisdiction. According to the Congo, the basis of such criminal immunity is purely functional, and immunity is accorded under customary international law simply in order to enable the foreign State representative enjoying such immunity to perform his or her functions freely and without let or hindrance. The Congo adds that the immunity thus accorded to Ministers for Foreign Affairs when in office covers *all* their acts, including any committed before they took office, and that it is irrelevant whether the acts done whilst in office may be characterized or not as "official acts".

48. The Congo states further that it does not deny the existence of a principle of international criminal law, deriving from the decisions of the Nuremberg and Tokyo international military tribunals, that the accused's official capacity at the time of the acts cannot, before any court, whether domestic or international, constitute a "ground of exemption from his criminal responsibility or a ground for mitigation of sentence". The Congo then stresses that the fact that an immunity might bar prosecution before a specific court or over a specific period does not mean that the same prosecution cannot be brought, if appropriate, before another court which is not bound by that immunity, or at another time when the immunity need no longer be taken into account. It concludes that immunity does not mean impunity.

49. Belgium maintains for its part that, while Ministers for Foreign Affairs in office generally enjoy an immunity from jurisdiction before the courts of a foreign State, such immunity applies only to acts carried out in the course of their official functions, and cannot protect such persons in respect of private acts or when they are acting otherwise than in the performance of their official functions.

50. Belgium further states that, in the circumstances of the present case, Mr. Yerodia enjoyed no immunity at the time when he is alleged to have committed the acts of which he is accused, and that there is no evidence that he was then acting in any official capacity. It observes that the arrest warrant was issued against Mr. Yerodia personally.

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51. The Court would observe at the outset that in international law it is firmly established that, as also diplomatic and consular agents, certain holders of high-ranking office in a State, such as the Head of State, Head of Government and Minister for Foreign Affairs, enjoy immunities from jurisdiction in other States, both civil and criminal. For the purposes of the present case, it is only the immunity from criminal jurisdiction and the inviolability of an incumbent Minister for Foreign Affairs that fall for the Court to consider.

52. A certain number of treaty instruments were cited by the Parties in this regard. These included, first, the Vienna Convention on Diplomatic Relations of 18 April 1961, which states in its preamble that the purpose of diplomatic privileges and immunities is "to ensure the efficient performance of the functions of diplomatic missions as representing States". It provides in Article 32 that only the sending State may waive such immunity. On these points, the Vienna Convention on Diplomatic Relations, to which both the Congo and Belgium are parties, reflects customary international law. The same applies to the corresponding provisions of the Vienna Convention on Consular Relations of 24 April 1963, to which the Congo and Belgium are also parties.

The Congo and Belgium further cite the New York Convention on Special Missions of 8 December 1969, to which they are not, however, parties. They recall that under Article 21, paragraph 2, of that Convention:

> "The Head of the Government, the Minister for Foreign Affairs and other persons of high rank, when they take part in a special mission of the sending State, shall enjoy in the receiving State or in a third State, in addition to what is granted by the present Convention, the facilities, privileges and immunities accorded by international law."

These conventions provide useful guidance on certain aspects of the question of immunities. They do not, however, contain any provision specifically defining the immunities enjoyed by Ministers for Foreign Affairs. It is consequently on the basis of customary international law that the Court must decide the questions relating to the immunities of such Ministers raised in the present case.

53. In customary international law, the immunities accorded to Ministers for Foreign Affairs are not granted for their personal benefit, but to ensure the effective performance of their functions on behalf of their respective States. In order to determine the extent of these immunities, the Court must therefore first consider the nature of the functions exercised by a Minister for Foreign Affairs. He or she is in charge of his or her Government's diplomatic activities and generally acts as its representative in international negotiations and intergovernmental meetings. Ambassadors and other diplomatic agents carry out their duties under his or her authority. His or her acts may bind the State represented, and there is a presumption that a Minister for Foreign Affairs, simply by virtue of that office, has full powers to act on behalf of the State (see, e.g., Art. 7, para. 2 *(a)*, of the 1969 Vienna Convention on the Law of Treaties). In the performance of these functions, he or she is frequently required to travel internationally, and thus must be in a position freely to do so whenever the need should arise. He or she must also be in constant communication with the Government, and with its diplomatic missions around the world, and be capable at any time of communicating with representatives of other States. The Court further observes that a Minister for Foreign Affairs, responsible for the conduct of his or her State's relations with all other States, occupies a position such that, like the Head of State or the Head of Government, he or she is recognized under international law as representative of the State solely by virtue of his or her office. He or she does not have to present letters of credence: to the contrary, it is generally the Minister who determines the authority to be conferred upon diplomatic agents and countersigns their letters of credence. Finally, it is to the Minister for Foreign Affairs that *chargés d'affaires* are accredited.

54. The Court accordingly concludes that the functions of a Minister for Foreign Affairs are such that, throughout the duration of his or her office, he or she when abroad enjoys full immunity from criminal jurisdiction and inviolability. That immunity and that inviolability protect the individual concerned against any act of authority of another State which would hinder him or her in the performance of his or her duties.

55. In this respect, no distinction can be drawn between acts performed by a Minister for Foreign Affairs in an "official" capacity, and those claimed to have been performed in a "private capacity", or, for that matter, between acts performed before the person concerned assumed office as Minister for Foreign Affairs and acts committed during the period of office. Thus, if a Minister for Foreign Affairs is arrested in another State on a criminal charge, he or she is clearly thereby prevented from exercising the functions of his or her office. The consequences of such impediment to the exercise of those official functions are equally serious, regardless of whether the Minister for Foreign Affairs was, at the time of arrest, present in the territory of the arresting State on an "official" visit or a "private" visit, regardless of whether the arrest relates to acts allegedly performed before the person became the Minister for Foreign Affairs or to acts performed while in office, and regardless of whether the arrest relates to alleged acts performed in an "official" capacity or a "private" capacity. Furthermore, even the mere risk that, by travelling to or transiting another State a Minister for Foreign Affairs might be exposing himself or herself to legal proceedings could deter the Minister from travelling internationally when required to do so for the purposes of the performance of his or her official functions.

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56. The Court will now address Belgium's argument that immunities accorded to incumbent Ministers for Foreign Affairs can in no case protect them where they are suspected of having committed war crimes or crimes against humanity. In support of this position, Belgium refers in its Counter-Memorial to various legal instruments creating international criminal tribunals, to examples from national legislation, and to the jurisprudence of national and international courts.

Belgium begins by pointing out that certain provisions of the instruments creating international criminal tribunals state expressly that the official capacity of a person shall not be a bar to the exercise by such tribunals of their jurisdiction.

Belgium also places emphasis on certain decisions of national courts, and in particular on the judgments rendered on 24 March 1999 by the House of Lords in the United Kingdom and on 13 March 2001 by the Court of Cassation in France in the *Pinochet* and *Qaddafi* cases respectively, in which it contends that an exception to the immunity rule was accepted in the case of serious crimes under international law. Thus, according to Belgium, the *Pinochet* decision recognizes an exception to the immunity rule when Lord Millett stated that "[i]nternational law cannot be supposed to have established a crime having the character of a *jus cogens* and at the same time to have provided an immunity which is co-extensive with the obligation it seeks to impose", or when Lord Phillips of Worth Matravers said that "no established rule of international law requires state immunity *rationae materiae* to be accorded in respect of prosecution for an international crime". As to the French Court of Cassation, Belgium contends that, in holding that, "under international law as it currently stands, the crime alleged [acts of terrorism], irrespective of its gravity, does not come within the exceptions to the principle of immunity from jurisdiction for incumbent foreign Heads of State", the Court explicitly recognized the existence of such exceptions.

57. The Congo, for its part, states that, under international law as it currently stands, there is no basis for asserting that there is any exception to the principle of absolute immunity from criminal process of an incumbent Minister for Foreign Affairs where he or she is accused of having committed crimes under international law.

In support of this contention, the Congo refers to State practice, giving particular consideration in this regard to the *Pinochet* and *Qaddafi* cases, and concluding that such practice does not correspond to that which Belgium claims but, on the contrary, confirms the absolute nature of the immunity from criminal process of Heads of State and Ministers for Foreign Affairs. Thus, in the *Pinochet* case, the Congo cites Lord Browne-Wilkinson's statement that "[t]his immunity enjoyed by a head of state in power and an ambassador in post is a complete immunity attached to the person of the head of state or ambassador and rendering him immune from all actions or prosecutions . . .". According to the Congo, the French Court of Cassation adopted the same position in its *Qaddafi* judgment, in affirming that "international custom bars the prosecution of incumbent Heads of State, in the absence of any contrary international provision binding on the parties concerned, before the criminal courts of a foreign State".

As regards the instruments creating international criminal tribunals and the latter's jurisprudence, these, in the Congo's view, concern only those tribunals, and no inference can be drawn from them in regard to criminal proceedings before national courts against persons enjoying immunity under international law.

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58. The Court has carefully examined State practice, including national legislation and those few decisions of national higher courts, such as the House of Lords or the French Court of Cassation. It has been unable to deduce from this practice that there exists under customary international law any form of exception to the rule according immunity from criminal jurisdiction and inviolability to incumbent Ministers for Foreign Affairs, where they are suspected of having committed war crimes or crimes against humanity.

The Court has also examined the rules concerning the immunity or criminal responsibility of persons having an official capacity contained in the legal instruments creating international criminal tribunals, and which are specifically applicable to the latter (see Charter of the International Military Tribunal of Nuremberg, Art. 7; Charter of the International Military Tribunal of Tokyo, Art. 6; Statute of the International Criminal Tribunal for the former Yugoslavia, Art. 7, para. 2; Statute of the International Criminal Tribunal for Rwanda, Art. 6, para. 2; Statute of the International Criminal Court, Art. 27). It finds that these rules likewise do not enable it to conclude that any such an exception exists in customary international law in regard to national courts.

Finally, none of the decisions of the Nuremberg and Tokyo international military tribunals, or of the International Criminal Tribunal for the former Yugoslavia, cited by Belgium deal with the question of the immunities of incumbent Ministers for Foreign Affairs before national courts where they are accused of having committed war crimes or crimes against humanity. The Court accordingly notes that those decisions are in no way at variance with the findings it has reached above.

In view of the foregoing, the Court accordingly cannot accept Belgium's argument in this regard.

59. It should further be noted that the rules governing the jurisdiction of national courts must be carefully distinguished from those governing jurisdictional immunities: jurisdiction does not imply absence of immunity, while absence of immunity does not imply jurisdiction. Thus, although various international conventions on the prevention and punishment of certain serious crimes impose on States obligations of prosecution or extradition, thereby requiring them to extend their criminal jurisdiction, such extension of jurisdiction in no way affects immunities under customary international law, including those of Ministers for Foreign Affairs. These remain opposable before the courts of a foreign State, even where those courts exercise such a jurisdiction under these conventions.

60. The Court emphasizes, however, that the *immunity* from jurisdiction enjoyed by incumbent Ministers for Foreign Affairs does not mean that they enjoy *impunity* in respect of any crimes they might have committed, irrespective of their gravity. Immunity from criminal jurisdiction and individual criminal responsibility are quite separate concepts. While jurisdictional immunity is procedural in nature, criminal responsibility is a question of substantive law. Jurisdictional immunity may well bar prosecution for a certain period or for certain offences; it cannot exonerate the person to whom it applies from all criminal responsibility.

61. Accordingly, the immunities enjoyed under international law by an incumbent or former Minister for Foreign Affairs do not represent a bar to criminal prosecution in certain circumstances.

First, such persons enjoy no criminal immunity under international law in their own countries, and may thus be tried by those countries' courts in accordance with the relevant rules of domestic law.

Secondly, they will cease to enjoy immunity from foreign jurisdiction if the State which they represent or have represented decides to waive that immunity.

Thirdly, after a person ceases to hold the office of Minister for Foreign Affairs, he or she will no longer enjoy all of the immunities accorded by international law in other States. Provided that it has jurisdiction under international law, a court of one State may try a former Minister for Foreign Affairs of another State in respect of acts committed prior or subsequent to his or her period of office, as well as in respect of acts committed during that period of office in a private capacity.

Fourthly, an incumbent or former Minister for Foreign Affairs may be subject to criminal proceedings before certain international criminal courts, where they have jurisdiction. Examples include the International Criminal Tribunal for the former Yugoslavia, and the International Criminal Tribunal for Rwanda, established pursuant to Security Council resolutions under Chapter VII of the United Nations Charter, and the future International Criminal Court created by the 1998 Rome Convention. The latter's Statute expressly provides, in Article 27, paragraph 2, that "[i]mmunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person".

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62. Given the conclusions it has reached above concerning the nature and scope of the rules governing the immunity from criminal jurisdiction enjoyed by incumbent Ministers for Foreign Affairs, the Court must now consider whether in the present case the issue of the arrest warrant of 11 April 2000 and its international circulation violated those rules. The Court recalls in this regard that the Congo requests it, in its first final submission, to adjudge and declare that:

> "[B]y issuing and internationally circulating the arrest warrant of 11 April 2000 against Mr. Abdulaye Yerodia Ndombasi, Belgium committed a violation in regard to the Democratic Republic of the Congo of the rule of customary international law concerning the absolute inviolability and immunity from criminal process of incumbent foreign ministers; in so doing, it violated the principle of sovereign equality among States."

63. In support of this submission, the Congo maintains that the arrest warrant of 11 April 2000 as such represents a "coercive legal act" which violates the Congo's immunity and sovereign rights, inasmuch as it seeks to "subject to an organ of domestic criminal jurisdiction a member of a foreign government who is in principle beyond its reach" and is fully enforceable without special formality in Belgium.

The Congo considers that the mere issuance of the warrant thus constituted a coercive measure taken against the person of Mr. Yerodia, even if it was not executed.

64. As regards the international circulation of the said arrest warrant, this, in the Congo's view, not only involved further violations of the rules referred to above, but also aggravated the moral injury which it suffered as a result of the opprobrium "thus cast upon one of the most prominent members of its Government". The Congo further argues that such circulation was a fundamental infringement of its sovereign rights in that it significantly restricted the full and free exercise, by its Minister for Foreign Affairs, of the international negotiation and representation functions entrusted to him by the Congo's former President. In the Congo's view, Belgium "[thus] manifests an intention to have the individual concerned arrested at the place where he is to be found, with a view to procuring his extradition". The Congo emphasizes moreover that it is necessary to avoid any confusion between the arguments concerning the legal effect of the arrest warrant abroad and the question of any responsibility of the foreign authorities giving effect to it. It points out in this regard that no State has acted on the arrest warrant, and that accordingly "no further consideration need be given to the specific responsibility which a State executing it might incur, or to the way in which that responsibility should be related" to that of the Belgian State. The Congo observes that, in such circumstances, "there [would be] a direct causal relationship between the arrest warrant issued in Belgium and any act of enforcement carried out elsewhere".

65. Belgium rejects the Congo's argument on the ground that "the character of the arrest warrant of 11 April 2000 is such that it has neither infringed the sovereignty of, nor created any obligation for, the [Congo]".

With regard to the legal effects under Belgian law of the arrest warrant of 11 April 2000, Belgium contends that the clear purpose of the warrant was to procure that, if found in Belgium, Mr. Yerodia would be detained by the relevant Belgian authorities with a view to his prosecution for war crimes and crimes against humanity. According to Belgium, the Belgian investigating judge did, however, draw an explicit distinction in the warrant between, on the one hand, immunity

from jurisdiction and, on the other hand, immunity from enforcement as regards representatives of foreign States who visit Belgium on the basis of an official invitation, making it clear that such persons would be immune from enforcement of an arrest warrant in Belgium. Belgium further contends that, in its effect, the disputed arrest warrant is national in character, since it requires the arrest of Mr. Yerodia if he is found in Belgium but it does not have this effect outside Belgium.

66. In respect of the legal effects of the arrest warrant outside Belgium, Belgium maintains that the warrant does not create any obligation for the authorities of any other State to arrest Mr. Yerodia in the absence of some further step by Belgium completing or validating the arrest warrant (such as a request for the provisional detention of Mr. Yerodia), or the issuing of an arrest warrant by the appropriate authorities in the State concerned following a request to do so, or the issuing of an Interpol Red Notice. Accordingly, outside Belgium, while the purpose of the warrant was admittedly "to establish a legal basis for the arrest of Mr. Yerodia . . . and his subsequent extradition to Belgium", the warrant had no legal effect unless it was validated or completed by some prior act "requiring the arrest of Mr. Yerodia by the relevant authorities in a third State". Belgium further argues that "[i]f a State had executed the arrest warrant, it might infringe Mr. [Yerodia's] criminal immunity", but that "the Party directly responsible for that infringement would have been that State and not Belgium".

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67. The Court will first recall that the "international arrest warrant in absentia", issued on 11 April 2000 by an investigating judge of the Brussels *Tribunal de première instance*, is directed against Mr. Yerodia, stating that he is "currently Minister for Foreign Affairs of the Democratic Republic of the Congo, having his business address at the Ministry of Foreign Affairs in Kinshasa". The warrant states that Mr. Yerodia is charged with being "the perpetrator or co-perpetrator" of:

> "—Crimes under international law constituting grave breaches causing harm by act or omission to persons and property protected by the Conventions signed at Geneva on 12 August 1949 and by Additional Protocols I and II to those Conventions (Article 1, paragraph 3, of the Law of 16 June 1993, as amended by the Law of 10 February 1999 concerning the punishment of serious violations of international humanitarian law)
>
> — Crimes against humanity (Article 1, paragraph 2, of the Law of 16 June 1993, as amended by the Law of 10 February 1999 concerning the punishment of serious violations of international humanitarian law)."

The warrant refers to "various speeches inciting racial hatred" and to "particularly virulent remarks" allegedly made by Mr. Yerodia during "public addresses reported by the media" on 4 August and 27 August 1998. It adds:

"These speeches allegedly had the effect of inciting the population to attack Tutsi residents of Kinshasa: there were dragnet searches, manhunts (the Tutsi enemy) and lynchings.

The speeches inciting racial hatred thus are said to have resulted in several hundred deaths, the internment of Tutsis, summary executions, arbitrary arrests and unfair trials."

68. The warrant further states that "the position of Minister for Foreign Affairs currently held by the accused does not entail immunity from jurisdiction and enforcement". The investigating judge does, however, observe in the warrant that "the rule concerning the absence of immunity under humanitarian law would appear . . . to require some qualification in respect of immunity from enforcement" and explains as follows:

"Pursuant to the general principle of fairness in judicial proceedings, immunity from enforcement must, in our view, be accorded to all State representatives welcomed as such onto the territory of Belgium (on 'official visits'). Welcoming such foreign dignitaries as official representatives of sovereign States involves not only relations between individuals but also relations between States. This implies that such welcome includes an undertaking by the host State and its various components to refrain from taking any coercive measures against its guest and the invitation cannot become a pretext for ensnaring the individual concerned in what would then have to be labelled a trap. In the contrary case, failure to respect this undertaking could give rise to the host State's international responsibility."

69. The arrest warrant concludes with the following order:

"We instruct and order all bailiffs and agents of public authority who may be so required to execute this arrest warrant and to conduct the accused to the detention centre in Forest;

We order the warden of the prison to receive the accused and to keep him (her) in custody in the detention centre pursuant to this arrest warrant;

We require all those exercising public authority to whom this warrant shall be shown to lend all assistance in executing it."

70. The Court notes that the *issuance*, as such, of the disputed arrest warrant represents an act by the Belgian judicial authorities intended to enable the arrest on Belgian territory of an incumbent Minister for Foreign Affairs on charges of war crimes and crimes against humanity. The fact that the warrant is enforceable is clearly apparent from the order given to "all bailiffs and agents of public authority . . . to execute this arrest warrant" (see paragraph 69 above) and from the assertion in the warrant that "the position of Minister for Foreign Affairs currently held by the accused does not entail immunity from jurisdiction and enforcement". The Court notes that the warrant did admittedly make an exception for the case of an official visit by Mr. Yerodia to

Belgium, and that Mr. Yerodia never suffered arrest in Belgium. The Court is bound, however, to find that, given the nature and purpose of the warrant, its mere issue violated the immunity which Mr. Yerodia enjoyed as the Congo's incumbent Minister for Foreign Affairs. The Court accordingly concludes that the issue of the warrant constituted a violation of an obligation of Belgium towards the Congo, in that it failed to respect the immunity of that Minister and, more particularly, infringed the immunity from criminal jurisdiction and the inviolability then enjoyed by him under international law.

71. The Court also notes that Belgium admits that the purpose of the international *circulation* of the disputed arrest warrant was "to establish a legal basis for the arrest of Mr. Yerodia . . . abroad and his subsequent extradition to Belgium". The Respondent maintains, however, that the enforcement of the warrant in third States was "dependent on some further preliminary steps having been taken" and that, given the "inchoate" quality of the warrant as regards third States, there was no "infringe[ment of] the sovereignty of the [Congo]". It further points out that no Interpol Red Notice was requested until 12 September 2001, when Mr. Yerodia no longer held ministerial office.

The Court cannot subscribe to this view. As in the case of the warrant's issue, its international circulation from June 2000 by the Belgian authorities, given its nature and purpose, effectively infringed Mr. Yerodia's immunity as the Congo's incumbent Minister for Foreign Affairs and was furthermore liable to affect the Congo's conduct of its international relations. Since Mr. Yerodia was called upon in that capacity to undertake travel in the performance of his duties, the mere international circulation of the warrant, even in the absence of "further steps" by Belgium, could have resulted, in particular, in his arrest while abroad. The Court observes in this respect that Belgium itself cites information to the effect that Mr. Yerodia, "on applying for a visa to go to two countries, [apparently] learned that he ran the risk of being arrested as a result of the arrest warrant issued against him by Belgium", adding that "[t]his, moreover, is what the [Congo] . . . hints when it writes that the arrest warrant 'sometimes forced Minister Yerodia to travel by roundabout routes'". Accordingly, the Court concludes that the circulation of the warrant, whether or not it significantly interfered with Mr. Yerodia's diplomatic activity, constituted a violation of an obligation of Belgium towards the Congo, in that it failed to respect the immunity of the incumbent Minister for Foreign Affairs of the Congo and, more particularly, infringed the immunity from criminal jurisdiction and the inviolability then enjoyed by him under international law.

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72. The Court will now address the issue of the remedies sought by the Congo on account of Belgium's violation of the above-mentioned rules of international law. In its second, third and fourth submissions, the Congo requests the Court to adjudge and declare that:

"A formal finding by the Court of the unlawfulness of [the issue and international circulation of the arrest warrant] constitutes an appropriate form of satisfaction, providing reparation for the consequent moral injury to the Democratic Republic of the Congo;

The violations of international law underlying the issue and international circulation of the arrest warrant of 11 April 2000 preclude any State, including Belgium, from executing it;

Belgium shall be required to recall and cancel the arrest warrant of 11 April 2000 and to inform the foreign authorities to whom the warrant was circulated that Belgium renounces its request for their co-operation in executing the unlawful warrant."

73. In support of those submissions, the Congo asserts that the termination of the official duties of Mr. Yerodia in no way operated to efface the wrongful act and the injury flowing from it, which continue to exist. It argues that the warrant is unlawful *ab initio*, that "[i]t is fundamentally flawed" and that it cannot therefore have any legal effect today. It points out that the purpose of its request is reparation for the injury caused, requiring the restoration of the situation which would in all probability have existed if the said act had not been committed. It states that, inasmuch as the wrongful act consisted in an internal legal instrument, only the "withdrawal" and "cancellation" of the latter can provide appropriate reparation.

The Congo further emphasizes that in no way is it asking the Court itself to withdraw or cancel the warrant, nor to determine the means whereby Belgium is to comply with its decision. It explains that the withdrawal and cancellation of the warrant, by the means that Belgium deems most suitable, "are not means of enforcement of the judgment of the Court but the requested measure of legal reparation/restitution itself". The Congo maintains that the Court is consequently only being requested to declare that Belgium, by way of reparation for the injury to the rights of the Congo, be required to withdraw and cancel this warrant by the means of its choice.

74. Belgium for its part maintains that a finding by the Court that the immunity enjoyed by Mr. Yerodia as Minister for Foreign Affairs had been violated would in no way entail an obligation to cancel the arrest warrant. It points out that the arrest warrant is still operative and that "there is no suggestion that it presently infringes the immunity of the Congo's Minister for Foreign Affairs". Belgium considers that what the Congo is in reality asking of the Court in its third and fourth final submissions is that the Court should direct Belgium as to the method by which it should give effect to a judgment of the Court finding that the warrant had infringed the immunity of the Congo's Minister for Foreign Affairs.

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75. The Court has already concluded (see paragraphs 70 and 71) that the issue and circulation of the arrest warrant of 11 April 2000 by the Belgian authorities failed to respect the immunity of the incumbent Minister for Foreign Affairs of the Congo and, more particularly,

infringed the immunity from criminal jurisdiction and the inviolability then enjoyed by Mr. Yerodia under international law. Those acts engaged Belgium's international responsibility. The Court considers that the findings so reached by it constitute a form of satisfaction which will make good the moral injury complained of by the Congo.

76. However, as the Permanent Court of International Justice stated in its Judgment of 13 September 1928 in the case concerning the *Factory at Chorzów*:

> "[t]he essential principle contained in the actual notion of an illegal act — a principle which seems to be established by international practice and in particular by the decisions of arbitral tribunals — is that reparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed" (*P.C.I.J., Series A, No. 17*, p. 47).

In the present case, "the situation which would, in all probability, have existed if [the illegal act] had not been committed" cannot be re-established merely by a finding by the Court that the arrest warrant was unlawful under international law. The warrant is still extant, and remains unlawful, notwithstanding the fact that Mr. Yerodia has ceased to be Minister for Foreign Affairs. The Court accordingly considers that Belgium must, by means of its own choosing, cancel the warrant in question and so inform the authorities to whom it was circulated.

77. The Court sees no need for any further remedy: in particular, the Court cannot, in a judgment ruling on a dispute between the Congo and Belgium, indicate what that judgment's implications might be for third States, and the Court cannot therefore accept the Congo's submissions on this point.

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78. For these reasons,

THE COURT,

(1) (A) By fifteen votes to one,

Rejects the objections of the Kingdom of Belgium relating to jurisdiction, mootness and admissibility;

FOR: *President* Guillaume; *Vice-President* Shi; *Judges* Ranjeva, Herczegh, Fleischhauer, Koroma, Vereshchetin, Higgins, Parra-Aranguren, Kooijmans, Rezek, Al-Khasawneh, Buergenthal; *Judges* ad hoc Bula-Bula, Van den Wyngaert;

AGAINST: *Judge* Oda;

(B) By fifteen votes to one,

Finds that it has jurisdiction to entertain the Application filed by the Democratic Republic of the Congo on 17 October 2000;

FOR: *President* Guillaume; *Vice-President* Shi; *Judges* Ranjeva, Herczegh, Fleischhauer, Koroma, Vereshchetin, Higgins, Parra-Aranguren, Kooijmans, Rezek, Al-Khasawneh, Buergenthal; *Judges* ad hoc Bula-Bula, Van den Wyngaert;

AGAINST: *Judge* Oda;

(C) By fifteen votes to one,

Finds that the Application of the Democratic Republic of the Congo is not without object and that accordingly the case is not moot;

FOR: *President* Guillaume; *Vice-President* Shi; *Judges* Ranjeva, Herczegh, Fleischhauer, Koroma, Vereshchetin, Higgins, Parra-Aranguren, Kooijmans, Rezek, Al-Khasawneh, Buergenthal; *Judges* ad hoc Bula-Bula, Van den Wyngaert;

AGAINST: *Judge* Oda;

(D) By fifteen votes to one,

Finds that the Application of the Democratic Republic of the Congo is admissible;

FOR: *President* Guillaume; *Vice-President* Shi; *Judges* Ranjeva, Herczegh, Fleischhauer, Koroma, Vereshchetin, Higgins, Parra-Aranguren, Kooijmans, Rezek, Al-Khasawneh, Buergenthal; *Judges* ad hoc Bula-Bula, Van den Wyngaert;

AGAINST: *Judge* Oda;

(2) By thirteen votes to three,

Finds that the issue against Mr. Abdulaye Yerodia Ndombasi of the arrest warrant of 11 April 2000, and its international circulation, constituted violations of a legal obligation of the Kingdom of Belgium towards the Democratic Republic of the Congo, in that they failed to respect the immunity from criminal jurisdiction and the inviolability which the incumbent Minister for Foreign Affairs of the Democratic Republic of the Congo enjoyed under international law;

FOR: *President* Guillaume; *Vice-President* Shi; *Judges* Ranjeva, Herczegh, Fleischhauer, Koroma, Vereshchetin, Higgins, Parra-Aranguren, Kooijmans, Rezek, Buergenthal; *Judge* ad hoc Bula-Bula;

AGAINST: *Judges* Oda, Al-Khasawneh; *Judge* ad hoc Van den Wyngaert;

(3) By ten votes to six,

Finds that the Kingdom of Belgium must, by means of its own choosing, cancel the arrest warrant of 11 April 2000 and so inform the authorities to whom that warrant was circulated;

FOR: *President* Guillaume; *Vice-President* Shi; *Judges* Ranjeva, Herczegh, Fleischhauer, Koroma, Vereshchetin, Parra-Aranguren, Rezek; *Judge* ad hoc Bula-Bula;

AGAINST: *Judges* Oda, Higgins, Kooijmans, Al-Khasawneh, Buergenthal; *Judge* ad hoc Van den Wyngaert.

Done in French and in English, the French text being authoritative, at the Peace Palace, The Hague, this fourteenth day of February, two thousand and two, in three copies, one of which will be placed in the archives of the Court and the others transmitted to the Government of the Democratic Republic of the Congo and the Government of the Kingdom of Belgium, respectively.

(Signed) Gilbert GUILLAUME,
President.

(Signed) Philippe COUVREUR,
Registrar.

President GUILLAUME appends a separate opinion to the Judgment of the Court; Judge ODA appends a dissenting opinion to the Judgment of the Court; Judge RANJEVA appends a declaration to the Judgment of the Court; Judge KOROMA appends a separate opinion to the Judgment of the Court; Judges HIGGINS, KOOIJMANS and BUERGENTHAL append a joint separate opinion to the Judgment of the Court; Judge REZEK appends a separate opinion to the Judgment of the Court; Judge AL-KHASAWNEH appends a dissenting opinion to the Judgment of the Court; Judge *ad hoc* BULA-BULA appends a separate opinion to the Judgment of the Court; Judge *ad hoc* VAN DEN WYNGAERT appends a dissenting opinion to the Judgment of the Court.

(Initialled) G.G.

(Initialled) Ph.C.

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Published Friday, November 6, 1998, in the Miami Herald

Cuban exile group sues Castro in Spain

Action against Pinochet inspires suit

From Herald Staff and Wire Reports

MADRID -- A Cuban exile group encouraged by the case against former Chilean strongman Augusto Pinochet filed suit here Thursday accusing Cuban President Fidel Castro of genocide, terrorism and torture.

``Spain's National Court has ruled that it is competent to investigate crimes of genocide, terrorism and torture in the case against Pinochet,'' said Guillermo Alonso Olarra, a lawyer for the Foundation for Human Rights in Cuba. ``This case is identical.''

The foundation said the suit was inspired by a National Court decision last week that gave a Spanish judge the green light to try to bring Pinochet to trial for crimes committed during his 1973-90 regime.

Spanish Judge Baltasar Garzon had Pinochet arrested in London last month as a first step toward his extradition. The case is pending in Britain's House of Lords after a court there ruled that Pinochet was entitled to immunity as a former head of state.

Alonso said his group had submitted papers to Spain's National Court detailing the cases of about 120 people who allegedly suffered torture or other abuses at the hands of Castro's government. The suit also included the names of 18,000 people who lawyers say have been killed or have disappeared in Cuba since 1959, when Castro took power.

``Spain has opened the door to the victims of Argentina and Chile,'' Clara Maria del Valle, foundation vice president, said at a Madrid news conference. ``Today we come to knock on the door of Spanish justice in the name of the victims . . . of Fidel Castro.''

Most of the 18,000 on the list are Cubans, but there are also several people from North America and Spain.

The suit was also announced in Washington at a press conference by Jorge Mas, vice chairman of the Miami-based Cuban American National Foundation. The Foundation for Human Rights in Cuba is allied with CANF.

With Rep. Peter Deutsch, a Broward Democrat at his side, Mas said: ``With the globalization of how we are treating dictators, there should be no differentiation between dictators of the right and the left. Those who care about human rights know that they should be treated equally.''

The Spanish court is likely to name a judge to review the case by this weekend, said Javier Barrilero, another lawyer for the foundation.

In Havana, Cuban Foreign Ministry Spokesman Alejandro Gonzalez said he would not respond ``to such ridiculous humbug.''

Also named in the suit are Castro's brother Raul, Cuban Tourism Minister and former army commander Osmani Cienfuegos and Carlos Amat, Cuba's ambassador in Geneva.

Frank Davies of The Herald's Washington bureau contributed to this report.

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The Miami Herald
November 14, 1998

Immunity law protects Castro

Spanish prosecutor says human-rights trial not possible

MADRID -- (EFE) -- A Spanish state prosecutor argues that Cuban President Fidel Castro cannot be put on trial in Spain for human rights crimes because a head of state is ``entitled to the privilege of immunity,'' officials said Friday.

High Court Prosecutor Javier Balaguer also said that insufficient evidence exists to back charges of genocide and terrorism in the complaint filed by the Foundation for Human Rights in Cuba, an offshoot of the Cuban American National Foundation.

The complaint also names Armed Forces Minister Raul Castro, Fidel's brother, Tourism Minister Osmany Cienfuegos and Cuba's ambassador to the United Nations in Geneva, Carlos Amat. And, it seeks international arrest warrants for ``all others who may be held legally accountable for said crimes.''

The exile group alleged that the Spanish court, which claims jurisdiction over human rights crimes in Chile and Argentina, must likewise examine ``the vast mechanism for suppressing human rights and public liberties that began with Fidel Castro's seizure of power on Jan. 8, 1959.''

Within this ``system of institutionalized repression'', the group claims that ``an infrastructure of penal institutions was set up where the use of torture was commonplace'' and Cuban police resorted to ``systematized psychological torture.''

Court officials who have seen the report said Balaguer maintains the same position his office asserted in urging the High Court to reverse course when one of its justices, Baltasar Garzon, indicted former Chilean President Augusto Pinochet for genocide, murder and terrorism. The court rejected Balaguer's recommendation and ruled that the indictment against Pinochet could proceed.

Balaguer argues that the crimes attributed to Castro ``took place after the latter had assumed the mantle of head of the Cuban State and continues to do so at the present time, and thereby is entitled to the privilege of immunity.''

He adds that none of the incidents cited meet the legal definition of genocide, since they do not constitute a ``systematic pattern of extermination of a group'' and observes that ``not all dictatorships necessarily lead to acts of genocide.''

In that sense, the 41 people who were killed on July 13, 1994, when Cuban coast guard vessels rammed and sunk the tugboat on which they were attempting to flee the island, cannot be considered victims of genocide since it was a ``specific and isolated occurrence,'' and not the result of a policy.

The prosecutor's opinion is taken into consideration but is not binding on the justice hearing the case, Ismael Moreno, who has yet to decide if he will file charges under Spanish law.

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The Miami Herald
March 9, 1999

Spain: Castro can't be tried

MADRID -- (AFP) -- Spain's highest court on Monday ruled that the country has no jurisdiction to try Cuban President Fidel Castro because he is a head of state, while reaffirming its right to judge former Chilean dictator Augusto Pinochet.

The National Audience said that the difference between the two was that Castro is still the leader of his country, whereas Pinochet left office in 1990.

The court was examining a suit filed against Castro by a Cuban human rights group for torture, terrorism and genocide, the same charges that were made against Pinochet.

Pinochet is under house arrest in England awaiting a verdict on whether he has immunity from prosecution and extradition to Spain.

The National Audience based its ruling not on conventions on diplomatic relations signed in Vienna but on ``bilateral treaties signed by states and on international practice,'' it said.

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Legal Status of Eastern Greenland

Permanent Court of International Justice
Judgment, April 5, 1933
Series A/B. No.53
(Denmark v. Norway)

[O]n July 10th, 1931, [The Norwegian Government] published a proclamation declaring that it had proceeded to occupy certain territories in Eastern Greenland, which, in the contention of the Danish Government, were subject to the sovereignty of the Crown of Denmark.

[T]he Danish Government [asked the Court]:

To give judgment to the effect that the declaration of occupation promulgated by the Norwegian Government on July 10th, 1931, and any steps taken in this connection by that Government, constitute a violation of the existing legal situation and are, accordingly, unlawful and invalid;

[T]he Norwegian Government [asked the Court]:

To adjudge and declare ... that Norway has acquired the sovereignty over Eirik Raudes Land [Eastern Greenland].

A large number of documents, including memorials or opinions on special points, and maps were filed on behalf of each of the Parties, either as annexes to the documents of the written proceedings or in the course of the hearings.

The submission of the case being in all respects regular, these are the circumstances in which the Court is now called upon to give judgment.
* * *

According to the royal Norwegian proclamation of July 10th, 1931, which gave rise to the present dispute, the "country" the "taking possession" of which "is officially confirmed" and which is "placed under Norwegian sovereignty" is "situated ... in Eastern Greenland."

[27] The climate and character of Greenland are those of an Arctic country. The "Inland Ice" is difficult to traverse, and parts of the coast - particularly of the East coast - are for months together difficult of access owing to the influence of the Polar current and the stormy winds on the icebergs and the floe ice and owing to the frequent spells of bad weather.

According to the information supplied to the Court by the Parties, it was about the year 900 A.D. that Greenland was discovered. The country was colonized about a century later. The best known of the colonists was Eric the Red, who was an inhabitant of Iceland of Norwegian origin; it was at that time that two settlements called Eystribygd and Vestribygd were founded towards the southern end of the western coast. These settlements appear to have existed as an independent State for some time, but became tributary to the kingdom of Norway in the XIIIth century. These settlements had disappeared before 1500.

Information as to these early Nordic settlements and as to the extent to which the settlers dominated the remainder of the country is very scanty. It seems clear that the settlers made hunting journeys far to the North on the western coast, and records exist of at least one expedition to places on the East coast.

In 1380, the kingdoms of Norway and Denmark were united under the same Crown; the character of this union, which lasted until 1814, changed to some extent in the course of time, more particularly

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as a result of the centralization at Copenhagen of the administration of the various countries which were under the sovereignty of the Dano-Norwegian Crown. This evolution seems to have obliterated to some extent the separation which had existed between them from a constitutional standpoint. On the other hand, there is nothing to show that during this period Greenland, in so far as it constituted a dependency of the Crown, should not be regarded as a Norwegian possession.

The disappearance of the Nordic colonies did not put an end to the King's pretensions to the sovereignty over Greenland.

[F]oreign countries appear to have acquiesced in the claims of the King of Denmark. Both the States-General of the United Provinces in 1631 and the King of France in 1636 intimated that they did not dispute the claims; and, by the Treaty of Lund of September 27th, 1679 (7th Secret Article), Sweden recognized the ancient rights and claims of the King of Denmark over Greenland and the adjacent seas and coasts.

In 1774, the State itself ... took over the Greenland trade, which it administered by means of an autonomous "Board", and the King, on March 18th, 1776, issued an Ordinance, which is still in force and which repeats the provisions of the previous instruments in very similar terms. The concessions previously granted to private persons were bestowed upon a privileged Trading Administration. Since then the Greenland trade has been a monopoly of the State of Denmark.

During this period, settlements were established described as colonies, factories or stations, along the West coast.... Attempts to reach the East coast and effect a landing there were made from the West coast of the island, but led to no results.

In the contention of Norway, the above-mentioned instruments, when they speak of Greenland in general, mean the colonized part of the West coast referred to above; Denmark, on the contrary, maintains that the expressions in question relate to Greenland in the geographical sense of the word, i.e. to the whole island of Greenland.

After ... war had broken out between Denmark, on the one hand, and Sweden and her allies, on the other ... the Swedish army compelled Denmark to sign the Peace Treaty of Kiel, dated January 14th, 1814, the fourth Article of which provided for the cession to Sweden of the kingdom of Norway, excluding however Greenland, the Faeroe Isles and Iceland.

In the course of the XlXth century and the early years of the XXth, the coasts of Greenland were entirely explored. For the purposes of the present case, it is only necessary to note two dates: first, in 1822 the Scottish whaler Scoresby made the first landing by a European in the territory covered by the Norwegian declaration of occupation; secondly, about 1900, thanks to the voyages of the American Peary, the insular character of Greenland was established.

Several Danish expeditions explored portions of the non-colonized part of Greenland during the XlXth century... It results ... that the whole East coast has been explored by Danish expeditions. There were, in addition, many non-Danish expeditions.

In 1863, the Danish Government granted to Mr. J.W. Tayler, an Englishman, an exclusive concession for thirty years to enable him to establish on the East coast of Greenland" stations for the purpose of trading with the natives....

The Tayler concession led to no practical result. The concessionaire was not able to establish any stations on the East coast.

Between 1854 and 1886, applications were made to the Danish Government for the grant of several other concessions for the erection of telegraph lines in or across Greenland, or for the grant of

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mining concessions. Some of these were granted, some were refused. They all use the term "Greenland" without qualification....

In 1894, at Angmagssalik, in latitude 650 36' N., the first Danish settlement on the East coast was established.

In 1905, a Decree was issued by the Danish Minister of the Interior, fixing the limits of the territorial waters around Greenland. The limits within which the fishing was stated to be reserved for Danish subjects were to be drawn at a distance of three marine miles along the whole coast of Greenland.

In 1908, a law was promulgated by Denmark relating to the administration of Greenland. The colonies on the West coast were divided into two districts, a northern and a southern.

In 1921, a Decree was issued, running as follows:

In pursuance of His Majesty's authority dated the 6th instant, and with reference to the Royal Ordinance of March 18th, 1776, know all men that Danish Trading, Mission and Hunting Stations have been established on the East and West coasts of Greenland, with the result that the whole of that country is henceforth linked up with Danish colonies and stations under the authority of the Danish Administration of Greenland....

Throughout this period and up to the present time, the practice of the Danish Government in concluding bilateral commercial conventions or when participating in multilateral conventions relating to economic questions... has been to secure the insertion of a stipulation excepting Greenland from the operation of the convention.

As regards Norwegian activities, in addition to visits to the East coast paid periodically during the summer from 1889 onwards, expeditions wintered in the territory in question in 1908 and 1909, and again in 1922 and in 1926 and the ensuing years. The expedition of 1922 established a provisional wireless station at Mygg-Bukta (Mackenzie Bay), but the Danish Government made a protest immediately against its erection. Owing to the loss of a ship, this station ceased working in the following year. It began to function again in 1926, and since then this Mygg-Bukta station has been working regularly. Since 1929 both hunting operations and the wireless service have been carried on by a Norwegian company, the Arktish Noeringdrift. The various Norwegian expeditions also have built a large number of houses and cabins in the disputed territory.

At the beginning of the present century, opinion again began to be manifested in favour of the more effective [Danish] occupation of the uncolonized areas in Greenland, in order that the risk of foreign settlement might be obviated.

On July 22nd, [1919] M. Ihlen [the Norwegian Minister for Foreign Affairs] made a statement to the Danish Minister to the effect that "...the plans of the Royal [Danish] Government respecting Danish sovereignty over the whole of Greenland... would meet with no difficulties on the part of Norway". It is the statement by the Norwegian Minister for Foreign Affairs which is described in this judgment as the "Ihlen declaration".

In the meanwhile, on June 28th, 1931, certain Norwegian hunters had hoisted the flag of Norway in Mackenzie Bay in Eastern Greenland, and announced that they had occupied the territory lying between Carlsberg Fjord, to the South, and Bessel Fjord, to the North, in the name of the King of Norway.

[On July 10th, 1931, a Norwegian Royal Resolution declared]:

1. The occupation of the country in Eastern Greenland between

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Carlsberg Fjord on the south and Bessel Fjord on the north, carried out

on June 27th, 1931, is officially confirmed, so far as concerns the territory extending from latitude 710 30' to latitude 750 40' N., and the said territory is placed under Norwegian Sovereignty.

2. Messrs. Hallvard Devoid and Herman Andresen are invested with police powers in the aforesaid territory...

On the following day - July 11th, 1931 - the Danish Government informed the Norwegian Government that it had "submitted the question" on the same day "to the Permanent Court of International justice".

The Danish submission in the written pleading, that the Norwegian occupation of July 10th, 1931, is invalid, is founded upon the contention that the area occupied was at the time of the occupation subject to Danish sovereignty; that the area is part of Greenland, and at the time of the occupation Danish sovereignty existed over all Greenland; consequently it could not be occupied by another Power.

In support of this contention, the Danish Government advances two propositions. The first is that the sovereignty which Denmark now enjoys over Greenland has existed for a long time, has been continuously and peacefully exercised and, until the present dispute, has not been contested by any Power. This proposition Denmark sets out to establish as a fact. The second proposition is that Norway has by treaty or otherwise herself recognized Danish sovereignty over Greenland as a whole and therefore cannot now dispute it.

The Norwegian submissions are that Denmark possessed no sovereignty over the area which Norway occupied on July 1Oth, 1931, and that at the time of the occupation the area was terra nullius. Her contention is that the area lay outside the limits of the Danish colonies in Greenland and that Danish sovereignty extended no further than the limits of these colonies.

On the Danish side it was maintained that the promise which in 1919 the Norwegian Minister for Foreign Affairs, speaking on behalf of his Government gave to the diplomatic representative of the Danish Government at Christiania debarred Norway from proceeding to any occupation of territory in Greenland, even if she had not by other acts recognized an existing Danish sovereignty there.

I

The first Danish argument is that the Norwegian occupation of part of the East coast of Greenland is invalid because Denmark has claimed and exercised sovereign rights over Greenland as a whole for a long time and has obtained thereby a valid title to sovereignty. The date at which such Danish sovereignty must have existed in order to render the Norwegian occupation invalid is the date at which the occupation took place, viz., July 10th, 1931.

The Danish claim is not founded upon any particular act of occupation but alleges - to use the phrase employed in the Palmas Island decision of the Permanent Court of Arbitration April 4th, 1928 - a title " founded on the peaceful and continuous display of State authority over the island". It is based upon the view that Denmark now enjoys all the rights which the King of Denmark and Norway enjoyed over Greenland up till 1814. Both the existence and the extent of these rights must therefore be considered, as well as the Danish claim to sovereignty since that date.

It must be borne in mind, however, that as the critical date is July 10th, 1931, it is not necessary that sovereignty over Greenland should have existed throughout the period during which the Danish Government maintains that it was in being. Even if the material submitted to the Court might be

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thought insufficient to establish the existence of that sovereignty during the earlier periods, this would not exclude a finding that it is sufficient to establish a valid title in the period immediately preceding the occupation.

Before proceeding to consider in detail the evidence submitted to the Court, it may be well to state that a claim to sovereignty based not upon some particular act or title such as a treaty of cession but merely upon continued display of authority, involves two elements each of which must be shown to exist: the intention and will to act as sovereign, and some actual exercise or display of such authority.

Another circumstance which must be taken into account by any tribunal which has to adjudicate upon a claim to sovereignty over a particular territory, is the extent to which the sovereignty is also claimed by some other Power. In most of the cases involving claims to territorial sovereignty which have come before an international tribunal, there have been two competing claims to the sovereignty, and the tribunal has had to decide which of the two is the stronger. One of the peculiar features of the present case is that up to 1931 there was no claim by any Power other than Denmark to the sovereignty over Greenland. Indeed, up till 1921, no Power disputed the Danish claim to sovereignty.

It is impossible to read the records of the decisions in cases as to territorial sovereignty without observing that in many cases the tribunal has been satisfied with very little in the way of the actual exercise of sovereign rights, provided that the other State could not make out a superior claim. This is particularly true in the case of claims to sovereignty over areas in thinly populated or unsettled countries.

After the founding of Hans Egede's colonies in 1721, there is in part at least of Greenland a manifestation and exercise of sovereign rights. Consequently, both the elements necessary to establish a valid title to sovereignty - the intention and the exercise - were present, but the question arises as to how far the operation of these elements extended.

Was the exercise of sovereign rights such as to confer a valid title to sovereignty over the whole country? ... Legislation is one of the most obvious forms of the exercise of sovereign power, and it is clear that the operation of [Danish] enactments was not restricted to the limits of the colonies. It therefore follows that the sovereign right in virtue of which the enactments were issued cannot have been restricted to the limits of the colonies.

Norway has argued that in the legislative and administrative acts of the XVIIIth century on which Denmark relies as proof of the exercise of her sovereignty, the word "Greenland" is not used in the geographical sense, but means only the colonies or the colonized area on the West coast.

This is a point as to which the burden of proof lies on Norway. The geographical meaning of the word "Greenland", i.e. the name which is habitually used in the maps to denominate the whole island, must be regarded as the ordinary meaning of the word. If it is alleged by one of the Parties that some unusual or exceptional meaning is to be attributed to it, it lies on that Party to establish its contention. In the opinion of the Court, Norway has not succeeded in establishing her contention.

The conclusion to which the Court is led is that, bearing in mind the absence of any claim to sovereignty by another Power, and the Arctic and inaccessible character of the uncolonized parts of the country, the King of Denmark and Norway displayed during the period from the founding of the colonies by Hans Egede in 1721 up to 1814 his authority to an extent sufficient to give his country a valid claim to sovereignty, and that his rights over Greenland were not limited to the colonized area.

In order to establish the Danish contention that Denmark has exercised in fact sovereignty over all Greenland for a long time, Counsel for Denmark have laid stress on the long series of conventions -

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mostly commercial in character - which have been concluded by Denmark and in which, with the concurrence of the other contracting Party, a stipulation has been inserted to the effect that the convention shall not apply to Greenland.

The importance of these treaties is that they show a willingness on the part of the States with which Denmark has contracted to admit her right to exclude Greenland. To some of these treaties, Norway has herself been a Party...

To the extent that these treaties constitute evidence of recognition of her sovereignty over Greenland in general, Denmark is entitled to rely upon them.

These treaties may also be regarded as demonstrating sufficiently Denmark's will and intention to exercise sovereignty over Greenland. There remains the question whether during this period, i.e. 1814 to 1915, she exercised authority in the uncolonized area sufficiently to give her a valid claim to sovereignty therein.

The concessions granted for the erection of telegraph lines and the legislation fixing the limits of territorial waters in 1905 are also manifestations of the exercise of sovereign authority.

In view of the above facts, when taken in conjunction with the legislation she had enacted applicable to Greenland generally, the numerous treaties in which Denmark, with the concurrence of the other contracting Party, provided for the non-application of the treaty to Greenland in general, and the absence of all claim to sovereignty over Greenland by any other Power, Denmark must be regarded as having displayed during this period of 1814 to 1915 her authority over the uncolonized part of the country to a degree sufficient to confer a valid title to the sovereignty.

Even if the period from 1921 to July 10th, 1931, is taken by itself and without reference to the preceding periods, the conclusion reached by the Court is that during this time Denmark regarded herself as possessing sovereignty over all Greenland and displayed and exercise her sovereign rights to an extent sufficient to constitute a valid title to sovereignty. When considered in conjunction with the facts of the preceding periods, the case in favour of Denmark is confirmed and strengthened.

It follows from the above that the Court is satisfied that Denmark has succeeded in establishing her contention that at the critical date, namely, July 10th, 1931, she possessed a valid title to the sovereignty over all Greenland.

II

The Court will now consider the second Danish proposition that Norway had given certain undertakings which recognized Danish sovereignty over all Greenland. These undertakings have been fully discussed by the two Parties, and in three cases the Court considers that undertakings were given.

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1. In the first place, the Court holds that, at the time of the termination of the Union between Denmark and Norway (1814 to 1819), Norway undertook not to dispute Danish sovereignty over Greenland.

The Court holds that, in consequence of the various undertakings resulting from the separation of Norway and Denmark and culminating in Article 9 of the Convention of September 1st, 1819, Norway has recognized Danish sovereignty over the whole of Greenland and consequently cannot proceed to the occupation of any part thereof.

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2. A second series of undertakings by Norway, recognizing Danish sovereignty over Greenland, is afforded by various bilateral agreements concluded by Norway with Denmark, and by various multilateral agreements to which both Denmark and Norway were contracting Parties, in which Greenland has been described as a Danish colony or as forming part of Denmark or in which Denmark has been allowed to exclude Greenland from the operation of the agreement.

In accepting these bilateral and multilateral agreements as binding upon herself, Norway reaffirmed that she recognized the whole of Greenland as Danish; and thereby she has debarred herself from contesting Danish sovereignty over the whole of Greenland, and, in consequence, from proceeding to occupy any part of it.

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3. In addition to the engagements dealt with above, the Ihlen declaration, viz. the reply given by M. Ihlen, the Norwegian Minister for Foreign Affairs, to the Danish Minister on July 22nd, 1919, must also be considered.

This declaration by M. Ihlen has been relied on by Counsel for Denmark as a recognition of an existing Danish sovereignty in Greenland. The Court is unable to accept this point of view.

Nevertheless, the point which must now be considered is whether the Ihlen declaration - even if not constituting a definitive recognition of Danish sovereignty - did not constitute and engagement obliging Norway to refrain from occupying any part of Greenland.

What Denmark desired to obtain from Norway was that the latter should do nothing to obstruct the Danish plans in regard to Greenland. The declaration which the Minster for Foreign Affairs gave on July 22nd, 1919, on behalf of the Norwegian Government, was definitely affirmative: "I told the Danish Minister to-day that the Norwegian Government would not make any difficulty in the settlement of this question." [i.e. the question of Danish sovereignty over Greenland].

The Court considers it beyond all dispute that a reply of this nature given by the minister for Foreign Affairs on behalf of his Government in response to a request by the diplomatic representative of a foreign Power, in regard to a question falling within his province, is binding upon the country to which the Minister belongs.

It follows that, as a result of the undertaking involved in the Ihlen declaration of July 22nd, 1919, Norway is under an obligation to refrain from contesting Danish sovereignty over Greenland as a whole, and a fortiori to refrain from occupying a part of Greenland.

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[75] FOR THESE REASONS, the Court, by twelve votes to two,

(1) decides that the declaration of occupation promulgated by the Norwegian Government on July 10th, 1931, and any steps taken in this respect by that Government, constitute a violation of the existing legal situation and are accordingly unlawful and invalid....

Legal Status of Eastern Greenland
Permanent Court of International Justice
Judgment, April 5, 1933
Series A/B. No.53
(Denmark v. Norway)

[O]n July 10th, 1931, [The Norwegian Government] published a proclamation declaring that it had proceeded to occupy certain territories in Eastern Greenland, which, in the contention of the Danish Government, were subject to the sovereignty of the Crown of Denmark.

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[T]he Danish Government [asked the Court]:

To give judgment to the effect that the declaration of occupation promulgated by the Norwegian Government on July 10th, 1931, and any steps taken in this connection by that Government, constitute a violation of the existing legal situation and are, accordingly, unlawful and invalid;

[T]he Norwegian Government [asked the Court]:

To adjudge and declare ... that Norway has acquired the sovereignty over Eirik Raudes Land [Eastern Greenland].

A large number of documents, including memorials or opinions on special points, and maps were filed on behalf of each of the Parties, either as annexes to the documents of the written proceedings or in the course of the hearings.

The submission of the case being in all respects regular, these are the circumstances in which the Court is now called upon to give judgment.
* * *

According to the royal Norwegian proclamation of July 10th, 1931, which gave rise to the present dispute, the "country" the "taking possession" of which "is officially confirmed" and which is "placed under Norwegian sovereignty" is "situated ... in Eastern Greenland."

[27] The climate and character of Greenland are those of an Arctic country. The "Inland Ice" is difficult to traverse, and parts of the coast - particularly of the East coast - are for months together difficult of access owing to the influence of the Polar current and the stormy winds on the icebergs and the floe ice and owing to the frequent spells of bad weather.

According to the information supplied to the Court by the Parties, it was about the year 900 A.D. that Greenland was discovered. The country was colonized about a century later. The best known of the colonists was Eric the Red, who was an inhabitant of Iceland of Norwegian origin; it was at that time that two settlements called Eystribygd and Vestribygd were founded towards the southern end of the western coast. These settlements appear to have existed as an independent State for some time, but became tributary to the kingdom of Norway in the XIIIth century. These settlements had disappeared before 1500.

Information as to these early Nordic settlements and as to the extent to which the settlers dominated the remainder of the country is very scanty. It seems clear that the settlers made hunting journeys far to the North on the western coast, and records exist of at least one expedition to places on the East coast.

In 1380, the kingdoms of Norway and Denmark were united under the same Crown; the character of this union, which lasted until 1814, changed to some extent in the course of time, more particularly as a result of the centralization at Copenhagen of the administration of the various countries which were under the sovereignty of the Dano-Norwegian Crown. This evolution seems to have obliterated to some extent the separation which had existed between them from a constitutional standpoint. On the other hand, there is nothing to show that during this period Greenland, in so far as it constituted a dependency of the Crown, should not be regarded as a Norwegian possession.

The disappearance of the Nordic colonies did not put an end to the King's pretensions to the sovereignty over Greenland.

[F]oreign countries appear to have acquiesced in the claims of the King of Denmark. Both the States-General of the United Provinces in 1631 and the King of France in 1636 intimated that they

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did not dispute the claims; and, by the Treaty of Lund of September 27th, 1679 (7th Secret Article), Sweden recognized the ancient rights and claims of the King of Denmark over Greenland and the adjacent seas and coasts.

In 1774, the State itself ... took over the Greenland trade, which it administered by means of an autonomous "Board", and the King, on March 18th, 1776, issued an Ordinance, which is still in force and which repeats the provisions of the previous instruments in very similar terms. The concessions previously granted to private persons were bestowed upon a privileged Trading Administration. Since then the Greenland trade has been a monopoly of the State of Denmark.

During this period, settlements were established described as colonies, factories or stations, along the West coast.... Attempts to reach the East coast and effect a landing there were made from the West coast of the island, but led to no results.

In the contention of Norway, the above-mentioned instruments, when they speak of Greenland in general, mean the colonized part of the West coast referred to above; Denmark, on the contrary, maintains that the expressions in question relate to Greenland in the geographical sense of the word, i.e. to the whole island of Greenland.

After ... war had broken out between Denmark, on the one hand, and Sweden and her allies, on the other ... the Swedish army compelled Denmark to sign the Peace Treaty of Kiel, dated January 14th, 1814, the fourth Article of which provided for the cession to Sweden of the kingdom of Norway, excluding however Greenland, the Faeroe Isles and Iceland.

In the course of the XlXth century and the early years of the XXth, the coasts of Greenland were entirely explored. For the purposes of the present case, it is only necessary to note two dates: first, in 1822 the Scottish whaler Scoresby made the first landing by a European in the territory covered by the Norwegian declaration of occupation; secondly, about 1900, thanks to the voyages of the American Peary, the insular character of Greenland was established.

Several Danish expeditions explored portions of the non-colonized part of Greenland during the XlXth century... It results ... that the whole East coast has been explored by Danish expeditions. There were, in addition, many non-Danish expeditions.

In 1863, the Danish Government granted to Mr. J.W. Tayler, an Englishman, an exclusive concession for thirty years to enable him to establish on the East coast of Greenland" stations for the purpose of trading with the natives....

The Tayler concession led to no practical result. The concessionaire was not able to establish any stations on the East coast.

Between 1854 and 1886, applications were made to the Danish Government for the grant of several other concessions for the erection of telegraph lines in or across Greenland, or for the grant of mining concessions. Some of these were granted, some were refused. They all use the term "Greenland" without qualification....

In 1894, at Angmagssalik, in latitude 650 36' N., the first Danish settlement on the East coast was established.

In 1905, a Decree was issued by the Danish Minister of the Interior, fixing the limits of the territorial waters around Greenland. The limits within which the fishing was stated to be reserved for Danish subjects were to be drawn at a distance of three marine miles along the whole coast of Greenland.

In 1908, a law was promulgated by Denmark relating to the administration of Greenland. The

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colonies on the West coast were divided into two districts, a northern and a southern.

In 1921, a Decree was issued, running as follows:

In pursuance of His Majesty's authority dated the 6th instant, and with reference to the Royal Ordinance of March 18th, 1776, know all men that Danish Trading, Mission and Hunting Stations have been established on the East and West coasts of Greenland, with the result that the whole of that country is henceforth linked up with Danish colonies and stations under the authority of the Danish Administration of Greenland....

Throughout this period and up to the present time, the practice of the Danish Government in concluding bilateral commercial conventions or when participating in multilateral conventions relating to economic questions... has been to secure the insertion of a stipulation excepting Greenland from the operation of the convention.

As regards Norwegian activities, in addition to visits to the East coast paid periodically during the summer from 1889 onwards, expeditions wintered in the territory in question in 1908 and 1909, and again in 1922 and in 1926 and the ensuing years. The expedition of 1922 established a provisional wireless station at Mygg-Bukta (Mackenzie Bay), but the Danish Government made a protest immediately against its erection. Owing to the loss of a ship, this station ceased working in the following year. It began to function again in 1926, and since then this Mygg-Bukta station has been working regularly. Since 1929 both hunting operations and the wireless service have been carried on by a Norwegian company, the Arktish Noeringdrift. The various Norwegian expeditions also have built a large number of houses and cabins in the disputed territory.

At the beginning of the present century, opinion again began to be manifested in favour of the more effective [Danish] occupation of the uncolonized areas in Greenland, in order that the risk of foreign settlement might be obviated.

On July 22nd, [1919] M. Ihlen [the Norwegian Minister for Foreign Affairs] made a statement to the Danish Minister to the effect that "...the plans of the Royal [Danish] Government respecting Danish sovereignty over the whole of Greenland... would meet with no difficulties on the part of Norway". It is the statement by the Norwegian Minister for Foreign Affairs which is described in this judgment as the "lhlen declaration".

In the meanwhile, on June 28th, 1931, certain Norwegian hunters had hoisted the flag of Norway in Mackenzie Bay in Eastern Greenland, and announced that they had occupied the territory lying between Carlsberg Fjord, to the South, and Bessel Fjord, to the North, in the name of the King of Norway.

