Do Heads of State in Office Enjoy Immunity from Jurisdiction for International Crimes? The Ghaddafi *Case Before the French* Cour de Cassation

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Abstract

In this paper, which comments upon a recent decision of the French Cour de Cassation*, an attempt is made to offer an evaluation of the status of international customary law on the question of jurisdictional immunity of Heads of State. It is submitted that under international customary law Heads of State (like other state officials) do not benefit from functional immunity for international crimes. Some acts of terrorism may have become international crimes under customary law and, consequently, exclude the operation of functional immunity for Heads of State. On the other hand, personal immunity should be considered as an appropriate protection for Heads of State, as it ensures virtually absolute immunity while the Head of State is in office (but ceases with the termination of official functions).*

1 The Case before the *Cour de Cassation*

On 13 March 2001 the *Cour de Cassation* of Paris issued its final decision in the case against Mouammar Ghaddafi, leader of the Socialist People's Libyan Arab Jamahiriya, who had been charged with murder for complicity in a terrorist action.[1] The case originated from the bombing of a DC-10 aircraft of the UTA airline on 19 September 1989, which exploded over the Ténéré desert causing the death of 156 passengers and

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1 *Arrêt* of the *Cour de Cassation*, 13 March 2001, No. 1414, at 1, the charge is 'complicité de destruction d'un bien par l'effet d'une substance explosive ayant entraîné la mort d'autrui, en relation avec une entreprise terroriste' (on file with the author).

15 crew members, including French citizens.[2] Subsequently, the *Cour d'Assises* condemned *in absentia* (*par contumace*) six Libyan citizens (members of the secret services, including the brother-in-law of Ghaddafi, who was alleged to be the chief of Libyan intelligence) for murder and destruction of an aircraft, consisting of acts of terrorism.[3] On the basis of this judgment, an NGO and some relatives of the victims filed a complaint with the competent French national authorities. They claimed involvement of the Libyan Government in the commission of those acts and requested the opening of a case against the Libyan leader, Ghaddafi. Pursuant to this complaint, a *juge d'instruction* of the *Tribunal de Grande Instance* of Paris brought charges against Ghaddafi for complicity in acts of terrorism leading to murder and the destruction of the aircraft. The *Chambre d'accusation* confirmed these charges. The Prosecutor filed a motion for annulment of the whole procedure before the *Cour de Cassation*, on the basis of the principle of the immunity of Heads of State. The Supreme Court, in a three-page terse and poorly reasoned decision, accepted the plea of immunity and declined jurisdiction on the case.

In this paper, an attempt will be made to show why the decision is questionable in four respects. First, it did not justify why it considered Ghaddafi as Head of State. Secondly, it did not adequately distinguish between immunity for official acts (or functional immunity) and personal immunity. Thirdly, it did not clarify whether it considered that exceptions to functional immunity for international crimes are provided for only by conventional texts or also by customary rules. Fourthly, it did not explain why it considered that terrorism was not an international crime under customary law.

2 Head of State or De Facto Head of State?

The Court did not indicate on what basis it considered Ghaddafi a Head of State. It is not possible to dwell at great length on this matter in this paper. However, it should be noted that, according to the Libyan constitutional system,[4] the characterization of Ghaddafi as Head of State may be doubtful. It is true that Ghaddafi is always referred to as the 'leader of the Revolution of 1st September', but the official functions to 'declare war, conclude and ratify treaties and agreements' are attributed to the Revolutionary Command Council,[5] a collective Head of State, while the acceptance of credentials of foreign diplomats is delegated by the General People's Congress to its chairperson.[6] Although 'normally a single person is Head of State ... there may also be joint or

[2] For more details on the facts of the case, cf. 'Documents 26 and 27', in Levie (ed.), *Terrorism*, vol. VII (1995) 217–219.

[3] Decision of the *Chambre d'accusation* of the *Cour d'Appel* of Paris, 20 October 2000. Cf. the unofficial text of the decision posted by the NGO Sos Attentats on the Internet at www.sos-attentats.org/html-fr/publi/paroles/archive/n11/dc10.htm.

[4] Cf. Ehrhardt, 'Libya', in Blaustein and Flanz (eds), *Constitutions of the Countries of the World*, Binder XIX (1993).

[5] Article 23 of the Constitutional Proclamation of 11 December 1969, *ibid.*, at 5.

[6] Article IV of the Declaration on the Establishment of the Authority of the People, *ibid.*, at 11.

collective Heads of State':[7] this was the general rule for example under socialist constitutional systems,[8] but is also adopted in other countries, particularly Switzerland.[9] However, even if Ghaddafi cannot be formally considered the Head of State of Libya,[10] he could, nonetheless, be regarded as *de facto* Head of State.[11] This finding would be reached not only on the basis of his factual influence on Libyan politics,[12] but on account of the performance of more specific powers generally attributed to Heads of State, which are substantially reflected in the 'living' Constitution of Libya.[13]

3 Which Immunities are Granted to (De Facto) Heads of State in Office?

A *General*

The French Supreme Court held that (absent any contrary international provision binding on the parties, i.e. the two states involved) international customary law prohibits the exercise of criminal jurisdiction over foreign Heads of State in office.[14]

[7] Watts, 'The Legal Position in International Law of Heads of State, Heads of Government and Foreign Ministers', 247 *RdC* (1994-III), at 21.

[8] For example, in the Soviet Union, the function of Head of State was attributed to the Praesidium of the Supreme Soviet (Article 49 of the USSR Constitution); cf. *ibid.*, at note 1.

[9] The Federal Council has a number of powers pertaining to Heads of State: cf. Articles 95 and 102 of the Federal Constitution of the Swiss Federation; and Flanz and Klein, 'Switzerland', in Blaustein and Flanz, *supra* note 4, at Binder X.

[10] According to Ehrhardt, *supra* note 4, at xxii, Ghaddafi himself, addressing the General People's Congress on 2 March 1992, declared that he held no office in the Libyan Government (for the purpose of underscoring that he had no authority to extradite the two individuals suspected of the Lockerbie bombing).

