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THE POSITION OF
HEADS OF STATE AND
SENIOR OFFICIALS IN
INTERNATIONAL LAW

JOANNE FOAKES

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not been issued in the correct form) had not been associated with any measures of constraint and 'was in fact merely an invitation to testify which the head of State could freely accept or decline'. The second 'summons', which was in the form prescribed by law, was again a mere request. As such, they did not infringe his inviolability or immunity from jurisdiction.

This case, together with *Certain Criminal Proceedings in France (Republic of Congo v France)*¹⁸⁸ is important in establishing that national courts may investigate alleged crimes committed abroad and, in the course of those investigations, seek testimony from an incumbent foreign head of State without necessarily infringing the latter's immunity from jurisdiction or inviolability.¹⁸⁹ It is worth noting that in the *Mutual Assistance* case, the subject of the investigation concerned international crimes allegedly committed by third parties, whereas in *Republic of Congo v France* the alleged crimes concerned acts for which responsibility was attributed, among others to the incumbent President himself. It is, however, difficult to draw any firm conclusions from the latter case as it was withdrawn from the Court's list at the request of the Government of the Republic of Congo, following the decision to deny the latter's request for provisional measures.¹⁹⁰

Immunity from suit before foreign courts

In considering a head of State's immunity from the jurisdiction of foreign courts, it is necessary to distinguish carefully between the extensive personal immunity enjoyed by incumbent heads of State and the separate functional immunity or immunity *ratione materiae* enjoyed by all State officials in

¹⁸⁸ *Certain Criminal Proceedings in France (Republic of Congo v France) (Provisional Measures)* (2003) ICJ Rep 102.

¹⁸⁹ See O'Donnell, 'Certain Criminal Proceedings in France (Republic of Congo v France) and Head of State Immunity: How Impenetrable Should the Immunity Veil Remain?' (2008) 26 Boston University International LJ 375 where it is concluded that, although an incumbent head of State enjoys absolute personal immunity, the ICJ's decision to reject the Congo's request for provisional measures (which would have stopped the French investigation entirely) indicates that it will not allow that 'veil of absolute immunity' to blindfold the Court or human rights litigants from international law violations. An incumbent head of State's decisions, while cloaked in an impenetrable veil during his tenure, are not invisible. Rather they are carried out on an international stage.

¹⁹⁰ In 2010, the French Court of Cassation upheld a call by Transparency International for an investigation into corruption charges involving Presidents Denis Sassou Nguesso of the Republic of the Congo, Teodoro Obiang Nguema Mbasogo of Equatorial Guinea, and Ali Bongo of Gabon (Re investigation of Assesors Blen Mal Acquies' Case, Court of Cassation, No 6042 9 November 2010). As sitting heads of State the three rulers will be able to claim immunity from any resulting prosecution but investigation could lead to proceedings against their relatives and associates and to their own prosecution following departure from office. See *The Times*, 10 November 2010 and the *Sunday Times*, 10 April 2011. However, on 26 September 2012, the Republic of Equatorial Guinea instituted proceedings against France (including a request for provisional measures) before the ICJ seeking the annulment of the proceedings and investigative measures against President Mbasogo and his Vice-President (against whom an arrest warrant has also been issued) on the ground that such actions violate the international law of state immunity.

respect of official acts carried out while they were in office. A former head of State continues to be entitled to the latter after he has left office but it is far less extensive than the personal immunity enjoyed by an incumbent head of State. The differences between these two types of immunity are discussed in section 1 above.

Personal immunity of incumbent head of State

(a) Criminal proceedings

It has long been accepted that, under customary international law, a serving head of State enjoys absolute immunity from the criminal jurisdiction of foreign courts.¹⁹¹ Moreover, the ICJ has held that this type of immunity applies not only in relation to official acts but also in relation to private acts and regardless of whether the head of State is on official business or on a private visit.¹⁹² Similarly, the immunity will apply whether the act concerned was carried out before the head of State assumed office or during the period of office.¹⁹³ The extensive nature of a sitting head of State's personal immunity in this regard has long been acknowledged by national courts. In 1989 the Swiss Supreme Court agreed with the following proposition:

Heads of State are absolutely exempt *ratione personae* from all measures of constraint and exercise of jurisdiction on the part of a foreign State for acts committed by them, anywhere in the world, in the exercise of their official functions. By contrast with immunity from civil jurisdiction... immunity from criminal jurisdiction of heads of State is absolute... This immunity would appear to cover, without reservation, to private acts.¹⁹⁴

The ICJ's conclusion in *Arrest Warrant of 11 April 2000 (DRC v Belgium)* was based upon the view that such full immunity is necessary to protect the head of State against any act of authority of another State which would hinder that individual in the performance of his or her duties. Before that decision, it had been argued that an exception to this rule of absolute inviolability and immunity from criminal jurisdiction should be accepted in the case of serious crimes under international law. However, the relatively sparse State practice that existed did not support such a contention and, even in the *Pinchoet* case, where an exception was admitted to the functional immunity enjoyed by a former head of State in relation to the crime of torture, the Court emphasized that the personal immunity to which an incumbent head of State was

¹⁹¹ See eg *Re Honcker* (1984) 80 ILR 365.

¹⁹² This is in contrast to the type of personal immunity enjoyed by a person on special mission which applies only when the individual concerned is on official business and for the duration of the special mission.

¹⁹³ See *Arrest Warrant of 11 April 2000 (DRC v Belgium)* (2002) ICJ Rep 9.