[On July 1Oth, 1931, a Norwegian Royal Resolution declared]:

1. The occupation of the country in Eastern Greenland between
Carlsberg Fjord on the south and Bessel Fjord on the north, carried out

on June 27th, 1931, is officially confirmed, so far as concerns the territory extending from latitude 710 30' to latitude 750 40' N., and the said territory is placed under Norwegian Sovereignty.

2. Messrs. Hallvard Devoid and Herman Andresen are invested with police powers in the aforesaid territory...

On the following day - July 11th, 1931 - the Danish Government informed the Norwegian Government that it had "submitted the question" on the same day "to the Permanent Court of

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International justice".

The Danish submission in the written pleading, that the Norwegian occupation of July 10th, 1931, is invalid, is founded upon the contention that the area occupied was at the time of the occupation subject to Danish sovereignty; that the area is part of Greenland, and at the time of the occupation Danish sovereignty existed over all Greenland; consequently it could not be occupied by another Power.

In support of this contention, the Danish Government advances two propositions. The first is that the sovereignty which Denmark now enjoys over Greenland has existed for a long time, has been continuously and peacefully exercised and, until the present dispute, has not been contested by any Power. This proposition Denmark sets out to establish as a fact. The second proposition is that Norway has by treaty or otherwise herself recognized Danish sovereignty over Greenland as a whole and therefore cannot now dispute it.

The Norwegian submissions are that Denmark possessed no sovereignty over the area which Norway occupied on July 1Oth, 1931, and that at the time of the occupation the area was terra nullius. Her contention is that the area lay outside the limits of the Danish colonies in Greenland and that Danish sovereignty extended no further than the limits of these colonies.

On the Danish side it was maintained that the promise which in 1919 the Norwegian Minister for Foreign Affairs, speaking on behalf of his Government gave to the diplomatic representative of the Danish Government at Christiania debarred Norway from proceeding to any occupation of territory in Greenland, even if she had not by other acts recognized an existing Danish sovereignty there.

I

The first Danish argument is that the Norwegian occupation of part of the East coast of Greenland is invalid because Denmark has claimed and exercised sovereign rights over Greenland as a whole for a long time and has obtained thereby a valid title to sovereignty. The date at which such Danish sovereignty must have existed in order to render the Norwegian occupation invalid is the date at which the occupation took place, viz., July I0th, 1931.

The Danish claim is not founded upon any particular act of occupation but alleges - to use the phrase employed in the Palmas Island decision of the Permanent Court of Arbitration April 4th, 1928 - a title " founded on the peaceful and continuous display of State authority over the island". It is based upon the view that Denmark now enjoys all the rights which the King of Denmark and Norway enjoyed over Greenland up till 1814. Both the existence and the extent of these rights must therefore be considered, as well as the Danish claim to sovereignty since that date.

It must be borne in mind, however, that as the critical date is July l0th, 1931, it is not necessary that sovereignty over Greenland should have existed throughout the period during which the Danish Government maintains that it was in being. Even if the material submitted to the Court might be thought insufficient to establish the existence of that sovereignty during the earlier periods, this would not exclude a finding that it is sufficient to establish a valid title in the period immediately preceding the occupation.

Before proceeding to consider in detail the evidence submitted to the Court, it may be well to state that a claim to sovereignty based not upon some particular act or title such as a treaty of cession but merely upon continued display of authority, involves two elements each of which must be shown to exist: the intention and will to act as sovereign, and some actual exercise or display of such authority.

Another circumstance which must be taken into account by any tribunal which has to adjudicate

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upon a claim to sovereignty over a particular territory, is the extent to which the sovereignty is also claimed by some other Power. In most of the cases involving claims to territorial sovereignty which have come before an international tribunal, there have been two competing claims to the sovereignty, and the tribunal has had to decide which of the two is the stronger. One of the peculiar features of the present case is that up to 1931 there was no claim by any Power other than Denmark to the sovereignty over Greenland. Indeed, up till 1921, no Power disputed the Danish claim to sovereignty.

It is impossible to read the records of the decisions in cases as to territorial sovereignty without observing that in many cases the tribunal has been satisfied with very little in the way of the actual exercise of sovereign rights, provided that the other State could not make out a superior claim. This is particularly true in the case of claims to sovereignty over areas in thinly populated or unsettled countries.

After the founding of Hans Egede's colonies in 1721, there is in part at least of Greenland a manifestation and exercise of sovereign rights. Consequently, both the elements necessary to establish a valid title to sovereignty - the intention and the exercise - were present, but the question arises as to how far the operation of these elements extended.

Was the exercise of sovereign rights such as to confer a valid title to sovereignty over the whole country? ... Legislation is one of the most obvious forms of the exercise of sovereign power, and it is clear that the operation of [Danish] enactments was not restricted to the limits of the colonies. It therefore follows that the sovereign right in virtue of which the enactments were issued cannot have been restricted to the limits of the colonies.

Norway has argued that in the legislative and administrative acts of the XVIIIth century on which Denmark relies as proof of the exercise of her sovereignty, the word "Greenland" is not used in the geographical sense, but means only the colonies or the colonized area on the West coast.

This is a point as to which the burden of proof lies on Norway. The geographical meaning of the word "Greenland", i.e. the name which is habitually used in the maps to denominate the whole island, must be regarded as the ordinary meaning of the word. If it is alleged by one of the Parties that some unusual or exceptional meaning is to be attributed to it, it lies on that Party to establish its contention. In the opinion of the Court, Norway has not succeeded in establishing her contention.

The conclusion to which the Court is led is that, bearing in mind the absence of any claim to sovereignty by another Power, and the Arctic and inaccessible character of the uncolonized parts of the country, the King of Denmark and Norway displayed during the period from the founding of the colonies by Hans Egede in 1721 up to 1814 his authority to an extent sufficient to give his country a valid claim to sovereignty, and that his rights over Greenland were not limited to the colonized area.

In order to establish the Danish contention that Denmark has exercised in fact sovereignty over all Greenland for a long time, Counsel for Denmark have laid stress on the long series of conventions - mostly commercial in character - which have been concluded by Denmark and in which, with the concurrence of the other contracting Party, a stipulation has been inserted to the effect that the convention shall not apply to Greenland.

The importance of these treaties is that they show a willingness on the part of the States with which Denmark has contracted to admit her right to exclude Greenland. To some of these treaties, Norway has herself been a Party...

To the extent that these treaties constitute evidence of recognition of her sovereignty over Greenland in general, Denmark is entitled to rely upon them.

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These treaties may also be regarded as demonstrating sufficiently Denmark's will and intention to exercise sovereignty over Greenland. There remains the question whether during this period, i.e. 1814 to 1915, she exercised authority in the uncolonized area sufficiently to give her a valid claim to sovereignty therein.

The concessions granted for the erection of telegraph lines and the legislation fixing the limits of territorial waters in 1905 are also manifestations of the exercise of sovereign authority.

In view of the above facts, when taken in conjunction with the legislation she had enacted applicable to Greenland generally, the numerous treaties in which Denmark, with the concurrence of the other contracting Party, provided for the non-application of the treaty to Greenland in general, and the absence of all claim to sovereignty over Greenland by any other Power, Denmark must be regarded as having displayed during this period of 1814 to 1915 her authority over the uncolonized part of the country to a degree sufficient to confer a valid title to the sovereignty.

Even if the period from 1921 to July 10th, 1931, is taken by itself and without reference to the preceding periods, the conclusion reached by the Court is that during this time Denmark regarded herself as possessing sovereignty over all Greenland and displayed and exercise her sovereign rights to an extent sufficient to constitute a valid title to sovereignty. When considered in conjunction with the facts of the preceding periods, the case in favour of Denmark is confirmed and strengthened.

It follows from the above that the Court is satisfied that Denmark has succeeded in establishing her contention that at the critical date, namely, July 10th, 1931, she possessed a valid title to the sovereignty over all Greenland.

II

The Court will now consider the second Danish proposition that Norway had given certain undertakings which recognized Danish sovereignty over all Greenland. These undertakings have been fully discussed by the two Parties, and in three cases the Court considers that undertakings were given.

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1. In the first place, the Court holds that, at the time of the termination of the Union between Denmark and Norway (1814 to 1819), Norway undertook not to dispute Danish sovereignty over Greenland.

The Court holds that, in consequence of the various undertakings resulting from the separation of Norway and Denmark and culminating in Article 9 of the Convention of September 1st, 1819, Norway has recognized Danish sovereignty over the whole of Greenland and consequently cannot proceed to the occupation of any part thereof.

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2. A second series of undertakings by Norway, recognizing Danish sovereignty over Greenland, is afforded by various bilateral agreements concluded by Norway with Denmark, and by various multilateral agreements to which both Denmark and Norway were contracting Parties, in which Greenland has been described as a Danish colony or as forming part of Denmark or in which Denmark has been allowed to exclude Greenland from the operation of the agreement.

In accepting these bilateral and multilateral agreements as binding upon herself, Norway reaffirmed that she recognized the whole of Greenland as Danish; and thereby she has debarred herself from contesting Danish sovereignty over the whole of Greenland, and, in consequence, from proceeding to occupy any part of it.

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3. In addition to the engagements dealt with above, the lhlen declaration, viz. the reply given by M. Ihlen, the Norwegian Minister for Foreign Affairs, to the Danish Minister on July 22nd, 1919, must also be considered.

This declaration by M. lhlen has been relied on by Counsel for Denmark as a recognition of an existing Danish sovereignty in Greenland. The Court is unable to accept this point of view.

Nevertheless, the point which must now be considered is whether the Ihlen declaration - even if not constituting a definitive recognition of Danish sovereignty - did not constitute and engagement obliging Norway to refrain from occupying any part of Greenland.

What Denmark desired to obtain from Norway was that the latter should do nothing to obstruct the Danish plans in regard to Greenland. The declaration which the Minster for Foreign Affairs gave on July 22nd, 1919, on behalf of the Norwegian Government, was definitely affirmative: "I told the Danish Minister to-day that the Norwegian Government would not make any difficulty in the settlement of this question." [i.e. the question of Danish sovereignty over Greenland].

The Court considers it beyond all dispute that a reply of this nature given by the minister for Foreign Affairs on behalf of his Government in response to a request by the diplomatic representative of a foreign Power, in regard to a question falling within his province, is binding upon the country to which the Minister belongs.

It follows that, as a result of the undertaking involved in the lhlen declaration of July 22nd, 1919, Norway is under an obligation to refrain from contesting Danish sovereignty over Greenland as a whole, and a fortiori to refrain from occupying a part of Greenland.

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[75] FOR THESE REASONS, the Court, by twelve votes to two,

(1) decides that the declaration of occupation promulgated by the Norwegian Government on July 10th, 1931, and any steps taken in this respect by that Government, constitute a violation of the existing legal situation and are accordingly unlawful and invalid....

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TWELFTH (ORDINARY) SESSION

Before:	MM.	Huber	*President*
		Loder	*Former President*
		Weiss	*Vice President*
	Lord	Finlay	
	MM.	Nyholm	
		Moore	
		De Bustamante	
		Altamira	Judges
		Oda	
		Anzilotti	
		Pessoa	
		Feizi-Daim Bey	National Judge

Judgment No. 9.

THE CASE OF THE S.S. "LOTUS".

The Government of the French Republic, represented by M. Basdevant, Professor at the Faculty of Law of Paris,

versus

The Government of the Turkish Republic, represented by His Excellency Mahmout Essat Bey, Minister of Justice.

The Court, composed as above, having heard the observations and conclusions of the Parties, delivers the following judgment:

By a special agreement signed at Geneva on October 12th, 1926, between the Governments of the French and Turkish Republics and filed with the Registry of the Court, in accordance with Article 40 of the Statute and Article 35 of the Rules of Court, on January 4th, 1927, by the diplomatic representatives at The Hague of the aforesaid Governments, the latter have submitted to the Permanent Court of International Justice the question of jurisdiction which has arisen between them following upon the collision which occurred on August 2nd, 1926, between the steamships *Boz-Kourt* and *Lotus.*

According to the special agreement, the Court has to decide the following questions:

"(1) Has Turkey, contrary to Article 15 of the Convention of Lausanne of July 24th, 1923, respecting conditions of residence and business and jurisdiction, acted in conflict with the principles of international law – and if so, what principles - by instituting, following the collision which occurred on August 2nd, 1926, on the high seas between the French steamer *Lotus* and the Turkish steamer Boz-Kourt and upon the arrival of the French steamer at Constantinople as well as against the captain of the Turkish steamship-joint criminal proceedings in pursuance of Turkish law against M. Demons, officer of the watch on board the *Lotus* at the time of the collision, in consequence of the loss of the *Boz-Kourt*

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having involved the death of eight Turkish sailors and passengers?

(2) Should the reply be in the affirmative, what pecuniary reparation is due to M. Demons, provided, according to the principles of international law, reparation should be made in similar cases?"

Giving effect to the proposals jointly made by the Parties to the special agreement in accordance with the terms of Article 32 of the Rules, the President, under Article 48 of the Statute and Articles 33 and 39 of the Rules, fixed the dates for the filing by each Party of a Case and Counter-Case as March 1st and May 24th, 1927, respectively ; no time was fixed for the submission of replies, as the Parties had expressed the wish that there should not be any.

The Cases and Counter-Cases were duly filed with the Registry by the dates fixed and were communicated to those concerned as provided in Article 43 of the Statute.

In the course of hearings held on August 2nd, 3rd, 6th, and 8th-10th, 1927, the Court has heard the oral pleadings, reply and rejoinder submitted by the above-mentioned Agents for the Parties.

In support of their respective submissions, the Parties have placed before the Court, as annexes to the documents of the written proceedings, certain documents, a list of which is given in the annex.

In the course of the proceedings, the Parties have had occasion to define the points of view respectively adopted by them in relation to the questions referred to the Court. They have done so by formulating more or less developed conclusions summarizing their arguments. Thus the French Government, in its Case, asks for judgment to the effect that:

"Under the Convention respecting conditions of residence and business and jurisdiction signed at Lausanne on July 24th, 1923, and the principles of international law, jurisdiction to entertain criminal proceedings against the officer of the watch of a French ship, in connection with the collision which occurred on the high seas between that vessel and a Turkish ship, belongs exclusively to the French Courts;

"Consequently, the Turkish judicial authorities were wrong in prosecuting, imprisoning and convicting M. Demons, in connection with the collision which occurred on the high seas between the *Lotus* and the *Boz-Kourt*, and by so doing acted in a manner contrary to the above-mentioned Convention and to the principles of international law;

"Accordingly the Court is asked to fix the indemnity in reparation of the injury thus inflicted upon M. Demons at 6'000 Turkish pounds and to order this indemnity to be paid by the Government of the Turkish Republic to the Government of the French Republic."

The Turkish Government, for its part, simply asks the Court in its Case to "give judgment in favour of the jurisdiction of the Turkish Courts".

The French Government, however, has, in its Counter-Case, again formulated the conclusions, already set out in its Case, in a slightly modified form, introducing certain new points preceded by arguments which should be cited in full, seeing that they summarize in a brief and precise manner the point of view taken by the French Government ; the new arguments and conclusions are as follows:

"Whereas the substitution of the jurisdiction of the Turkish Courts for that of the foreign

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consular courts in criminal proceedings taken against foreigners is the outcome of the consent given by the Powers to this substitution in the Conventions signed at Lausanne on July 24th, 1923;

"As this consent, far from having been given as regards criminal proceedings against foreigners for crimes or offences committed abroad, has been definitely refused by the Powers and by France in particular;

"As this refusal follows from the rejection of a Turkish amendment calculated to establish this jurisdiction and from the statements made in this connection;

"As, accordingly, the Convention of Lausanne of July 24th, 1923, construed in the light of these circumstances and intentions, does not allow the Turkish Courts to take cognizance of criminal proceedings directed against a French citizen for crimes or offences committed outside Turkey;

"Furthermore, whereas, according to international law as established by the practice of civilized nations, in their relations with each other, a State is not entitled, apart from express or implicit special agreements, to extend the criminal jurisdiction of its courts to include a crime or offence committed by a foreigner abroad solely in consequence of the fact that one of its nationals has been a victim of the crime or offence;

"Whereas acts performed on the high seas on board a merchant ship are, in principle and from the point of view of criminal proceedings, amenable only to the jurisdiction of the courts of the State whose flag the vessel flies ;

"As that is a consequence of the principle of the freedom of the seas, and as States, attaching especial importance thereto, have rarely departed therefrom;

"As, according to existing law, the nationality of the victim is not a sufficient ground to override this rule, and seeing that this was held in the case of the *Costa Ricca Packet;*

"Whereas there are special reasons why the application of this rule should be maintained in collision cases, which reasons are mainly connected with the fact that the culpable character of the act causing the collision must be considered in the light of purely national regulations which apply to the ship and the carrying out of which must be controlled by the national authorities;

"As the collision cannot, in order thus to establish the jurisdiction of the courts of the country to which it belongs, be localized in the vessel sunk, such a contention being contrary to the facts;

"As the claim to extend the jurisdiction of the courts of the country to which one vessel belongs, on the ground of the "connexity" (connexite) of offences, to proceedings against an officer of the other vessel concerned in the collision, when the two vessels are not of the same nationality, has no support in international law ;

"Whereas a contrary decision recognizing the jurisdiction of the Turkish Courts to take cognizance of the criminal proceedings against the officer of the watch of the French ship involved in the collision would amount to introducing an innovation entirely at variance with firmly established precedent;

"Whereas the special agreement submits to the Court the question of an indemnity to be awarded to Monsieur Demons as a consequence of the decision given by it upon the first question;

"As any other consequences involved by this decision, not having been submitted to the Court, are *ipso facto* reserved;

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"As the arrest, imprisonment and conviction of Monsieur Demons are the acts of authorities having no jurisdiction under international law, the principle of an indemnity enuring to the benefit of Monsieur Demons and chargeable to Turkey, cannot be disputed;

"As his imprisonment lasted for thirty-nine days, there having been delay in granting his release on bail contrary to the provisions of the Declaration regarding the administration of justice signed at Lausanne on July 24th, 1923 ;

"As his prosecution was followed by a conviction calculated to do Monsieur Demons at least moral damage;

"As the Turkish authorities, immediately before his conviction, and when he had undergone detention about equal to one half of the period to which he was going to be sentenced, made his release conditional upon ball in 6'000 Turkish pounds;

.....

"Asks for judgment, whether the Government of the Turkish Republic be present or absent, to the effect:

"That, under the rules of international law and the Convention respecting conditions of residence and business and jurisdiction signed at Lausanne on July 24th, 1923, jurisdiction to entertain criminal proceedings against the officer of the watch of a French ship, in connection with the collision which occurred on the high seas between that ship and a Turkish ship, belongs exclusively to the French Courts;

"That, consequently, the Turkish judicial authorities were wrong in prosecuting, imprisoning and convicting Monsieur Demons, in connection with the collision which occurred on the high seas between the Lotus and the *Boz-Kourt,* and by so doing acted in a manner contrary to the principles of international law and to the above-mentioned Convention;

"Accordingly, the Court is asked to fix the indemnity in reparation of the injury thus inflicted on Monsieur Demons at 6,000 Turkish pounds and to order this indemnity to be paid by the Government of the Turkish Republic to the Government of the French Republic within one month from the date of judgment, without prejudice to the repayment of the bail deposited by Monsieur Demons.

"The Court is also asked to place on record that any other consequences which the decision given might have, not having been submitted to the Court, are *ipso facto* reserved."

The Turkish Government. in its Counter-Case, confines itself to repeating the conclusion of its Case, preceding it, however, by a short statement of its argument, which statement it will be well to reproduce, since it corresponds to the arguments preceding the conclusions of the French Counter-Case:

"1.-Article 15 of the Convention of Lausanne respecting conditions of residence and business and jurisdiction refers simply and solely, as regards the jurisdiction of the Turkish Courts, to the principles of international law, subject only to the provisions of Article 16. Article 15 cannot be read as supporting any reservation whatever or any construction giving it another meaning. Consequently, Turkey, when exercising jurisdiction in any case concerning foreigners, need, under this article, only take care not to act in a manner contrary to the principles of international law.

"2.-Article 6 of the Turkish Penal Code, which is taken word for word from the Italian Penal Code, is not, as regards the case, contrary to the principles of international law.

"3.-Vessels on the high seas form part of the territory of the nation whose flag they fly, and in the case under consideration, the place where the offence was committed being the S. S. *Boz-Kourt* flying the Turkish flag, Turkey's jurisdiction in the proceedings taken is as clear as if the case had occurred on her territory-as is borne out by analogous cases.

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"4.-The *Boz-Kourt-Lotus* case being a case involving "connected" offences *(delits connexes),* the Code of criminal procedure for trial-which is borrowed from France-lays down that the French officer should be prosecuted jointly with and at the same time as the Turkish officer; this, moreover ' is confirmed by the doctrines and legislation of all countries. Turkey, therefore, is entitled from this standpoint also to claim jurisdiction.

"5.-Even if the question be considered solely from the point of view of the collision, as no principle of international criminal law exists which would debar Turkey from exercising the jurisdiction which she clearly possesses to entertain an action for damages, that country has Jurisdiction to institute criminal proceedings.

"6.-As Turkey is exercising jurisdiction of a fundamental character, and as States are not, according to the principles of international law, under an obligation to pay indemnities in such cases, it is clear that the question of the payment of the indemnity claimed in the French Case does not arise for the Turkish Government, since that Government has jurisdiction to prosecute the French citizen Demons who, as the result of a collision, has been guilty of manslaughter.

"The Court is asked for judgment in favour of the jurisdiction of the Turkish Courts."

During the oral proceedings, the Agent of the French Government confined himself to referring to the conclusions submitted in the Counter-Case, simply reiterating his request that the Court should place on record the reservations made therein as regards any consequences of the judgment not submitted to the Court's decision these reservations are now duly recorded.

For his part, the Agent for the Turkish Government abstained both in his original speech and in his rejoinder from submitting any conclusion. The one he formulated in the documents filed by him in the written proceedings must therefore be regarded as having been maintained unaltered.

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THE FACTS

According to the statements submitted to the Court by the Parties' Agents in their Cases and in their oral pleadings, the facts in which the affair originated are agreed to be as follows:

On August 2nd, 1926, just before midnight, a collision occurred between the French mail steamer Lotus, proceeding to Constantinople, and the Turkish collier *Boz-Kourt,* between five and six nautical miles to the north of Cape Sigri (Mitylene). The *Boz-Kourt,* which was cut in two, sank, and eight Turkish nationals who were on board perished. After having done everything possible to succour the shipwrecked persons, of whom ten were able to be saved, the Lotus continued on its course to Constantinople, where it arrived on August 3rd.

At the time of the collision, the officer of the watch on board the *Lotus* was Monsieur Demons, a French citizen, lieutenant in the merchant service and first officer of the ship, whilst the movements of the *Boz-Kourt* were directed by its captain, Hassan Bey, who was one of those saved from the wreck.

As early as August 3rd the Turkish police proceeded to hold an enquiry into the collision on board the *Lotus* ; and on the following day, August 4th, the captain of the Lotus handed in his master's report at the French Consulate-General, transmitting a copy to the harbour master.

On August 5th, Lieutenant Demons was requested by the Turkish authorities to go ashore to give evidence. The examination, the length of which incidentally resulted in delaying the departure of the *Lotus,* led to the placing under arrest of Lieutenant Demons without previous notice being given to the French Consul-General - and Hassan Bey, amongst others. This arrest, which has been characterized by the Turkish Agent as arrest pending trial *(arrestation preventive),* was effected in order to ensure that the criminal prosecution instituted against the two officers, on a charge of manslaughter, by the Public Prosecutor of Stamboul, on the complaint of the families of the victims of the collision, should follow its normal course.

The case was first heard by the Criminal Court of Stamboul on August - 28th. On that occasion, Lieutenant Demons submitted that the Turkish Courts had no jurisdiction; the Court, however, overruled his objection. When the proceedings were resumed on September 11th, Lieutenant Demons demanded his release on bail: this request was complied with on September I3th, the bail being fixed at 6'000 Turkish pounds.

On September 15th, the Criminal Court delivered its judgment, the terms of which have not been communicated to the Court by the Parties. It is, however, common ground, that it sentenced Lieutenant Demons to eighty days' imprisonment and a fine of twenty-two pounds, Hassan Bey being sentenced to a slightly more severe penalty.

It is also common ground between the Parties that the Public Prosecutor of the Turkish Republic entered an appeal against this decision, which had the effect of suspending its execution until a decision upon the appeal had been given; that such decision has not yet been given; but that the special agreement of October 12th, 1926, did not have the effect of suspending "the criminal proceedings .... now in progress in Turkey".

The action of the Turkish judicial authorities with regard to Lieutenant Demons at once gave rise to many diplomatic representations and other steps on the part of the French Government or its representatives in Turkey, either protesting against the arrest of Lieutenant Demons or demanding his release, or with a view to obtaining the transfer of the case from the Turkish Courts to the French Courts.

As a result of these representations, the Government of the Turkish Republic declared on September 2nd, 1926, that "it would have no objection to the reference of the conflict of jurisdiction to the Court at The Hague".

The French Government having, on the 6th of the same month, given "its full consent to

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the proposed solution", the two Governments appointed their plenipotentiaries with a view to the drawing up of the special agreement to be submitted to the Court; this special agreement was signed at Geneva on October 12th, 1926, as stated above, and the ratifications were deposited on December 27th, 1926.

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THE LAW

Before approaching the consideration of the principles of international law contrary to which Turkey is alleged to have acted thereby infringing the terms of Article 15 of the Convention of Lausanne of July 24th, 1923, respecting conditions of residence and business and, jurisdiction - , it is necessary to define, in the light of the written and oral proceedings, the position resulting from the special agreement. For, the Court having obtained cognizance of the present case by notification of a special agreement concluded between the Parties in the case, it is rather to the terms of this agreement than to the submissions of the Parties that the Court must have recourse in establishing the precise points which it has to decide. In this respect the following observations should be made:

1. – The collision which occurred on August 2nd, 1926, between the S. S. *Lotus,* flying the French flag, and the S. S. *Boz-Kourt,* flying the Turkish flag, took place on the high seas: the territorial jurisdiction of any State other than France and Turkey therefore does not enter into account.

2. – The violation, if any, of the principles of international law would have consisted in the taking of criminal proceedings against Lieutenant Demons. It is not therefore a question relating to any particular step in these proceedings - such as his being put to trial, his arrest, his detention pending trial or the judgment given by the Criminal Court of Stamboul - but of the very fact of the Turkish Courts exercising criminal jurisdiction. That is why the arguments put forward by the Parties in both phases of the proceedings relate exclusively to the question whether Turkey has or has not, according to the principles of international law, jurisdiction to prosecute in this case.

The Parties agree that the Court has not to consider whether the prosecution was in conformity with Turkish law; it need not therefore consider whether, apart from the actual question of jurisdiction, the provisions of Turkish law cited by Turkish authorities were really applicable in this case, or whether the manner in which the proceedings against Lieutenant Demons were conducted might constitute a denial of justice, and accordingly, a violation of international law. The discussions have borne exclusively upon the question whether criminal jurisdiction does or does not exist in this case.

3. – The prosecution was instituted because the loss of the *Boz-Kourt* involved the death of eight Turkish sailors and passengers. It is clear, in the first place, that this result of the collision constitutes a factor essential for the institution of the criminal proceedings in question; secondly, it follows from the statements of the two Parties that no criminal intention has been imputed to either of the officers responsible for navigating the two vessels; it is therefore a case of prosecution for involuntary manslaughter. The French Government maintains that breaches of navigation regulations fall exclusively within the jurisdiction of the State under whose flag the vessel sails ; but it does not argue that a collision between two vessels cannot also bring into operation the sanctions which apply to criminal law in cases of manslaughter. The precedents cited by it and relating to collision cases all assume the possibility of criminal proceedings with a view to the infliction of such sanctions, the dispute being confined to the question of jurisdiction concurrent or exclusive - which another State might claim in this respect. As has already been observed, the Court has not to consider the lawfulness of the prosecution under Turkish law; questions of criminal law relating to the justification of the prosecution and consequently to the existence of a *nexus causalis* between the actions of Lieutenant Demons and the loss of eight Turkish nationals are not relevant to the issue so far as the Court is concerned. Moreover, the exact conditions in which these persons perished do not appear from the documents submitted to the Court ; nevertheless, there is no doubt that their death may be regarded as the direct outcome of the collision, and the French Government has not contended that this relation of cause and effect cannot exist.

4. – Lieutenant Demons and the captain of the Turkish steamship were prosecuted jointly and simultaneously. In regard to the conception of "connexity" of offences *(connexite),* the Turkish Agent in the submissions of his Counter-Case has referred to

the Turkish Code of criminal procedure for trial, the provisions of which are said to have been taken from the corresponding French Code. Now in French law, amongst other factors, coincidence of time and place may give rise to "connexity" *(connexite).* In this case, therefore, the Court interprets this conception as meaning that the proceedings against the captain of the Turkish vessel in regard to which the jurisdiction of the Turkish Courts is not disputed, and the proceedings against Lieutenant Demons, have been regarded by the Turkish authorities, from the point of view of the investigation of the case, as one and the same prosecution, since the collision of the two steamers constitutes a complex of acts the consideration of which should, from the standpoint of Turkish criminal law, be entrusted to the same court.

5. – The prosecution was instituted in pursuance of Turkish legislation. The special agreement does not indicate what clause or clauses of that legislation apply. No document has been submitted to the Court indicating on what article of the Turkish Penal Code the prosecution was based; the French Government however declares that the Criminal Court claimed jurisdiction under Article 6 of the Turkish Penal Code, and far from denying this statement, Turkey, in the submissions of her Counter-Case, contends that that article is in conformity with the principles of international law. It does not appear from the proceedings whether the prosecution was instituted solely on the basis of that article.

Article 6 of the Turkish Penal Code, Law No. 765 of March 1st, 1926 (Official Gazette No. 320 of March 13th, 1926), runs as follows:

[Translation.]

"Any foreigner who, apart from the cases contemplated by Article 4, commits an offence abroad to the prejudice of Turkey or of a Turkish subject, for which offence Turkish law prescribes a penalty involving loss of freedom for a minimum period of not less than one year, shall be punished in accordance with the Turkish Penal Code provided that he is arrested in Turkey. The penalty shall however be reduced by one third and instead of the death penalty, twenty years of penal servitude shall be awarded.

"Nevertheless, in such cases, the prosecution will only be instituted at the request of the Minister of Justice or on the complaint of the injured Party.

"If the offence committed injures another foreigner, the guilty person shall be punished at the request of the Minister of Justice, in accordance with the provisions set out in the first paragraph of this article, provided however that:

"(1) the article in question is one for which Turkish law prescribes a penalty involving loss of freedom for a minimum period of three years;

"(2) there is no extradition treaty or that extradition has not been accepted either by the government of the locality where the guilty person has committed the offence or by the government of his own country."

Even if the Court must hold that the Turkish authorities had seen fit to base the prosecution of Lieutenant Demons upon the above-mentioned Article 6, the question submitted to the Court is not whether that article is compatible with the principles of international law; it is more general. The Court is asked to state whether or not the principles of international law prevent Turkey from instituting criminal proceedings against Lieutenant Demons under Turkish law. Neither the conformity of Article 6 in itself with the principles of international law nor the application of that article by the Turkish authorities constitutes the point at issue ; it is the very fact of the institution of

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proceedings which is held by France to be contrary to those principles. Thus the French Government at once protested against his arrest, quite independently of the question as to what clause of her legislation was relied upon by Turkey to justify it. The arguments put forward by the French Government in the course of the proceedings and based on the principles which, in its contention, should govern navigation on the high seas, show that it would dispute Turkey's jurisdiction to prosecute Lieutenant Demons, even if that prosecution were based on a clause of the Turkish Penal Code other than Article 6, assuming for instance that the offence in question should be regarded, by reason of its consequences, to have been actually committed on Turkish territory.

II.

Having determined the position resulting from the terms of the :special agreement, the Court must now ascertain which were the principles of international law that the prosecution of Lieutenant Demons could conceivably be said to contravene.

It is Article 15 of the Convention of Lausanne of July 24th, 1923, respecting conditions of residence and business and jurisdiction, which refers the contracting Parties to the principles of international law as regards the delimitation of their respective jurisdiction.

This clause is as follows:

"Subject to the provisions of Article 16, all questions of jurisdiction shall, as between Turkey and the other contracting Powers, be decided in accordance with the principles of international law."

The French Government maintains that the meaning of the expression "principles of international law" in this article should be sought in the light of the evolution of the Convention. Thus it states that during the preparatory work, the Turkish Government, by means of an amendment to the relevant article of a draft for the Convention, sought to extend its jurisdiction to crimes committed in the territory of a third State, provided that, under Turkish law, such crimes were within the jurisdiction of Turkish Courts. This amendment, in regard to which the representatives of France and Italy made reservations, was definitely rejected by the British representative ; and the question having been subsequently referred to the Drafting Committee, the latter confined itself in its version of the draft to a declaration to the effect that questions of jurisdiction should be decided in accordance with the principles of international law. The French Government deduces from these facts that the prosecution of Demons is contrary to the intention which guided the preparation of the Convention of Lausanne.

The Court must recall in this connection what it has said in some of its preceding judgments and opinions, namely, that there is no occasion to have regard to preparatory work if the text of a convention is sufficiently clear in itself. Now the Court considers that the words "principles of international law", as ordinarily used, can only mean international law as it is applied between all nations belonging to the community of States. This interpretation is borne out by the context of the article itself which says that the principles of international law are to determine questions of jurisdiction - not only criminal but also civil - between the contracting Parties, subject only to the exception provided for in Article 16. Again, the preamble of the Convention says that the High Contracting Parties are desirous of effecting a settlement in accordance "with modem international law", and Article 28 of the Treaty of Peace of Lausanne, to which the Convention in question is annexed, decrees the complete abolition of the Capitulations "in every respect". In these circumstances it is impossible - except in pursuance of a definite stipulation - to construe the expression "principles of international law" otherwise than as meaning the principles which are in force between all independent nations and which therefore apply equally to all the contracting Parties.

Moreover, the records of the preparation of the Convention respecting conditions of residence and business and jurisdiction would not furnish anything calculated to overrule the construction indicated by the actual terms of Article 15. It is true that the representatives of France, Great Britain and Italy rejected the Turkish amendment

already mentioned. But only the British delegate - and this conformably to British municipal law which maintains the territorial principle in regard to criminal jurisdiction - stated the reasons for his opposition to the Turkish amendment ; the reasons for the French and Italian reservations and for the omission from the draft prepared by the Drafting Committee of any definition of the scope of the criminal jurisdiction in respect of foreigners, are unknown and might have been unconnected with the arguments now advanced by France.

It should be added to these observations that the original draft of the relevant article, which limited Turkish jurisdiction to crimes committed in Turkey itself, was also discarded by the Drafting Committee; this circumstance might with equal justification give the impression that the intention of the framers of the Convention was not to limit this jurisdiction in any way.

The two opposing proposals designed to determine definitely the area of application of Turkish criminal law having thus been discarded, the wording ultimately adopted by common consent for Article 15 can only refer to the principles of general international law relating to jurisdiction.

III.

The Court, having to consider whether there are any rules of international law which may have been violated by the prosecution in pursuance of Turkish law of Lieutenant Demons, is confronted in the first place by a question of principle which, in the written and oral arguments of the two Parties, has proved to be a fundamental one. The French Government contends that the Turkish Courts, in order to have jurisdiction, should be able to point to some title to jurisdiction recognized by international law in favour of Turkey. On the other hand, the Turkish Government takes the view that Article 15 allows Turkey jurisdiction whenever such jurisdiction does not come into conflict with a principle of international law.

The latter view seems to be in conformity with the special agreement itself, No. I of which asks the Court to say whether Turkey has acted contrary to the principles of international law and, if so, what principles. According to the special agreement, therefore, it is not a question of stating principles which would permit Turkey to take criminal proceedings, but of formulating the principles, if any, which might have been violated by such proceedings.

This way of stating the question is also dictated by the very nature and existing conditions of international law.

International law governs relations between independent States. The rules of law binding upon States therefore emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law and established in order to regulate the relations between these co-existing independent communities or with a view to the achievement of common aims. Restrictions upon the independence of States cannot therefore be presumed.

Now the first and foremost restriction imposed by international law upon a State is that – failing the existence of a permissive rule to the contrary – it may not exercise its power in any form in the territory of another State. In this sense jurisdiction is certainly territorial; it cannot be exercised by a State outside its territory except by virtue of a permissive rule derived from international custom or from a convention.

It does not, however, follow that international law prohibits a State from exercising jurisdiction in its own territory, in respect of any case which relates to acts which have taken place abroad, and in which it cannot rely on some permissive rule of international law. Such a view would only be tenable if international law contained a general prohibition to States to extend the application of their laws and the jurisdiction of their courts to persons, property and acts outside their territory, and if, as an exception to this general prohibition, it allowed States to do so in certain specific cases. But this is certainly not the case under international law as it stands at present. Far from laying down a general prohibition to the effect that States may not extend the application of

their laws and the jurisdiction of their courts to persons, property and acts outside their territory, it leaves them in this respect a wide measure of discretion, which is only limited in certain cases by prohibitive rules; as regards other cases, every State remains free to adopt the principles which it regards as best and most suitable.

This discretion left to States by international law explains the great variety of rules which they have been able to adopt without objections or complaints on the part of other States ; it is in order to remedy the difficulties resulting from such variety that efforts have been made for many years past, both in Europe and America, to prepare conventions the effect of which would be precisely to limit the discretion at present left to States in this respect by international law, thus making good the existing lacunæ in respect of jurisdiction or removing the conflicting jurisdictions arising from the diversity of the principles adopted by the various States.

In these circumstances all that can be required of a State is that it should not overstep the limits which international law places upon its jurisdiction ; within these limits, its title to exercise jurisdiction rests in its sovereignty.

It follows from the foregoing that the contention of the French Government to the effect that Turkey must in each case be able to cite a rule of international law authorizing her to exercise jurisdiction, is opposed to the generally accepted international law to which Article 13 of the Convention of Lausanne refers. Having regard to the terms of Article 15 and to the construction which the Court has just placed upon it, this contention would apply in regard to civil as well as to criminal cases, and would be applicable on conditions of absolute reciprocity as between Turkey and the other contracting Parties; in practice, it would therefore in many cases result in paralysing the action of the courts, owing to the impossibility of citing a universally accepted rule on which to support the exercise of their jurisdiction.

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Nevertheless, it has to be seen whether the foregoing considerations really apply as regards criminal jurisdiction, or whether this jurisdiction is governed by a different principle: this might be the outcome of the close connection which for a long time existed between the conception of supreme criminal jurisdiction and that of a State, and also by the especial importance of criminal jurisdiction from the point of view of the individual.

Though it is true that in all systems of law the principle of the territorial character of criminal law is fundamental, it is equally true that all or nearly all these systems of law extend their action to offences committed outside the territory of the State which adopts them, and they do so in ways which vary from State to State. The territoriality of criminal law, therefore, is not an absolute principle of international law and by no means coincides with territorial sovereignty.

This situation may be considered from two different standpoints corresponding to the points of view respectively taken up by the Parties. According to one of these standpoints, the principle of freedom, in virtue of which each State may regulate its legislation at its discretion, provided that in so doing it does not come in conflict with a restriction imposed by international law, would also apply as regards law governing the scope of jurisdiction in criminal cases. According to the other standpoint, the exclusively territorial character of law relating to this domain constitutes a principle which, except as otherwise expressly provided, would, *ipso facto,* prevent States from extending the criminal jurisdiction of their courts beyond their frontiers; the exceptions in question, which include for instance extraterritorial jurisdiction over nationals and over crimes directed against public safety, would therefore rest on special permissive rules forming part of international law.

Adopting, for the purpose of the argument, the standpoint of the latter of these two systems, it must be recognized that, in the absence of a treaty provision, its correctness depends upon whether there is a custom having the force of law

establishing it. The same is true as regards the applicability of this system - assuming it to have been recognized as sound - in the particular case. It follows that, even from this point of view, before ascertaining whether there may be a rule of international law expressly allowing Turkey to prosecute a foreigner for an offence committed by him outside Turkey, it is necessary to begin by establishing both that the system is well-founded and that it is applicable in the particular case. Now, in order to establish the first of these points, one must, as has just been seen, prove the existence of a principle of international law restricting the discretion of States as regards criminal legislation.

Consequently, whichever of the two systems described above be adopted, the same result will be arrived at in this particular case: the necessity of ascertaining whether or not under international law there is a principle which would have prohibited Turkey, in the circumstances of the case before the Court, from prosecuting Lieutenant Demons. And moreover, on either hypothesis, this must be ascertained by examining precedents offering a close analogy to the case under consideration; for it is only from precedents of this nature that the existence of a general principle applicable to the particular case may appear. For if it were found, for example, that, according to the practice of States, the jurisdiction of the State whose flag was, flown was not established by international law as exclusive with regard to collision cases on the high seas, it would not be necessary to ascertain whether there were a more general restriction; since, as regards that restriction-supposing that it existed-the fact that it had been established that there was no prohibition in respect of collision on the high seas would be tantamount to a special permissive rule.

The Court therefore must, in any event ascertain whether or not there exists a rule of international law limiting the freedom of States to extend the criminal jurisdiction of their courts to a situation uniting the circumstances of the present case.

IV.

The Court will now proceed to ascertain whether general international law, to which Article 15 of the Convention of Lausanne refers, contains a rule prohibiting Turkey from prosecuting Lieutenant Demons.

For this purpose, it will in the first place examine the value of the arguments advanced by the French Government, without however omitting to take into account other possible aspects of the problem, which might show the existence of a restrictive rule applicable in this case.

The arguments advanced by the French Government, other than those considered above, are, in substance, the three following:

(1) International law does not allow a State to take proceedings with regard to offences committed by foreigners abroad, simply by reason of the nationality of the victim ; and such is the situation in the present case because the offence must be regarded as having been committed on board the French vessel.

(2) International law recognizes the exclusive jurisdiction of the State whose flag is flown as regards everything which occurs on board a ship on the high seas.

(3) Lastly, this principle is especially applicable in a collision case.

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As regards the first argument, the Court feels obliged in the first place to recall that its examination is strictly confined to the specific situation in the present case, for it is only in regard to this situation that its decision is asked for.

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As has already been observed, the characteristic features of the situation of fact are as follows : there has been a collision on the high seas between two vessels flying different flags, on one of which was one of the persons alleged to be guilty of the offence, whilst the victims were on board the other.

This being so, the Court does not think it necessary to consider the contention that a State cannot punish offences committed abroad by a foreigner simply by reason of the nationality of the victim. For this contention only relates to the case where the nationality of the victim is the only criterion on which the criminal jurisdiction of the State is based. Even if that argument were correct generally speaking - and in regard to this the Court reserves its opinion - it could only be used in the present case if international law forbade Turkey to take into consideration the fact that the offence produced its effects on the Turkish vessel and consequently in a place assimilated to Turkish territory in which the application of Turkish criminal law cannot be challenged, even in regard to offences committed there by foreigners. But no such rule of international law exists. No argument has come to the knowledge of the Court from which it could be deduced that States recognize themselves to be under an obligation towards each other only to have regard to the place where the author of the offence happens to be at the time of the offence. On the contrary, it is certain that the courts of many countries, even of countries which have given their criminal legislation a strictly territorial character, interpret criminal law in the sense that offences, the authors of which at the moment of commission are in the territory of another State, are nevertheless to be regarded as having been committed in the national territory, if one of the constituent elements of the offence, and more especially its effects, have taken place there. French courts have, in regard to a variety of situations, given decisions sanctioning this way of interpreting the territorial principle. Again, the Court does not know of any cases in which governments have protested against the fact that the criminal law of some country contained a rule to this effect or that the courts of a country construed their criminal law in this sense. Consequently, once it is admitted that the effects of the offence were produced on the Turkish vessel, it becomes impossible to hold that there is a rule of international law which prohibits Turkey from prosecuting Lieutenant Demons because of the fact that the author of the offence was on board the French ship. Since, as has already been observed, the special agreement does not deal with the provision of Turkish law under which the prosecution was instituted, but only with the question whether the prosecution should be regarded as contrary to the principles of international law, there is no reason preventing the Court from confining itself to observing that, in this case, a prosecution may also be justified from the point of view of the so-called territorial principle.

Nevertheless, even if the Court had to consider whether Article 6 of the Turkish Penal Code was compatible with international law, and if it held that the nationality of the victim did not in all circumstances constitute a sufficient basis for the exercise of criminal jurisdiction by the State of which the victim was a national, the Court would arrive at the same conclusion for the reasons just set out. For even were Article 6 to be held incompatible with the principles of international law, since the prosecution might have been based on another provision of Turkish law which would not have been contrary to any principle of international law, it follows that it would be impossible to deduce from the mere fact that Article 6 was not in conformity with those principles, that the prosecution itself was contrary to them. The fact that the judicial authorities may have committed an error in their choice of the legal provision applicable to the particular case and compatible with international law only concerns municipal law and can only affect international law in so far as a treaty provision enters into account, or the possibility of a denial of justice arises.

It has been sought to argue that the offence of manslaughter cannot be localized at the spot where the mortal effect is felt ; for the effect is not intentional and it cannot be said that there is, in the mind of the delinquent, any culpable intent directed towards the territory where the mortal effect is produced. In reply to this argument it might be observed that the effect is a factor of outstanding importance in offences such as manslaughter, which are punished precisely in consideration of their effects rather than of the subjective intention of the delinquent. But the Court does not feel called upon to consider this question, which is one of interpretation of Turkish criminal law. It will suffice to observe that no argument has been put forward and nothing has been found from which it would follow that international law has established a rule imposing on

States this reading of the conception of the offence of manslaughter.

* * *

The second argument put forward by the French Government is the principle that the State whose flag is flown has exclusive jurisdiction over everything which occurs on board a merchant ship on the high seas.

It is certainly true that – apart from certain special cases which are defined by international law - vessels on the high seas are subject to no authority except that of the State whose flag they fly. In virtue of the principle of the freedom of the seas, that is to say, the absence of any territorial sovereignty upon the high seas, no State may exercise any kind of jurisdiction over foreign vessels upon them. Thus, if a war vessel, happening to be at the spot where a collision occurs between a vessel flying its flag and a foreign vessel, were to send on board the latter an officer to make investigations or to take evidence, such an act would undoubtedly be contrary to international law.

But it by no means follows that a State can never in its own territory exercise jurisdiction over acts which have occurred on board a foreign ship on the high seas. A corollary of the principle of the freedom of the seas is that a ship on the high seas is assimilated to the territory of the State the flag of which it flies, for, just as in its own territory, that State exercises its authority, upon it, and no other State may do so. All that can be said is that by virtue of the principle of the freedom of the seas, a ship is placed in the same position as national territory but there is nothing to support the claim according to which the rights of the State under whose flag the vessel sails may go farther than the rights which it exercises within its territory properly so called. It follows that what occurs on board a vessel on the high seas must be regarded as if it occurred on the territory of the State whose flag the ship flies. If, therefore, a guilty act committed on the high seas produces its, effects on a vessel flying another flag or in foreign territory, the same principles must be applied as if the territories of two different States were concerned, and the conclusion must therefore be drawn that there is no rule of international law prohibiting the State to which the ship on which the effects of the offence have taken place belongs, from regarding the offence as having been committed in its territory and prosecuting, accordingly, the delinquent.

This conclusion could only be overcome if it were shown that there was a rule of customary international law which, going further than the principle stated above, established the exclusive jurisdiction of the State whose flag was flown. The French Government has endeavoured to prove the existence of such a rule, having recourse for this purpose to the teachings of publicists, to decisions of municipal and international tribunals, and especially to conventions which, whilst creating exceptions to the principle of the freedom of the seas by permitting the war and police vessels of a State to exercise a more or less extensive control over the merchant vessels of another State, reserve jurisdiction to the courts of the country whose flag is flown by the vessel proceeded against.

In the Court's opinion, the existence of such a rule has not been conclusively proved.

In the first place, as regards teachings of publicists, and apart from the question as to what their value may be from the point of view of establishing the existence of a rule of customary law, it is no doubt true that all or nearly all writers teach that ships on the high seas are subject exclusively to the jurisdiction of the State whose flag they fly. But the important point is the significance attached by them to this principle; now it does not appear that in general, writers bestow upon this principle a scope differing from or wider than that explained above and which is equivalent to saying that the jurisdiction of a State over vessels on the high seas is the same in extent as its jurisdiction in its own territory. On the other hand, there is no lack of writers who, upon a close study of the special question whether a State can prosecute for offences committed on board a foreign ship on the high seas, definitely come to the conclusion that such offences must

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be regarded as if they had been committed in the territory of the State whose flag the ship flies, and that consequently the general rules of each legal system in regard to offences committed abroad are applicable.

In regard to precedents, it should first be observed that, leaving aside the collision cases which will be alluded to later, none of them relates to offences affecting two ships flying the flags of two different countries, and that consequently they are not of much importance in the case before the Court. The case of the *Costa Rica Packet* is no exception, for the prauw on which the alleged depredations took place was adrift without flag or crew, and this circumstance certainly influenced, perhaps decisively, the conclusion arrived at by the arbitrator.

On the other hand, there is no lack of cases in which a State has claimed a right to prosecute for an offence, committed on board a foreign ship, which it regarded as punishable under its legislation. Thus Great Britain refused the request of the United States for the extradition of John Anderson, a British seaman who had committed homicide on board an American vessel, stating that she did not dispute the jurisdiction of the United States but that she was entitled to exercise hers concurrently. This case, to which others might be added, is relevant in spite of Anderson's British nationality, in order to show that the principle of the exclusive jurisdiction of the country whose flag the vessel flies is not universally accepted.

The cases in which the exclusive jurisdiction of the State whose flag was flown has been recognized would seem rather to have been cases in which the foreign State was interested only by reason of the nationality of the victim, and in which, according to the legislation of that State itself or the practice of its courts, that ground was not regarded as sufficient to authorize prosecution for an offence committed abroad by a foreigner.

Finally, as regards conventions expressly reserving jurisdiction exclusively to the State whose flag is flown, it is not absolutely certain that this stipulation is to be regarded as expressing a general principle of law rather than as corresponding to the extraordinary jurisdiction which these conventions confer on the state-owned ships of a particular country in respect of ships of another country on the high seas. Apart from that, it should be observed that these conventions relate to matters of a particular kind, closely connected with the policing of the seas, such as the slave trade, damage to submarine cables, fisheries, etc., and not to common-law offences. Above all it should be pointed out that the offences contemplated by the conventions in question only concern a single ship; it is impossible therefore to make any deduction from them in regard to matters which concern two ships and consequently the jurisdiction of two different States.

The Court therefore has arrived at the conclusion that the second argument put forward by the French Government does not, any more than the first, establish the existence of a rule of international law prohibiting Turkey from prosecuting Lieutenant Demons.

* * *

It only remains to examine the third argument advanced by the French Government and to ascertain whether a rule specially applying to collision cases has grown up, according to which criminal proceedings regarding such cases come exclusively within the jurisdiction of the State whose flag is flown.

In this connection, the Agent for the French Government has drawn the Court's attention to the fact that questions of jurisdiction in collision cases, which frequently arise before civil courts, are but rarely encountered in the practice of criminal courts. He deduces from this that, in practice, prosecutions only occur before the courts of the State whose flag is flown and that that circumstance is proof of a tacit consent on the part of States and, consequently, shows what positive international law is in collision cases.

In the Court's opinion, this conclusion is not warranted. Even if the rarity of the judicial decisions to be found among the reported cases were sufficient to prove in point of fact the circumstance alleged by the Agent for the French Government, it would merely

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show that States had often, in practice, abstained from instituting criminal proceedings, and not that they recognized themselves as being obliged to do so; for only if such abstention were based on their being conscious of having a duty to abstain would it be possible to speak of an international custom. The alleged fact does not allow one to infer that States have been conscious of having such a duty; on the other hand, as will presently be seen, there are other circumstances calculated to show that the contrary is true.

So far as the Court is aware there are no decisions of international tribunals in this matter; but some decisions of municipal courts have been cited. Without pausing to consider the value to be attributed to the judgments of municipal courts in connection with the establishment of the existence of a rule of international law, it will suffice to observe that the decisions quoted sometimes support one view and sometimes the other. Whilst the French Government have been able to cite the *Ortigia-Oncle-Joseph* case before the Court of Aix and the *Franconia-Strathclyde* case before the British Court for Crown Cases Reserved, as being in favour of the exclusive jurisdiction of the State whose flag is flown, on the other hand the *Ortigia-Oncle-Joseph* case before the Italian Courts and the *Ekbatana-West-Hinder* case before the Belgian Courts have been cited in support of the opposing contention.

Lengthy discussions have taken place between the Parties as to the importance of each of these decisions as regards the details of which the Court confines itself to a reference to the Cases and Counter-Cases of the Parties. The Court does not think it necessary to stop to consider them. It will suffice to observe that, as municipal jurisprudence is thus divided, it is hardly possible to see in it an indication of the existence of the restrictive rule of international law which alone could serve as a basis for the contention of the French Government.

On the other hand, the Court feels called upon to lay stress upon the fact that it does not appear that the States concerned have objected to criminal proceedings in respect of collision cases before the courts of a country other than that the flag of which was flown, or that they have made protests: their conduct does not appear to have differed appreciably from that observed by them in all cases of concurrent jurisdiction. This fact is directly opposed to the existence of a tacit consent on the part of States to the exclusive jurisdiction of the State whose flag is flown, such as the Agent for the French Government has thought it possible to deduce from the infrequency of questions of jurisdiction before criminal courts. It seems hardly probable, and it would not be in accordance with international practice that the French Government in the *Ortigia-Oncle-Joseph* case and the German Government in the *Ekbalana-West-Hinder* case would have omitted to protest against the exercise of criminal jurisdiction have by the Italian and Belgian Courts, if they had really thought that this was a violation of international law.

As regards the *Franconia* case (R. v. Keyn 1877, L.R. 2 Ex. Div. 63) upon which the Agent for the French Government has particularly relied, it should be observed that the part of the decision which bears the closest relation to the present case is the part relating to the localization of the offence on the vessel responsible for the collision.

But, whatever the value of the opinion expressed by the majority of the judges on this particular point may be in other respects, there would seem to be no doubt that if, in the minds of these judges, it was based on a rule of international law, their conception of that law, peculiar to English jurisprudence, is far from being generally accepted even in common-law countries. This view seems moreover to be borne out by the fact that the standpoint taken by the majority of the judges in regard to the localization of an offence, the author of which is situated in the territory of one State whilst its effects are produced in another State, has been abandoned in more recent English decisions (R. v. Nillins, 1884, 53 L. J. 157; R. v. Godfrey, L. R. 1923, 1 K. B. 24). This development of English case-law tends to support the view that international law leaves States a free hand in this respect.

In support of the theory in accordance with which criminal jurisdiction in collision cases would exclusively belong to the State of the flag flown by the ship, it has been contended that it is a question of the observance of the national regulations of each merchant marine and that effective punishment does not consist so much in the

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infliction of some months' imprisonment upon the captain as in the cancellation of his certificate as master, that is to say, in depriving him of the command of his ship.

In regard to this, the Court must observe that in the present case a prosecution was instituted for an offence at criminal law and not for a breach of discipline. Neither the necessity of taking administrative regulations into account (even ignoring the circumstance that it is a question of uniform regulations adopted by States as a result of an international conference) nor the impossibility of applying certain disciplinary penalties can prevent the application of criminal law and of penal measures of repression.

The conclusion at which the Court has therefore arrived is that there is no rule of international law in regard to collision cases to the effect that criminal proceedings are exclusively within the

jurisdiction of the State whose flag is flown.

This conclusion moreover is easily explained if the manner in which the collision brings the jurisdiction of two different countries into play be considered.

The offence for which Lieutenant Demons appears to have been prosecuted was an act – of negligence or imprudence – having its origin on board the *Lotus,* whilst its effects made themselves felt on board the *Boz-Kourt.* These two elements are, legally, entirely inseparable, so much so that their separation renders the offence non-existent. Neither the exclusive jurisdiction of either State, nor the limitations of the jurisdiction of each to the occurrences which took place on the respective ships would appear calculated to satisfy the requirements of justice and effectively to protect the interests of the two States. It is only natural that each should be able to exercise jurisdiction and to do so in respect of the incident as a whole. It is therefore a case of concurrent jurisdiction.

* * *

The Court, having arrived at the conclusion that the arguments advanced by the French Government either are irrelevant to the issue or do not establish the existence of a principle of international law precluding Turkey from instituting the prosecution which was in fact brought against Lieutenant Demons, observes that in the fulfilment of its task of itself ascertaining what the international law is, it has not confined itself to a consideration of the arguments put forward, but has included in its researches all precedents, teachings and facts to which it had access and which might possibly have revealed the existence of one of the principles of international law contemplated in the special agreement. The result of these researches has not been to establish the existence of any such principle. It must therefore be held that there is no principle of international law, within the meaning of Article 15 of the Convention of Lausanne of July 24th, 1923, which precludes the institution of the criminal proceedings under consideration. Consequently, Turkey, by instituting, in virtue of the discretion which international law leaves to every sovereign State, the criminal proceedings in question, has not, in the absence of such principles, acted in a manner contrary to the principles of international law within the meaning of the special agreement.

In the last place the Court observes that there is no need for it to consider the question whether the fact that the prosecution of Lieutenant Demons was "joint" *(connexe)* with that of the captain of the *Boz-Kourt* would be calculated to justify an extension of Turkish jurisdiction. This question would only have arisen if the Court had arrived at the conclusion that there was a rule of international law prohibiting Turkey from prosecuting Lieutenant Demons; for only in that case would it have been necessary to ask whether that rule might be overridden by the fact of the connexity" (connexite) of the offences.

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Having thus answered the first question submitted by the special agreement in the negative, the Court need not consider the second question, regarding the pecuniary reparation which might have been due to Lieutenant Demons.

FOR THESE REASONS,

The Court,

having heard both Parties,

gives, by the President's casting vote - the votes being equally divided -, judgment to the effect

(1) that, following the collision which occurred on August 2nd, 1926, on the high seas between the French steamship Lotus and she Turkish steamship Boz-Kourt, and upon the arrival of the French ship at Stamboul, and in consequence of the loss of the *Boz-Kourt* having involved the death of eight Turkish nationals, Turkey, by instituting criminal proceedings in pursuance of Turkish law against Lieutenant Demons, officer of the watch on board the *Lotus* at the time of the collision, has not acted in conflict with the principles of international law, contrary to Article 15 of the Convention of Lausanne of July 24th, 1923, respecting conditions of residence and business and jurisdiction;

(2) that, consequently, there is no occasion to give judgment on the question of the pecuniary reparation which might have been due to Lieutenant Demons if Turkey, by prosecuting him as above stated, had acted in a manner contrary to the principles of international law.

This judgment having been drawn up in French in accordance with the terms of Article 39, paragraph 1, second sentence, of the Statute of the Court, an English translation is attached thereto.

Done at the Peace Palace, The Hague, this seventh day of September, nineteen hundred and twenty-seven, in three copies, one of which is to be placed in the archives of the Court, and the others to be transmitted to the Agents of the respective Parties.

(Signed) Max Huber,

President.

(Signed) A. Hammarskjold,

Registrar.

MM. Loder, former President, Weiss, Vice-President, and Lord Finlay, MM. Nyholm and Altamira, Judges, declaring that they are unable to concur in the judgment delivered by the Court and availing themselves of the right conferred on them by Article ,of the Statute, have delivered the separate opinions which follow

hereafter.

Mr. Moore, dissenting from the judgment of the Court only on the ground of the connection of the criminal proceedings in the case with Article 6 of the Turkish Penal Code, also delivered a separate opinion.

(Initialled) M. H.

THE SCHOONER EXCHANGE v. M'FADDON & OTHERS.

SUPREME COURT OF THE UNITED STATES

11 U.S. 116; 3 L. Ed. 287; 7 Cranch 116

FEBRUARY, 1812 Term

PRIOR HISTORY: THIS being a cause in which the sovereign right claimed by NAPOLEON, the reigning emperor of the French, and the political relations between the United States and France, were involved, it was, upon the suggestion of the Attorney General, ordered to a hearing in preference to other causes which stood before it on the docket.

It was an appeal from the sentence of the Circuit Court of the United States, for the district of Pennsylvania, which reversed the sentence of the District Court, and ordered the vessel to be restored to the libellants.

The case was this -- on the 24th of August, 1811, John M'Faddon & William Greetham, of the State of Maryland, filed their libel in the District Court of the United States, for the District of Pennsylvania, against the Schooner Exchange, setting forth that they were her sole owners, on the 27th of October, 1809, when she sailed from Baltimore, bound to St. Sebastians, in Spain. That while lawfully and peaceably pursuing her voyage, she was on the 30th of December, 1810, violently and forcibly taken by certain persons, acting under the decrees and orders of NAPOLEON, Emperor of the French, out of the custody of the libellants, and of their captain and agent, and was disposed of by those persons, or some of them, in violation of the rights of the libellants, and of the law of nations in that behalf. That she had been brought into the port of Philadelphia, and was then in the jurisdiction of the court, in possession of a certain Dennis M. Begon, her reputed captain or master. That no sentence or decree of condemnation had been pronounced against her, by and court of competent jurisdiction; but that the property of the libellants in her, remained unchanged and in full force. They therefore prayed the usual process of the court, to attach the vessel, and that she might be restored to them.