[11] The French Government in a *communiqué de presse* of 20 October 2000 (on file with the author) clearly stated that 'du point de vue du ministère des Affaires étrangères, du point de vue du gouvernement français, de la branche exécutive de l'Etat, il y a effectivement une constatation qui est claire, c'est que l'ensemble de la communauté internationale considère le Colonel Kadhafi comme le chef de l'Etat libyen' and concluded 'on n'a jamais eu l'idée qu'il y ait un autre personnage libyen que le Colonel Kadhafi qui soit considéré comme chef de l'Etat, c'est tout'.

[12] The factual situation of exercising a very strong influence in the political life of a state is not *ipso facto* sufficient for a person to be considered a *de facto* Head of State. In *United States v. Noriega*, 746 F Supp 1506 (SD Fla, 1990), it was held that being the 'strong man' behind a governmental apparatus formally held by others does not amount to a position of *de facto* Head of State.

[13] On this issue, more than the Conclusions of the *Avocat général* (on file with the author), the impugned decision of the *Chambre d'accusation* (*supra* note 3) sheds some light on the legal arguments implied by the *Cour de Cassation* in its decision. The *Chambre d'accusation* affirmed that 'en tout état de cause [Colonel Ghaddafi] exercerait de manière effective et continue les fonctions normalement réservées aux Chefs d'Etat, dès lors, notamment . . . qu'il dispose d'un pouvoir d'orientation de la politique générale du pays, préside les grandes manifestations nationales, exerce la prééminence au sein de l'Etat libyen, participe aux réunions du Sommet des Chefs d'Etats arabes ou africains . . . reçoit les représentants des Etats étrangers et les lettres de créance des ambassadeurs'. These powers seem to coincide with those generally attributed to Heads of State as indicated by Watts, *supra* note 7.

[14] *Arrêt*, *supra* note 1, at 2, where it was held: 'la coutume internationale s'oppose à ce que les chefs d'Etats en exercice puissent, en l'absence de dispositions internationales contraires s'imposant aux parties concernées, faire l'objet de poursuites devant les juridictions pénales d'un Etat étranger'.

In so doing, the Court did not clarify what immunity was recognized to Ghaddafi, i.e. whether it was the immunity linked to his official functions, or the immunity covering his private life. In particular, it is not clear whether Ghaddafi was considered to be immune as a state official, with the consequence that prosecution was precluded even for the future (when he will no longer be in office), or as a private person, with the consequence that he would be protected as long as he is Head of State.[15]

It is well known that there are two different aspects according to which it may be possible to consider the issue of immunity of Heads of State:[16] first, the so-called functional immunity[17] or immunity for official acts (or *ratione materiae*),[18] which is granted to all state officials for the purpose of not hampering, or interfering with, the performance of state activities. The consequence is that a public official cannot be held accountable for acts performed in the exercise of an official capacity, as these are to be referred to the state itself. An application of this principle to diplomatic agents can be found in Article 39(2) of the Vienna Convention of 1961.[19] Secondly, the personal immunity of Heads of State, based on a treatment comparable to those granted to diplomatic agents for personal acts, implies immunity both from civil and criminal jurisdiction (with some well-known exceptions, at least for diplomats) as a form of additional protection.[20]

In this case, although the Court did not specify on the basis of which immunity it declined to exercise jurisdiction, it seems that it considered Ghaddafi immune under the functional immunity principles, a conclusion which, for the reasons set out below, does not seem to be correct.

[15] This issue has not only theoretical relevance, but may have a concrete impact on the rights of victims, because if the Court intended to grant full immunity, considering those acts as official acts of the state, Ghaddafi will be immune from criminal prosecution and civil suits even when he leaves office. On the other hand, if it was admitted that as Head of State in office Ghaddafi is only entitled to personal immunity from jurisdiction, it may be suggested that when he leaves office victims could present their claims and national courts will have to affirm jurisdiction.

[16] Cf. Watts, *supra* note 7, at 35–81, explains how protection, privileges and immunity of Heads of State under international law are based, on the one hand, on the *ratio* of state immunity (for their official acts), and, on the other, on the basis of diplomatic immunities (for all personal aspects). It seems that no special rules exist concerning the immunity of Heads of State: *ibid.*, at 35.

[17] In this respect, cf. the thorough study by De Sena, *Diritto internazionale e immunità funzionale degli organi statali* (1996).

[18] Other expressions are also adopted to refer to functional immunity, such as, for example, immunity *ratione materiae* or immunity for official acts; cf. Brownlie, *Principles of Public International Law* (5th ed., 1998) 361–362. For a penetrating discussion of the doctrine of functional immunity, cf. the ICTY Appeals Chamber Decision of 29 October 1997, on the issue of subpoena in the *Blaskic* case (IT-94–1-AR108*bis*) paras 38–45.

[19] The rule establishes that 'when the functions of a person enjoying privileges and immunities have come to an end, such privileges and immunities shall normally cease at the moment when he leaves the country, or on expiry of a reasonable period in which to do so, but shall subsist until 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 of the mission, *immunity shall continue to subsist*' (Article 39(2) of the Vienna Convention on Diplomatic Relations 1961). Emphasis added.

[20] Naturally, it must be underscored that, while diplomatic agents enjoy personal immunity only in the receiving state, the Head of State probably enjoys broader immunity.

B *The Scope of Personal Immunity of Heads of State from Jurisdiction*

Diplomatic immunity safeguards the uninterrupted deployment of state representation by diplomatic agents (on the basis of the principle *ne impediatur legatio*), banning almost any kind of intrusion into the agent's life by the authorities of the receiving state. Accordingly, it implies a very broad immunity from jurisdiction for private acts, with some well-known exceptions linked to the particular nature of the case,[21] or the nationality of the diplomat.[22] Personal immunity is closely linked to the fact that the receiving state accepts the diplomatic agent.[23] Thus, the agent is entitled to such immunity starting from the acceptance of credentials until he or she leaves the country, either because he or she is no longer in office or is sent back by the receiving state as *persona non grata*.

These principles relating to personal immunities of diplomatic agents must be applied to Heads of State in their capacity of representatives of the state in its external relations.[24] Practice confirms that Heads of State are certainly entitled to personal immunity (which includes personal inviolability, special protection for their dignity, immunity from criminal and civil jurisdiction, from arrest, etc.) when they are on the territory of a foreign state.[25] Protection is generally afforded when a Head of State is abroad both for official mission and for private visits (or even *incognito*). In the former case, immunity for private actions guarantees the scope of the mission and the fulfilment of the particular tasks involved, while in the latter, immunity is afforded in order to protect the general interest of the state to be represented (on the basis of a principle comparable to *ne impediatur legatio*). There are two main reasons that justify this approach: the first is reciprocal respect and courtesy (international comity); the second is linked to the particular position of the Head of State as permanent representative of the state, and, consequently, without territorial limitations. These two aspects of personal immunity ensure that the Head of State is fully shielded from interventions in his or her personal sphere.

It should be recalled that personal immunity of diplomatic agents for private acts is limited to the territory of the receiving state. It is argued that Heads of State, on account of their particular function, may be covered by a broader immunity from criminal jurisdiction, which extends beyond territorial limits (i.e. not limited to a particular state). In other words, as Heads of State permanently represent their state and its unity in foreign relations (*jus representationis omnimodae*), it can be assumed that there exists a sort of presumption according to which other states are supposed to accept that person as counterpart in foreign relations. Sir Arthur Watts, in his Hague lectures, refers to this acceptance as recognition: this, however, should not be seen as

[21] Mainly actions *in rerum* or linked to commercial or professional activities freely undertaken by the diplomatic agent as a private individual.

[22] In cases where the agent is a national of the receiving state, most privileges linked to diplomatic status may not operate.

[23] Sperduti persuasively indicates that diplomatic immunity is entirely based on a bilateral relationship between the sending state and the receiving state, substantially governed by reciprocity: cf. *Lezioni di diritto internazionale* (1958) 67.

[24] Cf., for example, section 20 of the UK State Immunity Act 1978.

[25] UN General Assembly Res. 24/2530 (1969), Annex (a), Convention on Special Missions.

a formal requirement for a state official to be Head of State under international law. Recognition, even in an implicit form, serves the same function of acceptance of credentials for diplomatic agents.

In any event, personal immunity of Heads of State (and perhaps Heads of Government and Ministers of Foreign Affairs), even in the special broader form suggested above, ceases as soon as they are no longer in office.

Finally, an additional element should be underscored. It is submitted that personal immunity of Heads of State for official visits must always be *preserved*, and even international crimes make no exception. This rule may have great importance, for example, in the case of a Head of State accused of war crimes who is invited to peace talks. Accordingly, a state could not invite a foreign Head of State and subsequently arrest him or her while on its territory for official meetings.[26] Such a state may refuse the visit, but cannot accept the visit and use it as a means for detaining the Head of a foreign state.[27] This would intolerably undermine international relations and be contrary to the purpose of those international rules which protect state sovereignty in external relations. Additionally, it is logical to believe that a Head of State would be covered by such immunity whenever he or she travels through a state to attend a diplomatic meeting in another state, or at the seat of an international organization. Recently, this was clearly affirmed by Belgium, with regard to an arrest warrant concerning the Minister of Foreign Affairs of Congo, in the case against Congo before the International Court of Justice,[28] and was implicitly confirmed by the Court in its order of 8 December 2000.[29]

4 Are Heads of State Entitled to Immunity from Jurisdiction against Charges for Crimes under International Customary Law?

A *General*

The decision under review implicitly admits the possibility of exceptions to immunity from jurisdiction of Heads of State in office. The Court concluded: 'at this stage of development of international customary law, *the crime charged* [i.e. terrorism], no matter how serious, *does not fall within the exceptions* to the principle of immunity from

[26] This issue was incidentally dealt with in the *Pinochet* case, with specific reference to section 20 of the UK State Immunity Act 1978 (cf. the opinions of Lord Browne-Wilkinson and Lord Phillips); see in this respect Bianchi, 'Immunity Versus Human Rights: The Pinochet Case', 10 *EJIL* (1999) at 237–277, nn. 42 and 77.

[27] Cf. the Order of 6 November 1998 of the Belgian Judge Vandermeersch, reprinted in 79 *Revue de droit pénal et de criminologie* (1999) at 278 *et seq*.

[28] Cf. the pleadings of Professor E. David before the International Court of Justice, in which he quoted the arrest warrant issued by the Belgian judge where the above-mentioned principle is clearly affirmed. Cf. www.icj-cij.org, under the folder 'Docket', case *Congo v. Belgium*, Hearing of 21 November 2000, 10.00 am.

[29] Cf. in this respect the Order of the International Court of Justice in the *Congo v. Belgium* case, *supra* note 28, 8 December 2000.

jurisdiction of foreign Heads of State in office.'[30] An *a contrario* interpretation of this passage leads to the conclusion that there are crimes that constitute exceptions to jurisdictional immunity of Heads of State. This passage, however, does not shed any light on the type of immunity involved.

B *Functional Immunity of Heads of State and International Crimes*

It is generally agreed that an exception to functional immunity exists in cases where the individual is responsible for crimes under international customary law.[31] The consequence is that the state official, including a Head of State, is personally responsible for his or her crimes.[32] The *Cour de Cassation* indirectly confirmed the existence of this exception, when it said that the crime charged is not included among those that would justify exceptions to immunity from jurisdiction.