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On the 20th of September, Mr. Dallas, the Attorney of the United States, for the District of Pennsylvania, appeared, and (at the instance of the executive department of the government of the United States, as it is understood,) filed a suggestion, to the following effect:

Protesting that he does not know, and does not admit the truth of the allegations contained in the libel, he suggests and gives the court to understand and be informed,

That in as much as there exists between the United States of America and Napoleon, emperor of France and king of Italy, &c. &c. a state of peace and amity; the public vessels of his said Imperial and Royal Majesty, conforming to the law of nations, and laws of the said United States, may freely enter the ports and harbors of the said United States, and at pleasure depart therefrom without seizure, arrest, detention or molestation. That a certain public vessel described, and known as the Balaou, or vessel, No. 5, belonging to his said Imperial and Royal Majesty, and actually employed in his service, under the command of the Sieur Begon, upon a voyage from Europe to the Indies, having encountered great stress of weather upon the high seas, was compelled to enter the port of Philadelphia, for refreshment and repairs, about the 22d of July, 1811. That having entered the said port from necessity, and not voluntarily; having procured the requisite refreshments and repairs, and having conformed in all things to the law of nations and the laws of the United States, was about to depart from the said port of Philadelphia, and to resume her voyage in the service of his said Imperial and Royal Majesty, when on the 24th of August, 1811, she was seized, arrested, and detained in pursuance of the process of attachment issued upon the prayer of the libellants. That the said public vessel had not, at any time, been violently and forcibly taken or captured from the libellants, their captain and agent on the high

seas, as prize of war, or otherwise; but that if the said public vessel, belonging to his said Imperial and Royal Majesty as aforesaid, ever was a vessel navigating under the flag of the United States, and possessed by the libellants, citizens thereof, as in their libel is a alleged, (which nevertheless, the said Attorney does not admit) the property of the libellants, in the said vessel was seized and divested, and the same became vested in his Imperial and Royal Majesty, within a port of his empire, or of a country occupied by his arms, out of the jurisdiction of the United States, and of any particular state of the United States, according to the decrees and laws of France, in such case provided. And the said Attorney submitting, whether, in consideration of the premises, the court will take cognizance of the cause, respectfully prays that the court will be pleased to order and decree, that the process of attachment, heretofore issued, be quashed; that the libel be dismissed with costs; and that the said public vessel, her tackle, &c. belonging to his said Imperial and Royal Majesty, be released, &c. And the said Attorney brings here into court, the original commission of the said Sieur Begon, &c.

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The District Attorney, produced the affidavits of the Sieur Begon, and the French consul, verifying the commission of the captain, and stating the fact, that the public vessels of the Emperor of France never carry with them any other document or evidence that they belong to him, than his flag, the commission, and the possession of his officers.

In the commission it was stated, that the vessel was armed at Bayonne.

On the 4th of October, 1811, the District Judge dismissed the libel with costs, upon the ground, that a public armed vessel of a foreign sovereign, in amity with our government, is not subject to the ordinary judicial tribunals of the country, so far as regards the question of title, by which such sovereign claims to hold the vessel.

From this sentence, the libellants appealed to the Circuit Court, where it was reversed, on the 28th of October, 1811.

From this sentence of reversal, the District Attorney, appealed to this Court.

[*135] **MARSHALL, Ch. J. Delivered the opinion of the Court as follows:**

This case involves the very delicate and important inquiry, whether an American citizen can assert, in an American court, a title to an armed national vessel, found within the waters of the United States.

The question has been considered with an earnest solicitude, that the decision may conform to those principles [*136] of national and municipal law by which it ought to be regulated.

In exploring an unbeaten path, with few, if any, aids from precedents or written law, the court has found it necessary to rely much on general principles, and on a a train of reasoning, founded on cases in some degree analogous to this.

The jurisdiction of courts is a branch of that which is possessed by the nation as an independent sovereign power.

The jurisdiction of the nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself. Any restriction upon it, deriving validity from an external source, would imply a diminution of its sovereignty to the extent of the restriction, and an investment of that sovereignty to the same extent in that power which could impose such restriction.

All exceptions, therefore, to the full and complete power of a nation within its own territories, must be traced up to the consent of the nation itself. They can flow from no other legitimate source.

This consent may be either express or implied. In the latter case, it is less determinate, exposed more to the uncertainties of construction; but, if understood, not less obligatory.

The world being composed of distinct sovereignties, possessing equal rights and equal independence, whose mutual benefit is promoted by intercourse with each other, and by an interchange of those good offices which humanity dictates and its wants require, all sovereigns have consented to a relaxation in practice, in cases under certain peculiar circumstances, of that absolute and complete jurisdiction within their respective territories which sovereignty confers.

This consent may, in some instances, be tested by common usage, and by common opinion, growing out of that usage.

[*137] A nation would justly be considered as violating its faith, although that faith might not be expressly plighted, which should suddenly and without previous notice, exercise its territorial powers in a manner not consonant to the usages and received obligations of the civilized world.

This full and absolute territorial jurisdiction being alike the attribute of every sovereign, and being incapable of conferring extra-territorial power, would not seem to contemplate foreign sovereigns nor their sovereign rights as its objects. One sovereign being in no respect amenable to another; and being bound by obligations of the highest character not to degrade the dignity of his nation, by placing himself or its sovereign rights within the jurisdiction of another, can be supposed to enter a foreign territory only under an express license, or in the confidence that the immunities belonging to his independent sovereign station, though not expressly stipulated, are reserved by implication, and will be extended to him.

This perfect equality and absolute independence of sovereigns, and this common interest impelling them to mutual intercourse, and an interchange of good offices with each other, have given rise to a class of cases in which every sovereign is understood to wave the exercise of a part of that complete exclusive territorial jurisdiction, which has been stated to be the attribute of every nation.

1st. One of these is admitted to be the exemption of the person of the sovereign from arrest or detention within a foreign territory.

If he enters that territory with the knowledge and license of its sovereign, that license, although containing no stipulation exempting his person from arrest, is universally understood to imply such stipulation.

Why has the whole civilized world concurred in this construction? The answer cannot be mistaken. A foreign sovereign is not understood as intending to subject himself to jurisdiction incompatible with his dignity, and the dignity of his nation, and it is to avoid this subjection [*138] that the license has been obtained. The character to whom it is given, and the object for which it is granted, equally require that it should be construed to impart full security to the person who has obtained it. This security, however need note be expressed; it is implied from the circumstances of the case.

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2d. A second case, standing on the same principles with the first, is the immunity which all civilized nations allow to foreign ministers.

Whatever may be the principle on which this immunity is established, whether we consider him as in the place of the sovereign he represents, or by a political fiction suppose him to be extra-territorial, and, therefore, in point of law, not within the jurisdiction of the sovereign at whose Court he resides; still the immunity itself is granted by the governing power of the nation to

which the minister is deputed. This fiction of exterritoriality could not be erected and supported against the will of the sovereign of the territory. He is supposed to assent to it.

This consent is not expressed. It is true that in some countries, and in this among others, a special law is enacted for the case. But the law obviously proceeds on the idea of prescribing the punishment of an act previously unlawful, not of granting to a foreign minister a privilege which he would not otherwise possess.

The assent of the sovereign to the very important and extensive exemptions from territorial jurisdiction [*139] which are admitted to attach to foreign ministers, is implied from the considerations that, without such exemption, every sovereign would hazard his own dignity by employing a public minister abroad. His minister would owe temporary and local allegiance to a foreign prince, and would be less competent to the objects of his mission. A sovereign committing the interests of his nation with a foreign power, to the care of a person whom he has selected for that purpose, cannot intend to subject is minister in any degree to that power; and, therefore, a consent to receive him, implies a consent that he shall possess those privileges which his principal intended he should retain -- privileges which are essential to the dignity of his sovereign, and to the duties he is bound to perform.

In what cases a minister, by infracting the laws of the country in which he resides, may subject himself to other punishment than will be inflicted by his own sovereign, is an inquiry foreign to the present purpose. If his crimes be such as to render him amenable to the local jurisdiction, it must be because they forfeit the privileges annexed to his character; and the minister, by violating the conditions under which he was received as the representative of a foreign sovereign, has surrendered the immunities granted on those conditions; or, according to the true meaning of the original assent, has ceased to be entitled to them.

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If there be no treaty applicable to the case, and the sovereign, from motives deemed adequate by himself, permits his ports to remain open to the public ships of foreign friendly powers, the conclusion seems irresistable, that they enter by his assent. And if they enter by his assent necessarily implied, no just reason is perceived by the Court for distinguishing their case from that of vessels which enter by express assent.

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"It is impossible to conceive," says Vattel, "that a Prince who sends an ambassador or any other minister can have any intention of subjecting him to the authority of a foreign power; and this consideration furnishes an additional argument, which completely establishes the independency of a public minister. If it cannot be reasonably presumed that his sovereign means to subject him to the authority of the prince to whom he is sent, the latter, in receiving the minister, consents to admit him on the footing of independency; and thus there exists between the two princes a tacit convention, which gives a new force to the natural obligation."

Equally impossible is it to conceive, whatever may be the construction as to private ships, that a prince who stipulates a passage for his troops, or an asylum for his ships of war in distress, should mean to subject his army or his navy to the jurisdiction of a foreign sovereign. And if this cannot be presumed, the sovereign of the port must be considered as having conceded the privilege to the extent in which it must have been understood to be asked.

To the Court, it appears, that where, without treaty, the ports of a nation are open to the private and public ships of a friendly power, whose subjects have also liberty without special license, to enter the country for business or amusement, a clear distinction is to be drawn between the rights accorded to private individuals or private trading vessels, and those accorded to public armed ships which constitute a part of the military force of the nation.

The preceding reasoning, has maintained the propositions that all exemptions from territorial jurisdiction, must be derived from the consent of the sovereign of the territory; that this consent may be implied or expressed; and that when implied, its extent must be regulated by the nature of the case, and the views under which the parties requiring and conceding it must be supposed to act.

[*144] When private individuals of one nation spread themselves through another as business or caprice may direct, mingling indiscriminately with the inhabitants of that other, or when merchant vessels enter for the purposes of trade, it would be obviously inconvenient and dangerous to society, and would subject the laws to continual infraction, and the government to degradation, if such individuals or merchants did not owe temporary and local allegiance, and were not amenable to the jurisdiction of the country. Nor can the foreign sovereign have any motive for wishing such exemption. His subjects thus passing into foreign countries, are not employed by him, nor are they engaged in national pursuits. Consequently there are powerful motives for not exempting persons of this description from the jurisdiction of the country in which they are found, and no one motive for requiring it. The implied license, therefore, under which they enter can never be construed to grant such exemption.

But in all respects different is the situation of a public armed ship. She constitutes a part of the military force of her nation; acts under the immediate and direct command of the sovereign; is employed by him in national objects. He has many and powerful motives for preventing those objects from being defeated by the interference of a foreign state. Such interference cannot take place without affecting his power and his dignity. The implied license therefore under which such vessel enters a friendly port, may reasonably be construed, and it seems to the Court, ought to be construed, as containing an exemption from the jurisdiction of the sovereign, within whose territory she claims the rites of hospitality.

Upon these principles, by the unanimous consent of nations, a foreigner is amenable to the laws of the place; but certainly in practice, nations have not yet asserted their jurisdiction over the public armed ships of a foreign sovereign entering a port open for their reception.

Bynkershoek, a jurist of great reputation, has indeed maintained that the property of a foreign sovereign is not distinguishable by any legal exemption from the [*145] property of an ordinary individual, and has quoted several cases in which courts have exercised jurisdiction over cases in which a foreign sovereign was made a party defendant.

Without indicating any opinion on this question, it may safely be said, that there is a manifest distinction between the private property of the person who happens to be a prince, and that military force which supports the sovereign power, and maintains the dignity and the independence of a nation. A prince, by acquiring private property in a foreign country, may possibly be considered as subjecting that property to the territorial jurisdiction; he may be considered as so far laying down the prince, and assuming the character of a private individual; but this he cannot be presumed to do with respect to any portion of that armed force, which upholds his crown, and the nation he is entrusted to govern.

The only applicable case cited by Bynkershoek, is that of the Spanish ships of war seized in Flushing for a debt due from the king of Spain. In that case, the states general interposed; and there is reason to believe, from the manner in which the transaction is stated, that, either by the interference of government, or the decision of the court, the vessels were released.

This case of the Spanish vessels is, it is believed, the only case furnished by the history of the world, of an attempt made by an individual to assert a claim against a foreign prince, by seizing the armed vessels of the nation. That this proceeding was at once arrested by the government, in a nation which appears to have asserted the power of proceeding in the same manner against the private property of the prince, would seem to furnish no feeble argument in support of the universality of the opinion in favor of the exemption claimed for ships of war. The distinction

made in our own laws between public and private ships would appear to proceed from the same opinion.

It seems then to the Court, to be a principle of public law, that national ships of war, entering the port of a friendly power open for their reception, are to be considered [*146] as exempted by the consent of that power from its jurisdiction.

Without doubt, the sovereign of the place is capable of destroying this implication. He may claim and exercise jurisdiction either by employing force, or by subjecting such vessels to the ordinary tribunals. But until such power be exerted in a manner not to be misunderstood, the sovereign cannot be considered as having imparted to the ordinary tribunals a jurisdiction, which it would be a breach of faith to exercise. Those general statutory provisions therefore which are descriptive of the ordinary jurisdiction of the judicial tribunals, which give an individual whose property has been wrested from him, a right to claim that property in the courts of the country, in which it is found, ought not, in the opinion of this Court, to be so construed as to give them jurisdiction in a case, in which the sovereign power has impliedly consented to wave its jurisdiction.

The arguments in favor of this opinion which have been drawn from the general inability of the judicial power to enforce its decisions in cases of this description, from the consideration, that the sovereign power of the nation is alone competent to avenge wrongs committed by a sovereign, that the questions to which such wrongs give birth are rather questions of policy than of law, that they are for diplomatic, rather than legal discussion, are of great weight, and merit serious attention. But the argument has already been drawn to a length, which forbids a particular examination of these points.

The principles which have been stated, will now be applied to the case at bar.

In the present state of the evidence and proceedings, the Exchange must be considered as a vessel, which was the property of the Libellants, whose claim is repelled by the fact, that she is now a national armed vessel, commissioned by, and in the service of the emperor of France. The evidence of this fact is not controverted. But it is contended, that it constitutes no bar to an enquiry into the validity of the title, by which the emperor holds this vessel. Every person, it is alleged, who is entitled to property brought within the jurisdiction of our Courts, has a [*147] right to assert his title in those Courts, unless there be some law taking his case out of the general rule. It is therefore said to be the right, and if it be the right, it is the duty of the Court, to enquire whether this title has been extinguished by an act, the validity of which is recognized by national or municipal law.

If the preceding reasoning be correct, the Exchange, being a public armed ship, in the service of a foreign sovereign, with whom the government of the United States is at peace, and having entered an American port open for her reception, on the terms on which ships of war are generally permitted to enter the ports of a friendly power, must be considered as having come into the American territory, under an implied promise, that while necessarily within it, and demeaning herself in a friendly manner, she should be exempt from the jurisdiction of the country.

If this opinion be correct, there seems to be a necessity for admitting that the fact might be disclosed to the Court by the suggestion of the Attorney for the United States.

I am directed to deliver it, as the opinion of the Court, that the sentence of the Circuit Court, reversing the sentence of the District Court, in the case of the Exchange be reversed, and that of the District Court, dismissing the libel, be affirmed.

United States District Court,
S.D. New York.

Adella Chiminya TACHIONA, on her own behalf on behalf of her late husband Tapfuma Chiminya Tachiona, and on behalf of all others similarly situated, Efridah Pfebve, on her own behalf and on behalf of her late brother Metthew Pfebve, Elliot Pfebve, on his own behalf and on behalf of his brother Metthew Pfebve, Evelyn Masaiti, on her own behalf, Maria Del Carmen Stevens, on her own behalf, on behalf of her late husband David Yendall Stevens, and on behalf of all others similarly situated, Plaintiffs,

v.

Robert Gabriel MUGABE, in his individual and personal capacity, Zimbabwe African National Union-Patriotic Front, Stan Mudenge, Jonathan Moyo, and Certain Other Unknown Named Senior Officers of ZANU-PF, Defendants.

No. 00 CIV. 6666(VM).

Oct. 30, 2001.

*263 DECISION AND ORDER

MARRERO, District Judge.

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*264 **1 Plaintiffs (hereinafter referred to collectively as "Plaintiffs") are citizens of Zimbabwe. They brought this suit as a class action in their own names and on behalf of other similarly situated Zimbabweans who Plaintiffs claim have suffered from wrongful actions they attribute to defendants. Plaintiffs' claims are lodged against Robert Gabriel Mugabe (hereinafter "Mugabe"), who is the President of Zimbabwe; Stan Mudenge (hereinafter "Mudenge"), Zimbabwe's Foreign Minister; and Jonathan Moyo, Minister for Information and Publicity of Zimbabwe; as well as against the Zimbabwe African National Union-Patriotic Front ("ZANU-PF"), the Zimbabwe government's ruling political party of which Mugabe is First Secretary and President, and Mudenge and Moyo are senior officers. As jurisdictional and substantive grounds for their action Plaintiffs invoke the Alien Tort Claims Act ("ATCA"), [FN1] the Torture Victim Protection Act ("TVPA"), [FN2] the general federal question jurisdictional statute, [FN3] and fundamental norms of international human rights law. [FN4]

FN1. 28 U.S.C. § 1350.

FN2. Pub.L. 102-256, 106 Stat. 73 (Mar. 12, 1992) (codified at 28 U.S.C. § 1350 Note).

FN3. 28 U.S.C. § 1331.

FN4. See Compl. 10, 173, 179-83, 188, 193, 199, 204, 211; see also infra notes 206-42 and accompanying text.

BACKGROUND

The principles at issue in this case hold ancient roots. They trace to a time when the concept of the sovereign embodied a dual meaning. It stood for both the abstract nation and the corporeal person of its ruler: the State was the monarch and the monarch was the State. The echoes of that notion resound most prominently in words that issue from the ancien régime, when perhaps not at all in haughty jest, but in a

pointed reflection of then perceived reality, France's King Louis XIV, in his enduring remark "L'état, c'est moi", proclaimed the state and himself synonymous.

*265 Old ideas die hard. And so, the core of the controversy now before the Court tests the residual vigor of a political and legal legacy of sovereign antiquity. At issue is whether and to what degree the duality that was once assumed as a truism of sovereignty, as though emanating from divine right, may still survive as a binding equation in a doctrine of sovereign immunity for a foreign head-of-state that would preclude this Court, as the United States Government here urges, from extending jurisdiction over the foreign government leaders here, no matter how grievous or unofficial the wrongs they are called upon to answer.

Conversely, Plaintiffs advance a more expansive theory. In essence, they posit that the concept of sovereignty has evolved, and that with it the traditional principles governing sovereign immunity changed, the world of these ideas over time scooped by the arcs of new realities above them, yielding ground to a modern age that, both in symbol and in fact, has witnessed "Diadems drop, and Doges surrender." [FN5] According to this view, in the ensuing progress of events and enlightened principles, the Court may find enough support to ground its exercise of judicial power over the foreign officials here.

FN5. Emily Dickinson, The Poems of Emily Dickinson 158 (Martha Dickinson Bianchi and Alfred Leete Hampson, eds.1930) (1890).

In the final analysis, as this Court concludes, the instant case is one in which hopes outpace remedy, personal demands for justice run higher than the availability of full and immediate legal recourse in this forum. The progression of the legal precepts and theories Plaintiffs here invoke, despite critical strides marked in recent years, still trails behind human aspirations and has some time and way to go to close the gap. Consequently, on the circumstances now before the Court, the measure of justice necessarily is gauged on a scale some may feel does not fully reckon all that is seen and unseen, and whose standards may account, perhaps disproportionately, for things not altogether discernible. Nonetheless, for the reasons described below the Court accepts the State Department's Suggestion of Immunity on behalf of Mugabe and Mudenge and dismisses the action as to them. Plaintiffs' motion for entry of a default judgment against ZANU-PF, however, is granted.

FACTS [FN6]

FN6. The statement of facts set forth below is based on the claims set forth in Plaintiffs' complaint and in the declarations of parties and witnesses, as well as exhibits submitted in support of Plaintiffs' Motion for Judgment by Default and their Answering Brief herein. See Compl.; Plaintiff's Answering Brief to the Suggestion of Immunity Submitted by the United States of America, dated Apr. 23, 2001 (hereinafter "Plaintiffs' Brief"); Declaration of Paul Sweeney in Support of Plaintiffs' Brief, dated Apr. 23, 2001 (hereinafter "Sweeney Decl."). The factual allegations detailed in these documents, in light of defendants' default, are deemed true for the purposes of this proceeding.

**2 The complaint asserts that the ZANU-PF led by President Mugabe and the other individual defendants acting in their personal capacities and as senior officers of ZANU-PF, planned and executed a campaign of violence designed to intimidate and suppress its burgeoning but peaceful political opposition, the Movement for Democratic Change ("MDC"). Specifically, Plaintiffs charge that

defendants' lawless conduct included "murder, torture, terrorism, rape, beatings, and destruction of property ...." [FN7] For reasons discussed below and critical to the legal dispute at *266 hand, Plaintiffs stress that the violent deeds associated with this campaign were all perpetrated by defendants and other agents of ZANU-PF acting individually, not by the government of Zimbabwe nor by Mugabe and Mudenge carrying out any public mandate or official duties. The complaint and supporting materials graphically depict acts of brutality this campaign inflicted upon its intended victims.

FN7. Compl. 15.

For present purposes, the Court accepts the uncontested assertions that the violence and wrongs Plaintiffs allege fall squarely within the conduct encompassed by the ATCA and TVPA and proscribed by universally recognized human rights norms. [FN8] On this basis, the Court adopts as findings of fact that, by reason of their support for the MDC, Tapfuma Chiminya, Metthew Pfebve, and David Stevens were all extrajudicially murdered; Metthew Pfebve and David Stevens were tortured; Efridah Pfebve and Evelyn Masaiti were attacked and beaten; and all of the named and unnamed Plaintiffs were in other ways terrorized by operatives of ZANU-PF operating in concert with or significantly aided by high-ranking Zimbabwe government officials acting under color of state law.

FN8. See infra notes 206-42 and accompanying text.

The actions taken against these individuals were part of an organized political campaign that occurred during the four-months preceding Zimbabwe's June 2000 Parliamentary elections. The violent drive was implemented, according to Plaintiffs, by ZANU-PF members who were trained and directed from the highest levels of ZANU-PF, and who acted pursuant to Mugabe's orders given through ZANU-PF's chain of command. Moreover, this effort was designed to intimidate all of ZANU-PF's political opposition through harassment, physical attacks and even assassination of targeted individuals.

The specific acts that comprise this conduct are set forth in considerable detail in the complaint and related documents in the record. For example, Plaintiffs assert that private individuals occupying a ZANU-PF vehicle attacked MDC members in a car on their way from filing a report with the police concerning a beating of another MDC member. After severely beating the three occupants of the car, the attackers then doused two of the occupants with gasoline and set them on fire. The ZANU-PF vehicle and the perpetrators remained at the scene while the victims burned. In addition, police officers in a vehicle nearby stopped at a distance and, though observing the MDC car in flames and the burning people, made no effort to stop the attack or the ZANU-PF vehicle when it fled from the scene. Instead, after the ZANU-PF vehicle had departed, the police sought, but were too late, to render assistance to the victims. One of the individuals who died in the attack was the late husband of the lead plaintiff in this case.

**3 In support of their factual assertions, and as confirmation of the concerted violence and lawlessness portrayed by the incidents described in the complaint, Plaintiffs cite to contemporary international expressions of concern and condemnation of events in Zimbabwe. They point, for example, to a U.S. Senate bill passed in 2000 condemning the campaign of violence that the ZANU-PF had "orchestrated and supported," and that continued at Mugabe's "explicit and public urging". [FN9] Likewise, the European Parliament adopted a series of resolutions expressing concern over human rights abuses allegedly perpetrated by Mugabe and ZANU-PF and resolved to *267 condemn "the sustained campaign

of murder, violence, intimidation and harassment by President Mugabe and the ruling ZANU-PF Party against political opponents, farm workers, white farmers, and homosexuals." [FN10] This resolution also found that "the ongoing breakdown in the rule of law in Zimbabwe is the direct result of the renewed cycle of violence initiated by President Mugabe against his political opponents" and deplored the treatment of Zimbabwe's Chief Justice, who was forced into retirement, and death threats reported against other judges. [FN11] Plaintiffs also point to press reports [FN12] of these events, and to an Amnesty International finding that "[d]uring the election campaign leading up to the parliamentary elections in June 2000 a pattern of violations that included extrajudicial execution and torture emerged." [FN13]

FN9. Zimbabwe Democracy Act of 2000, S. 2677, 106th Cong. (2000) (enacted).

FN10. Sweeney Decl., Ex. 2, Preamble A, D, F, G, 3.

FN11. Id.

FN12. See Sweeney Decl., Ex. 5, 60 Minutes (CBS Broadcast, January 21 2001).

FN13. Sweeney Decl., Ex. 1 at 3.

Plaintiffs served Mugabe and Mudenge with their pleadings while the officials were in New York City attending a conference at the United Nations. [FN14] To avoid particular diplomatic immunity rules that apply within United Nations Headquarters Area, [FN15] Plaintiffs arranged to serve process outside the boundaries of that district. Specifically, Plaintiffs assert that they served Mugabe as he arrived at an unofficial gathering organized by a private New York group which reportedly raises money for defendants under the name "Friends of the ZANU-PF" and which has nothing at all to do with the United Nations or the United States government. According to Plaintiffs, Mugabe chose to speak at this unofficial function precisely in order to defend his actions in Zimbabwe; to galvanize support for ZANU-PF; and to lobby the American public in opposition to legislation then pending before the U.S. Senate condemning ZANU- PF's campaign of violence.

FN14. The complaint also named Jonathan Moyo as a defendant. It appears that he was not personally served and Plaintiffs have not requested default judgment against him.

FN15. See 22 U.S.C. § 287 Note (Agreement Between The United Nations And The United States Of America Regarding The Headquarters Of The United Nations, Art. V, Section 15) (hereinafter the "Headquarters Agreement").

Defendants defaulted without any appearance before the Court. After Plaintiffs moved for entry of a default judgment, Mugabe and Mudenge submitted to the State Department a request for immunity. On February 23, 2001, the State Department responded by filing a Suggestion of Immunity on behalf of Mugabe and Mudenge. The Suggestion of Immunity asserts that the State Department informed the

Department of Justice that the "Department of State recognizes and allows the immunity of President Mugabe and Foreign Minister Mudenge from this suit" [FN16] and that "permitting this action to proceed against the President and Foreign Minister would be incompatible with the United States' foreign policy interests." [FN17] In connection with the Suggestion, the Government now urges dismissal of Plaintiffs' claims against Mugabe and Mudenge, and an order quashing or nullifying service of process against them. The Government's request asserts three grounds in *268 support of this result: (1) head-of-state immunity; (2) diplomatic immunity; and (3) personal inviolability attaching to both Mugabe and Mudenge. These theories and Plaintiffs' responses are discussed in turn below.

FN16. Suggestion of Immunity Submitted by the United States of America, dated February 23, 2001 (hereinafter the "Suggestion"), at 2-3.

FN17. Id. at 2.

DISCUSSION

I. HEAD-OF-STATE IMMUNITY

A. ABSOLUTE SOVEREIGN IMMUNITY DOCTRINE: THE SCHOONER EXCHANGE

**4 One legal manifestation of the longstanding conceptual identity of ruler and state, conveying the personification of the sovereign nation in the head- of-state, is the traditional doctrine of absolute sovereign immunity. This theory held that unless the protection were expressly waived, the sovereign state, acting through its officers and agents, was not subject to the jurisdiction of the judiciary, at least for acts taken by government agents in an official capacity. In the context of foreign nations, this principle was given expression and recognition early in American jurisprudence by the Supreme Court's 1812 decision in The Schooner Exchange v. McFaddon, [FN18] a case which "came to be regarded as extending virtually absolute immunity to foreign sovereigns." [FN19] There, McFaddon, claiming to be the rightful owner of an armed merchant vessel in the service of France, sought a court order to attach the ship when it sailed into an American port. Chief Justice Marshall ruled that, under an implied grant of immunity by the United States, a public armed ship of a friendly foreign nation, though having entered territory of this country, was exempt from the exercise of jurisdiction of United States courts.

FN18. 11 U.S. (7 Cranch) 116, 3 L.Ed. 287 (1812).

FN19. Verlinden v. B.V. Central Bank of Nigeria, 461 U.S. 480, 486, 103 S.Ct. 1962, 76 L.Ed.2d 81 (1983) (citing Berizzi Bros. Co. v. Pesaro, 271 U.S. 562, 46 S.Ct. 611, 70 L.Ed. 1088 (1926)); see also Republic of Mexico v. Hoffman, 324 U.S. 30, 34, 65 S.Ct. 530, 89 L.Ed. 729(1945); Ex Parte Peru, 318 U.S. 578, 587-89, 63 S.Ct. 793, 87 L.Ed. 1014 (1943).

The Schooner Exchange elaborated four enduring principles which form the cornerstone of foreign sovereign immunity jurisprudence and are central to the resolution of the issues at hand. First, Chief Justice Marshall observed that the jurisdiction of a sovereign state within its own territory, which derives from the perfect equality and independence of every nation and of which the jurisdiction of its courts is a

component, "is necessarily exclusive and absolute," subject to "no limitation not imposed by itself." [FN20]

FN20. The Schooner Exchange, 11 U.S. (7 Cranch) at 136.

Second, this full and absolute jurisdiction, an attribute of every sovereign, is incapable of conferring extra-territorial power and "would not seem to contemplate foreign sovereigns nor their sovereign rights as its objects," but by "common interest impel[s] them to mutual intercourse." [FN21] By this statement, The Schooner Exchange articulates the principles of comity and reciprocity which serve as the bedrock for the doctrine of sovereign immunity:

FN21. Id. at 137.

One sovereign being in no respect amenable to another; and being bound by obligations of the highest character not to degrade the dignity of his nation, by placing himself or its sovereign rights within the jurisdiction of another, can be supposed to enter a foreign territory only under an express license, or in the confidence that the immunities belonging *269 to his independent sovereign station, though not expressly stipulated, are reserved by implication, and will be extended to him. [FN22]

FN22. Id.

Third, all exceptions to the nation's exercise of jurisdiction within its territories "must be derived from the consent of the sovereign of the territory" [FN23], which consent may be expressed or implied. The Court then identifies three circumstances under which every sovereign, recognizing the common interest impelling mutual cooperation, is understood to waive a part of its absolute territorial jurisdiction: (1) the exemption of the person of the sovereign from arrest or detention within a foreign territory; (2) the immunity allowed to foreign ministers, ambassadors and other diplomats; and (3) the assent to the passage of foreign troops, a subset of which is the entry of friendly foreign naval ships into domestic ports. Noteworthy in this classification, and a vital point to which this Court returns below, [FN24] is the distinction Chief Justice Marshall draws between the exemption conferred upon the person of the sovereign to be free from arrest or detention while present within a foreign territory, and, as a separate category, the immunity of diplomatic ministers abroad.

FN23. Id. at 143.

FN24. See infra notes 141-46 and accompanying text.

**5 Fourth, and of particular interest here, Chief Justice Marshall admitted to some potential limitation to both the traditional identity of the sovereign and ruler and to the absoluteness of the sovereign's immunity. He noted, without expressing an opinion, the difference between "the private property of the person who happens to be a prince, and that military force which supports the sovereign power, and maintains the dignity and the independence of a nation." [FN25] As regards the former, the Chief Justice

makes an observation that presaged the basis and course for later changes in the law and anticipated disputes such as that now before this Court. He remarked:

FN25. The Schooner Exchange, 11 U.S. (7 Cranch) at 145.

A prince, by acquiring private property in a foreign country, may possibly be considered as subjecting that property to territorial jurisdiction; he may be considered as so far laying down the prince, and assuming the character of a private individual. [FN26]

FN26. Id.

Significantly, reflecting the common understanding that then conflated the sovereign nation and its ruler, Chief Justice Marshall throughout the opinion refers to the state and the "prince" as one, and describes the state, anthropomorphically transfigured in the person of the sovereign prince, as "he" and "him". [FN27] Both doctrinally and in practice, because the sovereign and the head-of-state were deemed to be the same, the fusion translated into a principle of immunity that, under customary international law, developed and was recognized as similarly unitary and coextensive. [FN28] Prior to 1976, the case law and *270 commentary record very few, if any, instances in which a claim for exercise of jurisdiction over a head-of-state was asserted personally against the ruler of a nation, separate and apart from the sovereign state the leader personified. [FN29]

FN27. See, e.g., id. at 137, 144 (referring to a public armed ship, the Court noted that it "acts under the immediate and direct command of the sovereign; is employed by him in national objects. He has many and powerful motives for preventing those objects from being defeated by the interference of a foreign state. Such interference cannot take place without affecting his power and his dignity."); see also supra note 22 and quote in accompanying text.

FN28. See, e.g., Restatement (Second) of Foreign Relations Law § 65, et seq. (1965). According to the Restatement § 66, the definition of head of state equated to that the state itself "The immunity of a foreign state under the rule stated in section 65 extends to ... its head of state and any person designated by him as a member of his official party..." Immunity under § 65 applied to: "(a) the state itself; (b) its head of state...; (c) its government or any governmental agency; (d) its head of government...; (e) its foreign minister...; (f) any other public minister, official or agent of the state with respect to acts performed in his official capacity if the effect of exercising jurisdiction would be to enforce a rule of law against the state...; (g) a corporation created under its laws and exercising functions comparable to those of an agency of the state."

FN29. See Lafontant v. Aristide, 844 F.Supp. 128, 136 (E.D.N.Y.1994); see also Lord Gore-Booth, Satow's Guide to Diplomatic Practice 9 (Lord Gore-Booth ed., 5th ed.1975) (hereinafter "Satow's Guide "); Jerrold L. Mallory, Resolving the Confusion Over Head of State Immunity: The Defined Rights of Kings, 86 Colum. L.Rev. 169, 170-73 n. 10 (1986) (hereinafter "Mallory").

B. RESTRICTIVE IMMUNITY

1. The Tate Letter

The theory of absolute sovereign immunity, incorporating the conceptual unity of sovereign and ruler that The Schooner Exchange articulated, served as controlling principle in foreign state immunity controversies in this country until 1952. As the doctrine was ultimately formulated by the Supreme Court,
"it is a guiding principle in determining whether a court should exercise or surrender its jurisdiction [in actions against foreign states], that the courts should not act as to embarrass the executive arm in its conduct of foreign affairs. 'In such cases the judicial department of this government follows the action of the political branch, and will not embarrass the latter by assuming an antagonistic jurisdiction.' " [FN30]

FN30. Hoffman, 324 U.S. at 35, 65 S.Ct. 530 (quoting United States v. Lee, 106 U.S. 196, 209, 1 S.Ct. 240, 27 L.Ed. 171 (1882) and Ex Parte Peru, 318 U.S. at 588, 63 S.Ct. 793).

Thus, upon a formal assertion by the Executive Branch that a foreign state or entity sued in the United States was entitled to sovereign exemption from jurisdiction, the courts were obligated to honor the total immunity that recognition conferred and to dismiss the action. [FN31]

FN31. See id.

By 1952 several developments had converged to bring about substantive change away from the absolute sovereign immunity doctrine. Following significant increases in international commerce and changes in state economic systems that occurred after World War II, many countries altered their foreign relations practices to conform to a restrictive theory of sovereign immunity. [FN32] Under this approach, an exception to state immunity was carved for foreign sovereign activities that were strictly commercial, thus limiting the absolute exemption from exercise of national jurisdiction over foreign states solely to disputes arising from public actions inherently within the sphere of governmental functions.

FN32. See Alfred Dunhill of London v. Republic of Cuba, 425 U.S. 682, 701-02 n. 15, 96 S.Ct. 1854, 48 L.Ed.2d 301 (1976).

**6 The change was prompted partly in response to the rapid rise in the number of countries that had adopted socialist or communist governments that nationalized major industries and conducted international *271 commerce through state-owned or controlled entities. [FN33] These means of trade produced competitive disadvantages and resulting injustices for other states and private parties that engaged in commerce with state-dominated enterprises. For example, in litigation arising from commercial disputes over the non- performance of contracts or other wrongful conduct, it became commonplace for these entities to hide behind the near-fiction that they were the state, and to assert sovereign immunity as an absolute defense, thereby erecting a shield against all liability for their obligations and damages. [FN34]

FN33. See generally id.

FN34. See, e.g., id. at 700-03, 96 S.Ct. 1854; The Katingo Hadjipatera, 40 F.Supp. 546 (S.D.N.Y.1941).

In the United States, a doctrinal watershed occurred in 1952 with the Department of State's promulgation of a new policy enunciated in a communication to the Justice Department. The Tate Letter, as it was called, put other nations on notice that the United States, in considering foreign governments' requests for sovereign immunity, would thereafter follow the restrictive theory of sovereign immunity. [FN35] The Tate Letter explicitly declared that the decisive considerations impelling the policy shift comprised two elements: the increasing practice on the part of (1) governments engaging in (2) commercial activities.

FN35. See Letter from Jack B. Tate, Acting Legal Adviser of the United States Department of State, to Acting Attorney General Philip B. Perlman (May 19, 1952), reprinted in 26 Dep't State Bull. No. 678 at 984 (June 27, 1952) (hereinafter the "Tate Letter").

These developments made necessary a means to enable persons doing business with state enterprises "to have their rights determined in the courts." [FN36] Significantly, neither the Tate Letter, nor other authority then reflecting on generally prevailing practice or customary international law, made mention of controversies involving claims of individual immunity for sovereigns, represented in the person of the country's ruler, from the jurisdiction of the courts over matters relating to non-governmental transactions, commercial or otherwise, undertaken in their private or public capacities. [FN37]

FN36. Id.; see also Verlinden, 461 U.S. at 487, 103 S.Ct. 1962 (noting that in the theory of restrictive immunity adopted by the United States by means of the Tate Letter "immunity is confined to suits involving foreign sovereign's public acts, and does not extend to cases arising out of a foreign state's strictly commercial acts").

FN37. See Joseph W. Dellapenna, Head-of-State Immunity--Foreign Sovereign Immunities Act--Suggestion by the Department of State, 88 Am. J. Int'l L. 528, 529 (July 1994) (hereinafter "Dellapenna") (noting the absence of precedent prior to the enactment of the Foreign Sovereign Immunities Act in 1976 for a doctrine of immunity for foreign heads-of- state as distinct from sovereign immunity for the state generally); see also Mallory, 86 Col. L.Rev. at 171.

In practice, the State Department implemented the modified policy by issuing guidance, in the form of "suggestions of immunity", in particular court cases in which the United States deemed its intervention appropriate. In those cases, the courts, in accordance with the Supreme Court's mandate in Ex Parte Peru, [FN38] uniformly deferred to the Executive Branch's assertions as conclusive on judicial determinations of foreign state immunity.

FN38. 318 U.S. at 578, 63 S.Ct. 793.

But the practical application of the Tate Letter policy and the results it yielded proved unsatisfactory. The distinction between a state's commercial activities and strictly governmental functions was not

always *272 clear. Often, the State Department's immunity determinations were not based on consistent or coherent standards, nor on established internal adjudicatory procedures. At times these determinations worked to the State Department's own embarrassment; to the displeasure of the private and public commercial interests sacrificed to diplomatic and political considerations; or to the growing discomfort and uninhibited consternation of the courts. [FN39] State Department "suggestions" often were issued on the basis of the foreign government's political and diplomatic pressures on the Executive Branch and similar situations yielded different outcomes. [FN40] Moreover, the courts were left without objective rules of law to apply in cases where the foreign state did not request immunity, or the State Department chose not to intervene. [FN41] As a consequence, sovereign immunity determinations were made by two branches of the government based on varying standards and considerations not always clearly compatible or uniformly applied. [FN42] The perceived politicization of the sovereign immunity process engendered mounting concern all around.

FN39. See, e.g., Jet Line Servs., Inc. v. M/V Marsa El Hariga, 462 F.Supp. 1165, 1169 (D.Md.1978).

FN40. See generally Shoba Varughese George, Head of State Immunity in the United States Courts: Still confused After All These Years, 64 Fordham L.Rev. 1051, 1058-59 (Dec.1995) (hereinafter "George").

FN41. See Jurisdiction of U.S. Courts in Suits Against Foreign States: Hearings on H.R. 11315 Before the Subcommittee on Administrative Law, and Governmental Relations of the House Committee on the Judiciary, 94th Cong., 2d Sess. 24, 27 (1976) (hereinafter "Hearings on H.R. 11315"); see also Verlinden, 461 U.S. at 487-88, 103 S.Ct. 1962; George, 64 Fordham L.Rev. at 1058-59.

FN42. See Verlinden, 461 U.S. at 487-88, 103 S.Ct. 1962.

2. The Foreign Sovereign Immunities Act

**7 General dissatisfaction with application of the Tate Letter's policy change motivated the passage of the Foreign Sovereign Immunities Act of 1976 (the "FSIA" or the "Act"). [FN43] The statute, intended to adopt "comprehensive rules governing sovereign immunity", [FN44] embodied two major objectives. It established as United States foreign relations practice the restrictive doctrine of sovereign immunity enunciated in the Tate Letter, thereby strictly limiting foreign states' immunity from the jurisdiction of United States courts to actions grounded on public or governmental functions. Accordingly, the Act denied sovereign immunity to foreign public entities for disputes arising out of their commercial ventures that are no different from ordinary private business transactions. The FSIA's major departure was its removal of the State Department's former role in the foreign state immunity process: it transferred "*273 the determination of sovereign immunity from the executive branch to the judicial branch." [FN45]

FN43. See 28 U.S.C. § 1603. In the principal report reciting the Act's legislative history, Congress noted that the Tate Letter had "posed a number of difficulties. From a legal stand point, if the Department applies the restrictive principle in a given case, it is in the awkward position of a political institution trying to apply a legal standard to litigation already before the courts .... From a foreign relations standpoint, the initiative is left to the foreign state .... From the standpoint of the private litigant, considerable uncertainty results. A private party who deals with a foreign government entity cannot be

certain that his legal dispute with a foreign sovereign will not be decided on the basis of nonlegal considerations through the foreign government's intercession with the Department of State." H.R.Rep. No. 94-1487, 94th Cong., 2d Sess. 8-9 (1976), reprinted in 1976 U.S.C.C.A.N. 6604, 6607 (hereinafter the "H.R. Report").

FN44. H.R. Report, at 12; Verlinden, 461 U.S. at 495 n. 22, 103 S.Ct. 1962.

FN45. H.R. Report, at 7; see also Chuidian v. Philippine Nat'l Bank, 912 F.2d 1095, 1100 (9th Cir.1990) ("[t]he principal change envisioned by the statute was to remove the role of the State Department in determining immunity"); Republic of the Philippines v. Marcos, 665 F.Supp. 793, 797 (N.D.Cal.1987) ("The power of the executive to determine when courts may exercise jurisdiction over foreign sovereigns has been abolished ...."); but cf. Lafontant v. Aristide, 844 F.Supp. at 136; supra notes 107-13 and accompanying text.

Like the Tate Letter whose policy shift it codified, the intent of the FSIA as manifested in its text and legislative history evinces preoccupation with "commercial activities" of "foreign states" and with according protection to corresponding interests of litigants who have dealings, and are engaged in legal disputes, with a "foreign government entity." [FN46] Instructive in conveying the distinction expressed during Congress' deliberations on the FSIA is the testimony on behalf of the Executive Branch by a witness from the Department of Justice. Describing how the proposed legislation would operate to permit suits in United States courts against foreign state-owned entities-- such as Lufthansa, West Germany's national airline--that were engaged in ordinary commercial activities, he clarified that: "Now we are not talking, Congressmen, in terms of permitting suit against the Chancellor of the Federal Republic ... [t]hat is an altogether different question." [FN47]

FN46. See George, 64 Fordham L.Rev. at 1075 n. 193 (citing H.R. Report, at 15-16 for examples of the kinds of "agencies or instrumentalities" that generated the FSIA's concerns: "state trading companies, mining enterprises, airlines, steel companies, central banks, export associations, government procurement agencies, and ministries").

FN47. Immunities of Foreign States: Hearing on H.R. 3493 Before the Subcomm. on Claims and Governmental Relations of the House Comm. on the Judiciary, 93d Cong., 1st Sess. 16 (1976) (statement of Bruno Ristau, Chief, Foreign Litigation Unit, Civil Division, Department of Justice).

That overarching concern with a foreign state's ordinary commercial transactions is given expression in the FSIA's text and legislative record in several ways. First, in its legislative findings, Congress declared that "the determination by United States courts of the claims of foreign states to immunity would serve the interests of justice and would protect the rights of both foreign states and litigants in United States courts." [FN48] Further, Congress noted that under international law "states are not immune from the jurisdiction of foreign courts insofar as their commercial activities are concerned .... [C]laims of foreign states to immunity should henceforth be decided by courts of the United States... in conformity with the principles set forth in [the Act]." [FN49] In this connection, substantial deliberation in the drafting and debate was devoted to the legal and practical difficulties encountered in defining and distinguishing between public and private commercial activities. [FN50]

FN48. 28 U.S.C. § 1602 (emphasis added).

FN49. Id. (emphasis added).

FN50. See Hearings on H.R. 11315, at 53 (recording the State Department Legal Advisor's observation that: "We realize that we probably could not draft legislation which would satisfactorily delineate that line of demarcation between commercial and governmental. We therefore thought it was the better part of valor to recognize our inability to do that definitively and to leave it to the courts with very modest guidance. For example, the courts would inquire whether the activity in question is one which private parties ordinarily perform or whether it is peculiarly within the realm of governments.").

*274 **8 Second, the integral connection of the immunity exclusions to both "commercial activities" and "foreign states" is further underscored by the Act's language defining "foreign state." The context the statute reflects is couched in words imbued with commercial purpose and usage. The term "foreign state" is meant to encompass an "agency or instrumentality of a foreign state", which in turn is defined as any entity "(1) which is a separate legal person, corporate or otherwise, and (2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political division thereof." [FN51] Apparently, Congress intended this definition to be exclusive. The House Subcommittee, in its report on the bill, indicated "an entity which does not fall within the definitions of § 1603(a) or (b) would not be entitled to sovereign immunity in any case before a Federal or State Court." [FN52]

FN51. 28 U.S.C. § 1603. See supra note 46 for examples of the types of state entities contemplated by the Act.

FN52. See H.R. Report, at 15.

Third, the Act adopts several specific exemptions as to which, depending on the particular activity, "a foreign state" would no longer be entitled to assert immunity from the jurisdiction of courts in the United States. With regard to the commercial exception, it provides that sovereign immunity is not available in any case
in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States. [FN53]

FN53. 28 U.S.C. § 1605 (emphasis added).

In determining the scope of commercial activity the Act contemplates that the nature of such activity "shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose." [FN54]

FN54. 28 U.S.C. § 1603(d).

The FSIA also created an exception applicable to certain torts encompassing actions in which money damages are sought against a foreign state for personal injury or death, or damage to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office of employment [FN55].

FN55. 28 U.S.C. § 1605(a)(5).

Fourth, Congress evidenced concern that United States sovereign immunity practice "conform to the practice in virtually every other country." [FN56] The theory and practice of foreign state immunity then understood by the community of nations and applied as customary international law, similarly reflected paramount concern over foreign entities' commercial activities and embodied rules empirically deriving from and addressing that context. [FN57]

FN56. H.R. Report, at 7.

FN57. See 28 U.S.C. § 1602; Tate Letter, 26 Dep't State Bull. at 984; Satow's Guide at 9 ("As regards the immunities of the foreign state itself, many states have developed complex and detailed rules under which these immunities are restricted in cases which may be broadly described as 'commercial'."); George, 64 Fordham L.Rev. at 1057.

*275 Finally, language in the legislative history indicates that Congress intended to devise rules to resolve claims of sovereign immunity of foreign states without in any way affecting established practice governing suits involving diplomatic or consular representatives. [FN58]

FN58. See H.R. Report, at 21.

**9 Palpably absent from the FSIA legislative history and prior practice is any specific reference to the particular issues in contention before this Court: (1) the scope of FSIA jurisdictional exemption, if any, intended to reach: (a) individuals, as opposed to state "agencies or instrumentalities", in particular, (b) the head-of-state, as distinct from the state itself; (c) private unofficial acts, as distinguished from actions attributable to the foreign state taken by government officials within the scope of their public duties; (d) private conduct of non-state persons or entities with which the head-of-state or other high ranking government leaders may be affiliated; and (2) as regards consideration of the foregoing issues, the extent of any remaining role the Department of State may play in suggesting foreign sovereign immunity in

actions before the courts, and the effect the courts should accord to such expressions of interest made on behalf of the Executive Branch.

In fact, during the fifteen years that spanned the issuance of the Tate Letter and the enactment of the FSIA the bulk of sovereign immunity litigation recorded, not only in United States courts but in other countries, entailed commercial disputes involving foreign state public entities. [FN59] In a compilation of sovereign immunity decisions covering this period, the State Department reported only two instances in which immunity determinations related specifically to suits brought against heads-of-state. [FN60] And the limited precedent that did exist may suggest that the sovereign officials there may have been named routinely, either for tactical pleading purposes or as surrogates for the state itself. [FN61]

FN59. See Dunhill, 425 U.S. at 702, 96 S.Ct. 1854 (noting the "enormous increase in the extent to which foreign sovereigns had become involved in international trade"); see also Victory Transp., Inc. v. Comisaria Gen. de Abastecimientos y Transportes, 336 F.2d 354, 356 (2d Cir.1964).

FN60. See Mallory, 86 Colum. L.Rev. at 175 n. 26 (citing report in 1977 Dig. U.S. Prac. Int'l L. 1017).

FN61. See id.; see also Dellapenna, 88 Am.J. Int'l L. at 530 ("The practice in courts abroad was only somewhat more finite than these few American precedents, although the foreign decisions are hardly more numerous.").

In this precedential void, as Plaintiffs here acknowledge, the courts, on the few occasions in which the principle of sovereign immunity was asserted in connection with an action filed against a head-of-state, regarded the conceptual issue as subsumed within the recognized principle of absolute sovereign immunity for states and governed by The Schooner Exchange doctrine. This treatment suggested the existence of a unified theory of sovereign immunity integrating the traditional notion that the sovereign and its ruler were one and the same, concepts that had not yet branched into distinct doctrines subject to their own separate policies, standards and applications. [FN62]

FN62. See, e.g., Dellapenna, 88 Am. J. Int'l L. at 529 (noting that cases involving foreign heads of state were generally decided by courts granting absolute immunity as derived from the recognized strands of state immunity and diplomatic immunity: "There was no precedent for a doctrine of substantive immunity for foreign heads of state (as distinct from the doctrine of sovereign immunity generally) until after the enactment of the [FSIA]."); George, 64 Fordham L.Rev. at 1055 ("Historically, sovereign immunity for states and heads-of-states immunity were considered one and the same.").

*276 The courts' view in this country was indeed consistent with prevailing norms and practices then accepted abroad as customary international law. One leading authority, referencing the growing volume of precedents and detailed rules reflecting restrictions promulgated by governments to limit claims of foreign state immunity, noted: "[b]ut none of this large and complex body of international law has been drawn up with the position of heads of state in mind." [FN63]

FN63. Satow's Guide at 9; see also Mallory, 86 Colum. L. Rev at 177 ("While a survey of the international community's approach to head of state immunity reveals wide agreement that heads of state are entitled to some immunity, there is no consensus on the extent of that immunity."). In the United Kingdom, the State Immunity Act, which was enacted in 1978 and serves as the model for similar legislation in other British Commonwealth countries, the law defines a foreign state as including the head-of-state and head-of-government and related entities. See State Immunity Act, 1978, 26 & 27 Eliz. 2, Ch. 33, § 14(1), reprinted in 17 I.L.M. 1123, 1127-29 (1978) (hereinafter the "State Immunity Act"). The British Act also confers upon heads-of-state the protections of diplomatic immunity by applying to them the Diplomatic Privileges Act of 1964, 12 & 13 Eliz. 2, Ch. 81. State Immunity Act, § 20. See Mallory, 86 Colum. L.Rev. at 178 n. 33. In France, heads-of-state are accorded more extensive immunity comparable to that granted to diplomatic representatives. See id. at 177.

The central issue left unaddressed by legislative history is the one the parties before the Court here argue: whether the FSIA adopted an integrated doctrine of foreign state immunity, rescinding in its entirety and in all cases the practice of court deference to the State Department's intercessions, or whether a distinct branch of absolute immunity applying uniquely to heads-of- state survived the Act. To this Court, the dearth of pre-FSIA authority distinctly addressing head-of-state immunity casts substantial doubt over the proposition that in enacting the FSIA Congress intended to enunciate a far- reaching substantive redirection of United States international relations policy in the form of a uniform rule of law to govern all assertions of foreign immunity, including head-of-state immunity. At the time of the FSIA's adoption, no widely accepted international practice established a separately standing principle of head-of-state immunity. In fact, prior to 1976 the doctrine of sovereign immunity was generally understood to encompass solely state immunity. Consequently, any reference to a head-of-state immunity "doctrine" as a concept distinct from foreign state immunity is a construct that does not arise in the case law and commentary as a specifically identified and widely recognized legal principle until after 1976. [FN64]

FN64. See Dellapenna, 88 Am. J. Int'l L. at 529-30 (noting that prior to the FSIA "We should perhaps refer to the supposed substantive immunity of foreign heads of state as having been more of a notion than a doctrine.").

**10 Thus, for Congress to have purposefully codified a head-of-state immunity rule would have required application of the FSIA to unique circumstances that were then relatively unencountered and undefined, not only domestically but abroad. To that degree such a pronouncement by Congress would have constituted a significant unilateral departure from international practice that, if so considered and designed would hardly have gone unnoticed and unmentioned by other governments.

Authorities recognize that the growth of international law is evolutionary. It expands by accretion as consensus develops among nations around widely recognized customs, practices and principles, and not by patchwork elevation of any one country's *277 ad hoc pronouncements. [FN65] Thus, any dramatic deviation from accepted international norms legislated by any single state without reference to widely accepted customary rules would be inconsistent with this principle. Chief Justice Marshall articulated this notion, also in The Schooner Exchange:

FN65. See Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 434- 35, 84 S.Ct. 923, 11 L.Ed.2d 804 (1964); Filartiga v. Pena-Irala, 630 F.2d 876, 880-81 (2d Cir.1980).

A nation would justly be considered as violating its faith, although that faith might not be expressly plighted, which should suddenly and without previous notice, exercise its territorial powers in a manner not consonant to the usages and received obligations of the civilized world. [FN66]

FN66. 11 U.S. (7 Cranch) at 137.

With a legislative record devoid of any explicit contrary expression, a deliberate purpose to depart from generally prevalent international customs and practices as regards immunity for heads-of-state should not be ascribed to Congress.

The substantial disarray and division in the courts' practice following the enactment of the FSIA still prevails regarding the treatment accorded to head- of-state immunity and various other related issues emanating from the Act. In fact, the Second Circuit and other courts concur only in that "[t]he scope of this [head-of-state] immunity is in an amorphous and undeveloped state." [FN67] In this Court's reading of relevant precedent, it thus would be an overstatement to say that Congress could have envisioned legislating to address a situation whose inherent problems, complexities and exact dimensions were not known or fully comprehended at the time.

FN67. In re Doe v. United States, 860 F.2d 40, 44 (2d Cir.1988) (citation omitted); see also In re Grand Jury Proceedings, John Doe # 700, 817 F.2d 1108, 1110 (4th Cir.1987) (the "exact contours of head-of-state immunity ... are still unsettled").

Since 1976, however, some conceptual fissures have separated the ancient notion that equated the head-of-state to the state itself. There is now growing recognition that the sovereign is solely the state and that the nation's ruler is a distinct entity. [FN68] In this regard, substantial case law has begun to develop, identifying issues singularly associated with head-of-state immunity and demanding treatment under a set of rules reflecting that uniqueness. But the courts are still grappling with the definition and scope of that doctrinal separation. Neither a clear consensus nor a controlling standard that can be considered to reflect customary international law has emerged *278 from the courts' consideration of those issues.

FN68. See Republic of the Philippines v. Marcos, 862 F.2d 1355 (9th Cir.1988), cert. denied, 490 U.S. 1035, 109 S.Ct. 1933, 104 L.Ed.2d 404 (1989) (holding that Marcos's illegal acts were not official acts pursuant to his authority as President of the Philippines, the court stated Marcos "was not the state, but the head of state, bound by the laws that applied to him"); Jimenez v. Aristeguieta, 311 F.2d 547, 557 (5th Cir.1962) ("Even though characterized as a dictator, appellant was not himself the sovereign--government--of Venezuela within the Act of State Doctrine. He was chief executive, a public officer, of the sovereign nation of Venezuela."); see also United States v. Noriega, 746 F.Supp. 1506, 1522 (S.D.Fla.1990); Satow's Guide, at 9 ("A clear distinction is drawn in the law of many states, and implied in that of others, between the foreign state as a legal entity and the head of state of such state as an individual to whom a very high degree of privilege and immunity remains due."); Mallory, 86 Colum. L.Rev. at 197 n. 10 ("Today heads of state are no longer viewed as the actual state, although in some cases they are regarded as personification of the state. States and the rulers are separate entities; states, not their rulers, are generally viewed as the primary subjects of international law.").

3. Post-FSIA Effects and Developments

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**11 A substantial increase in litigation brought against foreign states was recorded after the FSIA's enactment. [FN69] This development may have been a by-product not only of cases engendered by the clarifying rules the Act promulgated, but of the continuing rise in foreign trade conducted by states and their public entities. A phenomenon of particular significance to the action at bar is noteworthy in this post-FSIA trend: the substantial incidence of claims asserted directly against heads-of-states, as opposed to the state itself, often relating to conduct alleged to be personal and unconnected with any governmental duties. [FN70]

FN69. See Dellapenna, 88 Am. J. Int'l L. at 531.

FN70. See id. ("In the upsurge of litigation against foreign states and foreign-state-related entities in the United States that followed the enactment of the Foreign Sovereign Immunities Act in 1976, a rather remarkable number of suits (given prior dearth of such suits) was filed against heads of foreign states.").

Three circumstances may explain this development. First, some plaintiffs, aware that suits naming the state directly are explicitly barred by the FSIA, either for tactical effect or to test the substantive contours of the Act's exceptions, have sought to assert theories of liability that extend to foreign officials not only as "agencies or instrumentalities" of the state, but in their personal capacities. [FN71] Second, as international trade and opportunities to expand wealth in global markets has continued to expand, more heads-of-state themselves may be engaging in private foreign investment and commercial ventures funded by their personal and family fortunes. [FN72]

FN71. See, e.g.,Chuidian, 912 F.2d at 1106; Dellapenna, 88 Am. J. Int'l L. at 530.

FN72. See, e.g., First Am. Corp. v. Al-Nahyan, 948 F.Supp. 1107, 1112-13 (D.D.C.1996); Lasidi, S.A. v. Financiera Avenida, S.A., No. 5864/52 (N.Y.Sup.Ct.) (hereinafter "Lasidi") (as reported by David Berrely, Missing Millions, Nat'l L.J., August 29, 1983 at 1).

A third phenomenon, of more recent roots, is closer on point. Increasingly, the world's nations have come to give recognition and legal expression to new realities about the actions of state officials. These concerns have taken front-stage roles in international relations. Many major crimes and sources of personal injuries, such as genocide, acts of terrorism and abuses of human rights, honor no bounds of decency, and respect no national borders. People and the nations they comprise are more conscious that, like the effects of subterranean faults, violations of international law and state denials of universally recognized fundamental liberties in one country can reverberate harmfully in others.

As a by-product of this greater awareness, a deeper wedge has been driven in the old sovereign equation, in recognition that it is not the "state" as a collective abstraction, but rather live persons, with or without the badge of the state, who commit atrocities in violation of common norms, and that high- ranking government officials, even heads-of-state themselves, may be among the persons prone from time to time to indulge in lawlessness. Finally, to address these concerns and changing circumstances some adjustments in the practices governing relations among states became necessary. To these ends, a

considerable body of new rules emerged, both domestically and internationally, in large measure during the years soon after *279 the enactment of the FSIA. [FN73]

FN73. See infra notes 76-85 and accompanying text.

As a consequence, with greater incidence, foreign state officials are accused of wrongful conduct arising not just from private commercial ventures, but from alleged criminal activity and abuses of human rights in violation of customary international law. [FN74] In fact, the broad body of substantive law and behavior constituting recognized violations of international norms, which correspondingly has given rise to claims such as the one at bar for enforcement of those rights, has expanded significantly in more recent years. [FN75]

FN74. See George, 64 Fordham L.Rev. at 1051-52, 1054; Dellapenna, 88 Am. J. Int'l L. at 529-31.

FN75. See id.

**12 Concomitant with the increase in the body of law defining rights, is another related major development. Efforts to define the concept of international crime and the reach of human rights, and to hold violators accountable, would amount to no more than emblematic gestures unless those reforms were accompanied by a corresponding dismantling of the long-standing doctrinal bastions that have impeded the exercise of domestic and international jurisdiction over state officials for violation of the new standards. And in fact, just such relaxation of the old barriers has occurred; material chips have been scored in the ramparts foreign government agents once routinely erected as absolute defenses against litigation challenging their private conduct as crimes against humanity or other egregious abuses of human rights contravening international norms. [FN76] The world's nations, through treaties, conventions and declarations, have established standards defining as violations of customary international law, practices such as genocide, crimes against humanity, torture, forced disappearance, extra-judicial killings and terrorism. [FN77]

FN76. See, e.g., Rome Statute of the International Criminal Court, July 17, 1998, art. 27 (hereinafter "Rome Statute of the I.C.C.") ("This Statute shall apply to all persons without distinction based on official capacity as Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for a reduction of sentence.").

FN77. See, e.g., The Convention on the Prevention and Punishment of the Crime of Genocide, December 9, 1948 78 U.N.T.S. 277 entered into force Jan. 12, 1951, ratified by the United States effective Feb. 23, 1989; Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, 23 I.L.M. 1027 (1984), as modified, 24 I.L.M. 535 (1985), entered into force June 26, 1987, ratified by the United States effective Oct. 21, 1994, 34 I.L.M. 590 (1995) (hereinafter the "Convention Against Torture"); see also Restatement (Third) of Foreign Relations Law, Pt. 2.