Accountability of state officials derives from the emergence in customary international law of provisions based on the consciousness that certain acts (international crimes of individuals) cannot be considered as legitimate performance of official functions.[33] These acts, on the one hand, entail the responsibility of the state, and on the other the individual criminal responsibility of the perpetrator.[34]

This principle was first enshrined in the Versailles Treaty (Art. 227, whereby 'the Allied Powers publicly arraign the former German Emperor, for a supreme offence against international morality and the sanctity of treaties'). Moreover, the same principle was proclaimed in the Charter of the Nuremberg Tribunal (Article 7 of the IMT Charter), subsequently endorsed by the UN General Assembly, with its resolution affirming the principles of Nuremberg.[35] Additionally, a rule in the very same direction was adopted in Article IV of the Genocide Convention of 1948.[36] Finally, the

[30] The Court stated that 'en l'état du droit international, *le crime dénoncé*, quelle qu'en soit la gravité, ne *relève pas des exceptions* au principe de l'immunité de juridiction des chefs d'Etats étrangers en exercice' (emphasis added). *Arrêt*, *supra* note 1, at 3.

[31] See Bianchi, *supra* note 26, at 262–266.

[32] Cf. Watts, *supra* note 7, at 84.

[33] Cf. the Judgment of the Nuremberg International Military Tribunal: '[The] principle of international law, which under certain circumstances, protects the representatives of a state, cannot be applied to acts which are condemned as criminal by international law. The authors of these acts cannot shelter themselves behind their official position in order to be freed from punishment in appropriate proceedings . . . The very essence of the Charter [of the Nuremberg Tribunal] is that individuals have international duties which transcend the national obligations of obedience imposed by the individual state. He who violates the laws of war cannot obtain immunity while acting in pursuance of the authority of the state if the state in authorizing action moves outside its competence under international law.' This also seems to be the reasoning behind the decision of the *Chambre d'accusation*, *supra* note 3.

[34] Cf. the decision of the ICTY Trial Chamber in the *Furundzija* case (10 December 1998) on the crime of torture, as a crime against humanity, para. 147.

[35] UN General Assembly Res. 1/95 (1946), in which the General Assembly 'affirms the principles recognized by the Charter of the Nuremberg Tribunal and the judgment of the Tribunal'.

[36] UN General Assembly Res. 1/96 (1946).

same principle is now contained in Article 7 of the ICTY Statute,[37] Article 6 of the ICTR Statute[38] and Article 27 of the ICC Statute.[39] It is important to determine whether these conventional stipulations have turned into customary law.

In the case under review the *Avocat général* (deputy prosecutor appearing [or pleading] before the *Cour de Cassation*) seemed to deny the customary nature of the principle of irrelevance of official capacity, let alone its imperative character,[40] or alternatively its applicability to Heads of State in office.[41]

As to the first aspect of the position adopted by the *Avocat général*, it should be noted that he relied on the fact that the existence of conventions containing the principle of the irrelevance of official functions meant that states explicitly excluded immunity, whenever they felt it necessary. Consequently, the exceptions would be strictly limited to those conventional texts and would not have turned into customary law.[42] This seems a doubtful assessment of international practice and *opinio iuris*, which would have required a deeper analysis by the French prosecutor. Contrary to what was held by the Court, which endorsed the opinion of the *Avocat général*, it is here submitted that there are various elements for contending that the irrelevance of functional immunity for international crimes amounts to a norm of international customary law.

First, international agreements containing this provision may contribute to the formation of custom, as they are one of the elements to be taken into account in determining whether or not a customary norm has come into existence.[43]

Secondly, there are other indicia of the formation of a customary rule, such as the unanimous approval by the General Assembly of the resolution affirming the principles of Nuremberg.[44] Another confirmation of this rule can be found in the adoption by the International Law Commission of the Draft Code of Crimes Against the Peace and Security of Mankind, which includes a provision on the irrelevance of official functions.[45]

Thirdly, there is a compelling argument supporting the conclusion that international crimes are an exception to functional immunity from jurisdiction under

[37] UN Security Council Res. 827 (1993).

[38] UN Security Council Res. 955 (1994).

[39] See the UN website at www.un.org/icc.

[40] The *Avocat général*, in his conclusions, *supra* note 13, at 10–11, denied the very existence of *ius cogens* for France because it has not ratified the Vienna Convention on the Law of Treaties.

[41] The passage is not very clear, as the arguments address at the same time both the issue of the customary or conventional nature of the rule and the determination of its scope.

[42] The *Avocat général*, *supra* note 13, at 6, stated that 'ces exemples [the conventions] démontrent ... que lorsqu'il a été décidé de déroger à la règle coutumière de l'immunité de juridiction des Chefs d'Etats en exercice, on l'a fait de manière expresse dans des textes conventionnels'.

[43] *North Sea Continental Shelf* cases, ICJ Reports (1969), at 28–29 (para. 37), 37–43 (paras 60–74); and *Icelandic Fisheries* case, ICJ Reports (1974), at 26 (para. 58); on this issue, see in general Condorelli, 'Custom', in M. Bedjaoui (ed.), *International Law: Achievements and Prospects* (1991) 179–211.

[44] Cf. *supra* note 35.

[45] See also the commentary to Article 7 of the Draft Code of Crimes Against the Peace and Security of Mankind, in *Yearbook of the International Law Commission*, vol. II (1996) 26–27. Subsequently, the General Assembly expressed its appreciation to the International Law Commission for the completion of the Draft Code by Res. 51/160 (1996).

customary law. The inclusion of this principle in the Statutes of the UN ad hoc Tribunals (ICTY and ICTR; and also in the Statute of the Special Court for Sierra Leone[46]) cannot be considered simply as a treaty stipulation. Were one to accept that this is only a treaty-based principle, one would have to perforce conclude that the Tribunals are enjoined or allowed to apply retroactive law. In other words, if — before the adoption of the Statutes — the irrelevance of official capacity had not already been a rule of customary law, Heads of State and other senior state officials accused of crimes under the Statutes might not be considered responsible for acts committed at any time prior to the adoption of the Statutes themselves. Otherwise, the *nullum crimen sine lege* principle would be breached. In addition, the immunity principle, if admitted, would have a substantial effect: it would allow (or even mandate) the attribution of the action to a different subject — the state itself. The drafting history of the Statutes of the two Tribunals makes it clear that their framers explicitly intended to *refrain from legislating* on the *substantive* law to be applied by the Tribunals (that is, international humanitarian law and criminal law); they intended simply to restate, and entrust the Tribunals with applying, existing customary law. This was clearly set forth by the Secretary-General in his Report to the Security Council[47] and was echoed by members of that body.[48] When the Statutes, once approved by the Security Council, came before the General Assembly for the election of Judges and subsequently for the adoption of the Tribunals' budgets, no member of the General Assembly objected that some of the provisions of the Statute were intended to apply international criminal or humanitarian law retroactively. The inference is therefore warranted that no member state of the UN considered, among other things, that the provision of the Statutes on the irrelevance of the position of Head of State or other senior state officials amounted to *new* law. Rephrasing this point, there was general agreement on the *customary* status of the rule whereby functional immunity did not cover the crimes enumerated in the Statutes.

Finally, this rule has been codified in Article 27 of the Statute of the International Criminal Court. In drafting the Statute, this principle was never challenged and was consistently proposed at all stages of the drafting.[49] The ICC Statute constitutes important evidence of the *opinio iuris* of members of the international community. The ICTY, on at least two occasions, referred to provisions contained in the ICC Statute underscoring that it was approved by a large majority of states and was therefore

[46] ILC Draft Statute, UN Conference Draft Statute. Cf. Art. 6, para. 2, Statute of the Special Court for Sierra Leone, UNSC S/2000/915, 4 October 2000.

[47] See the Report by the Secretary General on the establishment of the ICTY, UNSG S/25704 (3 May 1993) paras 29, 34–35, and 57–58.

[48] In this respect cf. the Security Council's debates following approval of the ICTY Statute, in UNSC S/PV.3217 (25 May 1993), and in particular the statements by the representative of Venezuela who stated that the Security Council 'would not be empowered with [. . .] the ability to set down norms of international law' (at 7) and of the United Kingdom, who affirmed that '[the] Statute does not, of course, create new law, but reflects existing international law' (at 19).

[49] ILC Draft Statute (1994), in ILC Report, A/49/10, 1994, and the UN Draft Statute for the International Criminal Court, UN Doc. A/CONF. 183/2/Add.1, 14 April 1998.

indicative of the legal views of those states on matters of international criminal law.[50] Additionally, it should be noted that none of those who abstained or voted against ever suggested that they did so because they rejected the principle that Heads of State could be held responsible for the commission of international crimes. Furthermore, no sound argument to restrict the scope of the rule can be derived from the provisions of Article 98(1) of the ICC Statute,[51] because this norm refers, on the one hand, to the immunity of the state itself,[52] and, on the other, to diplomatic immunities, such as personal immunities of Heads of State and diplomatic agents, the inviolability of the diplomatic mission and state archives. This is not in contrast with the rule that provides for the irrelevance of official capacity for international crimes, as this rule deals only with functional immunity.

The above-mentioned provisions are generally considered to have confirmed the existence, under international customary law,[53] of an exception to functional immunity for those state officials who may be responsible for international crimes.[54] The irrelevance of official functions is also confirmed by the case law of various countries: the *Filartiga v. Peña-Irala*[55] case in the US, the *Cavallo* case in Mexico[56] and the arguments of Lord Millett in the *Pinochet* case.[57]

In any case, as stated above, even the *Cour de Cassation* in the passage referred to above[58] implies that there are some international crimes that afford exceptions to the principle of immunity of Heads of State from jurisdiction, although the Court does not specify which ones.

Certainly, the desire of national courts to rely on conventional texts may be misleading. In the *Pinochet* case, for example, great emphasis was laid on the 1984 Torture Convention.[59] This, however, can be explained by the fear of breaching principles relating to criminal law such as the principle of legality of crimes, by

[50] With reference to the Rome Convention on the ICC, it has been held by the ICTY that its norms represent to a very large extent the expression of the *opinio iuris* of the vast majority of states; cf. the judgment of the Trial Chamber in the *Furundzija* case, *supra* note 34 (para. 227), and the Appeals Chamber judgment in the *Tadic* case (IT-94–1-A), 15 July 1999 (para. 223).

[51] The rule provides that the Court may not require a 'State to act inconsistently with its obligation under international law with respect to the State or diplomatic immunities of a person or property of a third State'.

[52] On the issue of state immunity, see in general Brownlie, *supra* note 18, at 322–345.

[53] Cf. Report of the UN Secretary-General, *supra* note 47, in which he refers to 'all the written comments received by the Secretary-General' that suggested, drawing on the post-Second World War precedents, that the Statute of the International Tribunal should contain provisions with regard to the individual criminal responsibility of Heads of State, government officials and persons acting in an official capacity (para. 55).

[54] Additionally, the recent indictment and issuance of arrest warrant, against Slobodan Milosevic (at the time President of the Former Republic of Yugoslavia) seems to indicate that the exception to functional immunity is not limited to former Heads of State, but covers Heads of State in office.

[55] *Filartiga v. Peña-Irala*, 630 F 2d 876 (2nd Cir, 1980).

[56] The decision is posted on the Internet at www.derechos.org/nizkor/arg/espana/mex.html.

[57] In 38 ILM (1999), at 651 *et seq*.

[58] Cf. *supra* note 30.

[59] On these issues, see Bianchi, *supra* note 26, at 243 *et seq*, and Villalpando, 'L'Affaire Pinochet', *RGDIP* (2000), at 417 *et seq*.

referring to customary notions that may be less precisely defined than treaty stipulations. Additionally, it should be recognized that when both a customary norm and a treaty rule exist, courts may be inclined to follow the conventional text, as it is generally more specific and neatly defined (this is an approach well known to international law and codified in Article 38 of the ICJ Statute).