To promote enforcement of these standards, the international community has mobilized in establishing mechanisms, modeled after the Nuremberg War Crimes Tribunal following World War II, such as the International Criminal Tribunals for the Former Yugoslavia and for Rwanda created by the United Nations. [FN78] Most *280 recently, they adopted the statute of the International Criminal Court. [FN79] The United States itself has joined in some of these developments by ratifying the Convention Against Torture in 1994 and enacting the TVPA in 1991 that empowered victims to file suits against acts of official torture and extrajudicial killings occurring in foreign states. [FN80] Judicially, in 1980, the Second Circuit infused vitality into the ATCA, [FN81] which had lain dormant on the books from virtual desuetude since 1789. In Filartiga, [FN82] the Court of Appeals construed the law as "opening the federal courts for adjudication of the rights already recognized by international law," [FN83] and held that "an act of torture committed by a state official against one held in detention violates established norms of the international law of human rights, and hence the law of nations." [FN84]

FN78. See S.C. Res. 827, U.N. SCOR, 48th Sess., 3217th Mtg., U.N. Doc. S/INF/49 (1993) (the Yugoslavia Tribunal); S.C. Res. 955, U.N. SCOR, 49th Sess., 3453rd mtg., U.N. Doc. S/INF/50 (1994) (the Rwanda Tribunal). The Tribunals' prosecution of sitting and former heads-of-state and high- ranking government officials, for genocide, crimes against humanity and other violations of international law attest to the remarkable recent strides and the far-reaching implications of these developments in fostering the establishment of international legal norms. The Yugoslavia and Rwanda Tribunals, though creatures of U.N. Security Council resolutions, both have been legitimized, by way of implementing legislation, as playing an important role in the legal machinery of the United States for the Tribunals' specified purposes. See Judicial Assistance to the International Tribunal for Yugoslavia and to the International Tribunal for Rwanda, Pub.L. No. 104-106, 110 Stat. 186, 485 (1996).
As such, the Tribunals bear the imprimatur of both international consensus and domestic implementing legislation. In this respect, the Tribunals' mandates, functions and sources of authority are altogether different from those of a federal district court exercising its circumscribed authority in a civil matter pursuant to its grant of limited jurisdiction in Article III of the United States Constitution. Federal court jurisdiction cannot lay claim to genesis from international consensus nor to legislation that specifically authorizes all of the relief Plaintiffs seek here. Furthermore, recognizing that the Court's authority is constitutionally derived reinforces the delicate balance that exists between the judiciary and Executive Branch in matters of foreign relations.

FN79. See Rome Statute of the ICC, art. 27.

FN80. Pub.L. 102-256, 106 Stat. 73 (codified at 28 U.S.C. § 1350 Note).

FN81. 28 U.S.C. § 1350.

FN82. Filartiga v. Pena-Irala, 630 F.2d 876, 887-89 (2d Cir.1980); see also Kadic v. Karadzic, 70 F.3d 232 (2d Cir.1996) (declaring subject matter jurisdiction existed under the ATCA and TVPA in an action against the purported head-of-state of the Bosnian-Serb entity for acts of genocide, torture and other violations of international law); Xuncax v. Gramajo, 886 F.Supp. 162 (D.Mass.1995) (applying the ATCA to acts ascribed to Guatemala's Defense Minister); Noriega, 746 F.Supp. at 1506 (United States took unilateral action to capture Panama's dictator in Panama and prosecute him in the United States, on

accusations of trafficking in narcotics in violation of United States criminal statutes, which were applied to punish the extra-territorial effects of Noriega's conduct).

FN83. Filartiga, 630 F.2d at 887.

FN84. Id. at 880.

The net results of these developments bear upon the issues before this Court. They have caused some breach in the theoretical walls that once absolutely impeded the exercise of national jurisdiction against heads-of-state and other foreign officials for private conduct that violates clear and unambiguous norms of established international law. As a consequence, it has become harder for foreign officials accused of egregious personal misdeeds contravening customary international standards to find escape holes in which to crawl in flight from the arm of international law and its associated implementing domestic statutes. Private parties in rising numbers, such as Plaintiffs here, thereby have been encouraged to institute claims against such foreign state officials asserting damages caused by their personal derelictions. Importantly, to some degree, progression in the international sphere either mirrors or has been driven by comparable evolution of principles on the domestic front. For, *281 inroads have been recorded against the absolute immunity from suit that heads-of-state once enjoyed at home. [FN85]

FN85. See, e.g., Clinton v. Jones, 520 U.S. 681, 117 S.Ct. 1636, 137 L.Ed.2d 945 (1997); United States v. Nixon, 418 U.S. 683, 94 S.Ct. 3090, 41 L.Ed.2d 1039 (1974); but cf. Nixon v. Fitzgerald, 457 U.S. 731, 102 S.Ct. 2690, 73 L.Ed.2d 349 (1982) (former president entitled to absolute immunity from liability predicated on official acts).

**13 Nonetheless, many of these developments are incipient and still relatively modest. Whatever the trend, and however heartening it may be to the victims of gross brutality and to the human spirit's yearnings and strivings for justice, this progress by no means signifies, as confirmed by the intense arguments Plaintiffs and the Government advance before this Court, that a body of widely recognized principles exists, either in this country or internationally, clearly delimiting the bounds within which private claims against foreign heads-of-state and other high officials may be prosecuted in national courts. In this formative environment, agreement may exist with regard to one general proposition: that developments in the criminal context, whether concerning former or sitting government leaders, have advanced more definitively than the parameters defining permissible jurisdiction over sitting heads-of-states extending to personal conduct in civil matters.

4. FSIA Case Law

The conceptual distance that still exists between human expectations and the law's bestowals in relation to the international concepts here at issue is best illustrated by two conflicting camps into which construction and application of the FSIA have branched. One, which Plaintiffs advocate upon the Court, holds that the FSIA unequivocally shifted from the State Department to the courts responsibility for determining all claims of foreign immunity, including those filed on behalf of heads-of-state. Plaintiffs contend that this theory is reflected in the approach the Ninth Circuit adopted in Chuidian. [FN86]

FN86. See 912 F.2d 1095.

A second strand, pressed by the Government and articulated by the Eastern District of New York in Aristide, [FN87] holds that the FSIA does not apply to claims of immunity asserted by heads-of-state. As to heads-of-state immunity, this view maintains, pre-FSIA common law practice remains valid, constraining the courts to accept as conclusive the State Department's suggestions of immunity. For the reasons indicated below, this Court concludes, though not fully accepting some of Aristide's implications nor rejecting all aspects of Chuidian, that the analysis in Aristide better accords with this Court's reading of the FSIA's text, purposes and legislative history. The Aristide outcome is also more consistent with other cases precisely on point, as well as with prevailing practices of customary international law as reflected in United States jurisprudence.

FN87. See 844 F.Supp. 128.

a. Chuidian

Plaintiffs contend, relying heavily on Chuidian and the line of cases following it, that the FSIA applies so as to authorize the courts to adjudicate all claims of immunity not only by foreign governments, but by individual government officials, including heads-of-state, and that courts need not defer to State Department suggestions of immunity because the Act stripped the Executive Branch entirely of its former role in that process.

A full review of the facts in Chuidian is essential to an understanding of the actual *282 scope of the Ninth Circuit's holding and to a full assessment of Plaintiffs' contention here. Chuidian was brought by a Philippine citizen who owned various business interests in California. As part of a settlement of litigation commenced during the rule of former President Ferdinand Marcos between Chuidian and a Philippine government export loan agency, the Philippine National Bank, also a state-owned entity, issued an irrevocable letter of credit to Chuidian on behalf of the export agency. Following the overthrow of Marcos, the new government appointed a Commission on Good Government charged with recovering the wealth Marcos had unlawfully accumulated and held abroad. [FN88]

FN88. See Chuidian, 912 F.2d at 1097.

**14 Acting in accordance with this mandate, Raul Daza, a member of the Commission and a named defendant in the case, instructed the Bank not to honor Chuidian's letter of credit, purportedly because the settlement it secured was a fraudulent transaction whose purpose was to induce Chuidian not to reveal information about Marcos's personal interests in Chuidian's business enterprises. When the Bank refused to make payment on the letter of credit, Chuidian sued, naming Daza among the defendants. Among his claims, Chuidian asserted intentional interference in his contractual relations with the Bank. [FN89]

FN89. See id.

Though sued individually, Daza argued that he was entitled to sovereign immunity because he qualified as an "agency or instrumentality of a foreign state" as defined by FSIA § 1603(b). Chuidian countered that the Act was not meant to cover individuals sued for acts taken in their private capacities, or alternatively, that Daza and the conduct in question were otherwise encompassed by the FSIA's exceptions to sovereign immunity. [FN90] On this theory, because the Act provided the sole source of recognition of sovereign immunity, and Daza did not satisfy the definition of a "foreign state," his claim to immunity could not be granted.

FN90. See Chuidian, 912 F.2d at 1099.

The Government, in a "Statement of Interest" [FN91] issued by the Department of State on Daza's behalf, agreed with Chuidian's argument. It maintained that, in fact, as a private person, rather than a state-owned corporation or other entity, Daza was not covered by the Act, but that, as a representative of the state engaged in official business in the underlying transaction, he was nonetheless eligible to be granted immunity at the State Department's behest under pre-FSIA common law doctrine. [FN92] According to the Government's view, the Act replaced the common law sovereign immunity rules only in the context of claims brought against a foreign state or its instrumentalities; otherwise, as to individual government officials whose acts are not specifically covered by the Act, the common law sovereign immunity doctrine, as defined in the Restatement (Second) of Foreign Relations Law § 65 [FN93] and contemplating the binding effect of the *283 State Department's declarations of sovereign immunity, remained valid. [FN94]

FN91. The Government distinguishes between an assertion in a suggestion of immunity, which it contends confers absolute common law immunity that must be given conclusive effect by the courts, and a "statement of interest", which it deems akin to an amicus brief in which it argues that a particular non-binding analysis should be considered by the court in assessing an official's claim for immunity. See Government's Memorandum of Law in Reply to Plaintiffs' Answering Brief Concerning Defendants' Immunity, dated June 1, 2001, (hereinafter "Gov't Reply"), at 16.

FN92. See id.

FN93. See supra note 28 for the text of Restatement § 65.

FN94. See Chuidian, 912 F.2d at 1101.

The Ninth Circuit acknowledged that the Act was ambiguous in regards to its application to individuals. [FN95] In the court's reading, the legislative history suggested that Congress was concerned primarily with governmental organizations acting on behalf of foreign states and did not explicitly contemplate individuals sued in that capacity. [FN96] In fact, one district court in the Ninth Circuit already had held precisely as much. [FN97] Nonetheless, the Circuit Court rejected the positions advanced by Chuidian and the Government. It noted that while the Act did not expressly include individuals within the definition of "foreign state", it also did not explicitly exclude them. Absent clear indication that the Act precluded immunity claims by natural persons, the court concluded that, as a codification of prevailing

common law principles that extended immunity to certain individual foreign officials, the FSIA did cover Daza. [FN98]

FN95. See id.

FN96. See id.

FN97. See Republic of Philippines v. Marcos, 665 F.Supp. 793, 797 (N.D.Cal.1987) (noting that the terms used in § 1603(b)--"agency" "instrumentality", "entity", and "organ"--clearly indicated the Act's intent to exclude natural persons).

FN98. See Chuidian, 912 F.2d at 1101. For this proposition, the Ninth Circuit found support in other cases it cited. See Kline v. Kaneko, 685 F.Supp. 386, 389 (S.D.N.Y.1988) ("The FSIA does apply to individual defendants when they are sued in their official capacity."); American Bonded Warehouse Corp. v. Compagnie Nationale Air France, 653 F.Supp. 861, 863 (N.D.Ill.1987); Rios v. Marshall, 530 F.Supp. 351, 371 (S.D.N.Y.1981).

**15 In rejecting the Government's contention that the FSIA effectively bifurcated the sovereign immunity process--the same argument the Government urges before this Court--the Chuidian court observed that "the principal distinction between pre-1976 common law practice and post-1976 statutory practice is the role of the State Department" [FN99] and that the Government's interpretation was inconsistent with Congress' manifest intent to remove the State Department's discretionary role in the process. Finding that the Act was meant to be comprehensive, the court concluded that the statute could not "reasonably be interpreted to leave intact the pre-1976 common law with respect to foreign officials", a proposition that would require courts to revert to the practice of giving conclusive weight to the State Department's determinations of whether or not a foreign government official's activities fall within the traditional exceptions to sovereign immunity. [FN100]

FN99. Chuidian, 912 F.2d at 1102.

FN100. Id. at 1102. The court noted that the Restatement (Third) of Foreign Relations Law § § 451, et seq. (1986), which superseded the Second Restatement's scope of sovereign immunity the Government relied upon, entirely deleted the discussion of common law sovereign immunity and substituted a provision analyzing the relevant issues solely on the basis of the Act. See id. at 1103.

Addressing Chuidian's alternative theory--that in committing the alleged wrongs at issue Daza acted out of personal malice rather than in his official capacity--the Ninth Circuit made an observation, referred to by the parties here, that bears on the arguments in this case. The Court declared that "plainly Daza would not be entitled to sovereign immunity for acts not committed in his official capacity." [FN101] Nonetheless, the court concluded that, regardless of his motive, when Daza stopped *284 the Bank's letter of credit payment to Chuidian, he was still purporting to act as a government official and exercising authority deriving entirely from his office as a member of the Presidential Commission. [FN102]

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FN101. See id. at 1106.

FN102. See id.

The Chuidian court's conclusion that the FSIA covers natural persons, but that sovereign immunity ceases when an individual state officer acts beyond the scope of his governmental authority, has been favorably cited or followed in other cases. [FN103] The Ninth Circuit itself, in two related actions arising out of alleged acts of torture, executions and other human rights abuses allegedly committed by former Philippine President Ferdinand Marcos and his government ministers, ruled that the FSIA could not serve to provide sovereign immunity for such conduct when it is taken beyond the authority of any public mandate and thus could not have constituted acts of an agent or instrumentality of a foreign state within the meaning of the FSIA. [FN104] In a similar vein, in Cabiri v. Assasie-Gyimah, [FN105] a court in this District held that alleged acts of torture committed by a foreign state's Deputy Chief of National Security fell outside his governmental authority, and the protections of the FSIA therefore did not extend to immunize the individual's private conduct.

FN103. See Byrd v. Corporacion Forestal y Industrial de Olancho S.A., 182 F.3d 380, 389 (5th Cir.1999) (holding that two individual officers of a state governmental corporation doing business with parties in the United States qualified as state entities and that the FSIA accorded immunity for their official acts, despite accusations that their conduct was actuated by retaliatory motives); Jungquist v. Sheikh Sultan Bin Khalifa Al Nahyan, 115 F.3d 1020, 1028 (D.C.Cir.1997) (the son of a Crown Prince not entitled to FSIA immunity in connection with allegedly fraudulent agreement in furtherance of personal and private interests); El-Fadl v. Central Bank of Jordan, 75 F.3d 668, 671 (D.C.Cir.1996) (finding no evidence that actions by the Deputy Governor of the foreign state's central bank were private or personal, but were taken only in his official capacity on behalf of the bank).

FN104. See Hilao v. Marcos (In re Estate of Ferdinand Marcos, Human Rights Litig.), 25 F.3d 1467 (9th Cir.1994); Trajano v. Marcos (In re Estate of Ferdinand E. Marcos Litig.), 978 F.2d 493 (9th Cir.1992), cert. denied, 508 U.S. 972, 113 S.Ct. 2960, 125 L.Ed.2d 661 (1993).

FN105. 921 F.Supp. 1189, 1198 (S.D.N.Y.1996); see also Xuncax v. Gramajo, 886 F.Supp. 162, 175-76 (D.Mass.1995); cf. Kadic v. Karadzic, 70 F.3d 232, 250 (2d Cir.1995) (noting that the Act of State doctrine does not apply to acts of a governmental official committed in violation of the nation's basic laws and unratified by its government).

b. Aristide

Against the foregoing string of authority, the Government here continues to press the sovereign immunity theory Chuidian effectively rejected. The Government dismisses Chuidian and its line of precedents as inapposite and distinguishable in two critical respects: none of these cases involved a sitting head-of-state or foreign minister, and in none of them did the State Department file a suggestion of immunity. [FN106] Thus, the Government argues *285 that, contrary to Chuidian's broad language and

reasoning, courts uniformly have dismissed actions against heads-of-state where the Executive Branch did interpose a suggestion of immunity.

FN106. See supra notes 113-128 and accompanying text. The Government points out that in Chuidian what it filed was not a "Suggestion of Immunity" on behalf of the official, but what it characterized as a "Statement of Interest" in the case. See Gov't Reply, at 16; see also Kadic, 70 F.3d at 250 (where the State Department submitted a "Statement of Interest" disclaiming concern over the invocation of the political question doctrine to prevent adjudication of the underlying actions); Lasidi, (as reported by David A. Kaplan, Reprieve for a Sheik, Nat'l L.J., Oct. 10, 1983 at 2) (State Department filed a "Suggestion of Interest" indicating that it would be appropriate for the court to permit limited discovery in a suit concerning commercial interests involving the United Arab Emirates' head-of-state).

**16 The Government relies upon Aristide [FN107] as its leading authority. There, plaintiff was the wife of Dr. Roger Lafontant, a political opponent who allegedly attempted a coup d'etat to prevent Haiti's then recently elected President Jean-Bertrand Aristide from assuming office. Aristide, according to plaintiff, ordered a member of Haiti's armed forces to execute Dr. Lafontant while in prison, an act plaintiff contended was a crime and a tort not officially sanctioned by or in furtherance of Aristide's official duties. Plaintiff brought suit during Aristide's exile in the United States. In that action, the Government, which had recognized Aristide as Haiti's lawfully elected head-of-state despite his overthrow, filed a suggestion of immunity asserting that " 'permitting this action to proceed against President Aristide would be incompatible with the United States' foreign policy interests.' " [FN108]

FN107. See 844 F.Supp. 128.

FN108. Id. at 131.

The court applied common law immunity principles to hold that, absent waiver by statute or by the relevant foreign government, Aristide, as Haiti's head-of- state recognized by the United States, was absolutely immune from the exercise of jurisdiction by United States courts. After examining the FSIA's legislative history, Judge Weinstein concluded that the statute was inapplicable to a recognized sitting head-of-state because the Act had not "modified the long standing rule of international and common law" relating to head-of-state immunity. [FN109] Instead, the court read the intent of the Act more narrowly to contemplate the specified exemptions from sovereign immunity to apply to state-owned entities engaged in commercial activities. The Court noted that "the FSIA took these cases out of the political arena of the State Department, while leaving traditional head-of-state and diplomatic immunities untouched." [FN110]

FN109. Id. at 135.

FN110. Id. at 137.

In sharp contrast with the broad language and implications of Chuidian, Judge Weinstein declared that "the State Department needs to retain decisive control of grants of head-of-state immunity by preserving the pre-FSIA 'absolute' theory of immunity" and concluded that "the pre-1976 suggestion of immunity procedure survives the FSIA with respect to heads-of-state." [FN111] Accordingly, because Aristide enjoyed absolute head-of-state immunity, it was not necessary for the court to consider whether an act of his allegedly ordering a killing would be regarded as official or private. [FN112]

FN111. Id.

FN112. Id. at 139.

The central principle of Aristide--that the enactment of the FSIA did not alter the role or binding effect of the State Department's suggestions of immunity for foreign heads-of-state--in fact is consistently reflected in other post-FSIA cases where the Government filed suggestions of immunity. Especially on point in this regard is Domingo v. Republic of the Philippines. [FN113] There, plaintiffs alleged that the defendants, who included President Ferdinand Marcos and his wife Imelda, had planned, executed and covered up, during Marcos's rule, the murder of two senior *286 Philippine political leaders who had opposed the Marcos regime.

FN113. 694 F.Supp. 782 (W.D.Wash.1988).

**17 Plaintiffs commenced their suit in 1981, while Marcos was still in power. In 1982, the court, in response to a suggestion of immunity filed by the State Department, ruled that the Marcoses were entitled to dismissal of the claims against them. At that time the court had found that the legislative history of the FSIA demonstrated "no evidence ... that Congress intended to eliminate the Suggestion of Immunity procedure as a means of securing the dismissal of an action against a foreign head of state" [FN114]. On this basis, the court concluded that it was bound to accede to the State Department's intercession on behalf of the Marcoses. [FN115]

FN114. Estate of Silme G. Domingo v. Marcos, No. C82-1055V, slip. op. at 4 (W.D.Wash. July 14, 1983).

FN115. See Domingo, 694 F.Supp. at 786.

In 1987, however, after the Marcoses fell from grace and left office for exile in the United States, plaintiffs moved to reinstate the earlier dismissed claims against them in the same action, which had proceeded against the remaining defendants. On this occasion, the court granted the motion, noting that neither the United States nor the government of the Philippines had interceded on the Marcoses' behalf to assert immunity and that whatever significance the State Department's suggestion possessed when it was filed in 1982 had expired by reason of the changed circumstances. [FN116]

FN116. See id.

Also instructive is First Am. Corp. v. Al-Nahyan. [FN117] Plaintiffs in that case asserted claims naming various government officials and entities of the United Arab Emirates ("U.A.E."), including H.H. Sheikh Zayed ("Zayed"), the U.A.E.'s sitting head-of-state. The complaint alleged various fraudulent schemes and investments by defendants in connection with attempts to acquire certain banking interests in the United States. The Government filed a suggestion of immunity on behalf of Zayed. The court, rejecting arguments that the FSIA governed Zayed's assertion of immunity, ruled that claims against Zayed were barred because he was entitled to immunity from the court's jurisdiction under the head-of-state doctrine. [FN118] On this point, the court declared:

FN117. 948 F.Supp. 1107 (D.D.C.1996).

FN118. See id. at 1119.

the enactment of the FSIA was not intended to affect the power of the State Department ... to assert immunity for heads of state or for diplomatic and consular personnel .... The United States has filed a Suggestion of Immunity on behalf of H.H. Sheikh Zayed, and the courts of the United States are bound to accept such head of state determinations as conclusive. [FN119]

FN119. Id. (citing Ex Parte Peru, 318 U.S. at 588-89 and Aristide, 844 F.Supp. at 137).

As regards the issue of the FSIA's application to individuals, the court observed that the Act's focus " 'is towards corporate and government entities-- legal yet nonnatural "persons." Nowhere does the FSIA discuss the liability or role of natural persons, whether governmental officials or private citizens.' " [FN120] Significantly, the court held that certain defendants who were members of the ruling family of a political subdivision of the UAE, which thus was not a recognized independent state, were not entitled to head- of-state *287 immunity because none was a sitting head-of-state and the State Department had not suggested immunity on their behalf. [FN121] Similar reasoning and results are recorded in other cases involving State Department suggestions of immunity invoking the emerging head-of-state doctrine. [FN122]

FN120. Id. at 1120 (quoting Herbage v. Meese, 747 F.Supp. 60, 66 (D.D.C.1990), aff'd, 946 F.2d 1564 (D.C.Cir.1991)).

FN121. See id. at 1121.

FN122. See, e.g., Alicog v. Kingdom of Saudi Arabia, 860 F.Supp. 379, 382 (S.D.Tex.1994) (dismissing a claim against King Fahd on the appearance by the United States to acknowledge that King Fahd was the recognized head of state of Saudi Arabia, which representation the court accepted as conclusive); Saltany v. Reagan, 702 F.Supp. 319, 320 (D.D.C.1988) (claim naming British Prime Minister Margaret Thatcher in an action for damages arising out of the United States bombing raids in Lybia dismissed on the basis of

the Government's suggestion of immunity for a sitting head of government), aff'd in part, rev'd in part, 886 F.2d 438 (D.C.Cir.1989), cert. denied, 495 U.S. 932, 110 S.Ct. 2172, 109 L.Ed.2d 501 (1990); Gerritsen v. de la Madrid, No. CV-85-5020-PAR, slip. op. at 7-9 (C.D.Cal. Feb. 5, 1986) (in an action naming the President of Mexico and other Mexican officials in their individual and official capacities and alleging unlawful use of threat and force to prevent plaintiff from distributing leaflets in a public park in Mexico, the court accepted the State Department's suggestion of immunity on behalf of the Mexican President, noting that the FSIA "does not refer to individual representatives of foreign governments" and that its enactment "was not intended to affect the power of the State Department to assert immunity for diplomatic and consular personnel," which authority the court found extended to immunity for a head-of-state); Kilroy v. Windsor, No. C 78- 291, slip. op. (N.D.Ohio Dec. 7, 1978); see also Kline, 685 F.Supp. at 392 (in an action alleging kidnapping and wrongful expulsion from Mexico and naming as a defendant the wife of the President of Mexico, the court observed that "it appears that defendant Cordero De La Madrid may be entitled to a dismissal under the Head of State doctrine", though the court did not rule on the question because it held that it lacked jurisdiction in other respects and remanded the case to the state court). On remand the state court deferred to the State Department's suggestion of immunity and dismissed as to Mrs. De La Madrid. See Kline v. Kaneko 141 Misc.2d 787, 535 N.Y.S.2d 303 (Sup.Ct.N.Y.Co.1988), aff'd, 154 A.D.2d 959, 546 N.Y.S.2d 506 (N.Y.App. Div. 1st Dep't 1989); see also Guardian F. v. Archdiocese of San Antonio, Case No. 93-CI-11345 (Tex.Dist.Ct.1994) (suit against Pope John Paul II dismissed on Government's suggestion of immunity); Kim v. Kim Yong Shik, Civ. No. 12565 (Cir. Ct. 1st Cir. Hawaii 1963), reported in 58 Am. J. Int'l L. 186 (1964) (in pre-FSIA case, the court extended immunity to a foreign minister, deferring to a State Department suggestion of immunity).

**18 Equally germane is the courts' treatment of sovereign immunity in cases involving former or sitting heads-of-state where the State Department has decided not to intercede; where a waiver of immunity has been filed by the current foreign government; or where the United States does not recognize the legitimacy of the particular state or ruler. [FN123] In Karadzic, for example, the district court declined to exercise subject matter jurisdiction over claims alleging human rights violations brought against the self-declared head of the Bosnian-Serb entity, neither the state or ruler of which the United States had recognized. In considering Karadzic's claim of head-of-state immunity, the district court stated that "[w]ere the Executive Branch to declare defendant a head-of-state, this Court would be stripped of jurisdiction." [FN124]

FN123. See, e.g., Doe v. Karadzic, 866 F.Supp. 734, 737-38 (S.D.N.Y.1994), rev'd on other grounds, Kadic v. Karadzic, 70 F.3d 232 (2d Cir.1995); see also In re Doe, 860 F.2d at 43; In re Grand Jury Proceedings, 817 F.2d at 1110; Noriega, 746 F.Supp. at 1520; Domingo, 694 F.Supp. at 786; Hilao v. Estate of Marcos, 25 F.3d 1467, 1472 (9th Cir.1994).

FN124. 866 F.Supp. at 738.

On appeal, the Second Circuit, reversing the finding on subject matter jurisdiction, implicitly endorsed the district court's stated*288 assumption and the reasoning in Aristide by positing that recognition of Karadzic as head-of-state by the Executive Branch in the future may confer immunity over the actions at issue. [FN125] For the purposes of the case at bar, what is especially relevant and instructive in these circumstances is the courts' implied assumption that, but for the immunity waiver or absence of the State Department's intercession, a head-of-state immunity might still present a viable defense.

FN125. See Kadic, 70 F.3d at 248 (citing In re Doe, 860 F.2d at 45, for the proposition that the scope of head-of-state immunity remains unsettled).

The Second Circuit intimated as much in In re Doe, [FN126] an action against former President Marcos of the Philippines and his wife alleging fraud and embezzlement of public funds. The Marcoses there asserted head-of-state immunity to resist subpoenas served on them. The Philippines government of Marcos's successor presented a diplomatic note to the State Department purporting to waive any residual immunity the Marcoses may have possessed under international and United States law.

FN126. 860 F.2d at 45; see also In re Grand Jury Proceedings, 817 F.2d at 1111 (holding that head-of-state immunity is waivable at the behest of the sending state and accepting the Philippines government's waiver of whatever immunity Ferdinand and Imelda Marcos may have enjoyed).

On appeal from the district court's ruling accepting the waiver of immunity and holding the Marcoses in contempt for not complying with the subpoenas, the Second Circuit affirmed. The Court of Appeals observed that "because the FSIA makes no mention of heads-of-state their legal status remained uncertain." [FN127] It then added: "[w]hen lacking guidance from the executive branch, as here, a court is left to decide for itself whether a head-of-state is or is not entitled to immunity." [FN128]

FN127. 860 F.2d at 45.

FN128. Id.

c. Beyond Chuidian and Aristide

Taken as a whole, the import of the body of case law discussed above is that, whatever may be said in general concerning the effect and application of the FSIA to lower ranking individual foreign officials, whether sued in their governmental or private capacities, "the exact contours of head-of-state immunity ... are still unsettled." [FN129]

FN129. In re Grand Jury Proceedings, 817 F.2d at 1110.

Despite that part of the FSIA's legislative history prompted by the State Department's practices of filing suggestions of immunity pursuant to the Tate Letter and Congress' expressed intent to alter that process, the courts uniformly have continued to recognize an exception from application of the FSIA in cases dealing with actions brought against sitting heads-of-state on whose behalf the United States intercedes to confer immunity. This practice is regarded as a matter either not specifically addressed or explicitly precluded by the FSIA.

**19 The emerging consensus points to a rule of law encompassing uniquely the scope of immunity of foreign heads-of-state from the jurisdiction of United States courts. It holds that in enacting the FSIA,

Congress did not envision disturbing the traditional practice of the State Department, through filing its suggestions of immunity, conferring upon recognized heads-of-state absolute protection from the exercise of jurisdiction by courts in this country. [FN130]

FN130. See supra note 122 and cases cited therein; see also United States v. Noriega, 117 F.3d 1206, 1212 (11th Cir.1997) ("Because the FSIA addresses neither head-of-state immunity, nor foreign sovereign immunity in the criminal context, head-of-state immunity could attach in cases ... only pursuant to the principles and procedures outlined in The Schooner Exchange, and its progeny. As a result, this court must look to the Executive Branch for direction on the propriety of Noriega's immunity claim."), cert. denied, 523 U.S. 1060, 118 S.Ct. 1389, 140 L.Ed.2d 648 (1998).

*289 Nonetheless, despite developing agreement on some aspects of the FSIA's effects on head-of-state immunity, several issues have surfaced which have yet to be conclusively resolved. Among the open questions are: (1) Who is entitled to assert head-of-state immunity? While the courts uniformly have accepted the claim as to heads-of-state and heads-of-government recognized by the United States, questions remain as to how far down the hierarchical chain the protection could legitimately extend. [FN131] (2) What are the extent and circumstances under which head-of-state immunity may be waivable? [FN132] (3) To what degree are acts of individuals rather than governmental offices covered? [FN133] (4) Is there a distinction between private and governmental acts to which immunity may extend? [FN134] (5) Is there a difference in the degree of immunity conferred as between sitting and former heads-of-state? [FN135] (6) What is the exact weight to be accorded by the courts to the State Department's suggestions of immunity, and indeed whether, as the Chuidian court questioned, this role survived the FSIA at all? [FN136]

FN131. See Republic of Philippines v. Marcos, 665 F.Supp. 793, 797-98 (N.D.Cal.1987) (rejecting a suggestion of immunity filed by the State Department on behalf of the Philippines Solicitor General, the court noted that the official was neither a sovereign or a foreign minister, "the two traditional bases for a recognition or grant of head-of-state immunity," and declared "[t]he government in this instance seeks to expand the head-of-state doctrine to encompass all government officials of a foreign state to whom the State Department chooses to extend immunity. There is no precedent for such a radical departure from past custom ...."); see also El-Hadad v. Embassy of the United Arab Emirates, 69 F.Supp.2d 69, 82 n. 10 (D.D.C.1999) (while dismissing on other grounds and not dispositively addressing defendants' claim of head-of-state immunity as embassy officials representing the President of the U.A.E., the court noted that the head-of-state doctrine "is limited only to the sitting official head-of-state .... The Court declines to expand the head-of-state immunity to cover all agents of the head-of-state.") (citations omitted), aff'd in part, rev'd in part, 216 F.3d 29 (D.C.Cir.2000).

FN132. See In re Doe, 860 F.2d at 45; In re Grand Jury Proceedings, 817 F.2d at 1110; Aristide, 844 F.Supp. at 134; Paul v. Avril 812 F.Supp. 207 (S.D.Fla.1993); see also Hilao, 25 F.3d at 1472 (declining to reach plaintiffs' contention that communications from the then current Philippines government purporting to waive Marcos's immunity, as well as Marcos's argument that there is no authority allowing one government official to waive the immunity of another official); Chuidian, 912 F.2d at 1103-05 (waiver by one governmental entity does not extend to another entity).

FN133. See Republic of Philippines, 665 F.Supp. at 798-99; Aristide, 844 F.Supp. at 139.

FN134. See In re Doe, 860 F.2d at 44-45; Hilao, 25 F.3d at 1470-71.

FN135. See In re Doe, 860 F.2d at 45; In re Grand Jury Proceedings, 817 F.2d at 1110.

FN136. See supra notes 97-99 and accompanying text.

In light of these remaining uncertainties, this Court cannot conclude that resolution of the issues Plaintiffs present here is as clearly indicated as they contend. Absent more definitive guidance, this Court is persuaded that the more prudent course is one which does not presume that Congress squarely confronted these questions in drafting the FSIA and unequivocally had them all in mind at the time it adopted the statute, thereby indisputably resolving in the text of the Act the issues here in dispute. As already discussed, *290 nothing in the legislative history indicates that Congress even implicitly considered these matters. Simply put, the head-of-state immunity issues described above were not yet "in the air" as part of the underlying concerns that prompted the FSIA nor in the debate and deliberations that accompanied the enactment.

Rather, the dominant thrust of the FSIA, as Congress declared in its legislative findings, and as manifest on its face, relates to "the claims of foreign states to immunity" from jurisdiction of United States Courts. [FN137] Congress' expression of statutory purpose, after noting that "[u]nder international law, states are not immune from the jurisdiction of foreign courts insofar as their commercial activities are concerned," further asserted that "[c]laims of foreign states to immunity should henceforth be decided by the courts of the United States ... in conformity with the principles set forth in this chapter." [FN138]

FN137. 28 U.S.C. § 1602 (emphasis added).

FN138. Id. (emphasis added).

**20 The statute, as the Second Circuit has recognized, "makes no mention of heads-of-state." [FN139] Instead, it evinces a central concern with the adjudication of claims of sovereign immunity asserted in legal disputes arising from the commercial activities of states, their governmental agencies or public trading companies. The ordinary controversies that arose out of those claims were peculiarly susceptible to resolution by courts in accordance with familiar rules of law that offered the parties a greater measure of coherence, predictability and objectivity in an impartial forum, as well as a judicial process free from political and diplomatic pressures. This was an adjudicative process known to foreign states, consistent with international practices that had become prevalent. At the time the FSIA was enacted, most other nations had already adopted the restrictive theory of immunity to address precisely these considerations, as Congress itself acknowledged in expressing its intent to "conform to the practice in virtually every other country." [FN140]

FN139. In re Doe, 860 F.2d at 45.

FN140. H.R. Report, at 7.

While the "practice in virtually every other country" may have been uniform with regard to dealing with claims of immunity by states and their governmental entities in commercial disputes, it would be a dubious proposition to declare that uniform rules and practices that could be considered customary international law then existed with regard to sovereign immunity assertions made on behalf of heads-of-state. The record appears quite to the contrary.

Not only the uncertainty surrounding the basic head-of-state immunity issues-- many of them still unsettled today, let alone in 1976--but the distinct diplomatic considerations and political consequences associated with the two forms of immunity also suggest the absence of prevailing standards that could have been the subject of considered and intended legislative codification in the Act.

Several elements establish the differences between sovereign immunity for states and their governmental entities as opposed to heads-of-state, and support a finding that, until otherwise definitively settled by Congress, the Executive Branch's role in determinations of head-of-state immunity was not affected by the passage of the FSIA. By reason of the traditional identity of the sovereign as both the state and its ruler, a residual political embodiment that still holds *291 sway in some countries, individual and human dimensions enter into the mix in matters of sovereign immunity implicating recognized heads-of-state. Affronting the person and dignity of the leader of a sovereign nation, through an exercise of another state's territorial jurisdiction over the ruler, has a greater potential for fraying sensibilities than may be associated with subjecting foreign state agencies or their officials to the power of the courts in commercial disputes. In the latter cases, states can more readily agree to the wisdom and applicable rules of engagement.

Moreover, some widely recognized judicial standards exist to guide adjudication of disputes involving state companies and their ordinary trading ventures. No such coherent and widely accepted rules exist as yet as regard heads-of-state. Thus, far greater likelihood exists for stirring embarrassment and offense to national pride and provoking acts of retaliation in connection with an exercise of jurisdiction extended individually to a nation's ruler by denial of sovereign immunity than by such action asserted against state commercial entities or even lesser foreign government officials. The potential for harm to diplomatic relations between the affected sovereign states is especially strong in cases, such as the one now before this Court, that essentially entail branding a foreign ruler with the ignominy of answering personal accusations of heinous crimes.

**21 The significant distinction between the head-of-state and other governmental officials that justifies different sovereign immunity treatment was recognized and underscored in The Schooner Exchange. There Chief Justice Marshall in fact identified the "exemption of the person of the sovereign from arrest or detention within a foreign territory" [FN141] as an exception to the exercise of territorial jurisdiction in a category separate even from that pertaining to the immunity accorded to diplomatic ministers. [FN142] The Chief Justice acknowledged the unique personal sensibilities that attach to immunity for heads-of-state:

FN141. 11 U.S. (7 Cranch) at 137.

FN142. See id. at 138.

A foreign sovereign is not understood as intending to subject himself to a jurisdiction incompatible with his dignity, and the dignity of his nation, and it is to avoid this subjection that the license has been obtained. The character to whom it is given, and the object for which it is granted, equally require that it should be construed to impart full security to the person who has obtained it. [FN143]

FN143. Id. at 137-38.

Second, the reasons that prompted Chief Justice Marshall to classify immunity for the sovereign ruler in a category separate from that related to diplomatic envoys has another dimension. Unlike the sovereign nation itself, the head-of- state is not a static abstraction. The ruler travels. And when heads-of-state journey abroad on official business, they often engage in diplomatic activities and attend political and ceremonial functions, always uniquely attended by the emblems and trappings of office symbolizing the representation of their governments and sovereign states.

These foreign duties demand policies and practices--as an aspect of comity also fostering reciprocity--designed to safeguard that heads-of-state abroad be accorded the mutual respect and personal dignity to which their status entitles them. [FN144] That scope of protection would *292 extend to heads-of- state a level of immunity from territorial jurisdiction at minimum commensurate with that accorded by treaties and widely accepted customary international law to diplomatic and consular officials, [FN145] although, for the reasons stated above, an even greater degree of protection of heads-of-state would be warranted. As one court observed, it would be anomalous for states to confer upon their foreign envoys abroad diplomatic privileges and immunities extending farther than the immunity they recognize for heads-of-state. [FN146]

FN144. See Satow's Guide, at 9-10 ("It has been established for several centuries in customary international law that a sovereign, or head of state, who comes within the territory of another sovereign is entitled to wide privileges and to ceremonial honours appropriate to his position and dignity, and to full immunity from the criminal, civil and administrative jurisdiction of the state which he is visiting .... A head of state, whether a hereditary ruler or an elected president, does not enter the territory of another state in his official capacity without the clearest assurances being expressed or implied that full immunity and full ceremonial honours will be accorded.").

FN145. See id. (noting that "[t]he personal status of a head of state of a foreign state therefore continues to be regulated by long- established rules of customary international law" which include immunity from criminal and civil jurisdiction; inviolability of his residence, person and movable property; exemption from taxes and searches of baggage and goods brought along; and similar protection for his spouse, family and possibly members of his official entourage).

FN146. See In re Grand Jury Proceedings, 817 F.2d at 1111 (referring to the state's power to revoke immunity).

Third, while it may be only a modest extension under the FSIA definition of a foreign state to consider an individual official as an "agency" or "instrumentality", the fit is more awkwardly stretched as applied to

head-of- state. [FN147] By tradition, an act of the nation's leader has more claim to be identified and associated as that of the "foreign state" itself, which the FSIA exempts from the exercise of the courts' jurisdiction.

FN147. See Aristide, 844 F.Supp. at 136 (noting that "[n]o case has ... construed 'agency or instrumentality' to include a head-of-state").

Fourth, because the state and its ruler customarily have been so closely identified and intertwined, as regards a head-of-state it is far more difficult to draw the line distinguishing between conduct that is official and unofficial. The range of public activities directly involving heads-of-state is more encompassing and the demarcations of actions associated with them are more blurred than is the case as regards lesser officials and state agencies, the governmental functions of which are more discrete and better definable.

**22 Fifth, issues as to who qualifies to be considered a head-of-state, under what circumstances, and how far and for how long the scope of immunity stretches, require more nuanced political and diplomatic judgments than those pertaining to the mandate of state entities or lesser officials. As Noriega and Aristide demonstrate, head-of-state immunity is an attribute of state sovereignty, not an individual right. [FN148] The grant of immunity is also a matter of grace and comity entirely within the discretion of the Executive Branch. [FN149] Unlike the case of lower-ranking officials, head-of-state status requires a formal act of recognition by the Executive Branch, and only officials so recognized can claim entitlement to the corresponding privileges and immunities. [FN150]

FN148. See Aristide, 844 F.Supp. at 132-33; Noriega, 746 F.Supp. at 1519; see also In re Grand Jury Proceedings, 817 F.2d at 1111.

FN149. See Verlinden, 461 U.S. at 486, 103 S.Ct. 1962; The Schooner Exchange, 11 U.S. (7 Cranch) at 136.

FN150. See Noriega, 746 F.Supp. at 1520 n. 14 ("[S]ince ... head of state immunity is a privilege bestowed within the Executive's discretion, the government is not bound to a position it has taken on another foreign official in an entirely different context."); see also Aristide, 844 F.Supp. at 132-33.

*293 Immunity judgments also tend to present especially delicate complexities by virtue of the need to differentiate in some circumstances between the state, the head-of-state and the head-of-government. Thus, the Government may choose to recognize a particular state, but not its declared head-of-state. Or it may recognize a state and head-of-state but not the nation's head-of-government. In other words, the act of political recognition of the head-of-state requires its own exercise of executive power, separate and apart from diplomatic recognition of the state, in accordance with the Executive Branch's assessment of the nation's various foreign relations interests.

Decisions, for instance, about which leader the country recognizes, or whether the head-of-state's immunity should be extended to a spouse or to a special envoy on a particular high-level mission on behalf of the head-of-state, if second guessed by the courts, could inevitably lead to foreign relations

complications and invite reciprocal treatment. Those determinations are generally subject to their own intrinsically political and diplomatic considerations that could not readily lend themselves to coherent rules devised by the courts. Finally, after a head-of-state leaves office his former public status and corresponding privileges and immunities may require broader recognition and more complex waiver rules than ordinarily may be necessary to attach to lower ranking state officials.

In sum, the several considerations attest that Congress could not have encompassed resolution of the open questions described above in the FSIA. While ordinarily Congress should be ascribed its due measure of prescience, the legislative record of the FSIA is too sparse to support a fair inference that Congress' intent reached as far as Plaintiffs here urge to address concerns that were largely unknown at the time. Matters of such moment and magnitude, as regards sensitive issues touching on foreign relations--no less so than as to constitutional questions--should not be grounded on what at best may be described as adumbrations of Congressional design divined from legislative silences, or emanating from the interstices or penumbras of the law. As the Second Circuit advised in In re Doe,
**23 in the constitutional framework, the judicial branch is not the most appropriate one to define the scope of immunity for heads-of-state .... If heads-of-state or former heads-of-state are to be immune for property allegedly taken in violation of international law, Congress should enact--or amend existing--legislation to make that clear. [FN151]

FN151. 860 F.2d at 45.

d. Plaintiffs' Authorities Distinguished

The cases and authorities Plaintiffs rely upon do not support a contrary reading of the FSIA's intent, at least as it pertains to the Act's application to immunity for heads-of-state. Plaintiffs' argument rests heavily on the line of cases, discussed above, which have held that the FSIA's definition of "foreign state" extends to individuals deemed to constitute state "agencies", "legal persons", "entities" or "instrumentalities." [FN152] While there is significant opinion supporting that interpretation, some courts addressing the exact question have squarely ruled otherwise, [FN153] so that *294 the proposition is by no means entirely settled.

FN152. See supra note 98 and accompanying text.

FN153. See First Am. Corp., 948 F.Supp. at 1120; Herbage, 747 F.Supp. at 66; Republic of the Philippines, 665 F.Supp. at 797.

Second, all of these cases have turned essentially on one central fact: the actions the foreign officials were carrying out which gave rise to the claims brought against them in court were found to fall within the scope of their official duties. To this extent the outcome in the cases is unremarkable and by no means surprising. That result is consistent, as the Chuidian court observed, with the general principle established in our domestic law that "a suit against an individual acting in his official capacity is the practical equivalent of a suit against the sovereign directly." [FN154] The doctrine recognizes that actions naming government officers as defendants for suits in their capacities as public agents are only alternative means of asserting a claim against the state itself and that typically plaintiffs in these cases

contemplate that ultimately any recovery would come from the state treasury. On this basis, the rule distinguishes official-capacity suits from strictly personal claims. [FN155]

FN154. Chuidian, 912 F.2d at 1101 (citing Monell v. Department of Soc. Servs., 436 U.S. 658, 690 n. 55, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978)).

FN155. See Restatement (Second) of Foreign Relations Law § 66(f) (recognizing that immunity extended to any state official or agent with respect to acts performed in an official capacity "if the effect of exercising jurisdiction would be to enforce a rule of law against the state").

Starting from its predicated lack of practical difference between these two situations, the Ninth Circuit rejected an inference that, in passing the FSIA, Congress "intended to allow unrestricted suits against individual foreign officials acting in their official capacities." [FN156] In this regard, the court expressed concern that a contrary result would encourage litigants to evade the effects of the FSIA through artifice, pleading claims against individual officials rather than directly against the foreign state itself, thereby effecting "a blanket abrogation of foreign sovereign immunity by allowing litigants to accomplish indirectly what the Act barred them from doing directly." [FN157]

FN156. Chuidian, 912 F.2d at 1102.

FN157. Id.

Based on its stated premise, the court concluded that actions brought against government agents naming them individually, as well as the officials' assertions of sovereign immunity, must be assessed within the framework of the FSIA and the exemptions the Act delineates to the doctrine of immunity for states. It thus reflected the basis argued by the Government of the pre-FSIA common law deference under which the courts gave conclusive effect to assertions of immunity by the State Department on behalf of foreign officials.

**24 On this point, the Ninth Circuit, again referring to the practical equivalence between suits against foreign states and suits against a state's officials acting within the scope of governmental functions, was troubled by the prospect of promoting "a peculiar variant of forum shopping" [FN158] in which some litigants would choose to sue the foreign officials, while others would file directly against the foreign states, depending on their assessment of the State Department's likelihood of interceding and its potential influence in one instance rather than another.

FN158. Id.

Whatever the merits of these considerations, neither the Chuidian court's analysis, nor that of the other cases which have followed it, had occasion to consider the *295 unique circumstances associated with an action brought directly against a sitting head-of-state or foreign minister of a government recognized by the United States, whether the acts challenged are official or unofficial. Nor did they squarely confront

the threshold issue, central to the dispute at hand, of the effect of a suggestion of immunity filed by the Department of State relating to an exercise of a court's jurisdiction over a recognized sitting head-of-state. In none of the cases grounding Plaintiffs' arguments did the State Department intercede with such a suggestion. [FN159]

FN159. See supra note 91 for a discussion of the Government's "statement of interest" expressed in Chuidian.

In fact, only one instance, Republic of the Philippines, [FN160] has been reported in which a State Department suggestion of immunity was filed and not honored by a court. There, the action entailed not a head-of-state, but the foreign country's Solicitor General. That official, while traveling on government business in the United States, was served with a subpoena for a deposition and a request for production of documents. Insofar as the court declared that the FSIA entirely abrogated the Executive Branch's role in filing suggestions of sovereign immunity on behalf of foreign sovereigns, the statement runs counter to the greater weight of opinion which has held otherwise.

FN160. 665 F.Supp. at 797-98. While the Court rejected the claim of immunity under the head-of-state doctrine, it held that the official, present in the United States on a government mission, was entitled to diplomatic immunity.

Moreover, the court also relied for its holding upon a determination that the FSIA does not apply to individual government officials, a construction of the statute that the Ninth Circuit abrogated in Chuidian. Thus, the case could have been decided, following the Chuidian reasoning, on the ground that an exercise of jurisdiction over the Solicitor General, as a representative of the government acting in his official capacity, was tantamount to an action brought against the state itself and thus entitled to immunity under the FSIA because it did not fall within any of the Act's exemptions.

By the same token, cases such as Cabiri [FN161], which hold that foreign government officials sued in their individual capacity for unofficial acts do not enjoy FSIA immunity, shed no more light on the precise issues here because they entailed neither sitting heads-of-state nor consideration of a suggestion of immunity filed by the State Department. To be sure, a plausible argument may be constructed that, in light of the concerns pertaining to the State Department's suggestion of immunity practices that prompted the adoption of the FSIA, there must be some limit on the circumstances and on the individual foreign officials on whose behalf the State Department may interpose the protection of the emerging head-of-state doctrine. A gray zone may exist in which conceivably the bounds of FSIA immunity for foreign states and assertions of head-of-state immunity may intersect, overlap or even collide.

FN161. See 921 F.Supp. at 1197-98; see also Hilao, 25 F.3d at 1470.

**25 A not so far-fetched set of facts may be conceived under which the State Department, subjected to foreign government diplomatic and political pressures of the kind that propelled the enactment of FSIA, would, under the banner of its application of common law head-of-state sovereign immunity, intervene to assert immunity on behalf of an individual foreign official who clearly is not a sitting head-of-state, nor acting on a foreign mission as *296 special envoy or surrogate of the head-of-state, but is rather involved

in his private or official capacity in a commercial dispute of the kind the FSIA explicitly contemplated to be excluded from claims of sovereign immunity. Such hypothetical circumstances are not inconceivable because, in fact, they are not far afield from some of the pertinent events that arose in Chuidian and First Am. Corp. [FN162]

FN162. See Chuidian, 912 F.2d at 1097, 1099; First Am. Corp., 948 F.Supp. at 1121; see also Lasidi, supra note 72.

Fundamentally, the dispute at issue in Chuidian centered on a commercial transaction involving a foreign state "agency or instrumentality", albeit represented by an individual acting in his official capacity--a fact that the State Department itself may have recognized when it characterized its intervention not as a suggestion of immunity but as a "statement of interest." Viewed in this light, the Chuidian outcome is unassailable and the Government's intervention there was somewhat flawed. Closer to home, the supposed situation may prevail in this case in relation to Plaintiffs' claims against the ZANU-PF, discussed further in Part III below.

Were the State Department to file a suggestion of immunity on behalf of foreign officials under these circumstances, arguably its action would prompt the kinds of concerns that impelled the FSIA and raise valid questions as to whether the assertion of immunity should be evaluated under the framework of the FSIA or of pre-FSIA doctrine as it applies to heads-of-state. The Second Circuit intimated as much in In re Doe, where it noted that "were we to reach the merits of the issue, we believe there is respectable authority for denying head-of-state immunity to a former head-of-state for private or criminal acts in violation of American Law." [FN163] For that reason, this Court believes that both Chuidian and Aristide may overstate their essential positions insofar as they purport to offer an overly categorical reading of the FSIA's effect on the State Department's role in the foreign immunity process and the weight the courts should accord the Department's declarations, at least as these pertain to recognized heads-of-state.

FN163. 860 F.2d at 45 (citing The Schooner Exchange, 11 U.S. (7 Cranch) at 135 and Republic of the Philippines v. Marcos, 806 F.2d 344, 360 (2d Cir.1986)) (emphasis added).

The matter now before this Court, however, as it relates to Mugabe and Mudenge, does not present the hypothetical overlapping zone posited above. Rather, it squarely implicates both an action brought individually and directly against a sitting foreign head-of-state and a foreign minister, and an invocation of the head-of-state doctrine through a formal Suggestion of Immunity filed on their behalf by the Department of State declaring that "permitting this action to proceed against the President and the Foreign Minister would be incompatible with the United States' foreign policy interests." [FN164]

FN164. Suggestion, at 2.

**26 The Government's assertion of head-of-state immunity as to Mugabe extended to Mudenge, traveling as Foreign Minister and as a member of Mugabe's official entourage at the time he was served. [FN165] Accordingly, the Court concludes that, contrary to Plaintiffs' argument, the FSIA does not serve to abrogate the State Department's decisive role in the recognition of head-of-state immunity, nor *297 to

negate the head-of-state immunity invoked here by the State Department on behalf of Mugabe and Mudenge.

FN165. See Satow's Guide, at 10; see also Kim, 58 Am. J. Int'l L. at 186.

Inasmuch as the Court's honoring of the Executive Branch's Suggestion of Immunity is fully dispositive of the matter as it pertains to the Court's lack of personal jurisdiction over Mugabe and Mudenge, it is unnecessary for the Court to consider the merits of the substantive basis of Plaintiffs' claims of subject matter jurisdiction under the ATCA and the TVPA. It suffices to say, as the Aristide court concluded, that the TVPA does not negate head-of-state immunity, [FN166] and there are no defensible grounds for a different outcome as it relates to an action invoking the ATCA.

FN166. See Aristide, 844 F.Supp. at 138 (citing Sen. Comm. on the Judiciary, The Torture Victim Protection Act of 1991, S.Rep. No. 249, 102d Cong. 1st Sess. 7-8 (1991)) ("The TVPA is not intended to override traditional diplomatic immunities which prevent the exercise of jurisdiction by U.S. courts over foreign diplomats .... Nor should visiting heads-of-state be subject to suits under the TVPA.").

II. DIPLOMATIC IMMUNITY

The Suggestion asserts that in addition to head-of-state immunity, Mugabe and Mudenge, present in this country as representatives of the Government of Zimbabwe to the United Nations Millennium Summit at the time they were served, are also entitled to diplomatic immunity under the Convention on Privileges and Immunities of the United Nations [FN167] and the Vienna Convention on Diplomatic Relations. [FN168] Article IV, Section 11 of the U.N. Convention provides that temporary representatives of Member States to United Nations bodies and conferences accredited for those limited purposes are entitled to the privileges and immunities enjoyed by diplomatic envoys. Similarly, Article 31(1) of the Vienna Convention provides that diplomatic agents enjoy comprehensive immunity from civil jurisdiction.

FN167. Adopted Feb. 13, 1946, United States accession, April 29, 1970, 21 U.S.T. 1418, 1 U.N.T.S. 16 (hereinafter the "U.N. Convention").

FN168. Done April 18, 1961, United States accession, December 13, 1972, 23 U.S.T. 3227, 500 U.N.T.S. 95 (hereinafter the "Vienna Convention").

Immunity extends to such temporary representatives throughout the course of their United Nations visit and applies from the time of entry into the United States until departure or expiration of a reasonable period following conclusion of their United Nations business. [FN169] The Government contends that pursuant to the Diplomatic Relations Act [FN170], an action against an individual who is entitled to immunity shall be dismissed where immunity is established "upon motion or suggestion by or on behalf of the individual." [FN171]

FN169. See Vienna Convention, Article 39(1) and (2).

FN170. 22 U.S.C. § 254a, et seq.

FN171. Id. at § 254d. The Court notes that under Article 10 of the Vienna Convention, the State Department may certify foreign diplomatic agents even after the official has entered the country and that under Article 39, the agents are entitled to immunity at the moment of notification to the appropriate authorities of the receiving state, even if they have already entered the territory. See Republic of Philippines, 665 F.Supp. at 799 (citing Abdulaziz v. Metropolitan Dade County, 741 F.2d 1328, 1331 (11th Cir.1984)).

Plaintiffs counter that subsection 11(a) of the U.N. Convention confers a limited form of diplomatic immunity that does not apply to Mugabe and Mudenge in this case. Specifically, subsection 11(a) states *298 that representatives of member states to the principal and subsidiary organs of the United Nations and to conferences convened by the United Nations, shall, "while exercising their functions and during their journey to and from the place of meeting," enjoy:
(a) immunity from personal arrest or detention and from seizure of their personal baggage, and, in respect of words spoken or written and all acts done by them in their capacity as representatives, immunity from legal process of every kind. [FN172]

FN172. U.N. Convention, § 11(a).

**27 According to Plaintiffs, this provision does not grant Mugabe and Mudenge the absolute immunity from civil jurisdiction asserted by the Government, but accords protection from suit only in respect to any conduct taken by them in their capacity as temporary representatives to the United Nations. Thus, because the offenses alleged here were not committed by Mugabe and Mudenge while engaged in that limited official role, subsection 11(a) of the U.N. Convention would not immunize their personal conduct.

The Government, however, replies that subsection 11(g) of the U.N. Convention also applies here to support its diplomatic immunity theory. That provision, following the enumeration that precedes it under the heading of Section 11, states that the temporary officials covered shall receive "such other privileges, immunities and facilities not inconsistent with the foregoing as diplomatic envoys enjoy." In the Government's reading, it is not incompatible with subsection 11(a) to grant the immunities subsection 11(g) provides, so long as such additional immunities are not expressly excluded by Section 11.

But Plaintiffs read subsection 11(g)'s "not inconsistent" reference as a limitation to the scope of Section 11 as a whole. In Plaintiffs' view, those qualifying words would contradict subsection 11(a) if interpreted to grant absolute immunity for all conduct, though subsection 11(a) confers immunity only for words spoken or written or other acts taken by officials in the course of discharging their duties as temporary representatives to the United Nations. In other words, on this theory only things said and done arising from the particular event temporary delegates are attending would be protected. So construed, the broader immunity enjoyed by accredited diplomats and principal resident representatives to the United Nations encompassing other times, places and subjects would not extend to the temporary envoys covered by Section 11.

The Court is not persuaded by Plaintiffs' interpretation of Section 11. That reading too narrowly constricts the immunity contemplated by the U.N. Convention to ensure the freedom and independence temporary delegates require to fulfill their responsibilities effectively. Specifying that immunity from legal process applies to words spoken or written and acts performed by temporary representatives in an official capacity underscores that at least those actions are protected by immunity. In fact, Section 12 of the U.N. Convention highlights the significance of this immunity by specifying that it continues to be enjoyed by the covered temporary envoys even after they cease serving in their capacities as delegates. Though, if read technically and in isolation, the language of subsection 11(a) could suggest that immunity as regards all other acts of temporary delegates would be precluded, such an exclusion could not have been contemplated in light of the enlargements of immunity evident elsewhere in the U.N. Convention.

*299 **28 First, that interpretation would create an internal textual conflict between the captional language of Section 11 that refers to "while exercising their functions" and the limitation Plaintiffs read into the "capacity as representatives" provision of subsection 11(a). It is clear that the "while exercising their functions" clause in the heading could encompass a broader range of activities than those of the official capacity language of the subsection. In discharging their narrowly defined official duties as delegates to a given event, temporary representatives to United Nations organs and conferences generally attend meetings and make speeches. But they also may be designated by their governments to perform related functions that may extend beyond the strict confines of the particular gathering.

In practice, ancillary to their narrower duties, temporary envoys may be assigned to represent their governments at other diplomatic, ceremonial and goodwill missions and bilateral conferences that typically occur at the margins of United Nations events and contribute to their success. Exercising duties associated with such attendant activities may be encompassed by the broader band of the "functions" referred to by the language at the head of Section 11 and covered by immunity under subsection 11(g), even if the acts in question may not arise from within the narrow corners of the delegates' capacities strictly connected with attending meetings of a specified United Nations body or conference encompassed by subsection 11(a).

Moreover, the language in the heading of Section 11 also specifies that the special representatives enjoy immunity "during their journey to and from the place of meeting". [FN173] At such times, for example, upon arrival in or departure from the United States, the delegates presumably would not yet be performing any acts in their capacities as representatives as contemplated by subsection 11(a), though they nonetheless would be entitled to the specified immunity during that period of travel. On Plaintiffs' reading of subsection 11(a), temporary envoys theoretically would be subject to domestic civil jurisdiction in connection with any matter unrelated to their official duties at the moment they set foot in the host country and before they have had any opportunity to exercise any functions as delegates.

FN173. U.N. Convention, § 11.

Second, the narrower interpretation of Section 11 would create anomalies and absurd results. United Nations ambassadors accompanying their heads-of-state or foreign ministers to a function would enjoy broader immunities than accorded to their superior officers, even though in reality the latter as temporary representatives may be charged with larger duties related to the United Nations event at issue, and though, theoretically, under the customary rules governing immunity, as heads-of-state and foreign ministers, some of them would be entitled to broader exemption from territorial jurisdiction. [FN174]

FN174. Satow's Guide, at 9-10; see Restatement (Third) of Foreign Relations Law § 464, Reporter's Note 14.

Moreover, reading subsection 11(a) to authorize service of process upon temporary representatives at any moment they are not engaged in acts strictly connected with the representatives' limited capacity as conference delegates, or at any place they take a step beyond the borders of the designated United Nations district, would encourage litigants and their process-servers to pursue the delegates and lie in wait to seize upon the first departure from the narrow protocol, thereby potentially discouraging *300 the designation of particular temporary envoys and defeating the purposes of Section 11.

**29 The net effect of Plaintiffs' construction of Section 11 would be to equate the privileges and immunities enjoyed by temporary delegates of United Nations member states with those accorded to invitees of the United Nations. The latter, who may include private persons as well as government officials, travel to the United Nations at the invitation of the organization and not as representatives of the member states or necessarily in their public capacities. The privileges and immunities accorded to invitees are narrower than those enjoyed by permanent and temporary United Nations envoys who represent the states, and are separately set forth in the Headquarters Agreement. Section 9(a) of the Headquarters Agreement limits the invitees' protection from service of process strictly to the confines of the United Nations district. [FN175]

FN175. See 22 U.S.C.A. § 287 Note; Kadic, 70 F.3d at 247; Klinghoffer v. S.N.C. Achille Lauro, 937 F.2d 44, 54 (2d Cir.1991).

The Court finds that the broader reading of Section 11 better comports not only with the text, but, as the Government points out, with the history of the U.N. Convention's adoption by the United States. Because the language of the treaty is not as unambiguous as Plaintiffs contend, [FN176] consideration of the legislative record is appropriate. [FN177] The report accompanying the Senate's advice and consent to ratification of the U.N. Convention makes clear that in adopting the treaty the United States understood it was extending the privileges and immunities enjoyed by temporary representatives of Member States to the level of protection conferred upon accredited diplomats. [FN178]

FN176. See Yu-Long Ling, A Comparative Study of the Privileges and Immunities of United Nations Member Representatives and Officials with the Traditional Privileges and Immunities of Diplomatic Agents, 33 Wash. & Lee L.Rev. 91, 112 (1976) (hereinafter "Ling") (noting that members of one of the United Nations standing committees had expressed concern that subsection 11(g) of the U.N. Convention appeared ambiguous).

FN177. See Massachusetts v. Morash, 490 U.S. 107, 114-15, 109 S.Ct. 1668, 104 L.Ed.2d 98 (1989) (in statutory construction the courts are "not ... guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy"); see also Shell Oil Co. v. Iowa Dep't of Revenue, 488 U.S. 19, 25, 109 S.Ct. 278, 102 L.Ed.2d 186 (1988) ("the meaning of words depends on their context").

FN178. See Report of the Committee on Foreign Relations, Exec. Rept. 91-17, 91st Cong. (March 17, 1970) (hereinafter "Exec. Rept."). This understanding was expressly conveyed by the State Department Legal Adviser, John R. Stevenson, at hearings before the Foreign Relations Committee on March 9, 1970. Describing the effect the Convention would have on privileges and immunities for nonresident representatives, the official stated:

At the present time resident representatives are already granted full diplomatic privileges and immunities under the headquarters agreement. Nonresident representatives, on the other hand, are only covered by the International Organizations Immunities Act and that grants them immunities relating to acts performed by them in their official capacity.

Under the convention, the nonresident representatives would also receive full diplomatic privileges and immunities.

The Chairman [Senator Fulbright]: They are the principal beneficiaries; is that right?

Mr. Stevenson: They are in terms of numbers the principal beneficiaries. There are about 1,000 of them who would be covered who are not now.

As Ambassador Yost [then the U.S. Permanent Representative to the United Nations] pointed out, many of the nonresident representatives are distinguished parliamentarians who come to New York for very short periods of time and we believe should be treated with the same respect as permanent representatives.

Id. at 11-12.

*301 The Executive Branch's view that the U.N. Convention broadened immunities for temporary envoys to the United Nations so as to make them coextensive with those of resident representatives and accredited diplomats was unambiguously expressed by the Senate Committee:

With regard to representatives of members, currently only resident representatives of permanent missions to the U.N. have full diplomatic immunities. Nonresident representatives enjoy only functional immunities; that is, immunities with respect to their official acts. Under the convention, these nonresident representatives will also be entitled to full diplomatic immunities. The group covered here consists of foreign officials coming to the United Nations for a short time to attend specific meetings--such as the annual fall meetings of the General Assembly. Foreign ministers and other high government officials, distinguished parliamentarians, and representatives of that caliber, fall into this category, which is estimated to number about 1,000 persons a year. [FN179]

FN179. Id. at 3 (emphasis added).

Heads-of-state and foreign ministers are precisely the types of officials who visit the United Nations for temporary purposes to attend conferences and special activities and who are contemplated by this language as being afforded "full diplomatic immunities" under the Convention. In fact, the customary diplomatic practices of heads-of-state and foreign ministers also illustrate the point that in "exercising their functions" as contemplated by Section 11, they rarely confine their roles as temporary representatives solely to the narrower capacities of the particular conference. Rather, they typically engage in a wide range of associated diplomatic missions and ceremonial events that the opportunity affords, activities that substantially foster and enhance the purposes of the underlying United Nations conference or session. [FN180] Here, Mugabe and Mudenge, at the time they were served, were engaged in exactly the type of visit "for a short time to attend specific meetings" [FN181] at the United Nations that the United States intended to render absolutely immunized. [FN182]

FN180. See generally, Satow's Guide, at 312-13.

FN181. Exec. Rept., at 3.

FN182. In fact, then-Ambassador Yost had underscored this point in addressing the Senate Foreign Relations Committee:
I have long feared that a visiting dignitary to the United Nations might some day be involved in difficulties not of his own making and that the U.S. Government would be powerless to accord him the privileges which would be appropriate and which would be expected of us. Our ratification is long overdue.
Id. at 11.

**30 This legislative record conveys unequivocally that both the Executive Branch and the Senate intended that Section 11 of the U.N. Convention would confer full diplomatic immunity to temporary representatives to the United Nations. This understanding also accords with the reading and application of Section 11 by officials of the United Nations. The United Nations Secretary- General, as reflected in opinions of the organization's Legal Counsel, adopts a "broad" interpretation of Section 11's phrase "while exercising their functions" that is consistent with this Court's reading of the text and that effectively rejects the narrow view Plaintiffs espouse. [FN183] In one opinion, for example, the Legal Counsel advised that "[i]n the view of the Secretary-General, to interpret those words so as to limit them to the times when the *302 person concerned is actually doing something as part of his functions as a representative, for example, speaking in a United Nations meeting, leads to absurd and meaningless results making such an interpretation untenable." [FN184] The opinion concluded that, "taken as a whole, Section 11 of the Convention in fact confers, except for the exemptions [regarding payment of customs and taxes] just mentioned, diplomatic privileges and immunities on the representatives of Members." [FN185]

FN183. See 1976 U.N. Juridical Yearbook, at 228.

FN184. Id.

FN185. Id. at 227.

Because the United Nations and its Member States operate on a global scale, it is essential that the U.N. Convention is given uniform interpretation and application in all countries where it is in effect. For this reason alone, courts should defer to the interpretation of the U.N. Convention adopted by the United Nations and evinced by the United States Congress when it ratified the Convention. As the Supreme Court has declared, [FN186] "[w]hen the parties to a treaty both agree as to the meaning of a treaty provision, and that interpretation follows from the clear treaty language, [the court] must, absent extraordinarily strong contrary evidence, defer to that interpretation." This Court has found no extraordinarily strong evidence here suggesting that the interpretation of Section 11 the United States advances is not entitled to deference. Accordingly, the Court concludes that both Mugabe and Mudenge

enjoyed diplomatic immunity at the time they were served and that the Court therefore lacks a basis for exercise of jurisdiction over them.

FN186. Sumitomo Shoji America, Inc. v. Avagliano, 457 U.S. 176, 185, 102 S.Ct. 2374, 72 L.Ed.2d 765 (1982); accord, Kolovrat v. Oregon, 366 U.S. 187, 194, 81 S.Ct. 922, 6 L.Ed.2d 218 (1961) ("[T]he meaning given [treaty provisions] by the departments of government particularly charged with their negotiation and enforcement is given great weight."); 767 Third Avenue Assocs. v. Permanent Mission of Zaire, 988 F.2d 295, 301-02 (2d Cir.1993) ("federal courts must defer" to treaty interpretation advanced by United States and not contradicted by any signatory to the treaty).

III. PERSONAL INVIOLABILITY

Plaintiffs contend that even if head-of-state or diplomatic immunity shielded Mugabe and Mudenge from the Court's jurisdiction, such protection does not extend to ZANU-PF and that a default judgment should be entered in this action against that political entity because the organization was properly served with process through the personal service effectuated on Mugabe and Mudenge in their capacities as senior officers of the party. On Plaintiffs' theory, because the U.N. Convention immunizes foreign officials from service only for suits based on official acts associated with their United Nations visit, and not from unrelated private actions such as those involving ZANU-PF, personal inviolability would not apply to preclude service of process on Mugabe and Mudenge. The Government responds that both head-of-state and diplomatic immunity render Mugabe and Mudenge absolutely inviolable for all purposes, so that service of process on them, even that intended for ZANU-PF, was a nullity and should be quashed.

**31 Indisputably, personal inviolability goes to the core of diplomatic immunity. Inviolability is a venerable principle, its essence and enduring roots articulated by a leading treatise:
Personal inviolability is of all the privileges and immunities of missions and diplomats the oldest established and the most universally recognized .... The *303 inviolability of ambassadors is clearly established in the earliest European writings on diplomatic law and from the sixteenth century until the present one can find virtually no instances where a breach of a diplomat's inviolability was authorized or condoned by the Government which received him. [FN187]

FN187. Satow's Guide, at 120; see also Sen, A Diplomat's Handbook of International Law and Practice 107 (3d ed.1988) (hereinafter "Diplomat's Handbook ").

When Congress enacted the Diplomatic Relations Act [FN188] to implement the Vienna Convention, it established the applicable law on the subject in the United States. The Vienna Convention provides full personal diplomatic inviolability, stating simply that "[t]he person of a diplomatic agent shall be inviolable." [FN189] The principle of personal inviolability extends its privileges and immunities to visiting heads-of-state as an aspect of head-of-state immunity. [FN190]

FN188. 22 U.S.C. § 254a et seq.

FN189. Vienna Convention, Article 29.

FN190. See Restatement (Third) of Foreign Relations Law § 464, Reporters' Note 14 ("When a head of state or government comes on an official visit to another country, he is generally given the same personal inviolability and immunities as ... an accredited diplomat."); Satow's Guide, at 9.

The Government seeks to expand upon these settled principles. It argues that the scope of inviolability to which foreign officials are entitled effectively confers absolute immunity, not only from exposure to litigation and legal compulsion, but from all service of process. The Government further maintains that the service of process is an assertion of jurisdiction and is thus precluded as to persons who enjoy immunity from the Court's jurisdiction because if personal jurisdiction is lacking, then service of process is void. [FN191] Moreover, the Government asserts that "the State Department considers that personal inviolability under Article 29 of the Vienna Convention precludes the service of compulsory legal process on diplomatic agents." [FN192] Consequently, while the State Department's Suggestion of Immunity does not purport to assert immunity on behalf of ZANU-PF, and the Government has not maintained in this proceeding that ZANU-PF is entitled to invoke any form of immunity from the exercise of the Court's jurisdiction, the Government's inviolability theory effectively would achieve the same result by indirectly shielding ZANU-PF, under the cover of Mugabe's head-of-state immunity, from the reach of territorial jurisdiction.

FN191. See Aidi v. Yaron, 672 F.Supp. 516, 517 (D.D.C.1987); see also Aristide, 844 F.Supp. at 130.

FN192. Gov't Reply, at 34.

These respective arguments raise a threshold issue: the meaning and scope of the concept of diplomatic inviolability. The Vienna Convention articulates the standard in this regard. It provides that [t]he person of a diplomatic agent shall be inviolable. He shall not be liable to any form of arrest or detention. The receiving State shall treat him with due respect and shall take all appropriate steps to prevent any attack on his person, freedom or dignity. [FN193]

FN193. Vienna Convention, art. 29.

The principle is rooted in the traditional concept that diplomats, serving in a foreign and potentially hostile land as surrogates of their sovereign, required appropriate protections, and that any attack on or offense to them similarly constituted an *304 affront to the ruler they represented. [FN194] Inviolability of the diplomat's person therefore became essential "in order to allow him to perform his functions without any hindrance from the government of the receiving state, its officials and even private persons." [FN195]

FN194. See Diplomat's Handbook, at 107.

FN195. Id.; see also Satow's Guide, at 120-21.

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**32 The limited case law addressing the concept of inviolability generally involves actions that entail detention; searches of the person, baggage or premises; subpoenas to provide evidence at legal proceedings; and civil or criminal actions brought directly against diplomats who then assert immunity. [FN196] Neither Plaintiffs nor the Government has produced any precedent addressing the precise issue presented here: whether inviolability would extend to preclude service of process on foreign officials entitled to head-of- state or diplomatic immunity when service is effected on them for purposes not involving an assertion of personal jurisdiction against such officials, but is directed against an affiliated non-governmental third person or entity on whose behalf they may be served. The Court's own research has uncovered no case exactly on point or sufficiently analogous as regards either head-of-state or diplomatic immunity. Nonetheless, the Government, without citing any authority or even pre-FSIA practices, asserts that inviolability works to bar even such purported exercises of jurisdiction. On this point, the Court parts company with the Government's view.

FN196. See generally Ling, 33 Wash. & Lee L.Rev. at 104-31.

Whatever may be the remnants of post-FSIA common law foreign immunity as to heads-of-state, the Court is not persuaded that the doctrine reaches to the outer bounds the Government advances as regards Plaintiffs' action against ZANU-PF. From the analysis of sovereign immunity detailed above, it is clear that insofar as head-of-state immunity branched into a distinct doctrine since the enactment of the FSIA, whatever judicial support exists for the proposition that some stem of common law immunity survived the FSIA, that exception applies only to protect a recognized sitting head-of-state from suit and potential liability. The judicial deference accorded to State Department suggestions of immunity extends to honor the Executive Branch's determinations concerning which particular foreign ruler is a recognized head-of-state and what acts of his are strictly governmental and thereby entitle the official to claim personal immunity from territorial jurisdiction. Nothing in the evolution of the common law doctrine suggests that the exception also encompassed conferring upon the State Department the function of defining the full reach of the concept of inviolability as it pertains to heads-of-state.

Indeed, as discussed above, just how far beyond the original predicate the scope of head-of-state immunity may be carried, given the numerous uncertainties and the formative state of the doctrine, is subject to doubt and debate. Substantial questions remain unsettled, for example, concerning precisely which foreign officials may invoke the immunity; whether the doctrine applies solely to the head-of-state or government; or whether it may be enlarged to protect other persons or entities. [FN197] Similarly, as the Second, Fourth and Ninth Circuits have intimated, head-of-state immunity from suit may not necessarily equate under all circumstances to immunity from offering testimony at a deposition *305 or trial. [FN198] These open issues represent interstices in the law that must be filled by reasoned judicial interpretation in the light of experience and by sound application of the emerging common law, rather than by reflexive expansion of the Executive Branch's categorical reading of a limited doctrinal exception. In view of the flux and uncertainties surrounding the matters in question, and absent more settled law on point, this Court is not persuaded that the principle of personal inviolability would encompass the lengths to which the Government's assertion in the matter at hand would enlarge it.

FN197. See supra Part I.B.4.c.

FN198. See In re Doe, 860 F.2d at 44-45; In re Grand Jury Proceedings, 817 F.2d at 1111 ("The issue in this case, however, is not whether the Marcos' may be civilly liable, but whether they are wholly immune

from process."); Estate of Domingo, 808 F.2d at 1350; see also Lasidi, Nat'l L.J., Aug. 29, 1983 at 1, col. 1 (conditioning assertion by a head-of-state of a counterclaim in a dispute involving the ruler's private financial investments upon his agreement to submit to a deposition).

**33 While the Government here and in other cases has offered valid grounds for the courts to honor the State Department's suggestions of immunity and defer from exercising jurisdiction over a recognized sitting head-of-state that would subject the foreign official to be hauled into court and potentially be exposed to personal liability, the Court finds uncompelling the further contention that the doctrine requires courts to give conclusive effect to the State Department's advice with regard to the appropriateness of service of process upon a head-of-state as it arises in this case. Several considerations weigh against such a proposition.

First, the head-of-state doctrine as a residual branch of common law sovereign immunity addresses the personal immunity of the ruler. Nothing in the history of the principle suggests that it also worked indirectly to extend derivative immunity to private entities or non-governmental ventures with which the head-of-state may be associated. Thus, though under the common law rules the Court may be bound to accord conclusive effect to a suggestion of immunity filed on behalf of a recognized head-of-state to avert an exercise of personal jurisdiction over the sovereign, it is not similarly obliged to honor an assertion of immunity whose intended beneficiary, expressly or impliedly, is a private third person or organization not associated with the head-of-state in any governmental or familial connection, when the practical effect of the immunity claim is to cloak such a party from domestic civil jurisdiction.

Second, it is incontestable that arrest, detention, searches, taxation or any form of legal compulsion asserted directly against a foreign state leader or diplomat not only serve to create hindrances to the performance of the foreign official's functions, but constitute affronts to both the person and dignity of the ruler and to the sending foreign state. These practices also run counter to comity and invite reciprocal measures harmful to harmonious relations among nations. While these concerns provide the justification for the principle of inviolability, they do not arise to the same extent in connection with the service of process upon a foreign state official intended to effectuate jurisdiction concerning matters and parties collateral to the head-of-state's or diplomat's official status. Service of process under these circumstances would not demand the official's appearance in court nor subject him in other ways to the court's compulsory powers in a manner that could be deemed an assertion of territorial authority over the foreign dignitaries and, by extension, *306 over the foreign state they represent. Grounds to give affront to the person or dignity of the foreign official, or to interfere with the officer's governmental functions, do not arise in this context, or may do so only minimally or to a degree substantially outweighed by other interests of justice.

In this case, for example, it is ZANU-PF institutionally, rather than Mugabe or Mudenge personally, to which the exercise of the Court's jurisdiction applies; it is ZANU-PF, not Mugabe or Mudenge, which is called to answer to the notice of process served upon Mugabe and Mudenge as senior officers of ZANU-PF. In this regard, it is pertinent that the process served on Mugabe and Mudenge did not relate to a matter or third party with which they were unconnected. Rather, the complaint identifies Mugabe as First Secretary and President of ZANU-PF and Mudenge as a senior officer of the party. Service on them was designed to reach an unofficial organization whose political function they were attending and whose purpose, according to Plaintiffs' uncontested assertions, was to raise funds for ZANU-PF in this country, to elicit political support for Mugabe's regime and to blunt domestic attacks on his policies. Given this context, it would not be unexpected that such integral ties to and use of private entities by foreign state officials could supply grounds to justify, if not the exercise of personal jurisdiction over them, at least the

service of process intended to challenge wrongful actions of the particular organization with which they are closely associated and whose bidding they were doing at the time of service.

**34 Second, under practices pursuant to both the Tate Letter policy and the FSIA, the immunity recognized for foreign states did not conclusively eliminate service of process upon individual representatives of their governments, even if they otherwise happen to enjoy diplomatic immunity in connection with their own actions, as regard the matters the Act specifically exempted from foreign state immunity. Pursuant to § 1608(b)(2) of the FSIA, if suit is brought against an agency or instrumentality of a foreign state, service may be effected "by delivery of a copy of the summons and complaint whether to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process in the United States." [FN199] Nothing in the statute would bar service in an action properly arising under the Act to be made on an officer or general agent of the foreign state who also happens to be a state official or diplomat otherwise entitled to immunity--theoretically including even a head-of-state who satisfies the statutory criteria defining the persons upon whom service is authorized to be made. [FN200] Thus, the procedural provisions of the FSIA *307 seem to contemplate and legitimize the point that the doctrine of inviolability does not serve as an absolute barrier to the service of process in certain limited circumstances.

FN199. 28 U.S.C. § 1608(b)(2); see also Bowers ex rel. NYSA- ILA Pension Trust Fund v. Transportes Navieros Ecuadorianos (Transnave), 719 F.Supp. 166, 170 (S.D.N.Y.1989) (service properly effected on defendant's agent in the United States pursuant to § 1608(b)). In addition, service of process pursuant to other statutory regimes clearly permit service in some circumstances upon foreign officials who may enjoy some form of immunity. Section 311(a) of the New York Civil Practice Law and Rules, paralleling FSIA § 1608(b)(2), contemplates personal service upon a foreign corporation by direct delivery to an officer, director or general agent.

FN200. See Klinghoffer, 937 F.2d at 54 (noting that service of process upon the Palestine Liberation Organization's Permanent Observer to the United Nations may be appropriate, as that official, though otherwise entitled to limited immunity at the United Nations, also performed functions comparable to those of a general agent for purposes of service of process under federal procedure).

In applying the evolving doctrine of common law head-of-state immunity, this Court is mindful of another concern. Vigilance is essential to ensure that the type of misuse of sovereign state immunity that impelled the enactment of the FSIA does not tiptoe into the application of head-of-state doctrine. Just as states once employed corporate forms, shielded by sovereign immunity to engage in essentially private enterprise, heads-of-state should not assert the emerging doctrine, that immunizes them personally from the exercise of territorial jurisdiction, to extend their protection from liability, under the mantle of inviolability, to non-state individuals and entities used as agents and conduits to execute private wrongful actions.

Third, other principles and practices of international law confirm that the concept of inviolability is not absolute; widely recognized exceptions to it do exist. As Chief Justice Marshall acknowledged in The Schooner Exchange, circumstances do arise where, for instance, by acquiring property in a foreign country, a head-of-state could be considered to have subjected that property to territorial jurisdiction and himself to that limited degree to have assumed the character of a private individual. [FN201] Reflecting this principle, well- settled practices of customary international law hold that inviolability would not apply to bar civil jurisdiction over foreign rulers or diplomats in actions involving their real property

abroad, or their private services as executors of an estate, or other unofficial professional or commercial activities. [FN202] Recognition of these exceptions presupposes that to obtain personal jurisdiction over the head-of-state or diplomat in connection with the particular actions, they would have to be amenable to service of process. Consequently, to this extent the doctrine of inviolability would not preclude service of process upon a foreign head-of-state or diplomat. Failure to validate process in these situations would defeat the purposes of the noted exceptions.

FN201. See The Schooner Exchange, 11 U.S. (7 Cranch) at 145.

FN202. See Vienna Convention, Article 31; Satow's Guide, at 10; Diplomat's Handbook, at 118.

**35 Implicitly conveyed by the exceptions is that service of process per se does not offend the concept of personal inviolability. Rather, in the limited context described, process is permitted because it does not implicate the concerns over comity and affront to the person or dignity of the head-of-state or diplomat even under circumstances where the exercise of jurisdiction over the person, and conceivably the presence of the official in court or the court's compulsion over the person, may be demanded. The exceptions also reflect a recognition that in these limited circumstances the foreign rulers or diplomats, by engaging in certain private activities in the foreign state, could be deemed to have understood, and in some measure impliedly or expressly accepted, the piercing of their shield of inviolability. In a similar vein, by engaging in non-governmental activities abroad on behalf of private entities or enterprises with which they may be closely affiliated, foreign officials otherwise entitled to immunity could be considered to have subjected themselves to the service of process intended for the entity or enterprise at issue, even if the officials themselves continue to enjoy immunity as to their own persons.

*308 This proposition, in fact, parallels the development of exemption of foreign states from sovereign immunity in connection with activities that are strictly commercial as opposed to governmental. The exception, though recognizing immunity for the state itself, precludes the state's functionally private entities from invoking sovereign immunity to escape liability for wrongs arising from their commercial transactions. If under current practice a foreign head-of-state or diplomat may, consistent with personal inviolability, become personally and fully subject to the civil jurisdiction of another sovereign in some situations, it would not offend the principle to permit service of process upon such an official in a context that is narrower and less intrusive--that is, one in which service is intended for a private entity or enterprise with which the official is closely associated, where no hindrance to the official's exercise of governmental or diplomatic functions otherwise results.

In sum, however ancient and royal the pedigree of the inviolability doctrine may be, this Court finds no basis to conclude that the rule extends to confer absolute immunity from service of process where a head-of-state or diplomat would not be subjected personally to a foreign court's jurisdiction nor exposed to liability in that court. Modern realities have done much to demystify the figure of the head-of-state and to lay bare some of the ancient myths about the emperor's garb that cloaked the sovereign's conduct in divine fictions and absolutes.

In modern times, through the world-wide spread of democracy and its leveling concepts of equality, we have come to realize that rulers of states are human after all, subject to all human drives, predilections and foibles. They have private lives, in the course of which on occasion they stray from expected norms and are capable of abusing power and betraying their public trust. And when sovereigns assume human form and come down to earth, as did the gods of myths and kings of old, they do mundane things--the kinds of

things ordinary mortals routinely do. They engage in political affairs. They enter personal relationships. In pursuit of private gains, they undertake financial transactions and commercial ventures. In doing so, they may act personally or indirectly, as individuals or through surrogate entities or enterprises, by either means sometimes transcending public ends, their transgressions causing wrongs to people they encounter along the way.

**36 In this manner, leaders of nations evince that personal dignity is a two-faced thing. The public face whose appearance the law goes to great lengths to protect against affronts is sometimes sullied and diminished by the leader's own hand through dark deeds that soil the private face. For these reasons, there is growing acceptance for a rule of law that reaffirms that no person is above the law. And it should come as no surprise to heads-of-state and other high-ranking public officials that in some way at some point even they may be called upon to play a role in the public's quest for accountability for their privately inflicted harms. To this greater good, acceptance of process on behalf of their surrogate entities or agents is the minimum contribution that heads-of-state can make in advancing the interests of larger justice. In this way, an overarching end may be achieved at negligible sacrifice of the leader's public dignity perhaps already stained, and without hindrance to the performance of governmental roles.

This practice accords with principles recognized in this country. Under similar circumstances, the Supreme Court has carved considerable substance from the old categorical immunity barriers. It established *309 in United States v. Nixon [FN203] that even a sitting President may not assert immunity from a criminal subpoena, and in Clinton v. Jones [FN204] that official immunity would not bar a private civil lawsuit from proceeding against a President still in office. Globally, the inroads made by the community of nations in defining, asserting jurisdiction and prosecuting heads-of-state and other high-ranking government officials in connection with certain international crimes, have far-reaching implications. This evolution of events and the corresponding principles it has spawned, if not jettisoning head-of- state immunity altogether, persuades this Court of at least this much: that no sufficient grounds exist in statutes, legislative history, case law or principles of international comity for extending the doctrine of inviolability to deny recognition of the process served on Mugabe and Mudenge on behalf of ZANU-PF under the unique circumstances present here.

FN203. See 418 U.S. 683, 94 S.Ct. 3090, 41 L.Ed.2d 1039 (1974).

FN204. See 520 U.S. 681, 117 S.Ct. 1636, 137 L.Ed.2d 945 (1997).

IV. JURISDICTION

A. PERSONAL JURISDICTION

Concluding its review of personal jurisdiction over ZANU-PF, the Court considered Plaintiffs' assertions that ZANU-PF and its senior officers were present in the United States "availing themselves and their property of the security and sanctuary of the United States and the state of New York engaging in press and other activities." [FN205] They further allege that at the time process was served on Mugabe and Mudenge on behalf of ZANU-PF, these officials, in their capacities as senior officers of ZANU-PF, were attending a political function sponsored by the "Friends of ZANU-PF" whose purpose was to rally support for ZANU-PF and Mugabe's regime. Accepting these allegations to constitute sufficient minimal contacts to satisfy due process concerns for jurisdictional purposes and recognizing the validity of Plaintiffs' service of process on ZANU-PF as giving adequate notice of this action, the Court concludes

that the basic prerequisites for its exercise of personal jurisdiction over ZANU-PF have been fulfilled so as to allow the action to proceed as against ZANU-PF and Plaintiffs' motion for default judgment to be granted.

FN205. Compl. 11. The Complaint does not further elaborate on how extensive, systematic or continuous ZANU-PF's activities were in New York or the United States. Given ZANU-PF's default, however, any deficiency in and objection to personal jurisdiction on these grounds are deemed waived. See Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 705, 102 S.Ct. 2099, 72 L.Ed.2d 492 ("[T]he failure to enter a timely objection to personal jurisdiction constitutes, under Rule 12(h)(1), a waiver of objection.").

B. SUBJECT MATTER JURISDICTION

**37 Substantively, Plaintiffs claim that their causes of action arise under the ATCA, [FN206] the TVPA, [FN207] the general federal-question jurisdictional statute [FN208], as well as various *310 sources defining fundamental norms of international law. [FN209] For the purposes of this proceeding, the Court finds that the ordeals of torture, extrajudicial killings and other atrocities which Plaintiffs assert characterized the campaign of lawlessness and terror ZANU-PF inflicted upon them fall within the scope of the conduct encompassed by the TVPA and violations of international law cognizable under the ATCA. The Court finds sufficient support for this conclusion in case law sustaining claims grounded on acts characterized by similar lawlessness and extreme brutality found to have breached recognized international standards. [FN210]

FN206. 28 U.S.C. § 1350.

FN207. Pub.L. 102-256, 106 Stat. 73 (Mar. 12, 1992) (codified at 28 U.S.C. § 1350 Note).

FN208. See 28 U.S.C. § 1331. Because the Court rests its resolution of this matter on the other grounds asserted, it does not address the § 1331 basis, as to which considerable uncertainty exists. See Kadic, 70 F.3d at 246; Filartiga, 630 F.2d at 888 n. 22; see also Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 779-80 (D.C.Cir.1984) (Edwards, J., concurring), cert. denied, 470 U.S. 1003, 105 S.Ct. 1354, 84 L.Ed.2d 377 (1985); Xuncax, 886 F.Supp. at 193-94; but cf. Abebe-Jiri v. Negewo, No. 90 Civ.2010(GET), 1993 WL 814304 (N.D.Ga.1993), aff'd, 72 F.3d 844 (11th Cir.1996), cert. denied, 519 U.S. 830, 117 S.Ct. 96, 136 L.Ed.2d 51; Forti v. Suarez-Mason, 672 F.Supp. 1531, 1544 (N.D.Cal.1987).

FN209. See Compl. 10 (specifically citing "among others, the 1949 Geneva Conventions, Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, United Nations Charter, Universal Declaration of Human Rights, and the International Covenant on Civil and Political Rights."). The Court notes that Plaintiffs' complaint repeatedly characterizes the conduct ascribed to ZANU-PF and the other defendants as a campaign of terrorism. See Compl. 1, 2, 4. Plaintiffs, however, do not specifically base any of their substantive claims on violations of international law relating to terrorism, nor do they cite to any relevant international instrument on this subject. The Court therefore does not address these issues, for the additional reason that in this area clearly established definitions or widely recognized principles have yet to emerge. See, e.g., Tel-Oren, 726 F.2d at 795, where Judge

Edwards noted in his concurrence: "[w]hile this nation unequivocally condemns all terrorist attacks, that sentiment is not universal. Indeed, the nations of the world are so divisively split on the legitimacy of such aggression as to make it impossible to pinpoint an area of harmony or consensus." Nonetheless, terrorism has been the subject of several institutional statements of condemnation by the international community, and of regional and conduct-specific conventions. In this regard, momentum towards a rule of international law proscribing terrorism is gaining, just as carefully- planned, well-financed acts of terror with devastating consequences are also on the rise. See, e.g., G.A. Res. 40/61, reprinted in, 25 I.L.M. 239 (1986) (the United Nations General Assembly "[u]nequivocally condemns, as criminal, all acts, methods and practices of terrorism wherever and by whomever committed, including those which jeopardize friendly relations among States and their security."); Convention for the Suppression of Unlawful Seizure of Aircraft, done December 16, 1970, ratified September 14, 1971, 22 U.S.T. 1641; United Nations: International Convention for the Suppression of Terrorist Bombing, opened for signature January 12, 1998, entered into force May 23, 2001, 37 I.L.M. 249 (1998). Although the United States is a signatory, it has not yet ratified the Convention on Terrorist Bombings. As of the date of this Decision and Order, there are 58 signatories and 29 parties to the Convention. See also S.C. Res. 1373 (September 28, 2001) (the Security Council, in reaffirming its unequivocal condemnation of the terrorist attacks which took place on September 11, 2001 in New York, Washington, D.C. and Pennsylvania, declared that it regards such acts, like any act of international terrorism, to constitute a threat to international peace and security, and it urged states, among other measures, to prevent and suppress the financing of terrorist acts, to criminalize the provision of financial support for terrorists, to freeze their assets and to refrain from providing any form of safe haven or support to entities or persons involved in terrorist acts).

FN210. See Kadic, 70 F.3d at 237; Hilao, 25 F.3d at 1475; Filartiga, 630 F.2d at 878-79; Cabiri, 921 F.Supp. at 1191; Xuncax, 886 F.Supp. at 169-71, 179.

Whether liability properly could be imposed upon ZANU-PF for its role in these wrongs raises substantial questions that merit consideration and comment at this point. Though not specifically addressed by the parties before the Court, a *311 significant issue arises with respect to the applicability of the ATCA and the TVPA to ZANU-PF. ZANU-PF's liability under the ATCA and TVPA rests on the extent to which statutes authorizing causes of action grounded on violations of international law apply to private individuals as opposed to state officials acting with express or implied governmental authority or under color of law. A corollary of this inquiry is whether the reference to "individuals" in this context means particular natural persons only, or also encompasses organized collective groups and institutions such as ZANU-PF. These questions must be addressed because they implicate the Court's subject matter jurisdiction, the absence of which cannot be waived or ignored. [FN211] The underlying issue has engendered substantial debate which has not fully resolved the doubts that some courts have expressed. [FN212] Accordingly, in authorizing the default judgment against ZANU-PF, this Court feels compelled to consider the threshold substantive question.

FN211. See Insurance Corp. of Ireland, 456 U.S. at 702, 102 S.Ct. 2099.

FN212. See Kadic, 70 F.3d at 239-45 (holding that certain forms of conduct violate international law "whether undertaken by those acting under the auspices of a state or only as private individuals."); Tel-Oren, 726 F.2d at 791-95 (Edwards, J., concurring) (noting an absence of codification or international consensus on whether torture perpetrated by other than a recognized state or its officials acting under

color of state law violates the law of nations, while acknowledging some case law and commentary assuming or urging that private individuals may be the subjects of international law); Nguyen Da Yen v. Kissinger, 528 F.2d 1194, 1201 n. 13 (9th Cir.1975) (in a case against United States officials arising out of the evacuation of certain children from Vietnam and airlifting them to this country during the end of United States involvement in Vietnam, the court noted in dicta that jurisdiction under the ATCA conceivably could exist if the private adoption agencies that participated in the "Babylift" were joined in the action as potential joint tortfeasors); Doe I v. Islamic Salvation Front (FIS), 993 F.Supp. 3, 8 (D.D.C.1998) (finding jurisdiction under the ATCA in an action brought against an umbrella political organization); Lopes v. Reederei Richard Schroder, 225 F.Supp. 292, 297 (E.D.Pa.1963) (stating that in the context of the ATCA, violation of the law of nations means "at least a violation by one or more individuals"); Adra v. Clift, 195 F.Supp. 857, 864-65 (D.Md.1961) (establishing jurisdiction under the ATCA in a case alleging violation of international law by an individual--misuse of passports to bring into the United States a child involved in a custody battle); see also 1 C. Hyde, International Law Chiefly as Interpreted and Applied by the United States, § 2A, at 4 (2d. ed. rev.1945); Louis B. Sohn, The New International Law: Protection of the Rights of Individuals Rather Than States, 32 Am. U.L.Rev. 1, 9-10 (Fall 1982).

As a preliminary matter, it is noteworthy that the default judgment authorized here is rendered not against particular individuals representing ZANU-PF but presumably against the collective entity itself in whatever legal form it exists. This result gives expression to a vital modern reality. Though much of international law reflects the view that only sovereign states are the subjects of international law, entitling only them to invoke rights and possess duties derived from the law of nations, this notion has come increasingly under question. [FN213] Even classical formulations of the concept admitted exceptions for some private acts committed by individuals, such as genocide, war crimes, piracy and slave trading. [FN214]

FN213. See Kadic; 70 F.3d at 239-45; Thomas M. Franck, The Empowered Self: Law and Society in the Age of Individualism 196-223 (1999); Sohn, supra note 212, at 1.

FN214. See Kadic, 70 F.3d at 239; Restatement (Third) of Foreign Relations Law, pt. II, Introductory Note ("Individuals may be held liable for offenses against international law, such as piracy, war crimes or genocide.").

*312 More recently, prompted by the wider recognition and assertions of international human rights, the rights and roles of individuals as subjects of international law--as both victims and violators--have assumed greater prominence and have been given broader expression in the development of international norms. [FN215]

FN215. See Franck, supra note 213, at 196-223; Sohn, supra, note 212, at 1 ("States have had to concede to ordinary human beings the status of subjects of international law ....").
Professor Franck notes that although "[t]he ensuing canon of human rights laws has only partially fulfilled the aspirations of those heady postwar years ... a radical new idea has gained currency: that individuals can hold their governments accountable before an international tribunal applying globally adopted principles of personal rights." Franck, supra, note 213, at 198-206. Furthermore, individuals are asserting their emerging rights in the face of "violations of personal rights that are now formally protected by

international law and are judged in accordance with principles of law and legal reasoning, much as if the same issues had been raised before the Supreme Courts of India or the United States." Id. at 204.

**38 An offshoot of these developments is growing recognition of a reality reflected in the matter now before this Court. Barbaric offenses committed in violation of established international standards do not always spring from spontaneous acts of violence wreaked by random individuals or government agencies. Rather, they sometimes represent the culmination of elaborate schemes devised by expertly-organized and well-financed private groups. These entities give their causes names, banners and emblems for their doctrines and recruits, and bank accounts with which to carry out their inglorious business. The wrongful enterprise may seek political or economic ends and, not uncommonly, as is alleged here, may derive critical nurture and command from the not so invisible hand of the state or from rogue government officials who share the lawless and injurious goals of the particular group or venture and who use the cover of law to promote its private ends. At times, the masterminds and managers who hatch these plans are high-ranking leaders of the state who then employ public and private surrogates to implement their unofficial deeds. Under some circumstances, such as those prevailing here, the leaders may be eligible to assert some form of official immunity from court jurisdiction, or may otherwise possess the methods and means to escape personal liability for actions carried out by the subordinates used as accomplices and pawns.

Like all other civil remedies, the causes of action authorized by the ATCA and TVPA are intended to compensate victims and punish and deter the perpetrators. Were liability in such cases to be limited so as to permit recovery only from the particular natural individuals who actually commit the underlying wrongful acts, the result would effectively nullify the purposes of the statutes. Frequently the role of specified front-line actors in larger conspiracies is merely to execute the plans or follow orders issued by the scheme's leaders and institutional organizers. The lesser participants, though no less responsible, may have the least ability to evade jurisdiction or to satisfy a judgment of liability. Conversely, to exempt the organized perpetrators would allow an escape for actors with primary responsibility, encourage subterfuge and release the only players who may possess the resources to enable collection on any judgment rendered to the victims of the unlawful scheme.

Though the courts have not specifically addressed these concerns in the few recorded instances where claims against organized political organizations and other *313 private entities have been lodged alleging violations of international norms, such claims have been sustained, giving recognition to the application of international law to some conduct of private actors. [FN216] These cases have entailed the application of widely recognized international human rights standards to impose individual liability on organized non-state actors under two distinct circumstances: (1) when the individuals' deeds are done in concert with governmental officials or with their significant assistance, which thus may be deemed to constitute state action or conduct taken under the color of state law; and (2) when the individuals commit acts independently of any state authority or direction, especially encompassing more egregious conduct, such as genocide, war crimes or other crimes against humanity. [FN217]

FN216. See, e.g., Islamic Salvation Front, 993 F.Supp. at 8 (upholding a claim against an umbrella organization of extremist Islamic groups opposed to the governing military regime in Algeria and accused of instigating a campaign of atrocities against women and political opponents); Doe I v. Unocal Corp., 963 F.Supp. 880, 890-92 (C.D.Cal.1997) (sustaining a claim under the ATCA brought against a private corporation that entered a joint venture with state actors to develop a commercial project employing forced labor); Adra, 195 F.Supp. at 864- 65; see also Klinghoffer, 937 F.2d at 54; but cf. Tel-Oren, 726 F.2d at 792 (Edward, J., concurring).

FN217. See generally Kadic, 70 F.3d at 239-40; see also Ronald C. Slye, International Law, Human Rights Beneficiaries, and South Africa: Some Thoughts on the Utility of International Human Rights Law, 2 Chi. J. Int'l L. 59, 70 (Spring 2001).

**39 In significant respects, the development of international law in this area parallels the history of sovereign immunity of states, described above, that gave rise to the FSIA and comparable legislation in other countries. These statutes were designed to prevent the abuses associated with states engaging in trade through essentially private corporate entities cloaked with sovereign immunity. Just as under some interpretation and application of the FSIA, individuals acting in official capacities now may be regarded as embodying agencies and instrumentalities of the state, and as such may be entitled to assert sovereign immunity, [FN218] some non-state entities should be deemed individuals for the purposes of effectively applying statutes like the ATCA and the TVPA that rely upon state action as an element of liability, at least when the private schemes are significantly incubated, aided or carried out in concert with government officials.

FN218. See supra notes 95-98 and accompanying text.

1. The Alien Tort Claims Act

The ATCA confers upon federal district courts "original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." [FN219] Thus, to satisfy subject matter jurisdiction under the ATCA, three conditions must be satisfied: the action must be (1) brought by an alien; (2) alleging a tort; (3) committed in violation of international law. [FN220] Neither of the first two elements are disputed here: all named Plaintiffs are citizens of Zimbabwe, and the allegations state well-recognized torts. It is the nature and scope of the third element which require closer legal scrutiny. The ATCA, unlike the TVPA, does not explicitly require that the wrongful conduct be carried out under actual or apparent authority or color of law of a foreign state. [FN221] Nonetheless, whether *314 such a requirement exists as a matter of customary international law and therefore constitutes a corollary condition to satisfy subject matter jurisdiction in an action under the ATCA has been the subject of significant debate. [FN222]

FN219. 28 U.S.C. § 1350.

FN220. See Kadic, 70 F.3d at 238.

FN221. See id. at 239, 241; Islamic Salvation 993 F.Supp. at 3-9.

FN222. See Kadic, 70 F.3d at 238-40; Tel-Oren, 726 F.2d at 791-95 (Edwards, J., concurring); Islamic Salvation Front, 993 F.Supp. at 7-8.

In applying the ATCA to allegations of official torture, the Second Circuit in Filartiga declared: "Thus it is clear that courts must interpret international law not as it was in 1789, but as it has evolved and exists among the nations of the world today." [FN223] In Kadic, addressing the evolution of related principles fifteen years after Filartiga, the Circuit Court reaffirmed this instruction. [FN224] There, the court rejected the notion "that the law of nations, as understood in the modern era, confines its reach to state action," and ruled instead that "certain forms of conduct violate the law of nations whether undertaken by those acting under the auspices of a state or only as private individuals." [FN225]

FN223. See 630 F.2d at 881 (citing Ware v. Hylton, 3 U.S. (3 Dall.) 199, 1 L.Ed. 568 (1796)); see also Tel-Oren, 726 F.2d at 777 ("[T]he 'law of nations' is not stagnant and should be construed as it exists today among the nations of the world.").

FN224. See70 F.3d at 239.

FN225. Id.

The Second Circuit then held that among the specific acts which violate contemporary international norms, whether committed by state officials or private individuals, are genocide and war crimes. With regard to torture and summary execution, the court declared that, when not perpetrated in the course of genocide or war crimes, these acts are proscribed by international law only when committed by state officials or under the color of law. [FN226] In this connection, the Court instructed that applicable principles from the jurisprudence of § 1983 of the Civil Rights Act [FN227] should guide the courts in reaching those determinations.

FN226. See id. at 243-45.

FN227. 42 U.S.C. § 1983.

**40 In the case at bar, the complaint alleges that, acting under Mugabe's command and control, ZANU-PF officials inflicted a "brutal campaign of murder, torture, terrorism, rape, beatings, and destruction of property against Zimbabwean citizens and residents suspected of supporting the opposition political party ...." [FN228] The mission of terror was specifically designed to perpetuate Mugabe's rule and secure the dominant position of power held by ZANU-PF in the executive and legislative branches of Zimbabwe's government since 1980. [FN229] The complaint avers that the deliberate and systematic wrongs alleged were inflicted with the participation and assistance of the Zimbabwe military, Central Intelligence Organization, Republic Police and the Zimbabwe War Veterans Associations ("ZWVA").

FN228. Compl. 15.

FN229. Id. at 15, 19.

More specifically, Plaintiffs claim that ZANU-PF "has relied on its position as the unrivaled and dominant force in the Government to illegally direct and force the military and police to assist in the unlawful activities of ZANU-PF and ZWVA." [FN230] According to the complaint, for example, ZANU-PF employed government officials and other public resources in its unlawful activities. The party allegedly engaged and paid the ZWVA and its operatives *315 $20 million to form an organized force of armed militias charged with invading and occupying the land of ZANU-PF's political opponents, especially targeting white farmers. [FN231] These farm occupations resulted in thousands of recorded incidents of violence in the course of which, while police looked on and took no action, some Plaintiffs suffered physical attacks or their relatives were killed. [FN232] Plaintiffs assert that ZANU-PF's violent movement employed other Zimbabwe government equipment and facilities, such as transportation, communications and coordination, and, at Mugabe's behest, was placed under the command of Zimbabwe's Head of the Air Force. [FN233]

FN230. Id. at 17.

FN231. Id. at 44.

FN232. Id. at 5, 12.

FN233. Id. at 47.

These accusations amply demonstrate that ZANU-PF did not consist merely of loosely connected, haphazardly organized individuals, or a misguided mob of marauders randomly roving and unleashing terror throughout Zimbabwe. Rather, Plaintiffs' factual assertions and supporting evidence suggest that in carrying out the drive of organized violence and methodic terror portrayed here ZANU-PF worked in tandem with Zimbabwe government officials, under whose direction or control many of the wrongful acts were conceived and executed. On the facts presented, ZANU-PF thus became an integral arm of the state through which its apparent power extended to the wrongdoers. Accordingly, the Court concludes that Plaintiffs' claims allege conduct taken by ZANU-PF in concert with Zimbabwe officials or with significant assistance from state resources sufficient, under Kadic's instruction, [FN234] to satisfy the standard of what constitutes involvement by government officials in the conduct of non- state actors. Plaintiffs' allegations and related evidence support the "color of law" and state action requirements for the purposes of Plaintiffs' action against ZANU-PF under the ATCA. [FN235]

FN234. See Kadic, 70 F.3d at 244-45.

FN235. See id.; see also Lugar v. Edmondson Oil Co., Inc., 457 U.S. 922, 942, 102 S.Ct. 2744, 73 L.Ed.2d 482 (1982); Burton v. Wilmington Parking Auth., 365 U.S. 715, 725, 81 S.Ct. 856, 6 L.Ed.2d 45 (1961) ("The State has so far insinuated itself into a position of interdependence with [the defendant] that it must be recognized as a joint participant in the challenged activity, which, on that account, cannot be considered to have been so 'purely private' as to fall without the scope of the Fourteenth Amendment.");

Jensen v. Farrell Lines, Inc., 625 F.2d 379, 382 (2d Cir.1980), cert. denied, 450 U.S. 916, 101 S.Ct. 1359, 67 L.Ed.2d 341 (1981).

2. The Torture Victim Protection Act

**41 The TVPA recognizes a cause of action for victims of official torture and extrajudicial killing against "[a]n individual ... [acting] under actual or apparent authority, or color of law, of any foreign nation ...." [FN236] While the statute creates a cause of action, it does not itself, unlike the ATCA, confer federal court jurisdiction. [FN237] A victim seeking to exercise the right to sue established by the statute must rely upon a grant of federal jurisdiction provided in some other enactment, most notably the ATCA itself. [FN238]

FN236. 28 U.S.C. § 1350 Note, at § 2(a).

FN237. See Kadic, 70 F.3d at 246.

FN238. See id.

The TVPA's legislative history confirms that the state action condition was intended to make clear that a plaintiff "must establish some governmental involvement in the torture or killing to prove *316 a claim" and that the statute "does not attempt to deal with torture or killing by purely private groups." [FN239] The state action requirement was underscored by the Second Circuit in Kadic, where the court stated that torture and summary execution "are proscribed by international law only when committed by state officials or under color of law." [FN240] The Circuit Court there also provided guidance with regard to the interpretation of the TVPA's state action or color of law requirement that mirrors the court's analysis and application of the ATCA. It instructed that in construing the terms "actual or apparent authority" and "color of law", principles of agency law and the jurisprudence under § 1983 of the Civil Rights Act [FN241] would serve as a relevant guide. To this end, the court recognized that private individuals may act under color of law for TVPA purposes when they act in concert with state officials or with significant state aid. [FN242]

FN239. Kadic, 70 F.3d at 245 (citing H.R.Rep. No. 102-367, 102d Cong., at 5 (1991), reprinted in 1992 U.S.C.C.A.N. 84, 87).

FN240. Id. at 243 (citing the Convention Against Torture, pt. I, art 1) (defining torture as "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").

FN241. See 42 U.S.C. § 1983.

FN242. See Kadic, 70 F.3d at 245-46 (citing Lugar, 457 U.S. at 937, 102 S.Ct. 2744).

The underlying unlawful and injurious campaign carried out by ZANU-PF, as described above, allegedly employed government equipment and facilities such as transportation, communications and coordination, and were under the command of Zimbabwe's Air Force at the behest of Mugabe. [FN243] Plaintiffs' assertions of involvement or significant assistance by high-ranking Zimbabwe government officials in ZANU-PF's campaign of torture and summary killings that form the basis for the color of law element of Plaintiffs' claim under the ATCA also serve to satisfy the jurisdictional prerequisite as regards their TVPA cause of action. Accordingly, the Court concludes that Plaintiffs have established subject matter jurisdiction for their claim against ZANU-PF under the TVPA and that Plaintiffs' motion for entry of default judgment against ZANU-PF should be granted on this ground as well.

FN243. See Compl. 47.

V. CONCLUSION

This analysis ends on a mixed note. The Court is not unmindful of the enormity of the atrocities Plaintiffs so movingly and vividly portray. After depicting the "sustained campaign of murder, violence, intimidation and harassment by President Mugabe and the ruling ZANU-PF Party" against political opponents and others, Plaintiffs deplore that the State Department's honoring of the defendants' assertion of immunity "does not dispute that the plaintiffs have suffered extrajudicial killing and torture in violation of international law, but it tells the Court that, in this case, immunity trumps justice." [FN244]

FN244. Plaintiffs' Brief, at 7, 9.

**42 But Plaintiffs' eloquence alone does not equate to law. Nor, regrettably, is the law always as eloquent as we may wish it to be, especially when its outcomes may not comport with our own conception of the ideal. Certainly, torture, extrajudicial killings and other forms of deliberate brutality, anytime, anywhere, pierce the inner core of human baseness and cross the outer crusts of infamy. And if such a thing could be conceived--as the void that one step beyond infinity would occupy--that already vast barbarism and disgrace could be surpassed, the limit may exist where *317 conditions prevail such as those asserted here: where misdeeds imbued with such profound depravity are committed against innocents among their own people by the highest leaders of the state.

Not infrequently courts confront events that cry out loudly for immediate justice. And sometimes those occasions make the judges feel that their hands are tied by demands exerting more compelling pressures and pulls that also define justice, though some other way not always to everybody's liking. Instances like these rank among the most trying moments of judicial experience. At a hand-wringing and heartrending point just such as this, another court observed that "[t]he FSIA is absolute in this regard, no matter how heinous the alleged illegalities." [FN245] That remark sounds a harsh note. It seems unfitting for the moment, even if extenuation somehow could impart comfort to another person, or ease one's own qualms and constraints. But the point is not the severity of the judgment.

FN245. Herbage, 747 F.Supp. at 67; see also Sabbatino, 376 U.S. at 436-37, 84 S.Ct. 923 ("However offensive to the public policy of this country and its constituent States an expropriation of this kind may

be, we conclude that both the national interest and progress toward the goal of establishing the rule of law among nations are best served by maintaining intact the act of state doctrine in this realm of its application."); Underhill v. Hernandez, 168 U.S. 250, 253, 18 S.Ct. 83, 42 L.Ed. 456 (1897) ("It is idle to argue that the proceedings of those who triumphed [in a political revolution] should be treated as the acts of baditti, or mere mobs."); Alicog, 860 F.Supp. at 385 ("The courts cannot invade the executive and legislative prerogative by keeping cases alive that fall within the discretionary function exception, even if they contain scandalous allegations of multiple wrongs.").

The purpose of diplomatic and head-of-state immunity is not to cover up heinous deeds from coming to the light of day, or to protect a nation's leaders from accountability for their acts and, by shielding them from reprisals, tacitly condone their wrongs. If there is a larger end here to be served, for which accusations of grave misconduct as between particular individuals may be momentarily set aside, it is in the interest of comity among nations--to safeguard friendly relations among sovereign states.

This is a value judgment sovereigns make and honor mutually, each leaving to their own domestic methods--and to any measures permissible under customary international rules--the time and the means to guide the advent of the day of reckoning for the sovereign leader's wrongs: when and how that justice deferred is to be judged. And so, for Plaintiffs here, if their accusations are true, all is not lost. There is a lesson to be learned both from recent events and from the course of the law in this area, as Marcos, Kadic, Filartiga and other recent cases illustrate, and as the even more contemporaneous experiences of Augusto Pinochet and Slobodan Milosevic confirm. These precedents instruct that resort to head-of-state and diplomatic immunity as a shield for private abuses of the sovereign's office is wearing thinner in the eyes of the world and waning in the cover of the law. The prevailing trend teaches that the day does come to pass when those who violate their public trust are called upon, in this world, to render account for the wrongs they inflict on innocents.

**43 In the meantime, however, in the balancing of larger public values and priorities, individual claims sometimes unavoidably and regrettably end up with the shorter weight. But until that more opportune day arrives, these are choices that, as between sovereigns, in the interest of comity among nations and in the context of universally *318 accepted principles governing relations among states, sovereign nations are entitled to make unhindered by the second-guesses of their courts.

Not to conclude on an unduly dour tone, the Court offers a final comment. In guiding the growth of common law, it is well to keep in mind that we would not be true to the task nor rise to its multiple challenges were we to ignore the world and the times we live in. Today, events around us bear witness almost daily to the destructive power of individuals whose chosen way of life is to do wrong by inflicting harms of mass proportions. With modern means, the hands of one or a few persons hold the force sufficient to wreak in moments wanton devastation and horror of a magnitude that it once took whole armies to inflict. The response through the rule of law to such large acts of terror has lessons useful to recall, by the wisdom of which this Court has sought to steer the judgment it renders today.

Generally evil works by stealth and craft. It has many guiles and guises. It employs an ever-larger arsenal of lawless methods and devices. To iniquity's purpose of propagating large-scale grief, as evidenced in the case at hand, its capacity for injustice is virtually limitless because it honors none of the self-imposed restraints that contain the conduct of the civilized world within decent bounds. It is well to consider also that justice and injustice, paired like strands of life, normally travel hand in hand, their union joined in direct proportion. Every injustice gives rise to a call for justice that expands to the limits of the injuries suffered or perceived. The greater the wrong, the louder the cry for right to be requited.

In the light of these observations, the vanguard of the law should stand ready to adapt as appropriate, to shape redress and remedy so as to answer measure for measure the particular evil it pursues. Yet, while remaining no less resilient and resourceful than its counterpoise, the pathway of justice must always be mindful of the affirmative values it protects and the perils it guards against. Like the contours and relation of hand and glove, justice must stay outside and above the evil it encloses, while not becoming a part of it. This prompting reflects not just an act of self-preservation, but a reaffirmation of a principle embodied in our legal system that prominently stands out and has long held us in good stead: that survival itself is worth all the more when its end point is grounded on rules that are right, reasoned and just.

ORDER

For the reasons discussed above, it is hereby

ORDERED that Plaintiffs' motion for entry of a default judgment against defendants Mugabe and Mudenge is denied; and it is further

**44 ORDERED that Plaintiffs' claims against Mugabe, Mudenge and Moyo are dismissed; and it is further

ORDERED that Plaintiffs' motion for entry of a default judgment against defendant ZANU-PF is granted; and it is finally

ORDERED that this matter be referred to the designated Magistrate Judge for an inquest on damages arising from the liability determined herein relating to defendant ZANU-PF.

SO ORDERED.

169 F.Supp.2d 259, 2001 WL 1335003 (S.D.N.Y.)

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United States District Court,
S.D. New York.

Adela Chiminya TACHIONA, et al., Plaintiffs,
v.
Robert Gabriel MUGABE, Zimbabwe African National Union Patriotic Front, Stan Mudenge, et al. Defendants.

No. 00 CIV. 6666(VM).

Dec. 11, 2002.

DECISION AND ORDER

MARRERO, District J.

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I. BACKGROUND

*1 Plaintiffs in this matter, all citizens of Zimbabwe, brought suit alleging violations of the Alien Tort Claims Act (the "ATCA"), [FN1] the Torture Victim Protection Act (the "TVPA") [FN2], fundamental norms of international human rights law, and Zimbabwe law. In a Decision and Order dated October 30, 2001, the Court dismissed on jurisdictional grounds Plaintiffs' claims naming as defendants Zimbabwe President Robert Mugabe ("Mugabe") and other Zimbabwe government officials entitled to invoke sovereign or diplomatic immunity. But the Court found a sufficient basis to exercise jurisdiction over the claims asserted against the Zimbabwe African National Union-Patriotic Front "ZANU-PF," the country's ruling party, through process personally served on Mugabe, who is also ZANU-PF's titular head. [FN3]

ZANU-PF failed to answer the complaint or otherwise appear in the case and a default judgment was entered against it. The Court then referred the matter to Magistrate Judge James C. Francis, IV for an inquest on damages. ZANU-PF did not appear in that proceeding as well. Consequently, the Magistrate Judge issued a Report and Recommendation on July 1, 2002 (the "Report") recommending awards of damages on Plaintiffs' claims under both the ATCA and the TVPA. The Court, in a Decision and Order dated August 7, 2002, adopted the Report's factual findings and determination of damages relating to the torture and extrajudicial killing claims under the TVPA, but reserved judgment as to the award recommended under the ATCA. [FN4]

With regard to the ATCA claims, the Court determined that under its reading of applicable Second Circuit doctrine, as articulated in Filartiga v. Pena- Irala, [FN5] it was required to perform a choice of law analysis to determine the appropriate substantive law governing the adjudication of ATCA disputes alleging human rights abuses. [FN6] The Second Circuit recently reiterated this approach. In dictum in Wiwa v. Royal Dutch Petroleum Co., [FN7] the court construed Filartiga I to hold that the "ATCA establishes cause of action for violations of international law but requiring the district court to perform a traditional choice-of-law analysis to determine whether international law, law of forum state, or law of state where events occurred should provide substantive law in such an action."

Because the choice of law question had not been addressed in prior proceedings on this matter, the Court directed the parties to brief the issue. Plaintiffs submitted a timely response. ZANU-PF did not respond. Consequently, the Court regards Plaintiffs' factual assertions, and the materials describing the content and meaning of Zimbabwe law as it pertains to the proceeding now before the Court, as unrefuted and accords them appropriate weight.

Noting that each of the seven ATCA claims they assert describes conduct that violates substantive rights recognized by the Zimbabwe Constitution and applicable municipal laws, Plaintiffs urge the Court to approve the corresponding award of damages recommended by the Report. For the reasons described below, the Court adopts the recommendations of the Report with one modification.

II. DISCUSSION
A. LIMITATIONS OF CHOICE OF LAW

*2 Plaintiffs contend that the Court's ATCA choice of law inquiry should focus on the existence of substantive rights violated by particular unlawful conduct and not on whether the law of the state where the alleged deprivation occurred recognizes specific causes of action defining those rights and prescribes particular remedies for their violation.

Before undertaking the choice of law analysis Filartiga I instructs, the Court is obliged, as a context for its ruling, to express some conceptual challenges and practical constraints the task inherently presents. At the outset, a central question raised by the endeavor is the purpose the choice of law findings are to serve. Does the analysis compel the application of one forum's pertinent law in its entirety? Or is it to be employed, as Plaintiffs suggest, for comparative ends, to identify various sources of relevant substantive rights and principles from which the Court may draw in fashioning the ATCA remedy most appropriate under the circumstances of the case?

Ordinarily, a choice of law assessment weighs the competing interests of the different jurisdictions that may have significant contacts and relationships with a given legal dispute and substantial stakes in the outcome. The task presupposes that in considering the various claims for application of one forum's decisional rules as opposed to another's, the substantive local law applied would be that of the jurisdiction which, in the final analysis, possesses the most significant relationships with the parties and the events and thus the most extensive interests in the outcome of the litigation. [FN8] Consequently, the governing rules the inquiry would compel would encompass the entire body of local law that normally would be brought to bear domestically to fully resolve the merits of the controversy were it litigated in that jurisdiction. [FN9]

Under strict obedience to these choice of law doctrines, courts may not disregard applicable municipal law that the analysis points to as the substantive decisional rule, and instead pick and choose from among other doctrinal sources to tailor a remedy specific to the occasion. As the Supreme Court has observed: "The purpose of a conflict-of-laws doctrine is to assure that a case will be treated [in] the same way under the appropriate law regardless of the fortuitous circumstances which often determine the forum." [FN10]

The adoption of these principles as the product of a choice of law evaluation of an ATCA claim poses a significant quandary. In some cases the relevant municipal law of the jurisdiction where the events occurred and where the parties reside, and thus whose application may be demanded under traditional choice of law precepts, may be inadequate or may conflict with federal principles embodied in the ATCA, or with international norms. In consequence, circumstances may arise, as in the instant case, in which rigid adherence to that local law may defeat the purposes of the ATCA. [FN11]

*3 The rub here arises because a strict reading of Filartiga I may suggest the possibility of such an outcome. In pointing to the distinction between the ATCA jurisdictional threshold, which requires consideration of international law, and the question of the substantive law to be applied to determine liability, the Second Circuit indicated that the choice of law inquiry is "a much broader one, primarily concerned with fairness." [FN12] The Circuit Court then intimated that in performing the choice of law assessment on remand, the district court could very well decide that considerations of fairness would require application of municipal law of the foreign state where the events occurred, in which event "our courts will not have occasion to consider what law would govern a suit under the [ATCA] where the challenged conduct is actionable under the law of the forum and the law of nations, but not the law of the jurisdiction in which the tort occurred." [FN13]

This Court, in performing the requisite choice of law inquiry in the instant case, grappled with the meaning and implications of the Filartiga I court's mandate. Under traditional choice of law inputs relevant to the matter at hand, the United States has a significant interest in providing a forum for the adjudication of claims under the ATCA alleging certain violations of international human rights law,

thereby advancing the realization of the values embodied in universally recognized norms. [FN14] However, given the jurisdictional facts present here, Zimbabwe would have the predominant interests in the adjudication of this case pursuant to Zimbabwe law. All of the Plaintiffs are citizens of Zimbabwe. ZANU-PF is the country's ruling political party, headed by Mugabe. All of the events Plaintiffs describe as constituting the actionable conduct and corresponding injuries occurred in Zimbabwe, arising out of political conflicts and social conditions prevailing there. Thus, the pertinent relationships between this action and the parties and underlying events are predominantly connected with Zimbabwe. [FN15] Zimbabwe therefore has a strong interest in the application of its local law to the resolution of a controversy so fundamentally rooted in that country.