Let us now turn to the alternative interpretation of the position adopted by the *Avocat général*, by which he suggested that the general rule on irrelevance of official capacity, in case of commission of international crimes, would not apply to Heads of State in office. It is respectfully submitted that the *Avocat général* made a mistake by considering as functional immunity what is in reality the personal immunity of Heads of State. The position held is incorrect, because no evidence supports the idea that an exception to the exclusion of functional immunity for international crimes has evolved relating to Heads of State in office. The *Avocat général* referred to the absence of practice concerning trials of Heads of State in office. In particular, he considered that the rule excluding immunity, although it was contained in several conventional instruments, was never implemented.[60] Apart from an error relating to the application of the principle by the Nuremberg Tribunal,[61] it should be observed that the reasons for lack of judicial practice on this matter can be explained, on the one hand, by the fact that Heads of State, fortunately, are not often personally involved in the commission of international crimes, and, on the other hand, by the broad scope of personal immunity of Heads of State in office.

Finally, one must also consider that nowadays even state immunity is no longer absolute. It would, thus, be nonsensical to consider that individuals covering public functions may enjoy a wider immunity than the state itself.[62] In the United States, for example, the Foreign Sovereign Immunities Act of 1976, as subsequently amended by the Antiterrorism and Effective Death Penalty Act of 1996, provides for a specific exception to state immunity for civil claims for monetary damages linked to crimes of terrorism.[63]

C *Personal Immunities of Heads of State and International Crimes*

It has been stated above that, on the one hand, there is no functional immunity for crimes under international customary law, and on the other, personal (diplomatic)

[60] Conclusions, *supra* note 13, at 6–7.

[61] The *Avocat général* affirmed that the International Military Tribunal could not apply the rule that excluded immunity because of the suicide of Hitler (at 7), while in reality the Head of State in office at the moment of the Nuremberg trial was Admiral Doenitz (on 1 May 1945 he became the Head of State, succeeding Hitler), who was tried and convicted (to 10 years' imprisonment) on the basis of the above-mentioned rule.

[62] It is well known that, on the issue of state immunity, international law has progressively shifted from absolute immunity towards a more restrictive approach; in this respect, see in general Brownlie, *supra* note 18.

[63] Before the amendment, claims were rejected. Cf. *Smith v. Socialist People's Libyan Arab Jamahiriya*, US Court of Appeals for the Second Circuit, 26 November 1996, in 113 ILR (1999) at 534 *et seq*. But after the adoption of the amendment, jurisdiction over these claims was affirmed: cf. *Rein v. Socialist People's Libyan Arab Jamahiriya*, US Court of Appeals for the Second Circuit, 15 December 1998, in 37 ILM (1998), at 644 *et seq*.

immunity should certainly be recognized for official visits, including the case of international crimes.[64] It is here suggested that, with regard to the personal immunity from criminal jurisdiction of Heads of State for private visits (or *incognito*), a more elaborate solution is needed. One may suggest, for example, that foreign Heads of State — because they generally represent their nation in external relations — should not be arrested even if they are on a private visit, unless it can be proved that the competent authorities of the state exercising jurisdiction (or a competent international body[65]) do not (or no longer) consider that Head of State an appropriate counterpart in international relations. This would not be a formal procedure such as the rejection of credentials or the declaration of diplomatic agents as *personae non gratae*, but could be an extension by analogy of those principles to Heads of State.[66] In other words, a Head of State should not be taken by surprise, and a sort of warning that he or she may be not welcome in a foreign country should be required. Such a mechanism (or a comparable system) is needed in order to avoid abuses. The only limitation could be the recognition of a guarantee comparable to the *ius transitus inoxii* (the right to freely travel through a third state in order to reach the receiving or host country, and to return from there to one's own country) granted to diplomatic agents. Additionally, national courts could also rely on principles of self-restraint as indicated for example by the US Supreme Court in the *Sabbatino* case.[67] This solution is particularly justified in those states in which private parties may trigger criminal prosecutions. Of course, this approach has the undesirable counter-effect of introducing policy considerations into the administration of justice; this, however, seems to be justified by the highly sensitive character of the questions involved.

Two further steps might be propounded with a view to further developing the regulation of exceptions to personal immunity from jurisdiction of Heads of State for international crimes. First, one could argue that judicial authorities of a state may exercise jurisdiction over a civil suit or criminal charge for international crimes, even absent any requirement of hostility (or dislike) by their own state concerning the foreign Head of State involved. In this case personal immunity would still cover official meetings, but not private visits. Thus, a Head of State could be tried *in absentia* (if national law allows such trials[68]) and even arrested if on the territory of that state for private visits. Additionally, victims would be entitled to bring civil claims for the purpose of obtaining reparation and request measures of execution on the private

[64] The *Avocat général* in his Conclusions, *supra* note 13, at 4, suggested that 'le principe de l'immunité des Chefs d'Etats est traditionnellement assimilé à une règle de *courtoisie internationale* nécessaire au maintien des relations amicales entre les Etats'. This seems a correct characterization of the residual dimension of the protection offered to foreign Heads of State accused of crimes under international customary law.

[65] Such as, for example, the International Criminal Court or the Security Council acting under Chapter VII.

[66] In this respect, see the very interesting remarks by Bianchi, *supra* note 26, nn. 87 and 130. In particular, where he refers to the relationships between the declaration by the Department of State that certain states are supporters of terrorism and the denial of immunity to those states by US courts. See also the cases quoted therein.

[67] *Banco Nacional de Cuba v. Sabbatino*, 376 US 398 (1964).

[68] This is the case in French law: cf. Articles 1(2), 2, 2–1 to 2–19, 3 and 4 of the French Code of Criminal Procedure.

property of that Head of State in the state exercising jurisdiction (even in other countries, pursuant to the mechanisms of judicial co-operation, where available).