But what decisional rules should apply if, as discussed below, the governing law of Zimbabwe, while in general terms recognizing some of the rights Plaintiffs invoke here under the ATCA, does not define specific causes of action to vindicate the particular claims asserted, or does not permit recovery of the kinds of damages Plaintiffs seek, or may otherwise bar liability, so that the effect of applying the entire municipal law of Zimbabwe to address the violations of international law here alleged would be to defeat some or all of Plaintiffs' claims and thus the remedy the ATCA contemplated?

Similar concerns have been articulated by other courts that have encountered and addressed these complexities in determining the source of substantive law to apply in adjudicating ATCA claims. The doctrinal underpinnings of the dilemma is best captured in the divergent approaches expressed by the concurring opinions of the Circuit Court in Tel-Oren v. Libyan Arab Republic, [FN16] as to whether the ATCA, beyond conferring federal court jurisdiction, creates a cause of action, and as to the sources of any substantive decisional rules governing suits invoking the statute.

*4 As a threshold matter, as Judge Bork observed, international law ordinarily does not create causes of action conferring upon individuals a self- executing right to sue to vindicate particular violations of universally recognized norms. [FN17] Rather, many international human rights instruments merely enunciate in expansive generalities particular principles, aspirations and ideals of universal and enduring significance. These sources serve as fonts of broadly accepted behavioral norms that nations can draw upon in carrying out their obligations to their peoples. International law ordinarily leaves it to each sovereign state to devise whatever specific remedies may be necessary to give effect to universally recognized standards. [FN18] As noted by a leading commentator: "International human rights instruments do not legislate human rights; they 'recognize' them and build upon that recognition [ ]," which assumes the human rights' "preexistence in some other moral or legal order." [FN19]

To these ends, various international declarations, covenants and resolutions catalogue rights all persons should enjoy; affirm the obligations of nations to ensure those rights by means of implementing legislation; exhort governments to protect and promote widely recognized rights; and pronounce the global community's condemnations and renunciations of wrongful practices. [FN20] In the words of Judge Bork: "Some define rights at so high a level of generality or in terms so dependent for their meaning on particular social, economic and political circumstances that they cannot be construed and applied by courts acting in a traditional adjudicatory manner." [FN21]

These norms and practices acquire the status of customary "law of nations" only insofar as they ripen over time into settled rules widely recognized and enforced by international agreements, by judicial decisions, by the consistent usage and practice of states and by the "general assent of civilized nations." [FN22]

But, because such customary principles and practices of sovereign states do not derive and acquire the status of law from the authoritative pronouncements of any particular deliberative body, they generally do not create specific "causes of action" or a self-executing right to sue entitling victims to institute litigation

to vindicate violations of international norms. [FN23] As one court expressed this point: "While it is demonstrably possible for nations to reach some consensus on a binding set of principles, it is both unnecessary and implausible to suppose that, with their multiplicity of legal systems, these diverse nations should also be expected or required to reach consensus on the types of actions that should be made available in their respective courts to implement those principles." [FN24]

Nonetheless, under Filartiga I, certain wrongful conduct violates the law of nations, and gives rise to a right to sue cognizable by exercise of federal jurisdiction under the ATCA, when it offends norms that have become well- established and universally recognized. [FN25]

*5 The Filartiga I court, however, did not explicitly address whether the federal right of action it inferred existed under the ATCA in fact derives from and is to be substantively adjudicated by principles drawn from international law or from federal or municipal law. Manifesting some ambiguity on this point, the court construed the ATCA "not as granting new rights to aliens, but simply as opening the federal courts for adjudication of the rights already recognized by international law." [FN26] Rather, as stated above, the Second Circuit directed that once federal jurisdiction is properly exercised by means of the threshold determination that the claimant has asserted a recognized violation of international law, the rules of decision applicable to adjudication of the case must be decided by a choice of law inquiry employing the considerations set forth in Lauritzen. [FN27]

In his Tel-Oren concurrence, Judge Edwards endorsed the view of the Second Circuit that ATCA itself creates a right to sue for alleged violations of the law of nations. [FN28] He voiced a reservation, however, that the Filartiga I formulation "is not flawless" and recognized that the task the ruling entrusts to the district court at the threshold jurisdictional finding is daunting. [FN29] On this point, he noted that the Filartiga I approach "places an awesome duty on federal district courts to derive from an amorphous entity--i.e., the 'law of nations'--standards of liability applicable in concrete situations." [FN30]

The difficulty inherent in the Filartiga I charge is compounded by the second phase of the inquiry the ruling mandates, that of deciding the substantive standards to apply in evaluating ATCA claims involving human rights abuses. The challenge has engendered significant conceptual division and divergent practices among the courts that have addressed the question. In Tel-Oren, for example, Judge Edwards suggested, as an alternative formulation to the Filartiga I approach, that litigation may be brought under ATCA asserting substantive rights of action defined as common law torts, with the rules of decision supplied by domestic law of the United States, as long as a violation of international law is also alleged. [FN31] The alternative also has been the subject of considerable differences among the courts and has generated numerous permutations and adaptations variously applying, as the basis of substantive law in ATCA adjudications, rules of decision drawn from: federal common law; the forum state; the foreign jurisdiction most affected; international law; or a combination of these sources.

In Adra v. Clift, [FN32] for example, the court applied the alternative formulation where the tort, that of abducting a child from a parent entitled to custody, was defined by municipal law, and the violation of the law of nations consisted of the misuse of a passport as the means to carry out the wrongful conduct. A variation of this approach was followed in Trajano v. Marcos, [FN33] where the Ninth Circuit endorsed the district court's application of the Tel-Oren alternative as modified to rely upon the domestic law of the foreign jurisdiction, rather than that of the United States, to provide the cause of action. But in Doe v. Unocal Corp. [FN34] the Ninth Circuit determined the liability of a private third-party in an ACTA claim by reference to international law, rather than the municipal law of the foreign state, or federal or forum state law, where the alleged violations implicate only peremptory norms (jus cogens). [FN35] In Hilao v. Marcos, [FN36] another panel of the same court held that ATCA creates a cause of action for violations of universal human rights standards and applied federal law to decide a survival of claim issue without any choice of law analysis or review of municipal law.

*6 In Xuncax, however, the court rejected the domestic law right to sue alternative in favor of a different approach. The court applied violations of international law as the basis for both the exercise of ATCA jurisdiction and as the source of the pertinent substantive cause of action "without recourse to other law". [FN37] Noting that municipal law may be inadequate to address in a meaningful way alleged violations of international human rights, the court suggested that under the approach it proposed "courts will be freer to incorporate the full range of diverse elements that should be drawn upon to resolve international legal issues than they would if bound to straightforward recurrence to extant domestic law." [FN38]

In Wiwa, the Second Circuit acknowledged these fundamental qualms and alternative formulations, but declined to reach the issue because its decision to sustain ATCA jurisdiction in the case before it was based on other grounds. [FN39] However, several considerations counsel against a narrow reading and rigid application of Filartiga I as compelling unyielding allegiance to municipal law derived from choice of law analysis to supply the exclusive substantive cause of action and rules of decision governing adjudication of the merits of international human rights claims invoking the ATCA.

First is the treatment of the issue by the district court on remand. Grappling with the difficulties its mandate from the Second Circuit presented, Judge Nickerson addressed the open questions head on. [FN40] While conducting the choice of law analysis enunciated by the Circuit Court's ruling, Judge Nickerson considered whether the "tort" to which that statute refers means "a wrong 'in violation of the law of nations' or merely a wrong actionable under the law of the appropriate sovereign state?" [FN41]

Judge Nickerson responded to this question by determining that the court's inquiry was not circumscribed by, nor did it necessarily end with, the municipal law of the foreign state where the alleged international tort occurred. The interests of the foreign state were relevant in this context, but only "to the extent they do not inhibit the appropriate enforcement of the applicable international law or conflict with the public policy of the United States." [FN42] Rather, the district court determined that definition of the relevant wrongful conduct should be guided by the norms and practices universally recognized by the international community, and not by the laws of a particular state. "[W]here the nations of the world have adopted a norm in terms so formal and unambiguous as to make it international 'law,' the interests of the global community transcend those of any one state." [FN43] Consistent with these principles, Judge Nickerson found that:
[T]here is no basis for adopting a narrow interpretation of [the ATCA] inviting frustration of the purposes of international law by individual states that enact immunities for government personnel or other such exemptions or limitations. The court concludes that it should determine the substantive principles to be applied by looking to international law, which, as the Court of Appeals stated, "became a part of the common law of the United States upon the adoption of the Constitution." [FN44]

*7 According to the broader view of the scope of the ATCA that Judge Nickerson propounded, Congress entrusted to the federal courts the task of determining the substantive rights to be applied to ATCA claims by reference to international standards, as well as the "power to choose and develop federal remedies to effectuate the purposes of the international law incorporated into United States common law." [FN45] On this basis, the district court determined that the laws defining substantive rights recognized by the foreign state in the case before it (Paraguay) prohibited torture. The court applied that body of law to determine liability, but also found no provision in it authorizing punitive damages. Nonetheless, Judge Nickerson awarded such damages in order to effectuate the federal policy embodied in the ATCA and the clear objectives reflected in the international prohibition against state-promoted torture. [FN46]

Second, the broader approach adopted by the district court in Filartiga II has gained recognition and acceptance by other federal courts that have considered ATCA claims in the face of inadequate or conflicting municipal law of the foreign state. Under these circumstances, rather than relying wholesale

on foreign municipal law, the courts uniformly have undertaken to fashion a remedy by reference to the full range of available decisional guides and sources, in particular principles derived from federal common law. These precedents speak to the shortcomings of an approach that would compel an undeviating or even primary reliance on municipal law to adjudicate claims under the ATCA.

In Xuncax, for example, given the ATCA's silence concerning a claimant's standing to bring suit to vindicate harms to another victim, the district court sought a suitable rule of decision to adjudicate claims for summary execution and disappearance based on injuries to third persons. Relying on the doctrine that where federal legislation creates a cause of action without specifying vital details the courts look to analogous state law insofar as it would not defeat the purposes of the federal statute, the Xuncax court determined that the TVPA provided the most analogous remedy. [FN47] The court also invoked the TVPA to apply Guatemala law, rather than a forum state rule of decision which would have barred recovery, to decide the right of a sibling to sue under the ATCA. [FN48]

Similarly, in Forti I the district court faced a choice of whether to apply a federal or state limitations period. It found a germane analogy in the federal Civil Rights Act, [FN49] and did not feel compelled to look beyond the relevant body of federal law to formulate an appropriate decisional rule. [FN50]

Third, several conceptual, policy and practical constraints caution against strict adherence to municipal rules of the foreign state in defining the scope of substantive rights and causes of action to be applied in adjudicating ATCA claims, and counsel instead a measure of flexibility, as reflected by the cases cited above, to enable the courts to fashion remedies compatible with the principles of federal common law and the content of universally recognized norms of international law.

*8 Just as the sources from which universal norms of international conduct derive are often articulated as generalities or conclusory precepts, equally so many principles of the organic law of sovereign states are typically expressed in terms that are no less sweeping nor any more self-executing. Pronouncements recognizing fundamental rights governing the state's conduct in relation to its people are not always accompanied by corresponding promulgations of specific definitions and causes of action authorizing enforcement through private suits. In consequence, in their assessments of ATCA claims, courts looking to foreign municipal law are likely to encounter common situations, as experienced in the cases discussed above and by this Court in reviewing principles of Zimbabwe law in the matter at hand, that raise significant choice of law impediments to the application of the ATCA and hinder the furthering of the goals of international standards.

The municipal law, for example, may manifest general domestic recognition of a fundamental norm without specifically elevating it further into a defined private right of action. Local rules may also provide a remedy that may not suffice to adequately highlight and respond to the gravity of the conduct and the import of the case. Or else the foreign law may contain no relevant decisional rule at all. Or it may provide a standard that, if applied to adjudicate specific ATCA claims, would dispose of the case in a manner that would defeat a remedy consistent with fostering the purposes of federal and international law. As succinctly phrased by the Xuncax court: "Simply put, municipal law is ill-tailored for cases grounded on violations of the law of nations." [FN51]

This situation may prevail for several reasons. Even today--despite evidence of more widespread recognition of universal standards through the proliferation of international instruments among the many sovereign nations in the world, with their multiplicity of histories, cultures and customs, and diverse stages of development--there are many jurisdictions in which the rule of law as we know it remains a relatively recent and still incipient adaptation. Thus, in these states the enunciation of substantive definitions, and elaboration of causes of action and corresponding decisional rules necessary to govern all

aspects of the full range of mature, enforceable rights common in our jurisprudence, remain at various rudimentary stages, if they exist at all.

Another limitation inherent in placing undue reliance on municipal law of the foreign state in choice of law analysis is reflected in actions, such as the case at bar, that charge egregious misconduct by the sitting government itself through measures taken by the highest ranking officers of the regime. These are the very officials whose public duties encompass enacting, enforcing and construing domestic laws, and deciding the state's compliance with international norms. It is unlikely to escape the notice of government leaders who defile the powers of their offices by resorting to the barbarism of state- sponsored torture and murder, and to the brutalities characteristic of inhuman treatment of their nation's own people, to equally dishonor the municipal justice system and its laws in order to immunize themselves from accountability and liability for their wrongs. Doctrines such as absolute or qualified immunity for the state and government personnel, statutes of limitations, and definitions of state action and other exemptions, may be easily perverted by self-serving enactments specifically designed to shield the misconduct of the selfsame offenders whose deeds define the deviation from universal norms, thereby subverting international law. Were the federal courts obliged to give unremitting recognition and deference to the substantive laws and defenses compelled by municipal law under a choice of law analysis, in some instances such application of foreign law could frustrate the right of action the ACTA was designed to confer upon the victims of international lawlessness.

*9 Moreover, as described above, well-established, universal, and obligatory norms defining rules of international conduct, evolve by custom and usages of nations over time. They are further elaborated by the works of reputable jurists and scholars and settled through longstanding practice and application in judicial decisions recognizing and enforcing those rules. [FN52] In consequence, because customary international norms are not always fixed in codifications or treaties, not every nation will necessarily reflect clearly in its domestic jurisprudence principles that manifest its unequivocal assent and adherence to universal standards that may override municipal rules.

By the same token, under customary practice in many global bodies, the declarations, resolutions and covenants that embody international practices are adopted by consensus. This procedure, while giving some legitimacy to the content of the instrument as evidence of broad recognition, at times conceals the degree of unstated reservations or dissent among regimes that do not voice their objections and instead silently join the consensus in response to the pushes and pulls of internal and external social and political pressures. Accordingly, while it may be expedient for a state to refrain from objecting to the international community's promulgation of particular standards to govern relations among nations and their subjects, its tacit acceptance does not always translate into enactment of corresponding municipal law giving meaning and force to the generalities articulated in the instruments with which the state publicly associates itself.

Thus, a gap sometimes exists between the public concurrence the state professes abroad to norms of international conduct in their relations with the community of nations and the measures it actually adopts at home to enable its people to realize the benefits of those universal rules. It is not uncommon in international practice for states to pay lip-service homage to the promulgation of particular international instruments, and even to ratify binding covenants, but then delay or fail altogether to adopt the municipal implementing legislation necessary to give the enunciated international rights meaningful domestic legitimacy and create an effective national means to vindicate them. [FN53]

For much of the same reasons, adjudication of claims that assert violations of customary international law and seek to vindicate universally recognized rights often engenders conceptual anomalies between the gravity of the offenses, the high promise conveyed in lofty terms by universally recognized rights, and the limited scope of available municipal remedies. Human rights offenses universally held to contravene the law of nations occupy the low ground reserved by civilized people to rank the most heinous of human

behavior. Typically these wrongs are correspondingly branded in language employing the most profound opprobrium, fittingly portraying the depths of depravity the conduct encompasses, the often countless toll of human suffering the misdeeds inflict upon their victims, and the consequential disruption of the domestic and international order they produce. These expressions mark the high stakes enshrined by universally outlawed practices such as genocide; slavery; torture; summary execution; forced disappearance; war crimes and crimes against humanity. [FN54]

*10 Between the horrid deeds these recognized atrocities proclaim, and the ringing words and promises with which they are universally condemned and renounced in solemn international instruments, lies a reality: that extant municipal law may not be available or may lag behind the need in providing adequate or readily accessible remedies to redress universally recognized wrongs, and that not infrequently, in the absence of any particular right of action specifically defined and promulgated to fit the real wrongs at hand, such means of relief as may exist are achieved only by Procrustean analogies that do not always capture or do justice to the actual grievousness associated with the offenses. Thus, for example, under municipal law of some jurisdictions, the magnitude of genocide and murder by torture and extrajudicial killing may have to be adjudged and remedied in accordance with ordinary civil tort standards prescribed in wrongful death statutes. Wholesale degradations and deprivations of all traces of human dignity perpetrated by cruel, inhuman or degrading treatment may be civilly prosecuted under local principles defining assault and battery or infliction of emotional distress. Forced disappearance and prolonged arbitrary detention may be classified as false imprisonment. [FN55]

To be sure, some aspects of international offenses may share elements with the ordinary municipal law torts. But, in practice, the acute form of misconduct entailed in international violations in many cases amounts to more than mere differences in degree, and assumes differences in kind so fundamental as to compel distinct treatment under universally recognized rules. The "enemy of all humankind", in legal if not in genetic terms, often ranks as a different species from the ordinary tortfeasor of the typical case. [FN56] Equally so is the class of universal rules that outcast the international outlaw, and thus declare him unworthy of all sovereign protections, distinguished from the global community's exhortations of aspirational norms or even from customary international law. [FN57]

The difficulties, as evidenced by the courts that have addressed the issues, arise not merely as a question of semantics that demean the international standards. Rather, the greater concern lies in potential results that could frustrate efforts to fashion relief commensurate with the real repugnance of international wrongs and their profound effects, in other words, remedies that do not vindicate and recompense the victims of state-sponsored genocide and murder as if they had suffered nothing more than common law defamation and battery. [FN58]

Tel-Oren, for example, involved what Judge Edwards characterized as a "barbaric rampage" in which terrorists took 121 civilians hostage and "tortured them, shot them, wounded them and murdered them," killing 22 adults and 12 children and seriously wounding 73 adults and 14 children, before police managed to stop the "massacre." [FN59] Although the dismissal of the case was sustained on substantive grounds, the district court had ruled alternatively that the action was also barred by the local one-year statute of limitations applicable to certain torts, such as assault and battery. [FN60]

*11 For the same reasons, other courts, in order to reflect the true magnitude of the universally recognized wrongs at issue and confer relief proportionate to the harms engendered, have felt compelled to pick and choose from among available remedial options one that advances the purposes of the ATCA and international law, in doing so sometimes ignoring constraints of municipal law to fashion relief even when the foreign law did not specifically recognize a remedy. The underlying decisional rules at issue in these cases have involved, for example, survival of a cause of action after defendant's death; [FN61] the

right of a sibling of the victim to bring an action under the ATCA; [FN62] the applicable statute of limitations; [FN63] and punitive damages. [FN64]

A final drawback to a choice of law approach mandating strict adherence to municipal law in redressing international law violations in ATCA cases is the practical and jurisprudential complexities that inhere in discerning, construing and enforcing substantive rules of decision formulated by foreign courts, legislatives or administrative bodies. [FN65] The intricacies and challenges are compounded in ATCA adjudications by the integral links and interplay that exist between the application municipal and international law for both jurisdictional and decisional purposes. Though the Federal Rules of Civil procedures provide guidance for federal courts in applying foreign law, [FN66] this authority does not mitigate the conceptual and pragmatic obstacles always associated with in the task.

B. EMERGENCE OF FEDERAL COMMON LAW POST-FILARTIGA

In synthesis, the foregoing case law reflects the emergence of a set of decisional rules federal courts have crafted to give scope and content to the cause of action the ATCA creates as it relates to international human rights law. Under these principles, as regards to misconduct that violates universally recognized norms of international law, the cases suggest several standards to guide ATCA choice of law determinations: (1) the local law of the state where the wrongs and injuries occurred and the parties reside may be relevant and may apply to resolve a particular issue insofar as it is substantively consistent with federal common law principles and international law and provides a remedy compatible with the purposes of the ATCA and pertinent international norms; [FN67] (2) in the event the local law of the foreign state of the parties' residence and underlying events conflicts with federal or international law, or does not provide an appropriate remedy, or is otherwise inadequate to redress the international law violations in question, a remedy may be fashioned from analogous principles derived from federal law and the forum state, or from international law embodied in federal common law; [FN68] (3) should the application of law from federal and forum state principles as to some aspect of the claim defeat recovery, an analogous rule drawn from the municipal law of the foreign jurisdiction may be applied to the extent it supplies a basis for a decisional rule that may permit relief; [FN69] (4) if some part of the claim cannot be sustained as a violation of international law, a remedy might be found by application of the foreign state's municipal law under the federal court's pendent jurisdiction if so invoked. [FN70]

*12 In essence, what these precedents represent is the natural evolution of common law, and the organic branching of federal substantive rules through the ATCA, which "established a federal forum where courts may fashion domestic common law remedies to give effect to violations of customary international law." [FN71] This growth of federal decisional law gives expression to the longstanding principle that the law of nations has always been part of federal law. [FN72]

As a body of federal law develops under this approach, so as to give content to an ATCA right of action and thus fill in the interstices with federal decisional rules, the federal courts' response acquires the virtues of uniformity and recognition of more diverse sources of substantive standards to draw upon in shaping remedies for adjudication of ATCA claims. The advantages of this approach were noted by the Xuncax court's observation that: "[b]y not tethering [the ATCA] to causes of action and remedies previously developed under roughly analogous municipal law, federal courts will be better able to develop a uniform federal common law response to international law violations, a result consistent with the statute's intent in conferring federal court jurisdiction over such actions in the first place." [FN73]

Finally, a recent Second Circuit explication of Filartiga I is consistent with a reading that in appropriate cases would permit a choice of law determination not necessarily compelling dispositive application of foreign law where the municipal rule of decision may conflict with federal law or international standards. In Wiwa, the Circuit Court noted that under the choice of law analysis required by Filartiga I, the district

court would determine whether international law, the law of the forum, or the law of the state where the events occurred should provide the substantive law to adjudicate the action. [FN74]

Wiwa acknowledges significant developments in the progression of international human rights law since Filartiga I was decided that affect the application of the doctrine enunciated by that case. Most significant of these advances was the enactment of the TVPA in 1991, which the Wiwa court construed as both ratifying the holding in Filartiga I and significantly carrying it further. [FN75] The court noted that the TVPA not only grants federal jurisdiction, but makes it clear that it creates liability under United States law for torture and extrajudicial killing, and extends its remedy not just to aliens but to any individual. [FN76] "The TVPA thus recognizes what was perhaps implicit in [the ATCA]--that the law of nations is incorporated into the law of the United States and that a violation of international law of human rights is (at least with regard to torture) ipso facto a violation of U.S. domestic law." [FN77]

Implicit in all of these developments is that whatever virtue the Lauritzen choice of law analysis may have in the context of a maritime case, the evolution of international human rights law in the light of contemporary realities as reflected in the Second Circuit's recognition of these developments, points to the necessity of staking out a more flexible course in the determination of the substantive law to be applied in adjudicating ATCA cases. Against this more ample exposition of the considerations that guide its decision, the Court proceeds to conduct its choice of law inquiry as it pertains to Plaintiffs' ATCA claims.

C. CHOICE OF LAW ANALYSIS AND APPLICATION OF THE PERTINENT RULES OF DECISION

*13 Having examined the pertinent provisions of the Zimbabwe Constitution and relevant legal doctrine called to the Court's attention in Plaintiff's submission, [FN78] the Court is persuaded that this authority, though not explicitly creating defined causes of action as to all claims, sufficiently proscribes wrongful conduct and protects substantive rights encompassing Plaintiffs' claims asserting (1) torture and extrajudicial killing, (2) cruel, inhuman or degrading treatment, (3) denial of political rights, and (4) systematic racial discrimination. The Court is not persuaded that a sufficient basis for recovery exists under international law for Plaintiffs' claims asserting uncompensated seizure of their property. However, Plaintiffs have also sufficiently established legitimate grounds for recovery on their expropriation claims under Zimbabwe law.

1. Torture and Extrajudicial Killing

In their Claims One and Two, Plaintiffs seek monetary relief under the TVPA and ATCA to redress the torture and extrajudicial killing of Metthew Pfebve, David Stevens and Tafuma Chiminya Tachiona. The Magistrate Judge found that these individuals had been subjected by an organized mob of ZANU-PF members to severe pain and suffering by means of torture before being brutally murdered. [FN79] Specifically, the Magistrate Judge found as follows: [FN80]

a. Tapfuma Chiminya Tachiona
Tapfuma Chiminya Tachiona was a founding member of the [Movement for Democratic Change "MDC"], the National Youth Organizer for the MDC, and a close companion of Morgan Tsvangirai, the President of the MDC. On April 15, 2000, whole Mr. Chiminya was campaigning with Mr. Tsvangirai, a group of ZANU-PF supporters attacked them. Managing to escape, Mr. Chiminya drove injured colleagues to the hospital, after which he reported the incident to the police. On his way home from the police station, he and two other MDC supporters, Sanderson Makombe and Talent Mabika, were again stopped by ZANU-PF members, who began attacking them with knives and sticks. Mr. Makombe was able to escape through the window of the vehicle and hid in the nearby brush, but Mr. Chiminya and Ms. Mabika remained trapped inside the truck as the assailants continued to beat them. Mr. Chiminya was hit

repeatedly in the head with the butt of a gun, according to Mr. Makombe. At that point, the assailants doused the vehicle with gas, causing the whole truck to go up in flames. The attackers then jumped in their vehicle and fled, soon after which Mr. Chiminya and Ms. Mabika managed to tumble out of the burning truck. Mr. Chiminya "was just like a ball of flames running across the tarred road," according to Mr. Makombe. He ran toward a field and collapsed, but died before Mr. Makombe could reach him.

b. David Yendall Stevens
David Stevens and his wife, Maria, owned a private commercial farm in Zimbabwe. Mr. Stevens was a known supporter of the MDC. On February 12, 2000, their farm was invaded by twenty-six ZANU-PF and ZWVA members and supporters. After that initial invasion, there have been a number of incidents of violence. For example, on two occasions, several female farm workers were assaulted and on one occasion, one was raped. Complaints to the police went unheeded.... On April 15, 2000, ZANU-PF and ZWVA members killed the Stevens' dog and abducted David Stevens and five others. All six were severely beaten and tortured, and Mr. Stevens was forced to drink diesel oil.
*14 Several of Mr. Stevens' neighbors observed the kidnapping and attempted to come to his aid by following his abductors to the police station. Once there, they were taken hostage as well, bound with rope, and driven away in two different vehicles. The men were tortured in a variety of ways, including being burned with cigarettes; beaten on the soles of their feet; beaten with rods, rocks and iron bars; hit in the face; and whipped with a fan belt from a car. In addition, their legs were cut with knives and they were threatened with having their ears and testicles cut off. Mr. Stevens was summarily executed later that same day.

c. Metthew Pfebve
[O]n April 29, 2000, ZANU-PF supporters approached the Pfebve home wielding axes, spears, sticks, and stones. The Pfebve family ran in different directions. Metthew Pfebve's mother managed to run into the outhouse, but was eventually found and pelted with stones by the assailants. The plaintiff and his father were attacked with stones, sticks and fists, then dragged down the road. The plaintiff's father was eventually dropped unconscious on the road, suffering deep lacerations to his head and several broken fingers. Meanwhile, Metthew Pfebve was carried away by the assailants. He was found dead the next day, naked and lying in the middle of the road, approximately one and one-half kilometers from his home. He had been severely beaten. The plaintiffs allege that he was in all likelihood tortured prior to his death at or nearby a primary school which the defendant had turned into a torture camp.

To vindicate Plaintiffs' rights asserted in Claims One and Two, the Magistrate Judge recommended recovery of compensatory and punitive damages against ZANU-PF under both the TVPA and the ATCA. In Tachiona III, the Court adopted the Report's recommendation of damages with regard to Plaintiffs' claims of torture and extrajudicial killing under the TVPA. [FN81]

In considering Plaintiffs' Claims One and Two under the ATCA, the Court notes that the Zimbabwe Constitution contains provisions that explicitly prohibit both torture and extrajudicial killing. Article 12(1) states that "No person shall be deprived of his life intentionally save in execution of the sentence of a court in respect of a criminal offense of which he has been convicted." [FN82] Similarly, Article 15(1) declares in relevant part, with elaborations and exceptions not pertinent here, that: "No person shall be subjected to torture[.]" [FN83] To vindicate rights protected by these provisions, the Zimbabwe legal system establishes civil remedies for victims of certain unlawful deprivations of an individual's rights to life, person or property, as well as for infringements of dignity, reputation or liberty, committed by intentional conduct, including assault, extrajudicial killing and murder. [FN84] These remedies enable claimants to recover both compensatory and punitive damages from the wrongdoers. The Court finds this authority sufficient to sustain the Magistrate Judge's recommendation of awards under ATCA of compensatory and punitive damages on Plaintiffs' claims of torture and extrajudicial killing.

*15 Plaintiffs point out that their claims for torture and extrajudicial killing were filed under both the ATCA and the TVPA. They therefore urge that in addition or alternatively the Court consider the damages Plaintiffs are entitled to recover under the TVPA as undifferentiated damages awarded under the ATCA as well. The Court agrees.

In enacting the TVPA to effectuate this country's commitments under the Torture Convention, Congress gave express definition to causes of action arising under United States law specifying substantive rights and protections of individuals to be free from state-sponsored torture and extrajudicial killing. [FN85] The Second Circuit has construed this Congressional mandate as embodying recognition that these actions, when committed by foreign states under color of law in violation of international law, "is 'our business,' as such conduct not only violates the standards of international law but also as a consequence violates our domestic law." [FN86] The Circuit Court thus not only gave expression to Congressional intent favoring the adjudication of TVPA claims in federal courts as a matter of United States policy, but also implicitly recognized that in considering the substantive law governing a cause of action invoking the TVPA the courts may apply federal law rights embodied in the TVPA's definitions of torture and extrajudicial killing to adjudicate the dispute.

The practical effect of this approach is to obviate the need, in connection with torture and extrajudicial killing claims asserted under the TVPA and the ATCA, to conduct and adhere to a strict choice of law analysis in accordance with Filartiga I, and to offer the courts the ability to apply substantive rights defined by federal law in cases where the law of the foreign state in question may be ambiguous, silent or even incompatible. To this effect, the Second Circuit noted in Kadic that: "[t]he [TVPA] permits [claimants] to pursue their claims of official torture under the jurisdiction conferred by the [ATCA] and also under the general federal question jurisdiction of [28 U.S.C.] section 1331 ...." [FN87]

Accordingly, the Court adopts the Report's recommendation that Plaintiffs be awarded compensatory and punitive damages on their Claims One and Two for torture and extrajudicial killing under the TVPA and the ATCA.

2. Denial of Political Rights

Plaintiffs' Claims Three and Four under the ATCA assert violations of certain political freedoms: denials of the rights of association, assembly, expression and beliefs and of the right to run for political office and participate in the state's government. The Magistrate Judge recommended awards of compensatory and punitive damages with respect to these claims, finding that ZANU-PF systematically hounded its political opponents through repeated acts of terror and violence. According to the Magistrate Judge, ZANU-PF specifically targeted Plaintiffs' association with the Movement for Democratic Change ("MDC"), an opposition political party:
*16 MDC supporters were constantly harassed, peaceful assemblies were interrupted by mobs of ZANU-PF supporters attacking MDC supporters, assassination attempts were made on MDC candidates, and MDC supporters were killed. [FN88]

The freedoms of political association, speech, beliefs and participation that Plaintiffs assert are recognized in various international instruments. The Universal Declaration contains several provisions itemizing individual rights that go to the essence of a person's political expression and participation, including freedoms of thought and conscience; of opinion and expression; of peaceful assembly and association; and of participation in the government of the person's country. [FN89] Corresponding provisions are more particularized in the Civil and Political Rights Covenant. [FN90]

None of these sources, or other authorities elaborating on the scope, content and practical application of these rights, offers a particular definition or explicit guidance as to whether and to what extent universal

consensus exists concerning the kinds of deprivations of political rights that are cognizable as violations of customary international law. However, the Second Circuit has recognized the significance of the Universal Declaration in "specify[ing] with great precision the obligations of member nations under the [United Nations] Charter." [FN91] In this regard, the Filartiga I Court acknowledged scholarly opinion, which it cited favorably, for the view that the Universal Declaration "no longer fits into the dichotomy of 'binding treaty' against 'non-binding pronouncement,' but is rather an authoritative statement of the international community." ' [FN92] Consistent with this proposition, the Circuit Court also noted that "several commentators have concluded that the Universal Declaration has become, in toto, a part of binding, customary international law." [FN93] Thus, the elemental principles embodied in the Universal Declaration are not only repeatedly invoked by the international community in general pronouncements but have been adopted as part of the constitutions of many states around the world and as such are reflected concretely in applied organic law.

In considering with greater specificity the content and degree of universality accorded to the political rights at issue in the instant case, the Court must note that the world is characterized by fundamental diversity of political systems and established orthodoxies. A vast range of political thought and channels of expression exists around the globe. So, too, common tensions often prevail between individual and aggregate rights, and majorities versus minorities, on the one hand, and, on the other, the imperatives of maintaining territorial integrity, national security and internal public order, safety and health. Given these realities, the absence of a more particularized expression defining the precise contours of individual civil and political rights as customary international law is not surprising.

*17 Nonetheless, as sources of guidance for what qualifies as internationally recognized norms relating to the political rights Plaintiffs invoke, the Court may draw from general principles derived from international agreements, declarations and pronouncements on the particular subject, as well as from the general principles common to the world community's major legal systems. [FN94] In this connection, the Court considers relevant doctrine and expressions reflected in the Restatement of Foreign Relations and federal law principles, provisions of the Universal Declaration and the Civil and Political Rights Covenant, and interpretations and applications of these instruments by authoritative international and domestic bodies.

a. The Restatement of Foreign Relations

Reflecting the absence of greater particularity and universal understanding as to the civil and political rights encompassed within internationally recognized and obligatory norms, § 702 of the Restatement of Foreign Relations does not specifically enumerate denial of civil and political rights among the distinct state policies or practices that violate customary international human rights law. The Restatement § 702 lists as customary law the following violations of human rights: (a) genocide, (b) slavery or slave trade, (c) the murder or causing the disappearance of individuals, (d) torture or other cruel, inhuman, or degrading treatment or punishment, (e) prolonged arbitrary detention, (f) systematic racial discrimination, and (g) a consistent pattern of gross violations of internationally recognized human rights. The Restatement notes that the human rights prohibitions enumerated in clauses (a) through (f) are peremptory norms (jus cogens) and are not subject to derogation in times of emergency. [FN95]

Nonetheless, in § 702(g) the Restatement identifies a general category of international human rights violations where, as a matter of policy, a state practices, encourages or condones "a consistent pattern of gross violations of internationally recognized human rights." [FN96] Among consistent patterns deemed "gross," the Restatement cites as examples: "systematic harassment, invasions of the privacy of the home, arbitrary arrest and detention (even if not prolonged); ... denial of freedom of conscience ...." [FN97]

Several observations about § 702(g) are notable and pertinent to the instant case. First, because each of the violations listed in clauses (a) through (f) stands alone as having already acquired the requisite universal acceptance and definition to qualify as customary international law, the reference in clause (g) to "internationally recognized human rights" must comprise a residual body of protections and violations that, though articulated in global human rights declarations and instruments, standing alone presumably may not as yet have attained the authority of customary international law when considered as isolated incidences, but may rise to acquire such status when they satisfy the two specified standards: being both part of a "consistent pattern" and "gross" violations. In Kadic, the Second Circuit considered a somewhat analogous situation. It ruled that certain atrocities involving rape, torture and summary execution attributed personally to the offender that ordinarily would require state action to qualify as violations of international law were cognizable under the ATCA without regard to state action insofar as they were committed in furtherance of misconduct, such as genocide or war crimes, that did constitute recognized jus cogens violations of international law for which private individuals may be held liable even absent state action. [FN98]

*18 This reading and application would also be consistent with analogous federal law principles which hold that wrongful conduct by federal or municipal government officials is not actionable as violating certain constitutional prohibitions unless the underlying actions constitute a custom, policy or practice or, in the case of other constitutional standards, demonstrates conduct sufficiently gross to comprise reckless disregard or deliberate indifference for human life. [FN99]

Second, an interpretation of clause (g) that would define the violations it encompasses by reverting back to those already enumerated in clauses (a) through (f) would be tautological and render clause (g) meaningless. Third, the underlying concept of clause (g) is consistent with that of clause (f). Racial discrimination as such is universally denounced as incompatible with international norms. [FN100] But under § 702(f) racial discrimination, when practiced, encouraged or condoned by the state, violates international human rights law only when it is "systematic". [FN101]

Expressions of a concept similar to that embodied in Restatement § 702(g), articulating international concern and condemnation of "gross and systematic" violations of fundamental human rights, are reflected in various international pronouncements. [FN102] As it pertains specifically to certain political rights, this principle is affirmed in the Proclamation of Teheran, [FN103] which declares that: "Gross denials of human rights arising from discrimination on grounds of race, religion, belief or expressions of opinion outrage the conscience of mankind and endanger the foundations of freedom, justice and peace in the world."

b. The Civil and Political Rights Covenant

The Civil and Political Rights Covenant does offer greater specific definition and guidance with regard to the freedoms here in question. It makes clear that even if perhaps not all of the civil and political rights enunciated in the Universal Declaration may garner global recognition satisfying the requisite standards of universality and specificity, and thus qualify as customary international law, not all of the proclaimed rights necessarily stand on the same footing. In fact, the Covenant itself manifests that some universal human rights already have attained sufficient definition and recognition among the individual freedoms that are entitled to protection as peremptory norms. The listing includes proscriptions concerning: the right to life (Art. 6); freedom from torture (Art. 7) and slavery (Art. 8); imprisonment for debt (Art. 11); criminal convictions under ex post facto laws (Art. 15); and the right to recognition as a legal person (Art. 16). [FN104] Article 4(2) specifically enumerates the right to freedom of thought, conscience and religion enunciated in Article 18 among the provisions of the Covenant that are not subject to derogation in time of public emergency, and is thus accorded special rank among those standards that have acquired firm standing as customary international law. [FN105]

*19 Moreover, Article 18(3) of the Covenant articulates specific standards clearly defining the scope of freedom of thought, conscience and religion and the circumstances under which interference with exercise of these rights may be permissible. In particular, no restraints are allowed on these freedoms as such; Article 18(3) of the Covenant recognizes limitations only on a person's freedom to manifest his religion or beliefs, and then only insofar as such restrictions "are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others." [FN106]

A very similar framework defining the bounds of restraints on exercise of the right to freedom of opinion and expression is contained in Article 19. First, Article 19(1) recognizes the right of every person to hold opinions without interference. The right is expressed in absolute terms, with no permitted infringements. Freedom of expression, on the other hand, is made subject to specific limitations, but only as provided by law and necessary (a) for respect of the reputations or rights of others, or (b) for the protection of national security, or of public order, or of public health or morals. [FN107]

So structured, freedoms of thought, conscience and religion, and the related freedoms of opinion and expression, [FN108] may be regarded as ordered on a higher plane on the scale of universal acceptance and definition, and thus vested with a higher grade of protection, than associational and participatory rights such as freedom of association, assembly and political participation in government, each of which is subject to many more practical constraints associated with other public imperatives. [FN109]

On this point, the Preamble of the Universal Declaration itself eloquently affirms that "the advent of a world in which human beings shall enjoy freedom of speech and belief and freedom from fear and want has been proclaimed as the highest aspiration of the common people." [FN110] For, internal intrusions into the workings of the mind in formulating thought and opinion, and on their manifestations as beliefs and legitimate expression, may be inherently more invasive and perverse, and thus may be more fundamentally harmful to the individual and society, than some external restraints affecting an individual's associational and participatory political rights. [FN111] The Restatement of Foreign Relations also implicitly acknowledges the special significance of the person's mental freedoms in its specific mention of denial of freedom of conscience among its illustrations of the violations of internationally recognized human rights that would fall within the proscription of § 702. [FN112]

Similar recognition of the unique value, and the priority among human rights norms, vested by the Civil and Political Rights Covenant in freedom of conscience, thought, opinion and expression is also conveyed in other authoritative sources and scholarly views. The Supreme Court has described freedom of opinion and expression as "the matrix, the indispensable condition of nearly every other form of freedom." [FN113] These freedoms have also been characterized as "the 'touchstone of all the freedoms to which the United Nations is consecrated." ' [FN114]

*20 Article 2 of the Universal Declaration embodies this recognition by placing enjoyment of rights and freedoms without discrimination based on "political or other opinions" on par with other impermissible distinctions, such as race, color, sex, language, religion and national or social origin. [FN115] This provision is reinforced by the affirmative prescriptions set forth in Article 7, which recognize every person's right to equal protection of the law against any form of discrimination or incitement to discrimination, and in Article 19, which specifically enunciates the "right to freedom of opinion and expression," including "freedom to hold opinions without interference ...." [FN116]

These longstanding, consistent, widely recognized expressions uniformly convey a basic principle that "[t]he differential treatment of individual human beings entirely on the basis of political and other opinions is clearly incompatible with the values of human dignity." [FN117] Beyond its political and moral grounding, this precept also possesses other utilitarian value insofar as "abundant production and

wide sharing of all values are profoundly affected by the degree to which the members of a community enjoy freedom of opinion." [FN118]

c. Recognition by Courts and Other Adjudicatory Bodies

The level of the recognition and definition accorded to the rights to freedom of thought and beliefs and of opinion and expression as binding international norms is reflected in official interpretations and applications of the relevant provisions of the Civil and Political Rights Covenant by various international courts and adjudicatory bodies. These authorities uniformly reaffirm three essential principles that define and embody the specific content of these rights: (1) that the right to enjoy and exercise these freedoms is a fundamental and obligatory international norm; (2) that any interference with the exercise of these rights may be justified only (a) when provided by law, (b) when the restraint is necessary to protect essential rights of others or to further vital public purposes grounded on national security, public order, safety, health or morals, and (c) when the interference is proportionate to the legitimate aims pursued; and (3) that violation of these standards is actionable and compensable in damages to the victims.

These principles emerge from rulings rendered by the United Nations Human Rights Committee in the course of carrying out its adjudicatory role under the Optional Protocol to the Civil and Political Rights Covenant (the "Optional Protocol"). [FN119] These authoritative interpretations and applications of the Covenant reflect an index of the scope of the global community's recognition and acceptance of the principles of the Covenant in this regard as obligatory. In Aduayom v. Togo, [FN120] for example, the Human Rights Committee considered a claim under Article 19 of the Civil and Political Rights Covenant brought by a group of authors who were arrested and suspended from their public employment for various political offenses, including possession of pamphlets and other documents critical of the government of Togo and outlining the organization of a new political party. The Committee determined that the Togo government's refusal to reinstate the claimants to their jobs and compensate for lost wages constituted a violation of Article 19's right to freedom of political opinion and expression for which the state had provided no justification pursuant to any of the exceptions recognized under Article 19(3). In so ruling, the Committee observed that:
*21 the freedom of information and expression are cornerstones in any free and democratic society. It is on the essence of such societies that its citizens must be allowed to inform themselves about alternatives to the political system/parties in power, and that they may criticize or openly and publicly evaluate their governments without fear of interference or punishment, within the limits set by [A]rt. 19(3). [FN121]

Decisions in a similar vein construing the freedom of conscience, opinion and expression provisions of the European Convention, [FN122] which parallel those of the Civil and Political Rights Covenant, have been rendered by the European Court of Human Rights, as well as by some national courts. In Surek v. Turkey, [FN123] the European Court found a violation of Article 10 of the European Convention in the conviction and sentencing of two journalists for publication of interviews with the leader of a Turkish separatist organization that was declared illegal under national law, where there was no evidence that the political opinions expressed in the interviews could be construed as incitement to violence and the state action could not otherwise be justified as necessary under the exceptions of Article 10(2) of the Convention, a provision the court noted must be strictly construed. [FN124] Among the essential premises the court reaffirmed in its determination, which awarded compensatory damages to the claimants, was that freedom of expression constitutes "one of the basic conditions ... for each individual's self-fulfillment." [FN125]

It follows from the interpretation and application given by these international bodies and national courts to the exercise of freedom of political opinion and expression that if the state violates the right when it employs its legal process to prosecute and punish individuals who profess views at odds with the government's orthodoxy, it would contravene those fundamental human rights principles and ends even

more readily in instances where the state resorts to utter violence and lawlessness as the means to commit the internationally proscribed offenses. Hence, a systematic campaign of terror and violence conceived and arbitrarily waged by state agents arising not from any legitimate response to a demonstrable need related to the protection of public order, health or safety or other imperative governmental purpose, but rather hatched and calculated to suppress political opinion and expression, is neither provided by law, necessary to safeguard other vital rights or public purposes, nor proportionate to any justifiable state aims pursued. When accompanied by extreme deprivations of life and liberty and unwarranted invasions of privacy as the instruments employed to achieve these repressive ends, the state's actions present unique dimensions that should qualify under a standard requiring a consistent pattern of gross violations of internationally recognized human rights. [FN126]

d. Application to the Case At Bar

*22 Here, the infringements committed by ZANU-PF of Plaintiffs' rights of freedoms of political belief, opinion and expression were sufficiently systematic and gross to warrant a finding of a violation of international law and corresponding liability, as well as an award of consequential damages under the ATCA in accordance with the Magistrate Judge's recommendations in this case.

Undoubtedly, states may differ on the general content of certain political freedoms and the depth of their commitment to protect them. Their practices may vary as to the scope of the state's obligations to initiate defined measures to ensure meaningful exercise by their nationals of political rights universally recognized. And while nations may concede certain wrongful human rights practices as culpable excesses, or deny the existence of alleged violations of certain individual freedoms as grounded on legitimate political particularities of sovereign states, or as not supported by pertinent facts, few would justify or defend by legally supportable reasons that, as a matter of domestic or international law, a sufficient mandate exists for a state, as a means of advancing valid public purposes, to engage in an affirmative campaign of systematic harassment, egregious organized violence and terror, and arbitrary invasions of individual life, liberty and privacy specifically intended to deprive its people of freedoms of political thought, conscience, opinion and expression. This standard should govern especially where, as here, these rights are professedly recognized by the state's own organic law and avowed by the state as universal norms it has pledged to confer, honor and protect. [FN127]

It is true that under certain exigencies threatening safety, security or public order, the state may justifiably impose reasonable restraints on the exercise of these freedoms. [FN128] Article 19(3) of the Civil and Political Rights Covenant expressly recognizes that exercise of freedom of expression is subject to restrictions. But the exception, strictly construed by the authorities that have ruled on it, are circumscribed by the limitations. There is no evidence in this case of the existence of any public emergency officially proclaimed, or any necessity of national security or public order, that may have presented even colorable grounds to justify the state's actions as a warranted derogation from its obligations to ensure Plaintiffs' rights. [FN129]

Another consideration may weigh in the balance of gradations that may tip the measure of misconduct into the more severe scale deemed sufficiently gross or systematic for the purposes of assessing state violations of internationally recognized standards. In general, sovereign hypocrisy and cynicism, manifest in a state's failure to invest its domestic law and justice system with substance and force enough to enable its citizens meaningfully to exercise internationally recognized civil and political rights the state itself publicly embraces, may not suffice by itself to comprise a violation of universal norms. But hypocrisy exposed and materialized in the power of the state committed to organized brutality and violence inflicted against its own people and specifically calculated to deny political freedoms of conscience, opinion and expression the state itself ostensibly has conferred, may be a different matter. For, when the state undertakes to give expression and force of law not to foster the protection of fundamental human rights it

publicly proclaims, but rather to execute systematic denials of those freedoms, the action may cross over the imprecise line and assume the added dimension of virulence necessary to transgress into the domain of what qualifies as a pattern of gross violations of universal norms.

*23 By affirmatively unleashing a consistent pattern of violence and terror upon people led to believe, by the state's own domestic and international pronouncements, that those rights were theirs to enjoy, naked cynicism then not only substantiates the state's public deception in not sufficiently safeguarding those human rights, but may compound a failure to act that by itself may not be cognizable under one measure of illegality into a fury of affirmative wrongs and injuries actionable under another. This consideration is similar, albeit in a different context, to the principle of the common law of torts that a state may not be held liable for taking no action to enact remedial measures to address a potentially harmful condition it has no duty to correct, but may be found responsible for injuries when its agents do interject themselves into the situation and undertake related actions in the course of which they do not exercise the requisite standard of care the circumstances demand. [FN130] In the final analysis, when a state not only so eviscerates its own duty to ensure fundamental domestic and internationally recognized human rights as to render them nothing more than a hollow formalism, but also itself intentionally perpetrates gross violations of those very rights, the resulting combination of harms crosses the threshold of individual protections prevailing under universally recognized human rights norms.

On the basis of the preceding considerations and analysis, the Court concludes that Plaintiffs have established a violation of an internationally recognized norm to a right of freedom of political beliefs, opinion and expression without arbitrary and unjustified interference by the state.

e. Zimbabwe Law

The Court also notes that apart from the status of the political freedoms Plaintiffs assert under international law, these rights are also recognized under Zimbabwe law, although the scope of a municipal cause of action for monetary damages to vindicate these rights is somewhat ambiguous. The Zimbabwe Constitution contains explicit guarantees and prohibitions safeguarding freedoms of expression, of conscience, and of assembly and association. [FN131] Specifically, these rights are defined to proscribe that no person shall be hindered in the enjoyment of "freedom to hold opinions and to receive and impart ideas and information without interference," [FN132] as well as the "right to assemble freely and associate with other persons and in particular to form or belong to political parties ... or other associations for the protections of his interests." [FN133]

Under the foregoing provisions, a private action ordinarily does not exist to recover monetary compensation for violations of the specified rights, except that persons aggrieved by the unlawful conduct, including decedents' spouses and dependents, may be entitled to sue for damages where the wrong is also founded on a cause of action that falls within principles such as those comprising common law assault, torture or wrongful death. [FN134] The Court construes these provisions as sufficient to warrant a finding of liability and an award of compensatory damages to Plaintiffs with respect to ZANU-PF's violations of Zimbabwe law. [FN135]

*24 As the Magistrate Judge determined here, an analogous basis for liability exists under federal law for violations of First Amendment rights, which include freedoms of speech, assembly, protest and association. [FN136] Insofar as the Court has determined that Plaintiffs' injuries resulted from violations of the law of nations also recognized under federal law, Plaintiffs are entitled to compensation under the ATCA.

On the basis of the foregoing authority, the Court adopts the Magistrate Judge's recommendation to award compensatory damages and punitive damages with regard to Plaintiffs' Claims Three and Four.

3. Cruel, Inhuman or Degrading Treatment

Plaintiff's Claim Five describes ZANU-PF's acts of cruel inhuman or degrading treatment. The Magistrate Judge recommended an award of compensatory and punitive damages with respect to this claim. The wrongful conduct upon which the Magistrate Judge found liability, encompasses: [FN137]
• The suffering of Tapfuma Chiminya, Mathew Pfebve, and David Stevens, prior to their death, including being bound and gagged and forced to ride in a vehicle for hours, being dragged down the street in front of neighbors and loved ones, and being placed in fear of impending death;
• The suffering of Efridah Pfebve, who had watched her elderly mother being stoned by an angry mob, saw her brothers and elderly father being dragged down the street and beaten, and observed her home being ransacked; and
• The harms to Evelyn Masiti and Elliot Pfebve, who lived in constant threat of death by defendant and suffered repeated attacks upon their persons, families and property.

a. International Law

Other courts which have considered the issue have expressed divergent views as to whether cruel, inhuman or degrading treatment, though broadly expressed and accepted in the abstract as an international norm, possesses the requisite elements of universality and specificity to constitute a recognized proscription under the customary law of nations. In Forti v. Suarez-Mason, [FN138] for example, the court sustained its earlier dismissal of a claim of cruel, inhuman or degrading treatment upon concluding that there was not a sufficiently universal consensus defining the content of the prohibited conduct as a distinct international tort so as to be actionable under the ATCA.

The Xuncax court, however, reached a different result. [FN139] The court did note that the prohibition against cruel, inhuman or degrading treatment poses more complex definitional problems than other recognized international norms. Nonetheless, the court concluded that "[i]t is not necessary for every aspect of what might comprise a standard... be fully defined and universally agreed before a given action meriting the label is clearly proscribed under international law...." [FN140] It then held that any conduct proscribed by the United States Constitution and by a cognizable principle of international law falls within the scope of cruel, inhuman or degrading treatment and is thus actionable under the ATCA. [FN141]

*25 Other courts have expressed no reservations in accepting cruel, inhuman or degrading treatment as a "discrete and well recognized violation of international law," and a separate ground for liability under the ATCA, at least insofar as the unlawful conduct in question would also violate the Fifth, Eighth and/or Fourteenth Amendments to the United States Constitution. [FN142]

Grounds for doubts as to the scope of consensus and definitional content of the prohibition against the cruel, inhuman or degrading treatment arise by reason of ambiguous evidence of what unlawful conduct falls within the ascertainable contours of the action, beyond the bounds of what is already accepted as encompassed by prohibitions of torture, summary execution and prolonged arbitrary detention. [FN143] The conceptual difficulties are compounded because while the experts concur as to the existence of the norm, they offer little analytic guidance helpful in charting its precise frontiers as distinct wrongful conduct. [FN144] Thus, while most international declarations and covenants that proscribe torture also extend by conjunction to cruel, inhuman or degrading treatment or punishment, [FN145] those instruments contain specific definitions of torture but not of cruel, inhuman or degrading treatment. [FN146]

themselves victims of torture. Few would quarrel, however, that the offenders' lawlessness would cause these individuals themselves to suffer the severe emotional pain and indignities associated with forms of cruelty and inhuman treatment. Thus, wherever the nuances of conduct may blend at the frontiers that define the limits of cruel, inhuman or degrading treatment, this Court has no hesitation finding that the wrongs committed by ZANU-PF in this case fall well within the realm of the execrable-- unlawful conduct that would be condemned and rejected as contravening well- established and universally recognized norms of international law.

b. Zimbabwe Law

*27 Zimbabwe law also contains prohibitions against cruel, inhuman or degrading treatment. Specifically, the Zimbabwe Constitution provides that "no person shall be subjected to torture or to inhuman or degrading punishment or other such treatment." [FN149] It is not clear from the Zimbabwe law presented to the Court whether, behind this general proscription, Zimbabwe law recognizes a distinct, clearly defined private cause of action encompassing cruel, inhuman and degrading treatment. Some of the wrongs Plaintiffs charge under this claim, however, describe unlawful conduct that clearly would fall within the scope of assaults entailing homicide, injury to persons, destruction or damage to property. Such claims would be compensable under principles of Zimbabwe common law. [FN150]

Moreover, whether or not such injuries, inflicted by state agents or under the color of law, would state cognizable rights of action under Zimbabwe law, there can be no dispute that the actions describe violations other courts have found to fall within the proscriptions of the Fifth, Eighth and Fourteenth Amendments of the United States Constitution. [FN151] The dimension the offenses involved in these cases have in common include the wanton infliction of mental or physical suffering or assaults that manifest callous disregard for human dignity committed by the state or its agents through sustained, systematic and deliberate conduct engaged in the service of no legitimate public purpose.

4. Racial Discrimination and Unlawful Seizure of Property

With regard to Plaintiffs' Claims Six and Seven, the Magistrate Judge recommended an award of compensatory and punitive damages to Maria and David Stevens for the racial violence and terror they suffered through ZANU-PF unlawful conduct, and for damages caused by the Zimbabwe government's racially motivated confiscation of their farm, home and possessions motivated by racial animus. With respect to these claims, this Court found no basis to recognize that a taking of property by a sovereign state from its own citizens, as asserted here, constitutes a violation of well-established, universal norms of international law. [FN152] The Court left open the theoretical possibility of exercising pendent jurisdiction over the claim, but expressed reluctance to do so given the absence of a proof of relevant Zimbabwe municipal law to provide a grounds for such a remedy.

a. Racial Discrimination

Systematic racial discrimination and racially-motivated violence, especially where practiced as a matter of state policy, is proscribed as violations of international standards in various international instruments. [FN153] Plaintiffs' claims of such misconduct are also closely analogous to contraventions of well-established principles embodied in the Fourteenth Amendment of the United States Constitution and related federal civil rights statutes making such violations actionable. [FN154]

Plaintiffs have submitted evidence to establish that the Zimbabwe Constitution and other laws guarantee fundamental individual rights regardless of race, origins, color, creed or sex, and prohibits all forms of discrimination on these grounds. [FN155]

b. Seizure of Property

*28 The Zimbabwe Constitution forbids the state's seizure, damage or destruction of property without fair compensation. [FN156] Plaintiffs cite no authority, however, to support a determination that the state seizure of property of its own nationals without fair compensation described in Claim Seven constitutes a violation of well-defined, universal and obligatory norms of international conduct. It is true that the Universal Declaration, Art. 17, contains references the right to own property and not be arbitrarily deprived of it. [FN157] However, no corresponding right was included in the Civil and Political Rights Covenant, an omission that diminishes any claim to universal consensus concerning the status of this right as customary international law.

The Court has found no other persuasive evidence that universal consensus exists recognizing contravention of this principle as customary international law and defining the boundaries of the offenses with sufficient specificity. To the contrary, the case law that exists has rejected such a claim. In Dreyfus v. Von Finck, [FN158] the Second Circuit held that a state's seizure of the property of its nationals, even if racially motivated, was not a violation of the law of nations. Insofar as Plaintiffs assert that the invasions and unlawful takings of property for which ZANU-PF were racially-inspired, such misconduct is encompassed within the actions the Court sustained as recognized violations of international law under Claim Six.

Nonetheless, Plaintiffs' complaint invoked the Court's pendent jurisdiction under 28 U.S.C. § 1367 and asserted claims under Zimbabwe law. [FN159] The Court therefore will exercise its discretion to assert authority over those claims. Having examined the provisions of the Zimbabwe Constitution and related law called to its attention, the Court is satisfied that Plaintiffs have asserted rights and cognizable actions under Zimbabwe law that would entitle them to the compensatory damages recommended by the Magistrate Judge with respect to Claim Seven.

In connection with Claims Six and Seven, Plaintiffs made a general request for punitive damages, unlike the specific request they asserted with regard to their other five claims. However, because there is no evidence on the record to support a finding that Zimbabwe law would authorize the awarding of punitive damages in connection with unlawful seizure of property, the Court does not accept the portion of the Report that recommends Plaintiffs' recovery of exemplary damages with regard to Claim Seven.

III. CONCLUSION

The Court adopts the Magistrate Judge's recommendation, as modified above, that Plaintiffs be awarded compensatory and punitive damages as follows:

A. CLAIMS ONE AND TWO:

1. Extrajudicial Killing

	Compensatory	Punitive
Estate of Tapfuma Chiminya	$ 2,500,000	$ 5,000,000
Estate of Metthew Pfebve	$ 2,500,000	$ 5,000,000
Estate of David Stevens	$ 2,500,000	$ 5,000,000

2. Torture

Estate of Metthew Pfebve	$ 1,000,000	$ 5,000,000
Estate of David Stevens	$ 1,000,000	$ 5,000,000

B. CLAIMS THREE AND FOUR:

1. Loss of Enjoyment of Political Rights

Adella Chiminya	$ 500,000	$ 1,000,000
Efridah Pfebve	$ 500,000	$ 1,000,000
Elliott Pfebve	$ 1,000,000	$ 2,000,000
Evelyn Masaiti	$ 1,000,000	$ 2,000,000

2. Loss of Property

Efrideh Pfebve	$ 230,909

C. CLAIM FIVE

Cruel, Inhuman or Degrading Treatment

Estate of Tapfuma Chiminya	$ 1,000,000	$ 4,000,000
Estate of Metthew Pfebve	$ 1,000,000	$ 4,000,000
Estate of David Stevens	$ 1,000,000	$ 4,000,000
Efridah Pfebve	$ 1,000,000	$3,000,000
Evelyn Masaiti	$ 750,000	$ 1,500,000
Elliott Pfebve	$ 750,000	$ 1,500,000

D. CLAIMS SIX AND SEVEN

1. Systematic Racial Discrimination

Estate of David Stevens	$ 500,000	$ 1,000,000
Maria Stevens	$ 500,000	$ 1,000,000

2. Loss of Home, Destruction of Business and Seizure of Property

Maria Stevens	$ 1,000,000
Evelyn Masaiti	$ 19,544

TOTAL	$20,250,453	$51,000,000

IV. ORDER

*29 For the foregoing reasons, subject to the modifications discussed above, the Court adopts the Report and Recommendation of Magistrate Judge James Francis, dated July 1, 2002. Accordingly, it is hereby

ORDERED that Judgment be entered in favor of Plaintiffs and against defendant ZANU-PF in a total amount of $71,250,453.00 representing compensatory damages of $20,250,453.00 and punitive damages of $51,000,000.00 in accordance with the apportionment set forth above in the Conclusion section of this Decision and Order.

The Clerk of Court is directed to close this case.

SO ORDERED.

FN1. See 28 U.S.C. § 1350.

FN2. See Pub.L. No. 102-256, 106 Stat. 73 (1992) (codified at 28 U.S.C. § 1350 Note).

FN3. See Tachiona v. Mugabe, 169 F.Supp.2d 259 (S.D.N.Y.2001) ("Tachiona I "). The United States (the "Government"), which had filed a Suggestion of Immunity on behalf of Mugabe, moved for reconsideration, arguing that the Court's exercise of jurisdiction over ZANU-PF grounded on personal service on Mugabe was impermissible under federal law and international principles governing sovereign and diplomatic immunity that the Government suggested applied to Mugabe. The Court denied the Government's motion. See Tachiona v. Mugabe, 186 F.Supp.2d 383 (S.D.N.Y.2002) ("Tachiona II ").

FN4. See Tachiona v. Mugabe, 216 F.Supp.2d 262 (S.D.N.Y.2002) ("Tachiona III ").