Finally, a second step in the evolution of these rules could lead to the exclusion of personal immunity of Heads of State for crimes under international customary law even in the case of official visits. This would imply that no immunity whatsoever would be granted to a Head of State in office involved in the commission of *crimina juris gentium* and thus such a person could be arrested in any case, including on official missions. It seems that this development has never been suggested, and it does not seem desirable, because, while it is true that it could broaden the possibility of redress for victims of international crimes, it would — on the other hand — seriously destabilize international relations.

5 Is Terrorism a Crime under International Customary Law, Entailing the Lifting of Immunity for Heads of State?

The *Cour de Cassation* held that the crime charged, i.e. complicity in acts of terrorism, did not fall within the categories of international crimes providing for an exception to immunity from jurisdiction of Heads of State.[69]

Multiple efforts have been made in order to find agreement on a definition of terrorism and on a means for fighting it.[70] The crime of terrorism was outside the scope of the Nuremberg and Tokyo Charters, and it has not been included in the ICC Statute, nor is it under the jurisdiction of the UN ad hoc Tribunals. For more than 30 years the United Nations has been debating the issue of a definition of terrorism and an appropriate international response. Meanwhile, several conventions have been concluded to condemn aerial terrorism, in the framework of the International Civil Aviation Organization (the 1963 Tokyo Convention,[71] the 1970 Hague Convention[72] and the 1971 Montreal Convention[73] and its Protocol of 1988[74]). Other conventions have been concluded against acts of terrorism in the framework of the International Maritime Organization (the 1988 Rome Convention[75]). Additionally, efforts have also been made at the regional level: in Europe (the 1976 European Convention on the Suppression of the Crime of Terrorism[76]), the Americas (the 1976 Convention of the

[69] Cf. *supra* note 30.

[70] For a general study on terrorism, see Guillaume, 'Terrorisme et droit international', 215 *RdC* (1989-III), at 287–416 and the vast bibliography therein. The first project of a convention against terrorism dates back to 1937. It was the Convention on the Prevention and Punishment of Terrorism, but it never entered into force and was ratified by only one state (India); cf. Friedlander (ed.), *Terrorism* vol. 2 (1979), at 253–258.

[71] Tokyo Convention on Offences and Certain Other Acts Committed On Board of Aircraft, 14 September 1963, in Friedlander, *supra* note 70, at 1.

[72] *Ibid.*, at 102.

[73] *Ibid.*, at 107.

[74] In Levie, *supra* note 2, at 15.

[75] Rome Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (1988), in Levie, *supra* note 2, at 19.

[76] In Friedlander, *supra* note 71, at 565.

Organization of the American States[77]), the Arab region[78] and even on a more restricted geographical level.[79] However, while these conventions generally provide for a duty either to prosecute or to extradite, they never contain provisions clearly excluding functional immunity.

The above-mentioned practice certainly shows a strong conventional commitment of many states against terrorism; what may still be uncertain is the scope of customary rules, if any. In 1984, in *Tel-Oren v. Libyan Arab Republic*,[80] the Court of Appeals of the District of Columbia held that international terrorism did not attract universal jurisdiction because of lack of agreement on its definition under customary law.[81] Today, however, things seem to have changed; there is a much broader agreement on the general definition of international terrorism.[82] This has paved the way to the adoption by consensus of a General Assembly resolution dealing with measures to eliminate international terrorism.[83] Additionally, the General Assembly and the Security Council have often highlighted the fact that terrorism is a crime of concern for the international community as a whole,[84] and endangers international peace and security;[85] moreover, they have also insisted on the persistent need for international co-operation to fight effectively against it.[86]

This, however, does not automatically mean that terrorism has entirely turned into

[77] In Musch (ed.), *Terrorism*, vol. XIV (1997) 523 *et seq*.

[78] Arab Anti-Terrorism Agreement (1998) and the South Asian Association for Regional Cooperation (SAARC) Convention on the Suppression of Terrorism (1987), in Levie (ed.), *Terrorism*, vol. X (1996), at 313.

[79] Antiterrorism Agreement Between China, Kazakhstan, Kirgizstan, Russia and Tadjikistan, 6 July 2000, in *RGDIP* (2000), at 1013.

[80] The decision of 3 February 1984 is reprinted in Friedlander, *Terrorism*, vol. V (1990) 345 *et seq*.

[81] *Ibid*., at 366.

[82] Cf. in this respect, Cassese, *International Law* (forthcoming), chapter XII.

[83] UN General Assembly Res. 49/60, 9 December 1994, Declaration on Measures to Eliminate International Terrorism; see in particular para. 4 thereof.

[84] See the text of the tenth paragraph of the Preamble to the International Convention for the Suppression of Terrorist Bombing (Annex to UN General Assembly Res. 52/164, 15 December 1997), which states: 'Considering that the occurrence of such acts is a matter of grave concern to the international community as a whole . . .'; reprinted in 37 ILM (1998), at 252 *et seq*.

[85] Cf. in this respect UN Security Council Res. 1054 (1996), 26 April 1996, eighth preambular paragraph, which states that 'the suppression of acts of terrorism . . . is essential for the maintenance of international peace and security'. This statement was echoed in the debate at SC 3660th Meeting by the representatives of various states. For a synthesis, cf. UN Security Council Press Release SC/6214, 26 April 1996. In particular, the representative of the Republic of Korea affirmed that 'terrorism is a major source of threat to international peace and security'. The same clause is also found in the tenth preambular paragraph of Res. 1070 (1996), of 16 August 1996. Finally, most recently, with Res. 1269 (1999) the Security Council unanimously affirmed that 'international terrorism endangers the lives and well-being of individuals worldwide as well as the peace and security of all States' (first preambular paragraph) and 'the suppression of acts of international terrorism . . . is an essential contribution to the maintenance of international peace and security' (eighth preambular paragraph). In the debate, the representative of the United Kingdom underscored that it was 'essential to deny safe havens to terrorists . . . there could be no place where they could feel secure or beyond the reach of the law'. Cf. UN Press Release S/6741, at 6.