FN5. 630 F.2d 876 (2d Cir.1980) ("Filartiga I ").

FN6. See Tachiona III, 216 F.Supp.2d at 268-69.

FN7. 226 F.3d 88, 105 n. 12 (2d Cir.2000), cert. denied, 532 U.S. 941, 121 S.Ct. 1402, 149 L.Ed.2d 345 (2001).

FN8. See Babcock v. Jackson, 12 N.Y.2d 473, 240 N.Y.S.2d 743, 191 N.E.2d 279, 284 (N.Y.1963); Restatement (Second) of Conflict of Laws (1971) § 6 cmt. f. ("In general, it is fitting that the state whose interests are most deeply affected should have its local law applied.").

FN9. See Restatement (Second) of Conflict of Laws, supra § 6 cmt. f; see also Richards v. United States, 369 U.S. 1, 11, 82 S.Ct. 585, 7 L.Ed.2d 492 (1962) (holding that under the Federal Tort Claims Act the reference to "law" is to "the whole law of the State where the act or omission occurred," including its choice of law rules).

FN10. Lauritzen v. Larsen, 345 U.S. 571, 591, 73 S.Ct. 921, 97 L.Ed. 1254 (1953); see also Richards, 369 U.S. at 13-14.

FN11. See, e.g., Filartiga v. Pena-Irala, 577 F.Supp. 860, 863 (E.D.N.Y.1984)("Filartiga II"),; Xuncax v. Gramajo, 886 F.Supp. 162, 189-91 (D.Mass.1995); Forti v. Suarez-Mason, 672 F.Supp. 1531, 1547-48 (N.D.Cal.1987) ("Forti I ").

FN12. Filartiga I, 630 F.2d at 889 (citing Home Ins. Co. v. Dick, 281 U.S. 397, 50 S.Ct. 338, 74 L.Ed. 926 (1930)); see also Jeffrey M. Blum and Ralph G. Steinhardt, Federal Jurisdiction over International Human Rights Claims: The Alien Tort Claims Act after Filartiga v. Pena- Irala, 22 Harv. Int'l L.J. 53, 97-98 (1981).

FN13. Filartiga I, 630 F.2d at 889.

FN14. See Wiwa, 226 F.3d at 106; Filartiga I, 630 F.2d at 887.

FN15. See Filartiga II, 577 F.Supp. at 864 (finding on remand that choice of law analysis required application of Paraguay law because all of the parties were residents of that country and the underlying events happened there); see also Restatement (Second) of Conflict of Laws, supra § 6 cmt. f.

FN16. 726 F.2d 774 (D.C.Cir.1984).

FN17. See id. at 816-17.

FN18. See Restatement (Third) of the Foreign Relations Law of the United States (1987) § 703 cmt. c. [hereinafter the "Restatement of Foreign Relations "].

FN19. The International Bill of Rights 12, 15 (Louis Henkin, ed.) (1981) [hereinafter "The International Bill of Rights "].

FN20. See, generally, Universal Declaration of Human Rights (the "Universal Declaration"), G.A. Res. 217A(III), 3 U.N. GAOR, U.N. Doc. A/810 (1948), reprinted in United Nations Centre for Human Rights, Human Rights: A Compilation of International Instruments (hereinafter "International Instruments "), Vol. I, Pt. 1, at 1-7 (1994); Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (the "Torture Convention"), G.A. Res. 39/46, 39 U.N. GAOR Supp. (No. 51), at 197, U.N. Doc. A/39/51 (1984), reprinted in International Instrument, supra, Vol. I, Pt. 1, at 293-307; International Covenant on Civil and Political Rights (the "Civil and Political Rights Covenant" or the "Covenant"), G.A. Res. 2200A(XXI), 21 U.N. GAOR Supp. (No. 16), at 52, U.N. Doc. A/6316 (1966), reprinted in International Instruments, supra, Vol. I, Pt. 1, at 21-40; African Charter on Human and

Peoples' Rights (the "African Charter"), OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), reprinted in International Instruments, supra, Vol. II (1997), at 330- 346; American Convention on Human Rights (the "American Convention"), OEA/Ser. K/xvi/1.1, Doc. 65, Rev. 1. Corr. 1, Jan. 7, 1970, 9 I.L.M. 101 (1970), reprinted in International Instruments, supra, Vol. II at 14-36; European Convention for the Protection of Human Rights and Fundamental Freedoms (the "European Convention"), 213 U.N.T.S. 211, E.T.S. 5 (1950), reprinted in International Instruments, supra, Vol. II at 73-91.

FN21. Tel Oren, 726 F.2d at 818 (Bork, J., concurring); see also Xuncax, 886 F.Supp. at 180; but see Tel-Oren, 726 F.2d at 778 (Edwards, J., concurring) (noting that in some cases, as in the United Nations Genocide Convention, states have specifically committed to carry out their international obligations through explicitly prescribed means, such as declaring a form of conduct as defined to constitute a crime).

FN22. The Paquete Habana, 175 U.S. 677, 694, 20 S.Ct. 290, 44 L.Ed. 320 (1900); see also United States v. Smith, 18 U.S. (Wheat.) 153, 160-61 (1820); Filartiga I, 630 F.2d at 880; Restatement of Foreign Relations, supra § 102; Statute of the International Court of Justice, June 26, 1945, Art. 38, 59 Stat. 1055, T.S. No. 993, 3 Bevans 1179.

FN23. See Tel-Oren, 726 F.2d at 778 ("[T]he law of nations never has been perceived to create or define the civil actions to be made available by each member of the community of nations; by consensus, the states leave that determination to their respective municipal laws.") (Edwards, J., concurring).

FN24. Xuncax, 886 F.Supp. at 180; see also Louis Henkin, Foreign Affairs and the Constitution 224 (1972) ("International law, itself, finally, does not require any particular reaction to violations of law...."); Restatement of Foreign Relations, supra § 703 cmt. c.

FN25. 630 F.2d at 888; see also Alvarez-Machain v. United States, 266 F.3d 1045, 1050 (9th Cir.2001)(to be actionable under the ATCA, international norms must be "specific, universal and obligatory."); Xuncax, 886 F.Supp. at 184 (citing Forti I, 672 F.Supp. at 1540).

FN26. 630 F.2d at 887.

FN27. See Lauritzen, 345 U.S. at 571. The Supreme Court in Lauritzen, a maritime case, articulated seven factors to be weighed in the relevant choice of law analysis: (1) place of the wrongful act; (2) law of the flag; (3) allegiance or domicile of the injured party; (4) allegiance of the defendant; (5) place of contract; (6) inaccessibility of foreign forum; and (7)the law of forum. See id. at 583-90.

FN28. 726 F.2d at 780.

FN29. Id. at 781.

FN30. Id.

FN31. Id. at 782.

FN32. 195 F.Supp. 857 (D.Md.1961). In Tel-Oren, Judge Edwards questioned the sufficiency of the Adra court's determination that misuse of a passport could rise to the level of a violation of international law for the purposes of invoking ATCA jurisdiction. 726 F.2d at 787 (Edwards, J., concurring).

FN33. 978 F.2d 493, 503 (9th Cir.1992) ("Marcos I ").

FN34. 2002 WL 31063976, at *11 (9th Cir. Sept.18, 2002).

FN35. But see id. at *27 (Reinhardt, J., concurring) (rejecting the majority's application of international law and noting that "courts should not substitute international law principles for established federal common law or other domestic law principles ... unless a statute mandates that substitution, or other exceptional circumstances exist.") (emphasis in original).

FN36. 25 F.3d 1467, 1475-76 (9th Cir.1994) ("Marcos II ").

FN37. 886 F.Supp. at 182-83.

FN38. Id.; see also Filartiga II, 577 F.Supp. at 863.

FN39. 226 F.2d at 88 n. 12.

FN40. See Filartiga II, 577 F.Supp. at 862.

FN41. Id. at 862.

FN42. Id. at 863-64.

FN43. Id. at 863.

FN44. Id. (quoting Filartiga I, 630 F.2d at 886) (emphasis in original).

FN45. Id.

FN46. See id. at 867.

FN47. 886 F.Supp. at 191 (citing the TVPA and its legislative history as supporting the court's approach); see also The Rules of Decision Act, 28 U.S.C. § 1652. The statute provides that: "The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply." 28 U.S.C. § 1652.

FN48. See Xuncax, 886 F.Supp. at 191-92.

FN49. 42 U.S.C. § 1983.

FN50. 672 F.Supp. at 1547-48; see also Marcos II, 25 F.3d at 1476 (applying federal Eighth Amendment and Civil Rights Act decisional law in determining whether plaintiffs' cause of action extinguished on defendant's death); Unocal, 2002 WL 31063976, at *11 (applying international law principles to determine the liability of a private third- party for violations of international law).

FN51. 886 F.Supp. at 192.

FN52. See The Paguete Habana, 175 U.S. at 700; Filartiga I, 630 F.2d at 880.

FN53. See Louis Henkin, The Age of Rights ix-x (1990) (noting that despite universal acceptance of the concept of international human rights, that consensus "is at best formal, nominal, perhaps even hypocritical, cynical," though still maintaining that even giving hypocrisy its due, it is the idea of human rights, to which no state has offered a preferable alternative, that has dominated the global community's debate and gained international currency in recent decades).

FN54. See generally Restatement of Foreign Relations, supra § 702; Blum & Steinhardt, supra at 90-96.

FN55. See, e.g., Xuncax, 886 F.Supp. at 183, 200; Filartiga II, 577 F.Supp. at 865-66; Mehinovic v. Vuckovic, 198 F.Supp.2d 1322, 1357 (N.D.Ga.2002).

FN56. See Filartiga I, 630 F.2d at 890 ("[F]or the purposes of civil liability, the torturer has become like the pirate and slave trader before him hostis humani generis, an enemy of all mankind.").

FN57. See Siderman de Blake v. Republic of Argentina, 965 F.2d 699, 715-16 (9th Cir.1992) (describing the distinction under international law principles between peremptory norms (jus cogens), the obligations of which are binding on all states and from which there can be no derogation, and customary international law that derives from the consent of states).

FN58. See Mehinovic, 198 F.Supp.2d at 1359 (recognizing that under international law, compensation for a broad range of physical, emotional and social harms should be commensurate to the injury) (citing M. Whiteman, Damages in International Law 718-19 (1943)).

FN59. 726 F.2d at 776 (Edwards, J., concurring).

FN60. See id. at 799 n. 2 (citing Tel-Oren v. Libyan Arab Republic, 517 F.Supp. 542, 550-51 (D.D.C.1981); cf. Convention on the Non- Applicability of Statutory Limitations to War Crimes and Crimes against Humanity, G.A. Res. 2391 (XXIII), 23 U.N. GAOR Supp. (No. 18), at 40, U.N. Doc. A/7218 (1968) Art. 1, reprinted in International Instruments, supra, Vol. I, Pt. 2 at 679 (declaring that no statutory limitation shall apply to bar the prosecution of war crimes and crimes against humanity irrespective of the date of their commission).

FN61. See, e.g., Marcos II, 25 F.3d at 1476.

FN62. See, e.g., Xuncax, 886 F.Supp. at 191-92.

FN63. See, e.g., Forti I, 672 F.Supp. at 1547-48; see also Tel- Oren, 726 F.2d at 799 n. 2 (Bork, J., concurring) (noting that the district court had dismissed the case on the alternate ground that it was barred by the forum's statute of limitations for certain torts).

FN64. See, e.g., Filartiga II, 577 F.Supp. at 865-66; but see Xuncax, 886 F.Supp. at 198, 201 (awarding punitive damages in connection with ATCA claims but denying them as regards municipal law claims on account of doubt as to whether recovery of such damages was permissible under the municipal law of Guatemala).

FN65. See Xuncax, 886 F.Supp. at 183; see also Tel-Oren, 726 F.2d at 787 (Edwards, J., concurring).

FN66. See Fed.R.Civ.P. 44.1.

FN67. See Filartiga II, 577 F.Supp. at 863.

FN68. See id.; Unocal, 2002 WL 31063976, at *11; Abebe-Jira v. Newego, 72 F.3d 844, 848 (11th Cir.1996); Marcos II, 25 F.3d at 1476; Xuncax 886 F.Supp. at 189-91; Forti I, 672 F.Supp. at 1547-48.

FN69. See Xuncax, 886 F.Supp. at 191-92.

FN70. See id. at 194-97.

FN71. Abebe-Jira, 72 F.3d at 848 (citing Kadic v. Karadzic, 70 F.3d 232, 246 (2d Cir.1996); Filartiga I, 630 F.2d at 887; Xuncax, 886 F.Supp. at 179-183) see also Filartiga II, 577 F.Supp. at 863.

FN72. See Filartiga II, 630 F.2d at 885-86 (citing The Nereide, 13 U.S. (9 Cranch) 883, 422 (1815); The Paguete Habana, 175 U.S. at 700); see also Kadic, 70 F.3d at 246; Wiwa, 226 F.3d 104-05.

FN73. 886 F.Supp. at 182. (citing Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 427 n. 25, 84 S.Ct. 923, 11 L.Ed.2d 804 (1964)).

FN74. 226 F.3d at 105 n. 12.

FN75. See id. at 104.

FN76. See id. at 104-05.

FN77. Id. (citing H.R.Rep. No. 102-367, at 4 (1991), reprinted in 1992 U.S.C.C.A.N. 84, 86)).

FN78. See Fed.R.Civ.P. 44 (In determining the content and meaning of the laws of a foreign country, a court may examine and consider "any relevant material or source, including testimony, whether or not submitted by a party or admissible under the Federal Rules of Evidences"); see also Overseas Dev. Disc. Corp. v. Sangano Constr. Co., 840 F.2d 1319, 1324 (7th Cir.1988).

FN79. See Tachiona, 216 F.Supp.2d at 275.

FN80. See id. at 270-74 (internal citations omitted).

FN81. See id. at 267-68.

FN82. Zimbabwe Const. Art. 12(1). The Zimbabwe Constitution was submitted as Attachment C of Affidavit of Kevin Laue, dated 27 September 2002 ("Laue Aff."), attached to Plaintiff's Memorandum of Law Addressing Choice of Law Analysis Applicable to their claims for Relief Under the Alien Tort Claims Act, dated October 7, 2002.

FN83. Id. at Art. 15(1).

FN84. See Laue Aff., 11, 12 and 13.

FN85. See 28 U.S.C. § 1350 (statutory note); Wiwa, 226 F.3d at 104-05; Kadic, 70 F.3d at 245-46.

FN86. Wiwa, 88 F.3d at 106.

FN87. 70 F.3d at 246 (citing Xuncax, 886 F.Supp. at 178).

FN88. Tachiona III, 216 F.Supp.2d at 280-81.

FN89. See Universal Declaration, supra, Arts. 2, 7, 18, 19, 20, 21, reprinted in International Instruments, supra, Vol. I, Pt. 1, at 2-5. These provisions declare in pertinent part:
Art. 2:
Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status....
Art. 7:
All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any incitement to such discrimination.
Art. 18:
Everyone has the right to freedom of thought, conscience and religion...;
Art. 19:
Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers;
Art. 20:
(1) Everyone has the right to freedom of peaceful assembly and association;
Art. 21:
(1) Everyone has the right to take part in the government of his country, directly or through freely chosen representatives.

FN90. See Political and Civil Rights Covenant, supra, Arts. 18, 19, 20, 21, 22, 25 and 26, reprinted in International Instruments, supra, Vol. I, Pt. 1, at 27-30. The related provisions of the Covenant state in relevant part:
Art. 18:
1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.
2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.
3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.
Art. 19:

1. Everyone shall have the right to hold opinions without interference.
2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.
3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
(a) For respect of the rights or reputations of others;
(b) For the protection of national security or of public order (ordre public), or of public health or morals.
Art. 20:
2. Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.
Art. 21:
The right of peaceful assembly shall be recognized. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others.
Art. 22:
1. Everyone shall have the right to freedom of association with others ...
2. No restrictions may be placed on the exercise of this right other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others.
Art. 25:
Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions:
(a) To take part in the conduct of public affairs, directly or through freely chosen representatives;
(b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;
(c) To have access, on general terms of equality, to public service in his country.
Art. 26:
All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.
See also American Convention, supra, Arts. 12, 13, 15, 16, 23, 24, reprinted in International Instruments, supra, Vol. II at 9, 20, 22; African Charter, supra, Arts. 8, 9, 10, 11, 13, reprinted in International Instruments, supra, Vol. II at 333-34; European Convention, supra, Arts. 9, 10, 11, 14 reprinted in International Instruments, supra Vol. II at 77-78.

FN91. Filartiga I, 630 F.2d at 883.

FN92. Id. (quoting E. Schwelb, Human Rights and the International Community 70 (1964)).

FN93. Id. (citations omitted). This opinion is supported as well by other commentators who have urged that, taken as a whole, the Universal Declaration, as supplemented and elaborated by other international human rights instruments and practices of states, through constant invocation, widespread acceptance and global recognition as an authoritative definition and construction of the content of human rights, has

acquired the status of customary international law prohibiting the violation of any of the rights enumerated in the Universal Declaration. See Myers McDougal, Harold Lasswell and Lung-Chu Chen, Human Rights and World Public Order 273-74, 325-27 (1980).

FN94. See Filartiga I, 630 F.2d at 883; Restatement of Foreign Relations, supra § 102.

FN95. See Restatement of Foreign Relations, supra § 702; id. cmt. n and Reporters' Note 11.

FN96. Id. at § 702(g).

FN97. Id. cmt. m; see also id. Reporters' Note 10 (noting that " '[c]onsistent pattern of gross violations' generally refers to violations of those rights that are universally accepted and that no government would admit to violating as state policy," including political and civil rights such as those described above).

FN98. 70 F.3d at 243-44; accord Unocal, 2002 WL 31063976, at * 9.

FN99. See Farmer v. Brennan, 511 U.S. 825, 836, 114 S.Ct. 1970, 128 L.Ed.2d 811(1994); Monell v. Dep't Soc. Servs., 436 U.S. 658, 690- 91, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978); Bivens v. Six Unknown Agents of Fed. Bur. of Narcotics, 403 U.S. 388, 393, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971) ("An agent acting--albeit unconstitutionally--in the name of the United States possesses far greater capacity for harm than an individual trespasser exercising no authority other than his own."); see also Unocal, 2002 WL 31063976, at *34 (Reinhardt, J ., concurring).

FN100. See, e.g., Universal Declaration, supra, Arts. 2, 7, reprinted in International Instruments, supra, Vol. I, Pt. 1, at 2-3; Convention on Racial Discrimination, supra, Arts. 1-8. reprinted in International Instruments, supra, Vol. I, Pt. 1, at 66-71.

FN101. Restatement of Foreign Relations, supra § 702(g).

FN102. See e.g., Vienna Declaration and Programme of Action (the "Vienna Declaration"), 80, U.N. Doc. A/CONF. 157/23 (1993) (expressing condemnation of various "gross and systematic violations and situations that constitute serious obstacles to the full enjoyment of all human rights ..."); Beijing Declaration and Platform for Action (the "Beijing Declaration"), ch. IV.E. 114, 131, U.N. Doc. A/CONF. 177/20 (1995) (same, and specifically referencing "systematic rape"). The Vienna Declaration was adopted by the World Conference on Human Rights on June 25, 1993. See Vienna Declaration, supra, Note by the Secretariat. The Beijing Declaration was adopted by the Fourth World Conference on Women on September 15, 1995. See Beijing Declaration, supra, Resolution 1.

FN103. See Proclamation of Teheran, Final Act of the International Conference on Human Rights (the "Proclamation of Teheran"), 11, U.N. Doc. A/CONF. 32/41 at 3 (1968), reprinted in International Instruments, supra, Vol. I, Pt. 1, at 51-54. The Proclamation of Teheran was adopted by the International

Conference on Human Rights at Teheran on May 13, 1968. See International Instruments, supra, Vol. I, Pt. 1, at 51.

FN104. See International Instruments, supra, Vol. I, Pt. 1 at 22, 23, 25, 27; see also Restatement of Foreign Relations, supra § 702, cmt. n.

FN105. See International Instruments, supra, Vol. I, Pt. 1 at 22.

FN106. Id. at 27; see also Karl Josef Partsch, Freedom of Conscience and Expression, and Political Freedoms, published in The International Bill of Rights, supra at 212.

FN107. See International Instruments, supra, Vol. I, Pt. 1, at 28. Article 19(3)(a) and (b) add respect for the reputations of others and protection of national security to the grounds permitting limitations on freedom of expression. These concerns are not mentioned in Article 18(3) as regards freedom of thought, conscience and religion. See id. at 27-28.

FN108. By placing freedom of thought and freedom of opinion in separate Articles, the Covenant seems to imply a distinction between them. Any difference is tenuous. For, "thought" may include not only religious belief but social and political conceptualization as well. See The International Bill of Rights, supra at 214. One commentator endeavored to describe the nuances as follows: "[T]here are no clear frontiers between 'thought', and 'opinion'; both are internal. 'Thought' is a process, while 'opinion' is the result of this process. 'Thought' may be nearer to religion' or other beliefs, 'opinion' nearer to political convictions. 'Thought' may be used in connection with faith or creed, 'opinion' for convictions in secular and civil matters." Id. at 217.

FN109. As regards the rights of peaceful assembly, of association with others, and of participation in political affairs, Articles 21, 22 and 25 of the Covenant elaborate other qualifications that clearly manifest the hierarchy of the arrangement among these various civil and political rights. See International Instruments, supra, Vol. I, Pt. 1, at 28-20. As in Articles 18 and 19, limitations are placed by Articles 21 and 22 on exercise of the rights of peaceful assembly and association; any interference is subject to the condition that the restriction be "necessary" in connection with the specified public purposes. Articles 18 and 19, however, require that any limitation on freedom to manifest beliefs or religion, as well as exercise freedom of expression, must be necessary to "protect" public safety, order, health or morals. Id. at 27-28. Articles 21 and 22, on the other hand, provide that the interference must be necessary "in a democratic society" and "in the interests" of national security or public safety or public order. Moreover, Article 21 differs in that restrictions are permitted if "imposed in conformity with law," as opposed to the apparently stricter standard of "prescribed" or "provided" by law that is employed in other formulations of the limitation. Id. at 28. These modifications would have the effect of rendering the recognition of freedoms associated with manifestation of beliefs and expression more rigorous as well as more broadly based. By way of further contrast evidencing the distinctions and priorities built into the Covenant's hierarchical order, the rights of participation in political affairs set forth in Article 25 are not subject to the strict standards reflected in the "prescribed" or "provided" by law and "necessary" formulations that apply to the rights contained in Articles 18, 19, 21 and 22. Rather, these participatory rights are qualified by a far more ample and flexible condition that any restriction on them not be "unreasonable." Id . at 29-30.

FN110. International Instruments, supra, Vol. I, Pt. 1 at 1.

FN111. See Civil and Political Rights Covenant, supra, Arts. 19, 21, 22, 25 International Instruments, supra, Vol. I, Pt. 1 at 28-30 (categorically delineating a "right to hold opinions without interference" while providing for "reasonable" and "necessary" restrictions on rights to freedom of peaceful assembly, association and public governance and election; see also International Bill of Rights, supra at 217 ("The right to hold opinions may be seen as a special aspect of the right of privacy dealt with in Article 17 [of the Covenant], but there only arbitrary and unlawful interferences are prohibited; the privacy of thought and opinion is subject to no interference whatever.").

FN112. See Restatement of Foreign Relations, supra § 702, cmt. m.

FN113. Palko v. Connecticut, 302 U.S. 319, 327, 58 S.Ct. 149, 82 L.Ed. 288 (1937).

FN114. McDougal, Lasswell and Chen, supra at 700-01 (quoting Annotations on the Text of the Draft International Covenants on Human Rights, 10 U.N. GAOR, Annexes (Agenda Item No. 28) at 50, U.N. Doc A/2929 (1955)). See also The International Bill of Rights, supra at 216 ("It is an old commonplace that freedom of opinion and expression is one of the cornerstones of human rights and has great importance for all other rights and freedoms.").

FN115. See International Instruments, supra, Vol. I, Pt. 1 at 2.

FN116. Universal Declaration, supra, Art. 19, reprinted in International Instruments, supra, Vol. 1, Pt. 1, at 4; see also Civil and Political Rights Covenant, supra, Arts. 2(1), 26, reprinted in International Instruments, supra, Vol. I, Pt. 1, at 21, 26; African Charter, supra, Art. 2, reprinted in International Instruments, supra, Vol. II at 331; American Convention, supra, Art. 13, reprinted in International Instruments, supra, Vol. II at 19; European Convention, supra, Art. 14, reprinted in International Instruments, supra, Vol. II at 78; Proclamation of Teheran, supra 5, reprinted in International Instruments, supra, Vol. I, Pt. 1 at 52.

FN117. McDougal, Lasswell and Chen, supra at 697.

FN118. Id. at 697-98.

FN119. See G.A. Res. 2200 A(XXI), U.N. Doc. A/6316 (1966), reprinted in International Instruments, supra, Vol. I, Pt. 1, at 44-45. As of August 21, 2002, of the 156 state signatories of the Civil and Political Rights Covenant, 107 had signed and 102 had acceded to the Optional Protocol. See Status of Ratifications of the Principal International Human Rights Treaties, at http://www . unhchr.ch/pdf/report.pdf (August 21, 2002).

FN120. 1 B.H.R.C. 653 (1996).

FN121. Id. at 7.4; see also Ross v. Canada, 10 B.H.R.C. 219, 11.1-11.6 (U.N. H.R. Cmtee 2000) (finding no violation of Article 19 of the Covenant where the state demonstrated that the challenged interference with freedom of expression satisfied the standards set forth in Article 19(3), in that the restriction was imposed by law and did not go farther than necessary to achieve a legitimate protective function); Faurisson v. France, 2 B.H.R.C. 1, 9.1--10 (1996) (same); HKSAR v. Ng Kung Siu, 6 B.H.R.C. 591 (Hong Kong Ct.App.1999) (finding a violation of Article 19(3) in the conviction of a defendant under a national flag ordinance for defacing a flag during a peaceful demonstration).

FN122. Article 10 of the European Convention provides:
1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.
International Instruments, supra, Vol. II at 77.

FN123. 7 B.H.R.C. 339, 57-64 (Eur.Ct.H.R.1999).

FN124. Id. 57.

FN125. Id.; see also Redmond-Bate v. Dir. of Pub. Prosecutions, 7 B.H.R.C. 375, 20 (High Ct., Qns. Bench 1999) (same).

FN126. The United States Foreign Assistance Act of 1961 bars assistance to the government of "any country which engages in a consistent pattern of gross violations of internationally recognized human rights, including torture or cruel, inhuman, or degrading treatment or punishment, prolonged detention without charges, causing the disappearance of persons by the abduction and clandestine detention of those persons, or other flagrant denial of the right to life, liberty, and the security of person ...." 22 U.S.C. § 2151n(a). See also 22 U.S.C. § 2304; International Financial Assistance Act of 1977, 22 U.S.C. § 262d (expressing United States policy to oppose assistance to such governments by international financial institutions).

FN127. Zimbabwe is a signatory of the United Nations Charter, the Civil and Political Rights Covenant and the African Charter. (Laue Aff., 15.)

FN128. See, e.g., Gitlow v. New York, 268 U.S. 652, 666-67, 45 S.Ct. 625, 69 L.Ed. 1138 (1925); Schenck v. United States, 249 U.S. 47, 52, 39 S.Ct. 247, 63 L.Ed. 470 (1919).

FN129. See Civil and Political Rights Covenant, supra, Arts. 4(1), 4(2) and 19(3), reprinted in International Instruments, supra, Vol. I, Pt. 1, at 22, 28.

FN130. See, e.g., Raucci v. Town of Rotterdam, 902 F.2d 1050, 1055-56 (2d Cir.1990); Sorichetti v. City of New York, 65 N.Y.2d 461, 492 N.Y.S.2d 591, 482 N.E.2d 70, 74-75 (N.Y.1985).

FN131. See Zimbabwe Const. Arts. 11, 20, 21; Laue Aff., 14.

FN132. Zimbabwe Const. Art. 20(1).

FN133. Id. Art. 21(1).

FN134. See Laue Aff., 14.

FN135. However, there is no indication in the materials presented to the Court as to whether punitive damages could be awarded under Zimbabwe law with regard to a violation of these political rights.

FN136. See Tachiona III, 216 F.Supp.2d at 280 (citing Petramale v. Local No. 17 of Laborers Int'l Union of N. Am., 847 F.2d 1009, 1013 (2d Cir.1988), and Phillips v. Bowen, 115 F.Supp.2d 303, 306 (N.D.N.Y.2000), aff'd, 278 F.3d 103 (2d Cir.2002)).

FN137. See Tachiona III, 216 F.Supp. at 281.

FN138. 694 F.Supp. 707, 711-12 (N.D.Cal.1988) ("Forti II ").

FN139. See Xuncax, 886 F.Supp. at 186-87.

FN140. Id. at 187.

FN141. Id.

FN142. Jama v. United States Immigration and Nat. Serv., 22 F.Supp.2d 353, 363 (D.N.J.1998); Mehinovic, 198 F.Supp.2d at 1347-48 (citing Abebe-Jira, 72 F.3d at 847; Cabello v. Fernandez-Larios, 157 F.Supp.2d 1345, 1362 (S.D.Fla.2001)).

FN143. See Forti I, 672 F.Supp. at 1543; Xuncax, 886 F.Supp. at 186.

FN144. See Forti II, 694 F.Supp. at 711-712.

FN145. See, e.g., Universal Declaration, supra, Art. 5, reprinted in International Instruments, supra, Vol. I, Pt. 1, at 2 ("[N]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment."); Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (the "Torture Declaration"), Art. 1, G.A. Res. 3452, U.N. Doc. A/10034 (1975), reprinted in International Instrument, supra, Vol. I., Pt. 1, at 290 ("Any act of torture or other cruel, inhuman or degrading treatment or punishment is an offense to human dignity[.]"); Civil and Political Rights Covenant, supra, Art. 7, reprinted in International Instruments, supra, Vol. I, Pt. 1, at 23 ("No one shall be subjected to torture or to cruel, inhuman, or degrading treatment or punishment."); African Charter, supra, Art. 5, reprinted in International Instruments, supra, Vol. II at 332 (same); European Convention, supra, Art. 3, reprinted in International Instruments, supra, Vol. II at 74 (same); Restatement of Foreign Relations, supra § 702 (same).
In Xuncax, the court noted that the provisions of the Torture Convention relating to torture are more explicit and forceful than those describing cruel, inhuman or degrading treatment. 886 F.Supp. at 186 n. 33. While that Convention defines "torture," it contains no explicit definition of cruel, inhuman or degrading treatment. Moreover Article 14 prescribes that every member state ensure in its legal system that victims of torture obtain redress and have an enforceable right to fair and adequate compensation. In contrast, Article 16 commits states only to undertake to prevent other acts of cruel, inhuman or degrading treatment that do not amount to torture. See id.

FN146. See, e.g., Torture Declaration, supra, Art. 1, reprinted in International Instruments, supra, Vol. I, Pt. 1, at 293-94.

FN147. Meninovic, 198 F.Supp.2d at 1348; see also id. (" '[T]orture is at the extreme end of cruel, inhuman or degrading treatment." ') (quoting Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, 101 Senate Exec. Rep. 30, at 13 (1990)); Torture Declaration, supra, Art. 1(2) International Instruments, supra, Vol. I, Pt. 1, at 290 ("Torture constitutes an aggravated and deliberate form of cruel, inhuman or degrading treatment or punishment.").

FN148. See, e.g., Restatement (Second) of Torts: Interference with Dead Bodies § 868 (1982) (defining a cause of action for interference with dead bodies); Model Penal Code § 250.10 (Proposed Official Draft 1962) (making treatment of a corpse in a way that would "outrage ordinary family sensibilities" a misdemeanor); Criminal Code, R.S.C., ch. C-46, § 182 (1985) (Can.) (criminal law provision protecting the dignity of a corpse); see also Tyler Trent Ochoa, et al., Defiling the Dead: Necrophilia and the Law, 18 Whittier L.Rev. 539, 542-543 ("All societies for which there is any record have had customs concerning respect for corpses and the treatment of the bodies of the dead.").

FN149. See Zimbabwe Const. Art. 15(1).

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FN150. See Laue Aff., 11-13.

FN151. In the United States' ratification of the Civil and Political Rights Covenant the Senate expressed a reservation to Article 7, which relates to torture and cruel, inhuman or degrading treatment or punishment. It provides that "Art. 7 protections shall not extend beyond protections of the 5th, 8th and 14th Amendments of the U.S. Constitution." Senate Comm. on Foreign Relations Report on the International Covenant on Civil and Political Rights, S. Exec. Report. No. 23, 102nd Cong., 2d Sess. (1992), reprinted in 31 I.L.M. 645, 646 (1992). See Mehnovic, 198 F.Supp.2d at 1347-48; Cabello, 157 F.Supp.2d at 1360; Jama, 22 F.Supp.2d at 363; Xuncax, 886 F.Supp. at 187.

FN152. See Tachiona III, 216 F.Supp.2d at 267.

FN153. See, e.g., Universal Declaration, supra, Arts. 2, 7, reprinted in International Instruments, supra, Vol. I, Pt. 1, at 2, 3. These provisions declare in pertinent part:
Art. 2:
Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.
Art. 7:
All are equal before the law and are entitled without discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.
Id.; see also Civil and Political Rights Covenant, supra, Arts. 2, 4(1), 26, reprinted in International Instruments, supra, Vol. I, Pt. 1, at 22, 23, 30; African Charter, supra, Arts. 2, 3, 4, 5, reprinted in International Instruments, supra, Vol. II at 331, 332; International Convention on the Elimination of All Forms of Racial Discrimination, adopted Dec. 21, 1965, Arts. 2, 3, 4, 5, 660 U.N.T.S. 195, 5 I.L.M. 352 (1966), reprinted in International Instruments, supra, Vol. I, Pt. 1, at 68-71; Convention on the Prevention and Punishment of the Crime of Genocide, 78 U.N.T.S. 277 (1951), reprinted in International Instruments, supra, Vol. I, Pt. 2, at 669; International Convention on the Suppression and Punishment of the Crime of Apartheid, Arts. II, III, IV, G.A. Res. 3068, 28 U.N. GAOR, Supp. 30, U.N. Doc. A/9030 (1973), reprinted in International Instruments, supra, Vol. I, Pt. 1, at 82-83; Restatement of Foreign Relations, supra § 702(e).

FN154. See 42 U.S.C. § 1983; Johnson v. Smith, 890 F.Supp. 726, 728-29 (N.D.Ill.1995).

FN155. See Zimbabwe Const. Arts. 11, 23; Laue Aff., 14, 15.

FN156. See Zimbabwe Const. Art. 16; Laue Aff., 12(iii).

FN157. See International Instruments, Vol. I, Pt. 1, at 4.

FN158. 534 F.2d 24, 30 (2d Cir.1976), cert. denied, 429 U.S. 835, 97 S.Ct. 102, 50 L.Ed.2d 101 (1976); see also Jafari v. Islamic Republic of Iran, 539 F.Supp. 209, 214-15 (N.D.Ill.1982) (holding that the

expropriation by a state of property of its own nationals does not contravene the law of nations); Restatement of Foreign Relations, supra § 702 cmt. k (noting that "[t]here is ... wide disagreement among states as to the scope and content of that right, which weighs against the conclusion that a human right to property generally has become a principle of customary law."); see also Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 428-30, 84 S.Ct. 923, 11 L.Ed.2d 804 (1964) (noting the wide divergence of authority as to international limitations on a state's taking of alien property).

FN159. See Compl. 7, 210.

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United States Court of Appeals,

Eleventh Circuit.

Nos. 92-4687, 96-4471.

UNITED STATES of America, Plaintiff-Appellee,

v.

Manuel Antonio NORIEGA, Defendant-Appellant.

July 7, 1997.

Appeals from the United States District Court for the Southern District of Florida. (No. 88-79-CR-WMH), William H. Hoeveler, Judge.

Before ANDERSON and EDMONDSON, Circuit Judges, and KRAVITCH, Senior Circuit Judge.

KRAVITCH, Senior Circuit Judge:

Manuel Antonio Noriega appeals: (1) his multiple convictions stemming from his involvement in cocaine trafficking;[1] and (2) the district court's denial of his motion for a new trial based on newly discovered evidence. In attacking his convictions, Noriega asserts that the district court should have dismissed the indictment against him due to his status as a head of state and the manner in which the United States brought him to justice. Noriega also contends that the district court committed two reversible evidentiary errors. Alternatively, he seeks a new trial based on his discovery of: (1) the government's suppression of its pact with a non- witness; and/or (2) certain allegations, lodged after his conviction, that a group associated with the undisclosed, cooperating non- witness bribed a prosecution witness. We affirm Noriega's convictions and the district court's order denying his new trial motion.

I.

On February 4, 1988, a federal grand jury for the Southern District of Florida indicted Manuel Antonio Noriega on drug- related charges. At that time, Noriega served as commander of the Panamanian Defense Forces in the Republic of Panama. Shortly thereafter, Panama's president, Eric Arturo Delvalle, formally discharged Noriega from his military post, but Noriega refused to accept the dismissal. Panama's legislature then ousted Delvalle from power. The United States, however, continued to acknowledge Delvalle as the constitutional leader of Panama. Later, after a disputed presidential election in Panama, the United States recognized Guillermo Endara as Panama's legitimate head of state.

On December 15, 1989, Noriega publicly declared that a state of war existed between Panama and the United States. Within days of this announcement by Noriega, President George Bush directed United States armed forces into combat in Panama for the stated purposes of "safeguard[ing] American lives, restor[ing] democracy, preserv[ing] the Panama Canal treaties, and seiz[ing] Noriega to face federal drug charges in the United States." *United States v. Noriega,* 746 F.Supp. 1506, 1511 (S.D.Fla.1990). The ensuing military conflagration resulted in significant casualties and property loss among Panamanian civilians.[2] Noriega lost his effective control over Panama during this armed conflict, and he surrendered to United States military officials on January 3, 1990. Noriega then was brought to Miami to face the pending federal charges.

Following extensive pre- trial proceedings and a lengthy trial, a jury found Noriega guilty of eight counts in the indictment and not guilty of the remaining two counts. The district court entered judgments of conviction against Noriega upon the jury's verdict and sentenced him to consecutive imprisonment terms of 20, 15 and five years, respectively. Noriega timely appealed his convictions. During the pendency of that appeal, Noriega filed in district court a motion for a new trial based on newly discovered evidence. This court deferred further consideration of Noriega's initial appeal while the district court heard Noriega's new trial motion. When the district court denied that motion, Noriega took a second, timely appeal. Both matters now are properly before this court.

II.

At trial, the government presented the testimony of numerous witnesses as well as documentary evidence to prove Noriega's guilt. Noriega, through both cross- examination and defense witness testimony, fervently contested the veracity of the witnesses and the significance of the documents offered by the government. Under the defense theory of the case, Noriega's subordinates used his name in their drug- trafficking schemes, but Noriega had no personal connection to the alleged offenses. "The facts set out below are those which the jury might reasonably have found from the evidence properly admitted at trial." *United States v. Paradies,* 98 F.3d 1266, 1271 (11th Cir.1996).

From the early 1970s to 1989, Noriega secured progressively greater dominion over state military and civilian institutions in Panama, first as his nation's chief of military intelligence and later as commander of the Panamanian Defense Forces. In the early 1980s, Noriega's position of authority brought him into contact with a group of drug traffickers from the Medellin area of Colombia (the "Medellin Cartel"). Various Medellin Cartel operatives met with Noriega's associates and, later, with Noriega personally, regarding the

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Medellin Cartel's desire to ship cocaine through Panama to the United States. Eventually, Noriega and the Medellin Cartel reached the first of a series of illicit agreements. Thereafter, from 1982 through 1985, with Noriega's assistance, the Medellin Cartel transported significant quantities of cocaine through Panama to the United States. It also utilized its relationship with Noriega to move ether for cocaine processing and substantial cash proceeds from drug sales from the United States to or through Panama.

Noriega and his associates personally met with Medellin Cartel leaders in Colombia, Panama and Cuba regarding the transshipping arrangement, unofficial asylum for Medellin Cartel members fleeing prosecution and a botched plan to operate a cocaine processing laboratory in the Darien region of Panama. The Medellin Cartel directed large cash payments to Noriega in connection with its drug, ether and cash shipments through Panama. During this period, Noriega opened secret accounts in his name and the names of his family members with the Bank of Credit and Commerce International ("BCCI") in Panama. Noriega's associates made large, unexplained cash deposits into these accounts for him. In 1988, Noriega transferred approximately $20,000,000 of his amassed fortune to banks in Europe. The government ultimately located more than $23,000,000 of funds traceable to Noriega in financial institutions outside of Panama.

III.

Noriega challenges his convictions on five distinct grounds: the first three relate to the district court's decision to exercise jurisdiction over this case and the final two concern evidentiary rulings by the district court. Noriega does not contend that the record contains insufficient evidence to support the jury's verdicts of guilt and the resultant judgments of conviction entered by the district court.

A.

Noriega raised two of his three quasi- jurisdictional appellate claims via a pre- trial motion to dismiss the indictment which the district court denied. Generally, "when a district court denies a motion to dismiss [an] indictment, this court only reviews the denial for abuse of discretion." *United States v. Thompson,* 25 F.3d 1558, 1562 (11th Cir.1994). To the extent Noriega's assignments of error on these matters implicate the district court's resolution of questions of law, however, our review is *de novo. See generally United States v. Logal,* 106 F.3d 1547, 1550 (11th Cir.1997).

1.

Noriega first argues that the district court should have dismissed the indictment against him based on head- of- state immunity. He insists that he was entitled to such immunity because he served as the *de facto,* if not the *de jure,* leader of Panama. The district court rejected Noriega's head- of- state immunity claim because the United States government never recognized Noriega as Panama's legitimate, constitutional ruler.

The Supreme Court long ago held that "[t]he jurisdiction of courts is a branch of that which is possessed by the nation as an independent sovereign power. The jurisdiction of the nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself." *The Schooner Exchange v. McFaddon,* 11 U.S. (7 Cranch) 116, 136, 3 L.Ed. 287 (1812). The Court, however, ruled that nations, including the United States, had agreed implicitly to accept certain limitations on their individual territorial jurisdiction based on the "common interest impelling [sovereign nations] to mutual intercourse, and an interchange of good offices with each other...." *Id.* at 137. Chief among the exceptions to jurisdiction was "the exemption of the *person of the sovereign* from arrest or detention within a foreign territory." *Id.* (emphasis added).

The principles of international comity outlined by the Court in *The Schooner Exchange* led to the development of a general doctrine of foreign sovereign immunity which courts applied most often to protect foreign nations in their corporate form from civil process in the United States. *See Verlinden B.V. v. Central Bank of Nigeria,* 461 U.S. 480, 486, 103 S.Ct. 1962, 76 L.Ed.2d 81 (1983). To enforce this foreign sovereign immunity, nations concerned about their exposure to judicial proceedings in the United States:

follow[ed] the accepted course of procedure [and] by appropriate representations, sought recognition by the State Department of [their] claim of immunity, and asked that the [State] Department advise the Attorney General of the claim of immunity and that the Attorney General instruct the United States Attorney for the [relevant district] to file in the district court the appropriate suggestion of immunity....

Ex Parte Republic of Peru, 318 U.S. 578, 581, 63 S.Ct. 793, 795, 87 L.Ed. 1014 (1943) (citations omitted). As this doctrine emerged, the "Court consistently [ ] deferred to the decisions of the political branches–in particular, those of the Executive Branch–on whether to take jurisdiction over actions against foreign sovereigns and their instrumentalities." *Verlinden B.V.,* 461 U.S. at 486, 103 S.Ct. at 1967.

In 1976, Congress passed the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. §§ 1602-1611. The FSIA "contains a comprehensive set of legal standards governing claims of immunity in every *civil action* against a *foreign state or its political subdivisions, agencies, or instrumentalities.*" *Verlinden B.V.,* 461 U.S. at 488, 103 S.Ct. at 1967 (emphasis added). It codified the State Department's general criteria for making suggestions of immunity, and transferred the responsibility for case- by- case application of these principles from the Executive Branch to the Judicial Branch. *See id.* Because the FSIA addresses neither head- of- state immunity, nor foreign sovereign immunity in the criminal context, head- of- state immunity could attach in cases, such as this one, only pursuant to the principles and procedures outlined in *The Schooner Exchange* and its progeny. As a result, this court must look to the Executive Branch for direction on the propriety of Noriega's immunity claim. *See Kadic v. Karadzic,* 70 F.3d 232, 248 (2d Cir.1995) (questioning viability of head- of- state immunity doctrine in light of FSIA, but noting that, even if still operative, doctrine was inapplicable because Executive Branch had not recognized defendant as head of state).

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Generally, the Executive Branch's position on head- of- state immunity falls into one of three categories: the Executive Branch (1) explicitly suggests immunity; (2) expressly declines to suggest immunity; or (3) offers no guidance. Some courts have held that absent a formal suggestion of immunity, a putative head of state should receive no immunity. *See, e.g., In re Doe,* 860 F.2d 40, 45 (2d Cir.1988). In the analogous pre- FSIA, foreign sovereign immunity context, the former Fifth Circuit accepted a slightly broader judicial role. It ruled that, where the Executive Branch either *expressly* grants or denies a request to suggest immunity, courts must follow that direction, but that courts should make an independent determination regarding immunity when the Executive Branch neglects to convey clearly its position on a particular immunity request. *See Spacil v. Crowe,* 489 F.2d 614, 618-19 (5th Cir.1974) (granting petition for writ of mandamus directing district court to follow government's suggestion of immunity in civil case).[3]

Noriega's immunity claim fails under either the *Doe* or the *Spacil* standard. The Executive Branch has not merely refrained from taking a position on this matter; to the contrary, by pursuing Noriega's capture and this prosecution, the Executive Branch has manifested its clear sentiment that Noriega should be denied head- of- state immunity. Noriega has cited no authority that would empower a court to grant head- of- state immunity under these circumstances. Moreover, given that the record indicates that Noriega never served as the constitutional leader of Panama, that Panama has not sought immunity for Noriega and that the charged acts relate to Noriega's private pursuit of personal enrichment, Noriega likely would not prevail even if this court had to make an independent determination regarding the propriety of immunity in this case. *See generally In re Doe,* 860 F.2d at 45 (noting that "there is respectable authority for denying head- of- state immunity to a former head- of- state for private or criminal acts" and finding that immunity claim was waived by the government of the foreign defendant). Accordingly, we find no error by the district court on this point.

2.

Noriega next contends his conviction should be reversed because he alleges he was brought to the United States in violation of the Treaty Providing for the Extradition of Criminals, May 25, 1904, United States of America-Republic of Panama, 34 Stat. 2851 ("U.S.- Panama Extradition Treaty"). The Supreme Court's decision in *United States v. Alvarez-Machain,* 504 U.S. 655, 112 S.Ct. 2188, 119 L.Ed.2d 441 (1992), forecloses this argument.[4] In *Alvarez-Machain,* the Court considered the issue of "whether a criminal defendant, abducted to the United States from a nation with which it has an extradition treaty, thereby acquires a defense to the jurisdiction of this country's courts." *Id.* at 657. In answer, the Court stated: "We hold that he does not, and that he may be tried in federal district court for violations of the criminal law of the United States." *Id.*

In reaching this decision, the Court considered whether the treaty at issue *expressly* barred abductions. It determined that the treaty's provision that " "[n]either Contracting Party shall be bound to deliver up its own nationals ...' [fails] to specify the only way in which one country may gain custody of a national of the other country for purposes of prosecution." *Id.* at 663-64, 112 S.Ct. at 2193-94 (quoting Extradition Treaty, May 4, 1978, United States of America-United Mexican States, 31 U.S.T. 5059 ("U.S.- Mexico Extradition Treaty").) The Court also rejected the argument that, by entering into an extradition treaty with Mexico, the United States *impliedly* agreed to seek custody of persons in Mexico only via extradition. *Id.* at 668-69, 112 S.Ct. at 2195-96 ("[T]o infer from this Treaty and its terms that it prohibits all means of gaining the presence of an individual outside of its terms goes beyond established precedent and practice.").

The article of the U.S.- Panama Extradition Treaty upon which Noriega relies for his extradition treaty claim contains almost the same language as the provision of the U.S.- Mexico Extradition Treaty at issue in *Alvarez-Machain. See* U.S.- Panama Extradition Treaty, art. 5 ("Neither of the contracting parties shall be bound to deliver up its own citizen or subject ..."). Noriega contends that *Alvarez-Machain* is distinguishable despite the near identity of the relevant clauses because, at the time the United States entered into the U.S.- Panama Extradition Treaty, it knew or should have known that Panama's constitution prohibited the extradition of its nationals. This bald assertion, even if accepted, does not save Noriega's claim. A clause in Panama's constitution regarding the extradition of Panamanians, at most, informs the United States of the hurdles it will face when pursuing such extraditions in Panama; such a provision says nothing about the treaty signatories' rights to opt for self- help (i.e., abduction) over legal process (i.e., extradition).

Under *Alvarez-Machain,* to prevail on an extradition treaty claim, a defendant must demonstrate, by reference to the express language of a treaty and/or the established practice thereunder, that the United States affirmatively agreed not to seize foreign nationals from the territory of its treaty partner. Noriega has not carried this burden, and therefore, his claim fails.

3.

In his pre- trial motion, Noriega also sought the dismissal of the indictment against him on the ground that the manner in which he was brought before the district court (i.e., through a military invasion) was so unconscionable as to constitute a violation of substantive due process. Noriega also argued that to the extent the government's actions did not shock the judicial conscience sufficiently to trigger due process sanctions, the district court should exercise its supervisory power to decline jurisdiction. The district court rejected Noriega's due process argument, and it declared Noriega's alternative supervisory power rationale non- justiciable. On appeal, Noriega offers no substantive argument regarding the due process prong of this claim, but rather discusses only his alternative supervisory power theory. [5] Because, however, the due process and supervisory power issues are intertwined, we discuss them both.

Noriega's due process claim "falls squarely within the [Supreme Court's] *Ker-Frisbie* doctrine, which holds that a defendant cannot defeat personal jurisdiction by asserting the illegality of the procurement of his presence." *United States v. Darby,* 744 F.2d 1508, 1530 (11th Cir.1984) (denying due process challenge based on government's extraterritorial seizure of defendant), *cert. denied sub nom., Yamanis v. United States,* 471 U.S. 1100, 105 S.Ct. 2322, 85 L.Ed.2d 841 (1985). *See Frisbie v. Collins,* 342 U.S. 519, 522, 72 S.Ct. 509, 511, 96 L.Ed. 541 (1952) ("This Court has never departed from the rule announced in *Ker v. Illinois,* 119 U.S. 436, 444, 7 S.Ct. 225, 229, 30 L.Ed. 421 (1886), that the power of a court to try a person for crime is not impaired by the fact that he had been brought within the court's jurisdiction by reason of a "forcible abduction.' "). Noriega has not alleged that the government mistreated

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him personally, and thus, he cannot come within the purview of the caveat to *Ker-Frisbie* recognized by the Second Circuit in *United States v. Toscanino,* 500 F.2d 267 (2d Cir.1974), were this court inclined to adopt such an exception. *See Darby,* 744 F.2d at 1531 (questioning viability of *Toscanino* exception and refusing to apply it absent allegations that *defendant* endured "cruel, inhuman and outrageous treatment"). Further, whatever harm Panamanian civilians suffered during the armed conflict that preceded Noriega's arrest cannot support a due process claim in this case. *See United States v. Payner,* 447 U.S. 727, 737 n. 9, 100 S.Ct. 2439, 2447, n. 9, 65 L.Ed.2d 468 (1980) (holding that even where government's conduct toward third parties "was so outrageous as to offend fundamental canons of decency and fairness, the fact remains that [t]he limitations of the Due Process Clause ... come into play only when the Government activity in question violates some protected right of the *defendant* " (internal quotations omitted)).

Noriega's attempt to evade the implications of the *KerFrisbie* doctrine by appealing to the judiciary's supervisory power is equally unavailing. Although, "in the exercise of supervisory powers, federal courts may, within limits, formulate procedural rules not specifically required by the Constitution or the Congress," *United States v. Hasting,* 461 U.S. 499, 505, 103 S.Ct. 1974, 1978, 76 L.Ed.2d 96 (1983), we are aware of no authority that would allow a court to exercise its supervisory power to dismiss an indictment based on harm done by the government to third parties. To the contrary, the Supreme Court has held that "[t]he supervisory power merely permits federal courts to supervise "the administration of criminal justice' among the parties before the bar." *Payner,* 447 U.S. at 735 n. 7, 100 S.Ct. at 2446 n. 7 (quoting *McNabb v. United States,* 318 U.S. 332, 340, 63 S.Ct. 608, 612, 87 L.Ed. 819 (1943)) (rejecting defendant's claim that search of third party provided district court sufficient basis to exercise supervisory power to suppress seized evidence).

In *Payner,* the Court began by noting that an unlawful search of a third party would not warrant relief for the defendant under the Fourth Amendment; it then rejected the defendant's alternative supervisory power rationale on the grounds that "[t]he values assigned to the competing interests do not change because a court has elected to analyze the question under the supervisory power instead of the Fourth Amendment." *Id.* at 736, 100 S.Ct. at 2446. The Court explained that by exercising its supervisory power to suppress evidence based on governmental misconduct directed at persons other than the defendant when such action would not lie under the Fourth Amendment, the district court wrongly "substitut[ed][its] individual judgment for the controlling decisions of th[e] Court." *Id.* at 737, 100 S.Ct. at 2446. In a footnote, the Court then observed that "[t]he same difficulty attends [the defendant's] claim to the protections of the Due Process Clause of the Fifth Amendment." *Id.* at 737 n. 9, 100 S.Ct. at 2447 n. 9. A reasonable reading of *Payner* thus compels the conclusion that a court may not exercise its supervisory power to dismiss an indictment if the government treated third parties unconscionably, where, as here, such an approach would circumvent the Supreme Court's limiting construction of the Fifth Amendment.

Accordingly, the district court did not err when it declined to dismiss Noriega's indictment pursuant to either the Due Process Clause or its supervisory power.[6]

B.

This court reviews Noriega's appeal of the district court's evidentiary rulings under the abuse of discretion standard. *See United States v. Veltmann,* 6 F.3d 1483, 1491 (11th Cir.1993).

1.

Noriega's first evidentiary claim relates to the district court's exclusion of evidence regarding the intelligence services Noriega allegedly provided to the United States prior to his indictment. The district court made this ruling before trial pursuant to the Classified Information Procedures Act ("CIPA"), 18 U.S.C.App. 3 §§ 1-16. "[The] CIPA requires defendants who expect to disclose classified information to notify the court and the government of their intention to do so." *United States v. Baptista-Rodriguez,* 17 F.3d 1354, 1363 (11th Cir.1994). Upon the government's motion, the district court then must determine whether such evidence would be admissible at trial under the Federal Rules of Evidence. As this court has held:

[t]he district court may not take into account the fact that evidence is classified when determining its "use, relevance, or admissibility." ... If the classified information is admissible under ordinary evidentiary analysis it becomes the government's task to propose an alternative way of conveying the information to the jury that is less damaging to national security.

Id. at 1364 (citations omitted).[7]

In this case, Noriega gave notice of his intent to use classified information regarding his intelligence work for the United States to rebut the government's assertion that he had unexplained wealth.[8] The government objected to any disclosure of the purposes for which the United States had paid Noriega. In pre- trial proceedings, the government offered to stipulate that Noriega had received approximately $320,000 from the United States Army and the Central Intelligence Agency. Noriega insisted that the actual figure approached $10,000,000, and that he should be allowed to disclose the tasks he had performed for the United States.

The district court held that information about the content of the discrete operations in which Noriega had engaged in exchange for the alleged payments was irrelevant to his defense. Alternatively, it ruled that the tendency of such evidence to confuse the issues before the jury substantially outweighed any probative value it might have had. The district court's CIPA ruling, however, left Noriega free to present evidence of the fact, amounts, time, source and method of conveyance of money he alleged he had received from the United States. At trial, Noriega declined to submit evidence regarding monies he allegedly received from the United States, because, he now contends, it would not have appeared credible to the jury absent the excluded details regarding the actual services he had performed. [9]sufficiently apprised of the dispute to issue a virtual blanket ruling excluding evidence regarding the content of the services provided by Noriega for the United States, we will assume *arguendo* that Noriega created an adequate record on this issue.

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We conclude first that, contrary to Noriega's suggestions, the district court judged the admissibility of the evidence in question solely under the standards set out in the Federal Rules of Evidence. The record does not indicate that the district court misunderstood or ignored its obligation to apply normal evidentiary principles despite the classified nature of the material at issue. With this understanding, we turn to an evaluation of the district court's ruling.

Our review leads us to conclude that information regarding the purposes for which the United States previously paid Noriega potentially had some probative value. Specifically, had Noriega testified that he had received $10,000,000 from the United States, and had the government then rebutted that testimony by presenting evidence that it had paid Noriega $320,000, evidence regarding what Noriega did for the United States might have helped the jury determine which of the two payment totals was more credible. To the extent that the proffered evidence on the intelligence operations showed that the United States had engaged Noriega to carry out significant duties, the jury might have inferred that he had received the higher figure, rather than the lower sum. Thus, the district court may have overstated the case when it declared evidence of the purposes for which the United States allegedly paid Noriega wholly irrelevant to his defense.

The potential probative value of this material, however, was relatively marginal. Evidence of the purposes for which monies allegedly are given does not aid significantly in the determination of the fact and amount of such purported payments.[10]the record still would show that Noriega had between $3,000,000 and $7,000,000 in unexplained wealth. That fact would have supported the same negative inference as to which he objects. Further, and more importantly, the district court correctly recognized that the admission of evidence regarding the nature of Noriega's assistance to the United States would have shifted unduly the focus of the trial from allegations of drug trafficking to matters of geo- political intrigue. Accordingly, we cannot conclude that the district court abused its discretion when it determined that the probative value of the proffered material was outweighed substantially by the confusion of issues its admission would have caused. *See* Fed.R.Evid. 403.

2.

Noriega's second evidentiary assignment of error also fails. At trial, Noriega presented the testimony of an officer from the Panamanian Defense Forces who denied that Noriega trafficked in drugs. Noriega contends that the district court reversibly erred when it allowed the government to cross- examine the officer about an incident in which he risked his life to protect Noriega from a coup attempt. The district court held that such an inquiry was relevant to show the witness's loyalty toward and bias in favor of Noriega; we agree.

Noriega insists that even if this evidence had probative value, the district court nonetheless abused its discretion because the testimony at issue unfairly prejudiced Noriega by showing that his own soldiers wanted to oust him from power. As the government noted, Noriega brought out evidence of coup attempts against him during his own questioning of witnesses. Further, the cross- examination about which Noriega complains consumed relatively little time before the jury. As a result, any unfair prejudice associated with this line of questioning was, at most, minimal, and certainly did not outweigh substantially the probative value of the solicited evidence. *See* Fed.R.Evid. 403. Accordingly, we hold that the district court's handling of this matter did not constitute an abuse of discretion.

IV.

The remaining issues before this court relate to claims raised in Noriega's motion, timely filed in district court pursuant to Fed.R.Crim.P. 33, for a new trial based on newly discovered evidence. Noriega first sought a new trial based on his discovery of an undisclosed cooperation agreement between the government and a non- witness, Lucho Santacruz-Echeverri, an associate of one of the Medellin Cartel's rival drug- trafficking organizations from Cali, Colombia (the "Cali Cartel"). As part of this pact, the government agreed to move the district court, pursuant to Fed. R. Crim. P. 35, to reduce Santacruz-Echeverri's sentence in an unrelated case, if Santacruz-Echeverri helped to procure the surrender and cooperation of Ricardo Bilonick in connection with government's case against Noriega. Bilonick later turned himself in and testified against Noriega, and, in fulfillment of the deal at issue, the government helped Santacruz-Echeverri secure a sentence reduction.

In its responsive pleading before the district court, the government contended that it had no duty to reveal such non- witness, cooperation agreements to Noriega, at least absent evidence that a witness benefitted from or otherwise was influenced by the third-party pact. The government also informed the court that, as it was preparing to address Noriega's new trial motion, it received information that the Cali Cartel paid Bilonick $1,250,000 to testify against Noriega. In his reply to the government's response, Noriega outlined his belief that these bribery allegations further supported his new trial motion.

Following an evidentiary hearing, the district court ruled that the government had no duty to disclose to Noriega its agreement with Santacruz-Echeverri. The district court alternatively concluded that even if the government should have revealed its deal with Santacruz-Echeverri, its suppression of the agreement was not sufficiently material to warrant a new trial. The district court also determined that the post- conviction bribery allegations failed to satisfy the requirements for the granting of a new trial. Noriega appeals these rulings.

This court will not overturn a district court's denial of a motion for a new trial based on newly discovered evidence absent an abuse of discretion. *See United States v. Swindall,* 971 F.2d 1531, 1555 (11th Cir.1992), *cert. denied,* 510 U.S. 1040, 114 S.Ct. 683, 126 L.Ed.2d 650 (1994). The district court's underlying determinations regarding prosecutorial misconduct involve mixed questions of law and fact, and therefore, are subject to *de novo* review. *See generally Hays v. Alabama,* 85 F.3d 1492, 1498 (11th Cir.1996), *cert. denied,* --- U.S. ----, 117 S.Ct. 1262, 137 L.Ed.2d 341 (1997).

A.

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The Supreme Court has held that "regardless of request, favorable [exculpatory or impeachment] evidence is material, and constitutional error results from its suppression by the government, "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.' " *Kyles v. Whitley,* 514 U.S. 419, 433, 115 S.Ct. 1555, 1565, 131 L.Ed.2d 490 (1995) (citations omitted). Accordingly, to secure a new trial based on his discovery of the government's agreement with Santacruz-Echeverri, Noriega must first establish that such non- witness deals constitute proper impeachment material. Noriega insists that they do because, had he known about the government's pact with Santacruz-Echeverri, he would have cross-examined Bilonick about whether and how Santacruz-Echeverri induced Bilonick to cooperate with the government.

The government responds that because Bilonick was not a beneficiary of its agreement with Santacruz-Echeverri, and Bilonick maintained to the government, prior to trial, that he chose to cooperate of his own accord, not due to any efforts by Santacruz-Echeverri, its deal with Santacruz-Echeverri lacks impeachment value. Noriega notes that the government's dismissal of the possible inference that Santacruz-Echeverri influenced Bilonick conflicts with its decision to move for a sentence reduction for Santacruz-Echeverri in his unrelated case. Indeed, at the hearing on the government's Rule 35 motion for Santacruz-Echeverri, the government stated that it "could not convince [Bilonick] to surrender himself, and [it] didn't have a way to arrest him. There were no charges outstanding in Panama and Panama would not itself arrest him. So, whatever [Santacruz-Echeverri's attorney] and Santacruz[-Echeverri] did, they were successful in."[11] In this statement, the government essentially acknowledged that Santacruz-Echeverri *may have done something* to secure Bilonick's cooperation against Noriega.

In sum, the government gave Santacruz-Echeverri an incentive to induce Bilonick to testify against Noriega, and credited Santacruz-Echeverri with achieving that object, but it concealed that information from Noriega. With knowledge of these facts, Noriega would have had more than a good- faith basis to question Bilonick at trial about what, if any, inducements he received from Santacruz-Echeverri.[12] Bilonick could have denied that Santacruz-Echeverri influenced improperly, or at all, his decision to cooperate. The jury then could have determined: (1) whether it believed Bilonick's denial of third- party pressure; and (2) the degree to which it should discount Bilonick's testimony about Noriega, if it inferred that Bilonick acted at Santacruz-Echeverri's behest.

Under the government's reasoning, a defendant apparently is entitled to have a jury make these determinations only if the witness in question admits to the government that he or she was induced to cooperate by a non- witness with whom the government has made a deal. Where, as here, the witness at issue has entered into his own cooperation agreement with the government, and knows that the value of his testimony, upon which his chances for a more lenient sentence largely hinge, would be undercut by such an admission, the witness has a strong motive to give the government false information about any third- party inducements. Further, the government has an equally powerful incentive to accept, even willfully blindly, the witness's denial of outside pressure, so that it can withhold this information from the defendant. Such a regime appears inconsistent with the policy underlying the government's witness- incentive disclosure obligations, which this court has described as "ensur[ing] that the jury know[s] the facts that *might* motivate a witness in giving testimony...." *Smith v. Kemp,* 715 F.2d 1459, 1467 (11th Cir.) (emphasis added), *cert. denied,* 464 U.S. 1003, 104 S.Ct. 510, 78 L.Ed.2d 699 (1983).

Assuming that, for the reasons cited above, the government's pact with Santacruz-Echeverri would have afforded Noriega a basis to impeach Bilonick, Noriega still cannot win a new trial unless he satisfies the *Kyles* materiality test. To do so, Noriega must show the existence of a "reasonable probability" that the disclosure of the suppressed information would have led to a different result at trial. *Kyles,* 514 U.S. at 433, 115 S.Ct. at 1565. "The question is not whether the defendant would more likely than not have received a different verdict with the [concealed] evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence." *Id.* at 434, 115 S.Ct. at 1566. Because the evidence at issue only would have facilitated *further* impeachment of *one* witness (out of more than forty called by the government) who gave testimony *corroborative* in nature related to one area of the case, we affirm the district court's conclusion that the government's suppression of its deal with Santacruz-Echeverri fails to satisfy *Kyles*'s second prong.

Bilonick was questioned thoroughly at trial about his plea agreement with the government. As a result, the jury knew that Bilonick had a compelling motive to testify against Noriega, i.e., he hoped to receive a lesser prison term based on his cooperation. If the government had disclosed its agreement with Santacruz-Echeverri, Noriega, through his cross- examination of Bilonick, might have been able to raise an inference in the jury's mind that, by testifying against Noriega, Bilonick *also* hoped to gain benefits from Santacruz-Echeverri. This cumulative impeachment regarding Bilonick's "incentives" for cooperating likely would not have led the jury to scrutinize his testimony much more than it already had, and thus, the suppression of that information does not call the verdicts against Noriega into question. *See United States v. Williams,* 81 F.3d 1434, 1439-40 (7th Cir.1996) (ruling that newly discovered impeachment evidence regarding government's provision of gifts and jailhouse privileges for witnesses "was unlikely to make a difference" to the jury's credibility determinations given impeachment of witnesses at trial regarding their hopes for immunity or "punishment discounts" based upon their testimony). *See also United States v. Amiel,* 95 F.3d 135, 145 (2d Cir.1996) (affirming district court's denial of new trial motion where suppressed "impeachment evidence was cumulative").

The fact that the government's nondisclosure related only to a single corroborative witness's testimony from one area of the case also supports the district court's decision to deny Noriega's new trial motion. The government did not rely upon Bilonick to establish the elements of any of the charges against Noriega. *See Carter v. Johnson,* 110 F.3d 1098, 1105 (5th Cir.1997) (rejecting *Kyles* claim premised upon suppressed impeachment evidence related to one witness because "[t]he prosecution did not rely upon [that witness]'s testimony to establish the essential elements of the offense, but merely to corroborate the [defendant's] confession"); *Amiel,* 95 F.3d at 146 ("Moreover, independent evidence tied each defendant to the criminal conduct, such that cumulative impeachment evidence against [two witnesses] does not undermine our confidence in the outcome of the trial."). Because, "ultimately, [as the Supreme Court explained in *Kyles*] sufficiency of the evidence is not the "touchstone' under the *Brady* line of cases," *United States v. Gonzalez,* 93 F.3d 311, 316 (7th Cir.1996), we note that the record contains not merely evidence from sources other than Bilonick *sufficient* to sustain Noriega's convictions, but also significant additional corroboration of the principal testimony on all the key points in the government's case. *See id.* at 317 ("Because there is *independent corroborating evidence* of the guilt [of the defendants], there is no reasonable probability that the result of the trial would have been different had the undisclosed impeachment material been disclosed prior to trial.").

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As Noriega recognizes, the government relied upon Bilonick to substantiate the testimony of other witnesses, most notably Carlos Lehder, about the Medellin Cartel's use of the Panamanian INAIR airline which Bilonick nominally owned.[13] The government could not rely upon Bilonick more extensively because he neither served as a Medellin Cartel insider (as had Lehder), nor dealt directly with Noriega (as did witnesses, such as Floyd Carlton, Luis Del Cid and Amjad Awan). As a result, Bilonick's testimony had no bearing on many aspects of the case, including Noriega's (and his associates') meetings with Medellin Cartel members, numerous non- INAIR drug, money and ether shipments and Noriega's handling of payments he received from the Medellin Cartel.[14]

Accordingly, we conclude that the district court did not abuse its discretion when it denied Noriega a new trial based on the government's suppression of its cooperation agreement with Santacruz-Echeverri.

B.

Noriega also asserts that he deserves a new trial because after his conviction two people came forward with information that Bilonick received $1,250,000 from the Cali Cartel for testifying against Noriega.[15] In Noriega's view, this revelation shows that Bilonick gave perjured, or at least highly misleading, testimony at Noriega's trial. Specifically, Noriega contends that Bilonick deceived the jury when he "affirmed that all promises made to him were reflected in [his] plea agreement ... [and] that his surrender to the United States had been completely voluntary." Appellant's Supp. Br. at 18. According to Noriega, the bribery allegations establish that Bilonick knew of other promises and acted not of his own volition, but rather because he was paid to do so. Noriega argues that the government violated his due process rights when it failed to correct this false and/or highly misleading testimony. Noriega points to no evidence that the government had actual knowledge of the alleged payment by the Cali Cartel, but he insists that it should be charged with constructive knowledge of the bribe.

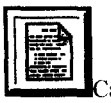
The Supreme Court long has held that " "deliberate deception of a court and jurors by the presentation of known false evidence is incompatible with "rudimentary demands of justice".' " *DeMarco v. United States,* 928 F.2d 1074, 1076 (11th Cir.1991) (quoting *Giglio v. United States,* 405 U.S. 150, 153, 92 S.Ct. 763, 765, 31 L.Ed.2d 104 (1972), quoting *Mooney v. Holohan,* 294 U.S. 103, 112, 55 S.Ct. 340, 341, 79 L.Ed. 791 (1935)). As a result, "due process is violated when the prosecutor, although not soliciting false evidence from a Government witness, allows it to stand uncorrected when it appears." *United States v. Sanfilippo,* 564 F.2d 176, 178 (5th Cir.1977) (citing *Napue v. Illinois,* 360 U.S. 264, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (1959)). The violation arises even if the "false testimony goes only to the credibility of the witness...." *Id.* "Where either [the government solicits false or misleading testimony or fails to correct it], the falsehood is deemed to be material [and thus, to warrant a new trial] "if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury.' " *United States v. Alzate,* 47 F.3d 1103, 1110 (11th Cir.1995) (citations omitted) (ruling that "standard of materiality [for such claims] is equivalent to the *Chapman v. California,* 386 U.S. 18, 24, 87 S.Ct. 824, 827, 17 L.Ed.2d 705 (1967), "harmless beyond a reasonable doubt' standard"). Noriega has shown no such wrong in this case.

First, Noriega mistakenly treats the alleged bribe as an established fact, rather than as a disputed matter.[16] Further, even if one assumes that the Cali Cartel did bribe Bilonick, the portions of Bilonick's trial testimony cited by Noriega do not constitute a denial of such payments. For example, Noriega charges that Bilonick falsely testified that his plea agreement contained all the promises made to him. Read in context, the record reflects that Bilonick was responding to questions regarding guarantees made by the *government;* he was not asked about promises generally. Bilonick's second statement cited by Noriega as misleading, i.e., that Bilonick waited to surrender until after the Medellin Cartel heads went into custody in Colombia, does not exclude the possibility that he received compensation from the Cali Cartel. Finally, Noriega has cited no authority to support the application of the various agency theories, by which he seeks to impute to the government knowledge of the alleged bribe, in this context. Although the government appears to have treaded close to the line of willful blindness,[17] the crossing of which might establish constructive knowledge, we decline to charge the government with prior cognizance of the alleged payment, particularly given Bilonick's continued disavowal of it. *See United States v. Michael,* 17 F.3d 1383, 1385 (11th Cir.1994) ("It is axiomatic that only the knowing use of false testimony constitutes a due process violation.").[18]

Because the record fails to support a claim of prosecutorial misconduct in this regard, to win a new trial based on the post- conviction bribery allegations, Noriega must satisfy the general standard for newly discovered evidence. *See United States v. Garcia,* 13 F.3d 1464, 1472 (11th Cir.) (ruling that a district court may grant a new trial based on newly discovered evidence "only if: (1) the evidence was in fact discovered after trial; (2) the defendant exercised due care to discover the evidence; (3) the evidence was not merely cumulative or impeaching; (4) the evidence was material; and (5) the evidence was of such a nature that a new trial would probably produce a new result"), *cert. denied sub nom., Chaves v. United States,* 512 U.S. 1226, 114 S.Ct. 2723, 129 L.Ed.2d 847 (1994). Evidence regarding the bribing of a witness, although disturbing, clearly does constitute impeachment material, and therefore, Noriega cannot satisfy the *Garcia* standard. *See United States v. Starrett,* 55 F.3d 1525, 1554 (11th Cir.1995) ("Failure to meet any one of these elements will defeat a motion for new trial."), *cert. denied sub nom., Sears v. United States,* --- U.S. ----, 116 S.Ct. 1335, 134 L.Ed.2d 485 (1996). Accordingly, we find no abuse of discretion by the district court in denying Noriega a new trial on this basis.

V.

For all the foregoing reasons, Noriega's convictions are AFFIRMED, and the district court's order denying Noriega's motion for a new trial is AFFIRMED.

 Case in RTF Format

PINOCHET 591

House of Lords

Session 1998-99

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Regina v. Evans and another and the Commissioner of Police for the Metropolis and others EX Parte Pinochet (on appeal from a Divisional Court of the Queen's Bench Division)

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AND OTHERS (APPELLANTS)

EX PARTE PINOCHET (RESPONDENT)
(ON APPEAL FROM A DIVISIONAL COURT
OF THE QUEEN'S BENCH DIVISION)

ON 25 NOVEMBER 1998

UNAMENDED

LORD SLYNN OF HADLEY

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My Lords,

The respondent to this appeal is alleged to have committed or to have been responsible for the commission of the most serious of crimes--genocide, murder a large scale, torture, the taking of hostages. In the course of 1998, eleven crimi suits have been brought against him in Chile in respect of such crimes. Proceedir have also now been brought in a Spanish court. The Spanish Court has, however held that it has jurisdiction to try him. In the latter proceedings, none of these specific crimes is said to have been committed by the respondent himself.

If the question for your Lordships on the appeal were whether these allegations should be investigated by a Criminal Court in Chile or by an international tribunal the answer, subject to the terms of any amnesty, would surely be yes. But that is not the question and it is necessary to remind oneself throughout that it is not th question. Your Lordships are not being asked to decide whether proceedings sho be brought against the respondent, even whether he should in the end be extrad to another country (that is a question for the Secretary of State) let alone wheth he in particular is guilty of the commission or responsible for the commission of these crimes. The sole question is whether he is entitled to immunity as a former Head of State from arrest and extradition proceedings in the United Kingdom in respect of acts alleged to have been committed whilst he was Head of State.

The Proceedings

The proceedings have arisen in this way. On 16 October 1998 Mr. Nicholas Evans Metropolitan Magistrate, issued a provisional warrant for the arrest of the respondent pursuant to section 8(1)(*b*) of the Extradition Act 1989 on the basis t there was evidence that he was accused that:

- "between 11 September 1973 and 31 December 1983 within the jurisdictic of the Fifth Central Magistrate of the National Court of Madrid did murder Spanish citizens in Chile within the jurisdiction of the Government of Spain

A second warrant was issued by Mr. Ronald Bartle, a Metropolitan Magistrate, on October 1998 on the application of the Spanish Government, but without the respondent being heard, despite a written request that he should be heard to oppose the application. That warrant was issued on the basis that there was evidence that he was accused:

- "between 1 January 1988 and December 1992 being a public official intentionally inflicted severe pain or suffering on another in the performan or purported performance of his official duties within the jurisdiction of the Government of Spain."

Particulars of other alleged offences were set out, namely:

(i)between 1 January 1988 and 31 December 1992, being a public official, conspi with persons unknown to intentionally inflict severe pain or suffering on another the performance or purported performance of his official duties;

(ii)Between 1 January 1982 and 31 January 1992: (a) he detained; (b) he conspi with persons unknown to detain other persons ("the hostages") and in order to compel such persons to do or to abstain from doing any act, threatened to kill, injure or continue to detain the hostages;

(iii)Between January 1976 and December 1992, conspired together with persons unknown to commit murder in a Convention country.

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It seems, however, that there are alleged at present to have been only one or tw cases of torture between 1 January 1988 and 11 March 1990.

The respondent was arrested on that warrant on 23 October.

On the same day as the second warrant was issued, and following an application the Home Secretary to cancel the warrant pursuant to section 8(4) of the Extradi Act 1989, solicitors for the respondent issued a summons applying for an order o Habeas Corpus. Mr. Michael Caplan, a partner in the firm of solicitors, deposed th the plaintiff was in hospital under medication following major surgery and that he claimed privilege and immunity from arrest on two grounds. The first was that, a stated by the Ambassador of Chile to the Court of St. James's, the respondent wa "President of the Government Junta of Chile" according to Decree No. 1, dated 1 September 1973 from 11 September 1973 until 26 June 1974 and "Head of State the Republic of Chile" from 26 June 1974 until 11 March 1990 pursuant to Decree Law No. 527, dated 26 June 1974, confirmed by Decree Law No. 806, dated 17 December 1974, and subsequently by the 14th Transitory Provision of the Politica Constitution of the Republic of Chile 1980. The second ground was that the respondent was not and had not been a subject of Spain and accordingly no extradition crime had been identified.

An application was also made on 22 October for leave to apply for judicial review quash the first warrant of 16 October and to direct the Home Secretary to cancel warrant. On 26 October a further application was made for Habeas Corpus and judicial review of the second warrant. The grounds put forward were (in addition the claim for immunity up to 1990) that all the charges specified offences contrai to English statutory provisions which were not in force when the acts were done. to the fifth charge of murder in a Convention country, it was objected that this charged murder in Chile (not a Convention country) by someone not a Spanish national or a national of a Convention country. Objection was also taken to the is of a second provisional warrant when the first was treated as being valid.

These applications were heard by the Divisional Court on 26 and 27 October. On October leave was given to the respondent to move for certiorari and the decisio issue the provisional warrant of 16 October was quashed. The Magistrate's decisi of 22 October to issue a provisional warrant was also quashed, but the quashing the second warrant was stayed pending an appeal to your Lordships' House for which leave was given on an undertaking that the Commissioner of Police and th Government of Spain would lodge a petition to the House on 2 November 1998. was ordered that the applicant was not to be released from custody other than o bail, which was granted subsequently. No order was made on the application for Habeas Corpus, save to grant leave to appeal and as to costs.

The Divisional Court certified:

- "that a point of law of general public importance is involved in the Court's decision, namely the proper interpretation and scope of the immunity enjc by a former Head of State from arrest and extradition proceedings in the United Kingdom in respect of acts committed when he was Head of State"

The matter first came before your Lordships on Wednesday 5 November. Applica for leave to intervene was made first by Amnesty International and others representing victims of the alleged activities. Conditional leave was given to thes intervenors, subject to the parties showing cause why they should not be heard. was ordered that submissions should so far as possible be in writing, but that, in view of the very short time available before the hearing, exceptionally leave was given to supplement those by oral submissions, subject to time limits to be fixed. the hearing no objection was raised to Professor Brownlie, Q.C. on behalf of thes intervenors being heard. Leave was also given to other intervenors to apply to pu

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written submissions, although an application to make oral submissions was refus
Written submissions were received on behalf of these parties. Because of the urgency and the important and difficult questions of international law which appeared to be raised, the Attorney General, at your Lordships request, instructe Mr. David Lloyd-Jones as amicus curiae and their Lordships are greatly indebted him for the assistance he provided in writing and orally at such very short notice. Many cases have been cited by counsel, but I only refer to a small number of the

At the date of the provisional warrants and of the judgment of the Divisional Cou no extradition request had been made by Spain, a party to the European Conven on Extradition, nor accordingly any authority to proceed from the Secretary of St under the Extradition Act 1989.

The Divisional Court held that the first warrant was defective. The offence specifi of murder in Chile was clearly not said to be committed in Spain so that section 2 (*a*) of the 1989 Act was not satisfied. Nor was section 2(1)(*b*) of the Act satisfied since the United Kingdom Courts could only try a defendant for murder outside tl United Kingdom if the defendant was a British citizen (section 9 of the Offences Against the Person Act 1861 as amended). Moreover, section 2(3)(*a*) was not satisfied, since the accused is not a citizen of Spain and it is not sufficient that th victim was a citizen of Spain. The Home Secretary, however, was held not to hav been in breach of his duty by not cancelling the warrants. As for the second provisional warrant, the Divisional Court rejected the respondent's argument that was unlawful to proceed on the second warrant and that the Magistrate erred in holding an inter partes hearing. The Court did not rule at that stage on the respondent's argument that the acts alleged did not constitute crimes in the Unit Kingdom at the time they were done, but added that it was not necessary that th conduct alleged did constitute a crime here at the time the alleged crime was committed abroad.

As to the sovereign immunity claim, the Court found that from the earliest date i the second warrant (January 1976), the respondent was Head of State of Chile a although he ceased to be Head of State in March 1990, nothing was relied on as having taken place after March 1990 and indeed the second international warran issued by the Spanish Judge covered the period from September 1973 to 1979. Section 20 in Part III of the State Immunity Act 1978 was held to apply to matte which occurred before the coming into force of the Act. The Court read the international warrant as accusing the respondent not of personally torturing or murdering victims or causing their disappearance, but of using the powers of the State of which he was Head to do that. They rejected the argument that section (1) of the 1970 Act and Article 39 of the Vienna Convention only applied to acts done in the United Kingdom, and held that the applicant was entitled to immunit a former Head of State from the criminal and civil process of the English Courts.

A request for the extradition of the respondent, signed in Madrid on 3 November 1998 by the same judge who signed the international warrant, set out a large number of alleged murders, disappearances and cases of torture which, it is said were in breach of Spanish law relating to genocide, to torture and to terrorism. T occurred mainly in Chile, but there are others outside Chile--e.g. an attempt to murder in Madrid, which was abandoned because of the danger to the agent concerned. The respondent personally is said to have met an agent of the intelligence services of Chile (D.I.N.A.) following an attack in Rome on the Vice-President of Chile in October 1975 and to have set up and directed "Operation Condor" to eliminate political adversaries, particularly in South America.

- "These offences have presumably been committed, by Augusto Pinochet Ugarte, along with others in accordance with the plan previously establish and designed for the systematic elimination of the political opponents, specific segments of sections of the Chilean national groups, ethnic and

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religious groups, in order to remove any ideological dispute and purify the Chilean way of life through the disappearance and death of the most prominent leaders and other elements which defended Socialist, Communi (Marxist) positions, or who simply disagreed."

By order of 5 November 1998, the Judges of the National Court Criminal Division Plenary Session held that Spain had jurisdiction to try crimes of terrorism, and genocide even committed abroad, including crimes of torture which are an aspec genocide and not merely in respect of Spanish victims.

- "Spain is competent to judge the events by virtue of the principle of unive prosecution for certain crimes--a category of international law--establishec our internal legislation. It also has a legitimate interest in the exercise of s jurisdiction because more than 50 nationals were killed or disappeared in Chile, victims of the repression reported in the proceedings."

The Validity of the Arrest

Although before the Divisional Court the case was argued on the basis that the respondent was at the relevant times Head of State, it was suggested that he wa not entitled to such recognition, at any rate for the whole of the period during wl the crimes were alleged to have been committed and for which immunity is claim An affidavit sworn on 2 November 1974 was produced from Professor Faundez tc support this. His view was that by Decree Law No. 1 of 11 September 1973, the respondent was only made President of the Military Junta; that Decree Law was i any event unconstitutional. By Decree Law No. 527 of 26 June 1974, the respond was designated "Supreme Chief of the Nation" and by Decree Law No. 806 of 17 December 1974, he was given the title President of the Republic of Chile. This, tc it is said was unconstitutional, as was the Decree Law No. 788 of 4 December 19 purporting to reconcile the Decree Laws with the Constitution. He was not, in any event, appointed in a way recognised by the Constitution. It seems clear, howeve that the respondent acted as Head of State. In affidavits from the Ambassador o Chile to the Court of St. James's, sworn on 21 October 1998, and by affidavits of two former Ambassadors, his position has been said to be that of President of th Junta from 11 September 1973 until 26 June 1974 and then Head of State from 2 June 1974 until 11 March 1990. Moreover, it was the respondent who signed the letters of credential presented to The Queen by the Chilean Ambassador to the United Kingdom on 26 October 1973. Further, in the request for extradition date November 1998, the Spanish Government speak of him as being Head of State. H is said not to have immunity "in regard to the allegedly criminal acts committed when [the respondent] was Head of State in Chile" and in considering whether a immunity should be accorded, it was relevant to take into account that "Mr. Pino became Head of State after overthrowing a democratically elected Government b force". I accordingly accept for the purposes of this appeal that, although no certificate has been issued by the Secretary of State pursuant to section 21(a) of State Immunity Act 1978, on the evidence at all relevant times until March 1990 respondent was Head of State of Chile.

The protection claimed by the respondent is put essentially on two different base one a procedural bar to the proceedings for extradition and the other an objectio that the issues raised are not justiciable before the English Courts. They are disti matters, though there are common features. See for example *Argentina v. Amer Hess* 488 U.S. 428, *Filartiga v. Pena-Irala* (1984) 577 F.Supp. 860, *Siderman de Blake v. Republic of Argentina*(1992) 965 F 2d 699, and *Al Adsani v. Kuwait* 107 I.L.R. 536.

The Claim of Immunity

Chronologically, it is the procedural bar which falls to be considered first. Can the

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respondent say either that because the State is immune from proceedings he car be brought before the Court, or can he say that as a former Head of State he ha: immunity of his own which, as I see it, is a derivative of the principle of State immunity. The starting point for both these claims is now the State Immunity Act 1978. The long title of that Act states that this is to (a) make new provision in respect of proceedings in the United Kingdom by or against other States and (b) make new provision with respect to the immunities and privileges of Heads of St

Part I deals with (a); Part III with (b). *Part I*

By section 1 headed "General Immunity from Jurisdiction", it is provided: "(1) A State is immune from the jurisdiction of the Courts of the United Kingdom except provided in the following provisions of this Part of this Act".

The first part of the sentence is general and the exceptions which follow in sectic 2 to 11 relate to specific matters--commercial transactions, certain contracts of employment and injuries to persons and property caused by acts or omissions in United Kingdom--and do not indicate whether the general rule applies to civil or criminal matters, or both. Some of these exceptions -patents, trademarks and business names, death or personal injury--are capable of being construed to incl both civil and criminal proceedings.

Section 1 refers only to States and there is nothing in its language to indicate tha covers emanations or officials of the State. I read it as meaning States as such. Section 14, however, goes much further, since references to a State:

- "include references to (a) the sovereign or other head of that State in his public capacity; (b) the government of that State; and (c) any department that government, but not to any entity (hereinafter referred to as a separa entity) which is distinct from the executive organs of the government of th State and capable of suing or of being sued".

A "separate entity" is immune from jurisdiction "if, and only if--(a) the proceedin relate to anything done by it in the exercise of sovereign authority and (b) the circumstances are such that a State . . . would have been so immune." This secti does not deal expressly with the position of a former Head of State.

Section 16(4), however, under the heading "Excluded Matters", provides that "th Part of this Act does not apply to criminal proceedings". Mr. Nicholls, Q.C. conten that this must be read subject to the terms of the provision of Section 1(1) whicl confers absolute immunity from jurisdiction on States. Section 16(4) therefore excludes criminal proceedings from the exceptions provided in sections 2 to 11, b it does not apply to section 1(1), so that a State is immune from criminal proceedings and accordingly Heads of State enjoy immunity from criminal proceedings under section 14. I am not able to accept this. Section 16(4) is in qu general terms and must be read as including section 1 as well as sections 2 to 11 the Act. It is hardly surprising that crimes are excluded from section 1, since the number of crimes which may be committed by the State as opposed to by individuals seems likely to be limited. It is also consistent with the Federal State Immunity Act of the United States which, as I understand it, does not apply to criminal proceedings. Since extradition proceedings in respect of criminal charges are themselves regarded as criminal proceedings, the respondent cannot rely on Part I of the 1978 Act.

Part III

Part III of the Act contains the provisions of this Act on which it seems that this claim turns, curiously enough under the heading, "Miscellaneous and Supplementary". By section 20(1), "Heads of State", it is provided that:

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- "subject to the provisions of this section and to any necessary modificatio the Diplomatic Privileges Act 1964 shall apply to (a) A sovereign or other head of State; (b) members of his family forming part of his household; a (c) his private servants, as it applies to the head of a diplomatic mission, t members of his family forming part of his household and to his private servants. . . . .

- (5)This section applies to the sovereign or other head of any State on whi immunities and privileges are conferred by Part I of this Act and is without prejudice to the application of that Part to any such sovereign or head of State in his public capacity".

Again there is no mention of a former Head of State.

The Diplomatic Privileges Act 1964, unlike the 1978 Act, provides in section 1 tha the provisions of the Act, "with respect to the matters dealt with shall "have effe substitution for any previous enactment or rule of law". By section 2, Articles of t Vienna Convention on Diplomatic Relations (1961) set out in the Schedule, "shall have the force of law in the United Kingdom."

The Preamble to the Vienna Convention (which though not part of the Schedule i in my view be looked at in the interpretation of the articles so scheduled) refers t the fact that an International Convention on Diplomatic Privileges and Immunitie would contribute to the development of friendly relations among nations "irrespective of the differing constitutional and social systems" and records that t purpose of such privileges and immunities is "not to benefit individuals, but to ensure the efficient performance of the functions of diplomatic missions as representing States." It confirmed, however, "that the rules of customary international law should continue to govern questions not expressly regulated by provisions of the present Convention."

It is clear that the provisions of the Convention were drafted with the Head and t members of a diplomatic staff of the mission of a sending State (whilst in the territory of the receiving State and carrying out diplomatic functions there) in mir and the specific functions of a diplomatic mission are set out in article 3 of the Convention. Some of the provisions of the Vienna Convention thus have little or i direct relevance to the Head of State: those which are relevant must be read "wi the necessary modifications".

The relevant provisions for present purposes are:-

(i)Article 29:

- "The person of a diplomatic agent shall be inviolable. He shall not be liabl any form of arrest or detention. The receiving State shall treat him with d respect and shall take all appropriate steps to prevent any attack on his person, freedom or dignity."

(ii)By Article 31(1), a diplomatic agent shall enjoy immunity from the criminal jurisdiction of the receiving State

(iii)By Article 39:

- "1. Every person entitled to privileges and immunities shall enjoy them fro the moment he enters the territory of the receiving State on proceedings t take up his post or, if already in its territory, from the moment when his appointment is notified to the Ministry for Foreign Affairs or such other ministry as may be agreed. 2. When the functions of a person enjoying

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> privileges and immunities have come to an end, such privileges and immunities shall normally cease at the moment when he leaves the countr or on expiry of a reasonable period in which to do so, but shall subsist unt that time, even in case of armed conflict. However, with respect to acts performed by such a person in the exercise of his functions as a member o the mission, immunity shall continue to subsist."

It is also to be noted that in article 38, for diplomatic agents who are nationals o resident in the receiving State, immunity is limited. Such immunity is only in resp of "official" acts performed in the exercise of his functions.

Reading the provisions "with the necessary modifications" to fit the position of a Head of State, it seems to me that when references are made to a "diplomatic agent" one can in the first place substitute only the words "Head of State". The provisions made cover, prima facie, a Head of State whilst in office. The next question is how to relate the time limitation in article 39(1) to a Head of State. H does not, in order to take up his post as Head of State, "enter the territory of a receiving State", i.e. a country other than his own, in order to take up his functio or leave it when he finishes his term of office. He may, of course, as Head of Sta visit another State on an official visit and it is suggested that his immunity and privileges are limited to those visits. Such an interpretation would fit into a strictl literal reading of article 39. It seems to me, however, to be unreal and cannot ha been intended. The principle functions of a Head of State are performed in his ov country and it is in respect of the exercise of those functions that if he is to have immunity that immunity is most needed. I do not accept therefore that section 2(the 1978 Act read with article 39(2) of the Vienna Convention is limited to visits abroad.

Nor do I consider that the general context of this Convention indicates that it onl grants immunity to acts done in a foreign state or in connection only with international diplomatic activities as normally understood. The necessary modification to "the moment he enters the territory of the receiving State on proceeding to take up his post" and to "the moment when he leaves the country' to the time when he "becomes Head of State" to the time "when he ceases to be Head of State". It therefore covers acts done by him whilst in his own State and post. Conversely there is nothing to indicate that this immunity is limited to acts done within the State of which the person concerned is Head.

If these limitations on his immunity do not apply to a Head of State they should a apply to the position of a former Head of State, whom it is sought to sue for acts done during his period as Head of State. Another limitation has, however, been suggested. In respect of acts performed by a person in the exercise of his functic as head of a mission, it is said that it is only "immunity" which continues to subsi whereas "privileges and immunities normally cease at the moment when he leave the country [sc. when he finishes his term of office]." It is suggested that all the provisions of article 29 are privileges not immunities. Mr. Nicholls, Q.C. replies th even if being treated with respect and being protected from an attack on his pers freedom or dignity are privileges, the provision that a diplomatic agent [sc. Head State] "shall not be liable to any form of arrest or detention" is an immunity. As a matter of ordinary language and as a matter of principle it seems to me that Mr. Nicholls is plainly right. In any event, by article 31 the diplomatic agent/Head of State has immunity from the criminal jurisdiction of the receiving State: that immunity would cover immunity from arrest as a first step in criminal proceeding Immunity in article 39(2) in relation to former Heads of State in my view covers immunity from arrest, but so also does article 29.

Where a diplomatic agent [Head of State] is in post, he enjoys these immunities privileges as such--i.e. ratione personae just as in respect of civil proceedings he enjoys immunity from the jurisdiction of the Courts of the United Kingdom under

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section 14 of the 1978 Act because of his office.

For one who ceases to occupy a post "with respect to acts performed by such a person in the exercise of his functions as a member of the mission [Head of Stat immunity shall continue to subsist." This wording is in one respect different from wording in article 38 in respect of a diplomat who is a national of the receiving State. In that case, he has immunity in respect of "official" acts performed in the exercise of his function, but as Mrs. Denza suggests, the two should be read in tl same way [see Diplomatic Law, 2nd Edition, p. 363].

The question then arises as to what can constitute acts (i.e. official acts) in the exercise of his functions as Head of State.

It is said (in addition to the argument that functions mean only international functions which I reject):

(i) that the functions of the Head of State must be defined by international law, t cannot be defined simply as a matter of national law or practice; and

(ii) genocide, torture and the taking of hostages cannot be regarded as the functions of a Head of State within the meaning of international law when international law regards them as crimes against international law.

As to (i), I do not consider that international law prescribes a list of those functio which are, and those which are not, functions for the purposes of article 32. The role of a Head of State varies very much from country to country, even as betwe Presidents in various States in Europe and the United States. International law recognises those functions which are attributed to him as Head of State by the la or in fact, in the country of which he is Head as being functions for this purpose, subject to any general principle of customary international law or national law, which may prevent what is done from being regarded as a function.

As to (ii), clearly international law does not recognise that it is one of the specific functions of a Head of State to commit torture or genocide. But the fact that in carrying out other functions, a Head of State commits an illegal act does not mea that he is no longer to be regarded as carrying out one of his functions. If it did, immunity in respect of criminal acts would be deprived of much of its content. I c not think it right to draw a distinction for this purpose between acts whose criminality and moral obliquity is more or less great. I accept the approach of Sir Arthur Watts, Q.C. in his Hague Lectures at pp. 56-57:

- "A Head of State clearly can commit a crime in his personal capacity; but i seems equally clear that he can, in the course of his public functions as He of State, engage in conduct which may be tainted by criminality or other forms of wrongdoing. The critical test would seem to be whether the cond was engaged in under colour of or in ostensible exercise of the Head of State's public authority<hw6>90. If it was, it must be treated as official conduct, and so not a matter subject to the jurisdiction of other States *whether or not* it was wrongful or illegal under the law of his own State.91

In the present case it is accepted in the international warrant of arrest that in relation to the repression alleged "the plans and instructions established beforeh from the Government enabled these actions to be carried out". "In this sense [he Commander in Chief of the Armed Forces and Head of the Chilean Government a the time committed punishable acts . . . "

I therefore conclude that in the present case the acts relied on were done as par the carrying out of his functions when he was Head of State.

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The next question is, therefore, whether this immunity in respect of functions is (down as a matter of the interpretation of the Vienna Convention and the Act. Th provisions of the Act "fall to be considered against the background of those principles of public international law as are generally recognised by the family of nations" (*Alcom Ltd. v. Republic of Columbia* [1984] A.C. 580, 597 *per* Lord Diplc So also as I see it must the Convention be interpreted.

The original concept of the immunity of a Head of State in customary internation law in part arose from the fact that he or she was a Monarch who by reason of personal dignity and respect ought not to be impleaded in a foreign State: it was linked no less to the idea that the Head of State was, or represented, the State a that to sue him was tantamount to suing an independent State extra-territorially, something which the comity of nations did not allow. Moreover, although the concepts of State immunity and Sovereign immunity have different origins, it see to me that the latter is an attribute of the former and that both are essentially ba on the principles of Sovereign independence and dignity, see for example, Suchariktul in his report to the International Law Commission (1980) Vol. II Doc. (LN 4--331 and Add.J.) Marshall C.J. in the *Schooner Exchange v. M'Faddon* (181 11 US (7 Cranch) 116.

In the *Duke of Brunswick v. The King of Hanover* (1848) 2 H.L. Cas. 1 the Duke claimed that the King of Hanover had been involved in the removal of the Duke f his position as reigning Duke and in the maladministration of his estates. The Lor Chancellor said:

- "A foreign Sovereign, coming into this country cannot be made responsibl here for an act done in his Sovereign character in his own country; wheth be an act right or wrong, whether according to the constitution of that country or not, the Courts of this country cannot sit in judgment upon an of a Sovereign, effected by virtue of his Sovereign authority abroad, an ac not done as a British subject, but supposed to be done in the exercise of h authority vested in him as Sovereign."

He further said:

- "If it be a matter of sovereign authority, we cannot try that fact, whether be right or wrong. The allegation that it is contrary to the laws of Hanover taken in conjunction with the allegation of the authority under which the defendant had acted, must be conceded to be an allegation, not that it wa contrary to the existing laws as regulating the right of individuals, but that was contrary to the laws and duties and rights and powers of a Sovereign exercising Sovereign authority. If that be so, it does not require another observation to shew, because it has not been doubted, that no Court in th country can entertain questions to bring Sovereigns to account for their ac done in their sovereign capacities abroad."

This case has been cited since both in judicial decisions and in the writing of juris and in *Buttes Gas and Oil Co. v. Hammer* [1982] A.C. 888 was said by Lord Wilberforce to be "a case in this House which is still authoritative and which has influenced the law both here and overseas" (p. 932). In *Hatch v. Baez* (1876) 7 Hun. 596, the plaintiff claimed that he had suffered injuries in the Dominican Republic as a result of acts done by the defendant in his official capacity of President of that Republic. The Court accepted that because the defendant was i New York, he was within the territorial jurisdiction of the State. The Court said, however:

- "But the immunity of individuals from suits brought in foreign tribunals for acts done within their own States, in the exercise of the sovereignty there it is essential to preserve the peace and harmony of nations, and has the

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sanction of the most approved writers on international law. It is also recognised in all the judicial decisions on the subject that have come to m knowledge . . .

- "The fact that the defendant has ceased to be president of St. Domingo d not destroy his immunity. That springs from the capacity in which the acts were done, and protects the individual who did them, because they emana from a foreign and friendly government."

Jurists since have regarded this principle as still applying to the position of a form Head of State. Thus in the 9th edition of *Oppenheim's International Law* (1992 S Robert Jennings, Q.C. and Sir Arthur Watts, Q.C.) it is said that a Head of State enjoys all the privileges set out as long as he holds that position (i.e. ratione personae) but that thereafter he may be sued in respect of obligations of a privat character.

- "For his official acts as Head of State, he will like any other agent of the St enjoy continuing immunity."

Satow in *Guide to Diplomatic Practice*, Fifth Edition, is to the same effect. Having considered the Vienna Convention on Diplomatic Relations of 1961, the New Yorl Convention on Special Missions of 1969 and the European Convention on State Immunity, the editors conclude at page 9:

- "2. The personal status of a head of a foreign state therefore continues to regulated by long established rules of customary international law which c be stated in simple terms. He is entitled to immunity--probably without exception--from criminal and civil jurisdiction."

- "2.4. A head of state who has been deposed or replaced or has abdicated resigned is of course no longer entitled to privileges or immunities as a he of state. He will be entitled to continuing immunity in regard to acts which performed while head of state, provided that the acts were performed in h official capacity; in this his position is no different from that of any agent c the state. He cannot claim to be entitled to privileges as of right, although may continue to enjoy certain privileges in other states on a basis of courtesy."

In his Hague Lectures on "The Legal Position in International Law on Heads of St et al", Sir Arthur Watts, Q.C. wrote that a former Head of State had no immunity respect of his private activities taking place whilst he was Head of State. "A Head State's official acts, performed in his public capacity as Head of State, are howev subject to different considerations. Such acts are acts of the State rather than th Head of State's personal acts and he cannot be sued for them even after he has ceased to be Head of State" ().

One critical difference between a Head of State and the State of course resides in the fact that a Head of State may resign or be removed. As these writers show, customary international law whilst continuing to hold immune the Head of State f acts performed in such capacity during his tenure of the office, did not hold him immune from personal acts of his own. The distinction may not always be easy t draw, but examples can be found. On the one side in the United States was *Hatc Baez* to which I have referred, *Nobili v. Charles I of Austria* (1921) (Annual Diges Public International Law Cases, Volume I 1932, Case No. 90, page 136). On the other side, in France is the case of *Mellerio v. Isabel de Bourbon ex Queen of Sp* Journal of International Law (1974) (page 32); more recently the former King Fa was held not immune from suits for goods supplied to his former wife whilst he v Head of State (Review Critique 1964, page 689).

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The reasons for this immunity as a general rule both for the actual and a former Head of State still have force and, despite the changes in the role and the persor the Head of State in many countries, the immunity still exists as a matter of customary international law. For an actual Head of State as was said in *United States of America v. Noriega* (1990) 746 F. Supp. 1506 the reason was to ensure that "leaders are free to perform their Governmental duties without being subjec detention, arrest or embarrassment in a foreign country's legal system." There ai my view analogous if more limited reasons for continuing to apply the immunity ratione materiae in respect of a former Head of State.

Rules of customary international law change, however, and as Lord Denning, M.F said in *Trendtex Trading Corporation v. Central Bank of Nigeria* [1977] 1 Q.B. 52' "we should give effect to those changes and not be bound by any idea of stare decisis in international law". Thus, for example, the concept of absolute immunity for a Sovereign has changed to adopt a theory of restrictive immunity in so far as concerns the activities of a State engaging in trade (*I Congresso del Partido* [198 A.C. 244). One must therefore ask is there "sufficient evidence to show that the i of international law has changed?" (p. 556).

This principle of immunity has, therefore, to be considered now in the light of developments in international law relating to what are called international crimes Sometimes these developments are through Conventions. Thus, for example, the International Convention against the Taking of Hostages 1979 provides that:

- "Any person who seizes or detains and threatens to kill, to injure . . . anot person . . . in order to compel a third party, namely a State, an internatior inter-governmental organisation, a natural or juridical person, or a group (persons, to do or to abstain from doing any act as an explicit or implicit condition for the release of the hostage commits the offence of taking hostages."

States undertake to prosecute if they do not extradite an offender (any offender "without exception whatsoever") through proceedings in accordance with the law that State, but subject to "enjoyment of all the rights and guarantees provided b' the law of the State in the territory of which he is present." This Convention ente into force on 3 June 1983 and was enacted in the United Kingdom in the Taking Hostages Act 1982 which came into force on 26 November 1982.

By the Genocide Convention of 1948,

- "the Contracting Parties confirmed that genocide (being any of the acts specified in article II of the Convention), whether committed in time of pe or in time of war, is a crime under international law which they undertake prevent and punish".

By article IV,

- "Persons committing genocide or any of the other acts enumerated in artic III shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals."

The Genocide Act 1969 made the acts specified in article II of the Convention the criminal offence of genocide, but it is to be noted that article IV of the Conventio which on the face of it would cover a Head of State was not enacted as part of domestic law. It is, moreover, provided in article VI that persons charged with genocide "shall be tried by a competent tribunal of the State in the territory in wl the act was committed, or by such international penal tribunal as may have jurisdiction." It seems to me to follow that if an immunity otherwise exists, it wou only be taken away in respect of the State where the crime was committed or

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before an international tribunal.

There have in addition been a number of Charters or Statutes setting up international tribunals--There is the Nuremberg Charter in 1945 which gave jurisdiction to try crimes against peace, war crimes and crimes against humanity (Article 6). By Article 7 "the official position of defendants, whether as a Heads o State or responsible officials in Government Departments shall not be considered freeing them from responsibility or mitigating punishment." A similar provision wa found in the Tokyo Convention. In 1993 the international tribunal for the former Yugoslavia was given power to prosecute persons "responsible for serious violatic of international humanitarian law" including grave breaches of the Geneva Conventions of 1949, torture and taking civilians as hostages, genocide, crimes against humanity "when committed in armed conflict whether international or internal in character, and directed against any civilian population" including murd torture, persecution on political racial or religious grounds. In dealing with indivic criminal responsibility it is provided in Article 7 that "the official position of any accused person whether as Head of State or Government or as a responsible Government Official shall not relieve such person of criminal responsibility."

The Statute of the International tribunal for Rwanda (1994) also empowered the tribunal to prosecute persons committing genocide and specified crimes against humanity "when committed as part of a widespread or systematic attack against civilian population on national political ethnic or other specified grounds." The sai clause as to Head of State as in the Yugoslav tribunal is in this Statute.

The Rome Statute of the International Criminal Court provides for jurisdiction in respect of genocide as defined, crimes against humanity as defined but in each c only with respect to crimes committed after the entry into force of this statute. Official capacity as a Head of State or Government shall in no case exempt the person from criminal responsibility under this statute. Although it is concerned wi jurisdiction, it does indicate the limits which States were prepared to impose in th area on the tribunal.

There is thus no doubt that States have been moving towards the recognition of some crimes as those which should not be covered by claims of State or Head of State or other official or diplomatic immunity when charges are brought before international tribunals.

Movement towards the recognition of crimes against international law is to be se also in the decisions of National Courts, in the resolution of the General Assembl the United Nations 1946, in the reports of the International Law Commission and the writings of distinguished international jurists.

It has to be said, however, at this stage of the development of international law some of those statements read as aspirations, as embryonic. It does not seem to that it has been shown that there is any State practice or general consensus let alone a widely supported convention that all crimes against international law sho be justiciable in National Courts on the basis of the universality of jurisdiction. Nc there any jus cogens in respect of such breaches of international law which requi that a claim of State or Head of State immunity, itself a well established principle international law, should be overridden. I am not satisfied that even now there would be universal acceptance of a definition of crimes against humanity. They h their origin as a concept after the 1914 War and were recognised in the Nurembe Tribunal as existing at the time of international armed conflicts. Even later it was necessary to spell out that humanitarian crimes could be linked to armed conflict internally and that it was not necessary to show that they occurred in internation conflict. This is no doubt a developing area but states have proceeded cautiously

That international law crimes should be tried before international tribunals or in t

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perpetrator's own state is one thing; that they should be impleaded without rega to a long-established customary international law rule in the Courts of other state another. It is significant that in respect of serious breaches of "intransgressible principles of international customary law" when tribunals have been set up it is w carefully defined powers and jurisdiction as accorded by the states involved; that the Genocide Convention provides only for jurisdiction before an international tribunal of the Courts of the state where the crime is committed, that the Rome Statute of the International Criminal Court lays down jurisdiction for crimes in ver specific terms but limits its jurisdiction to future acts.

So, starting with the basic rule to be found both in Article 39(2) and in customary international law that a former Head of State is entitled to immunity from arrest a prosecution in respect of official acts done by him in the exercise of his functions Head of State, the question is what effect, if any, the recognition of acts as international crimes has in itself on that immunity. There are two extreme positic The first is that such recognition has no effect. Head of State immunity is still necessary for a former Head of State in respect of his official acts; it is long established, well recognised and based on sound reasons. States must be treatec recognising it between themselves so that it overrides any criminal act, whether national or international. This is a clear cut rule, which for that reason has considerable attraction. It, however, ignores the fact that international law is not static and that the principle may be modified by changes introduced in State practice, by Conventions and by the informed opinions of international jurists. Ju: as it is now accepted that, contrary to an earlier principle of absolute immunity, States may limit State immunity to acts of sovereign authority (acta jure imperii) exclude commercial acts (acta jure gestionis) as the United Kingdom has done ar just as the immunity of a former Head of State is now seen to be limited to acts which he did in his official capacity and to exclude private acts, so it is argued, th immunity should be treated as excluding certain acts of a criminal nature.

The opposite extreme position is that all crimes recognised as, or accepted to be, international crimes are outside the protection of the immunity in respect of form Heads of State. I do not accept this. The fact even that an act is recognised as a crime under international law does not mean that the Courts of all States have jurisdiction to try it, nor in my view does it mean that the immunity recognised b States as part of their international relations is automatically taken away by international law. There is no universality of jurisdiction for crimes against international law: there is no universal rule that all crimes are outside immunity ratione materiae.

There is, however, another question to be asked. Does international law now recognise that some crimes are outwith the protection of the former Head of Stat immunity so that immunity in Article 39 (2) is equally limited as part of domestic law; if so, how is that established? This is the core question and it is a difficult question.

It is difficult partly because changes in international law take place slowly as stat modify existing principles. It is difficult because in many aspects of this problem t appropriate principles of international law have not crystallised. There is still muc debate and it seems to me still much uncertainty so that a national judge should proceed carefully. He may have to say that the position as to State practice has r reached the stage when he can identify a positive rule at the particular time whe he has to consider the position. This is clearly shown by the developments which have taken place in regard to crimes against humanity. The concept that such crimes might exist was as I have said recognised, for Nuremburg and the Tokyo Tribunals in 1946 in the context of international armed conflict when the tribunal were given jurisdiction to try crimes against humanity. The Affirmation of the Principles of International Law adopted by the United Nations General Assembly i December 1945, the International Law Commission reports and the European Convention on Human Rights and Fundamental Freedoms also recognised these

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crimes as international crimes. Since then there have been, as I have shown, conventions dealing with specific crimes and tribunals have been given jurisdictio over international crimes with a mandate not to treat as a defence to such crime: the holding of official office including that of Head of State. National Courts as in Eichmann Case held that they had jurisdiction to deal with international crimes (s also *Re Honecker* (1984) 80 I.L.R. 36, and *Demanjanjuk* 776 F 2d 511).

But except in regard to crimes in particular situations before international tribuna these measures did not in general deal with the question as to whether otherwis existing immunities were taken away. Nor did they always specifically recognise t jurisdiction of, or confer jurisdiction on, National Courts to try such crimes.

I do not find it surprising that this has been a slow process or that the Internatio Law Commission eventually left on one side its efforts to produce a convention dealing with Head of State immunity. Indeed, until *Prosecutor v. Tadic* (105 I.L.R 419) after years of discussion and perhaps even later there was a feeling that cri against humanity were committed only in connection with armed conflict even if did not have to be international armed conflict.

If the States went slowly so must a national judge go cautiously in finding that th immunity in respect of former Heads of State has been cut down. Immunity, it m be remembered, reflects the particular relationship between states by which they recognise the status and role of each others Head and former Head of State.

So it is necessary to consider what is needed, in the absence of a general international convention defining or cutting down Head of State immunity, to def or limit the former Head of State immunity in particular cases. In my opinion it is necessary to find provision in an international convention to which the State asserting, and the State being asked to refuse, the immunity of a former Head of State for an official act is a party; the convention must clearly define a crime aga international law and require or empower a state to prevent or prosecute the crir whether or not committed in its jurisdiction and whether or not committed by on its nationals; it must make it clear that a National Court has jurisdiction to try a crime alleged against a former Head of State, or that having been a Head of Stat no defence and that expressly or impliedly the immunity is not to apply so as to l proceedings against him. The convention must be given the force of law in the National Courts of the State; in a dualist country like the United Kingdom that means by legislation, so that with the necessary procedures and machinery the crime may be prosecuted there in accordance with the conditions to be found in convention.

In that connection it is necessary to consider when the pre-existing immunity is l In my view it is from the date when the national legislation comes into force, although I recognise that there is an argument that it is when the convention cor into force, but in my view nothing earlier will do. Acts done thereafter are not protected by the immunity; acts done before, so long as otherwise qualifying, are protected by the immunity. It seems to me wrong in principle to say that once th immunity is cut down in respect of particular crimes it has gone even for acts dor when the immunity existed and was believed to exist. Equally, it is artificial to say that an evil act can be treated as a function of a Head of State until an internatio convention says that the act is a crime when it ceases ex post facto to have beer function. If that is the right test, then it gives a clear date from which the immun was lost. This may seem a strict test and a cautious approach, but in laying dowr when States are to be taken to be taken as abrogating a long established immun it is necessary to be satisfied that they have done so.

The Crimes Alleged

What is the position in regard to the three groups of crimes alleged here: torture

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genocide and taking hostages?

The Torture Convention of 10 December 1984 defines torture as severe pain or suffering intentionally inflicted for specific purposes, "by or at the instigation of o with the consent or acquiescence of a public official or other person acting in an official capacity."

Each State Party is to ensure that all acts of torture are offences under its crimin law and to establish jurisdiction over offences committed in its territory, or by a national of that State or, if the State considers it appropriate, when the victim is national of that State (Article 5). It must also establish jurisdiction where, "the alleged offender is present under its jurisdiction and it does not extradite pursua to Article 8." Thus, where a person is found in the territory of a State in the case contemplated in Article 5, then the State must, by Article 7: "if it does not extrad him, submit the case to its competent authorities for the purpose of prosecution. States are to give each other the greatest measure of assistance in connection w criminal proceedings.

The important features of this Convention are: (1) that it involves action "by a pu official or other person acting in an official capacity"; (2) that by Articles 5 and 7, not extradited, the alleged offender must be dealt with as laid down; and (3) Chi was a State Party to this Convention and it therefore accepted that, in respect of offence of torture, the United Kingdom should either extradite or take proceedinç against offending officials found in its jurisdiction.

That Convention was incorporated into English law by section 134 of the Crimina Justice Act 1988. Section 134(1) and (2) provides:

- "(1)A public official or person acting in an official capacity, whatever his nationality, commits the offence of torture if in the United Kingdom or elsewhere he intentionally inflicts severe pain or suffering on another in th performance or purported performance of his official duties."

- "(2)A person not falling within subsection (1) above commits the offence c torture, whatever his nationality, if:- (a)in the United Kingdom or elsewhe he intentionally inflicts severe pain or suffering on another at the instigatic or with the consent or acquiescence:- (i) of a public official; or (ii)of a per acting in an official capacity; and (b)the official or other person is perform or purporting to perform his official duties when he instigates the commis of the offence or consents to or acquiesces in it."

If committed other than in the United Kingdom lawful authority, justification or excuse under the law of the place where the torture was inflicted is a defence, b in Chile the constitution forbids torture.

It is thus plain that torture was recognised by the State Parties as a crime which might be committed by the persons, and be punishable in the States, referred to particular, the Convention requires that the alleged offender, if found in the terri of a State Party, shall be, if not extradited, submitted to the prosecution authorit

This, however, is not the end of the enquiry. The question remains--have the Sta Parties agreed, and in particular have the United Kingdom and Chile, which asse the immunity, agreed that the immunity enjoyed by a former Head of State for a ratione materiae, shall not apply to alleged crimes of torture? That depends on whether a Head of State, and therefore a former Head of State, is covered by th words "a public official or a person acting in that capacity". As a matter of ordina usage, it can obviously be argued that he is. But your Lordships are concerned w the use of the words in their context in an international Convention. I find it impossible to ignore the fact that in the very Conventions and Charters relied on

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the appellants as indicating that jurisdiction in respect of certain crimes was extended from 1945 onwards, there are specific provisions in respect of Heads of State as well as provisions covering officials. These provisions may relate to jurisdiction, or to the removal of a defence, and immunity of course is different fr each, both as a concept and in that it is only pleadable in bar to proceedings in National Courts. These provisions do, however, serve as a guide to indicate whet States have generally accepted that former Heads of State are to be regarded as "public officials" and accordingly that the immunity has been taken away from former Heads of State in the Torture Convention.

Thus, in the Nuremberg Charter 1945 (Article 7), the official position of defendan "whether as *Heads of State* or responsible officials" does not free them from responsibility. In the Genocide Convention (1948) persons committing the act sh be punished "whether they are *constitutionally responsible rulers*, public officials private individuals". In the Yugoslav and Rwanda Tribunals,

- "The official position of any accused person, whether as *Head of State* or Government or as a responsible Government official"

is not a defence (Article 7). Even as late as the Rome Statute on the Internationa Criminal Court by Article 27 "official capacity as a *Head of State or Government* .. Government official" is not exempted from criminal responsibility.

In these cases, States have not taken the position that the words public or government official are wide enough to cover Heads of State or former Heads of State, but that a specific exclusion of a defence or of an objection to jurisdiction that basis is needed. It is nothing to the point that the reference is only to Head State. A Head of State on ceasing to be a Head of State is not converted into a public official in respect of the period when he was a Head of State if he was not otherwise. This is borne out by the experience of the International Law Commiss in seeking to produce a draft in respect of State immunity. The reports of its meeting show the difficulties which arose in seeking to deal with the position of a Head of State.

I conclude that the reference to public officials in the Torture Convention does nc include Heads of State or former Heads of State, either because States did not w to provide for the prosecution of Heads of State or former Heads of State or because they were not able to agree that a plea in bar to the proceedings based immunity should be removed. I appreciate that there may be considerable politic and diplomatic difficulties in reaching agreement, but if States wish to exclude th long established immunity of former Heads of State in respect of allegations of specific crimes, or generally, then they must do so in clear terms. They should nc leave it to National Courts to do so because of the appalling nature of the crimes alleged.

The second provisional warrant does not mention genocide, though the internatic warrant and the request for extradition do. The Genocide Convention in Article 6 limits jurisdiction to a tribunal in the territory in which the act was committed anc not limited to acts by public officials. The provisions in Article 4 making "constitutionally responsible rulers" liable to punishment is not incorporated into English Genocide Act of 1948. Whether or not your Lordships are concerned with second international warrant and the request for extradition (and Mr. Nicholls, Q. submits that you are not), the Genocide Convention does not therefore satisfy th test which I consider should be applied.

The Taking of Hostages Convention which came into force in 1983 and the Takin Hostages Act 1982 clearly make it a crime for "any person, whatever his national who "in the United Kingdom or elsewhere to take hostages for one of the purpos specified." This again indicates the scope both of the substantive crime and of

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jurisdiction, but neither the Convention nor the Act contain any provisions which be said to take away the customary international law immunity as Head of State former Head of State.

It has been submitted that a number of other factors indicate that the immunity should not be refused by the United Kingdom--the United Kingdom's relations wi Chile, the fact that an amnesty was granted, that great efforts have been made i Chile to restore democracy and that to extradite the respondent would risk unsettling what has been achieved, the length of time since the events took plac that prosecutions have already been launched against the respondent in Chile, th the respondent has, it is said, with the United Kingdom Government's approval o acquiescence, been admitted into this country and been received in official quart These are factors, like his age, which may be relevant on the question whether h should be extradited, but it seems to me that they are for the Secretary of State (the executive branch) and not for your Lordships on this occasion.

The Alternative Basis--Acts of State--and Non-Justiciability

United States Courts have been much concerned with the defence of act of state well as of sovereign immunity. They were put largely on the basis of comity between nations beginning with the Schooner Exchange v. M'Faddon (supra). Se also *Underhill v. Hernandez* 168 US 250. In *Banco National de Cuba v. Sabbatinc* 307F 2d 845 (1961) it was said that "the Act of State Doctrine briefly stated that American Courts will not pass on the validity of the acts of foreign governments performed in their capacities as sovereigns within their own territories . . . This doctrine is one of the conflict of laws rules applied by American Courts; it is not i a rule of international law . . . it stems from the concept of the immunity of the sovereign because "the sovereign can do no wrong" (page 855) see also the 3rd Restatement of the Law paragraph 443/444. In *International Association of Machinists v. Opec* (649F 2d 134) [1981] the 9th circuit Court of Appeals took th matter further

- "The doctrine of sovereign immunity is similar to the Acts of State Doctrin that it also represents the need to respect the sovereignty of foreign state The law of sovereign immunity goes to the jurisdiction of the Court. The A of State Doctrine is not jurisdictional . . . Rather it is a procedural doctrine designed to avoid action in sensitive areas. Sovereign immunity is a princi of international law, recognised in the United States by statutes. It is the states themselves, as defendants, who may claim sovereign immunity."

The two doctrines are separate, but they are often run together. The law of Sovereign immunity is now contained in the Foreign Sovereignty Immunities Act USSC-1602) ("F.S.I.A.") in respect of civil matters and many of the decisions on sovereign immunity in the United States turn on the question whether the exemption to a general State immunity from suit falls within one of the specific exemptions. The F.S.I.A. does not deal with criminal Head of State immunity. In United States the Courts would normally follow a decision of the executive as to t grant or denial of immunity and it is only when the executive does not take a position that "Courts should make an independent determination regarding immunity" (Kravitch S.C.J. in US v. Noriega (7 July 1997)).

In *Kirkpatrick v. Environmental Tectonics* (493 U.S. 403 110 S. Ct. 701 (1990)) th Court said that, having begun with comity as the basis for the act of State doctri the Court more recently regarded it as springing from the sense that if the judici adjudicated on the validity of foreign acts of State, it might hinder the conduct of foreign affairs. The Supreme Court said that "Act of State issues only arise when Court must decide--that is when the outcome of the case turns upon--the effect official action by a foreign Sovereign" (p. 705).

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In English law the position is much the same as it was in the earlier statements c the United States Courts. The act of State doctrine "is to the effect that the Cour of one State do not, as a rule, question the validity or legality of the official acts c another Sovereign State or the official or officially avowed acts of its agents, at a rate in so far as those acts involve the exercise of the State's public authority, purport to take effect within the sphere of the latter's own jurisdiction and are nc themselves contrary to international law" (*Oppenheim* 9th edition, page 365). In *Buttes Gas* (supra), Lord Wilberforce spoke of the normal meaning of acts of Stat as being "action taken by a Sovereign State within its own territory." In his speec only a year before Sabatino, Lord Wilberforce asked whether, apart from cases concerning acts of British officials outside this country and cases concerned with examination of the applicability of foreign municipal legislation within the territor a foreign State, there was not "a more general principle that the Courts will not adjudicate upon the transactions of foreign Sovereign States"--a principle to be considered if it existed "not as a variety of 'acts of State', but one of judicial restr or abstention".

Despite the divergent views expressed as to what is covered by the Act of State doctrine, in my opinion once it is established that the former Head of State is entitled to immunity from arrest and extradition on the lines I have indicated, Un Kingdom Courts will not adjudicate on the facts relied on to ground the arrest, bu Lord Wilberforce's words, they will exercise "judicial restraint or abstention."

Accordingly, in my opinion, the respondent was entitled to claim immunity as a former Head of State from arrest and extradition proceedings in the United Kingc in respect of official acts committed by him whilst he was Head of State relating t the charges in the provisional warrant of 22 October 1998. I would accordingly dismiss the appeal.

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