[86] On 12 December 2000, the General Assembly adopted a Resolution on Measures to Eliminate International Terrorism (Res. 55/614), with a vote of 151 in favour, none against and only two abstentions; cf. UN Press Release GA/9845, 12 December 2000.

a crime under international customary law (in the sense of *crimina juris gentium*). While there is consensus on the absence of immunity for crimes such as crimes against humanity, genocide, torture and war crimes, there is no certainty about other classes of crime such as the illicit traffic in narcotic drugs and psychotropic substances, the unlawful arms trade, the smuggling of nuclear and other potentially deadly materials, and money-laundering.[87]

Terrorism seems to stay somewhere in the middle between these two broad categories. The reason may be that the difficulties in finding agreement on a general definition have led states to postpone a global and comprehensive convention, and rather to adopt, meanwhile, a selective approach.[88] This process may well have influenced the development of customary norms. Hence, it may be suggested that, although not all acts that may amount to a crime of terrorism under national or treaty law are also covered by customary norms, at least some of them may have turned into customary law. In this respect, it seems that, because of their intrinsic gravity and their odious consequences for the life and assets of innocent civilians, such acts as aircraft bombing or aircraft hijacking may belong to the class of crimes covered by customary law, particularly when they take on large-scale proportions (as in the instance under discussion).[89] Other classes of crimes of terrorism under customary law could be attacks against senior state officials and other specially protected personnel, and mass murder of innocent civilians. Such terrorist acts have generally engendered strong condemnation by the international community as a whole, echoed in the debates of the General Assembly and the resolutions of the Security Council.[90] In contrast, destruction of property or isolated losses of life, and the killing of high-ranking officials may not yet have turned into international crimes under customary law.[91]

If some classes of terrorist acts amount to international crimes, it is warranted to contend that the customary rule on the irrelevance of the status as Head of State or

[87] The first class of crimes is generally referred to as international crimes or *crimina juris gentium*; the second class may be labelled as 'transnational' crimes. On this issue, cf. Cassese, *supra* note 82, at chapter XII.

[88] This practical attitude is very well reflected in the words of the US representative in the UN General Assembly Sixth Committee (Mr Rosenstock) who affirmed that it was only when the international community had turned from a general approach to specific conduct that it had begun to make progress on terrorism; cf. UN General Assembly Press Release GA/L/3169, 15 November 2000. This, however, does not mean that, parallel to conventional progress, customary law has not evolved on its side. On the other hand, other states, such as India, have held different positions; cf. UN General Assembly Press Release GA/L/3013, 1 November 1996, in which it is stated that the Indian representative affirmed that the fight against terrorism on a selective geographical basis has little hope of lasting success.

[89] For an in-depth discussion of the various forms that crimes of terrorism may assume cf. Dinstein, 'Terrorism as an International Crime', in 19 *Israel YBHR* (1989) 55; in the same volume. See also the contribution by Franck and Niedermeyer, 'Accommodating Terrorism: An Offence against the Law of Nations', *ibid*, 75.

[90] Cf. *supra* notes 83–86.

[91] This idea is somehow reflected in the opinion expressed by the Russian representative during the debates in the Sixth Committee on the inclusion of the crimes of terrorism among the so-called 'core crimes' under the jurisdiction of the International Criminal Court. He supported the inclusion of terrorism among the 'core crimes', but only for the most serious cases. The Court should not move against isolated cases of kidnapping, hijacking and other minor incidents. Cf. UN Press Release L/2766, 27 March 1996.

other senior official also applies to such acts. Indeed, it would be illogical and incongruous to assert that this rule only covers such international crimes as war crimes, crimes against humanity and genocide. The general purpose and object of that rule is to remove the shield of functional immunity for those acts committed by senior state officials that are regarded as so heinous and inhuman as to be condemned by the entire international community as *crimina juris gentium,* thereby enabling the prosecution and punishment of the authors of those crimes. It would be preposterous to hold that a Head of State, a prime minister or member of cabinet is not allowed to hide behind functional immunity when they order the torture of 150 political opponents, while they could invoke immunity from international criminal responsibility when they order, with a view to spreading terror, the bombing of a civilian aircraft belonging to a foreign state, and the consequent killing of 150 innocent civilians guilty only of being nationals of a certain country.

One of the arguments used by the *Avocat général* in the *Ghaddafi* case under review was that states have never specifically provided for the irrelevance of official capacity in terrorism conventions.[92] In this respect it may be suggested that terrorism has never been seen (or admitted) as an action attributable to the state itself; therefore no specific provision on the irrelevance of functional immunity appeared to be necessary. In the well-known *Lockerbie* case, although the Security Council referred to 'results of investigations which implicate officials of the Libyan Government',[93] Libyan authorities have never recognized that the two suspects were acting as state officials,[94] and, consequently, have never claimed functional immunity for their actions. Libya generally adopted the position that it would not extradite the two individuals charged, because its national law prohibited the extradition of nationals. Additionally, functional immunity was implicitly denied by all those governments that requested (or pronounced in favour of requests for) surrender of the two Libyan individuals to the United Kingdom or United States for trial. Nor has the Scottish court sitting in the Netherlands, where — after a controversy that lasted a decade — the two persons were eventually tried, ever discussed the issue of immunity.

In contrast with the opinion of the *Avocat général*, this cluster of elements supports the proposition that states have never specifically and explicitly insisted on the irrelevance of official position for crimes of terrorism, because, by definition, the idea that terrorism could be a state action has been rejected.[95] On the contrary, terrorism has typically been a means of fight for non-governmental entities. Therefore, the operation of functional immunity seems *ipso facto* inappropriate with respect to crimes of terrorism, as it would be inappropriate for example for piracy.

[92] The *Avocat général* said that: 'En réalité, il convient de rappeler qu'aucune des grandes Conventions internationales traitant des actes de terrorisme n'a prévu de dérogation expresse à l'immunité de juridiction des Chefs d'Etat'; Conclusions, *supra* note 13, at 9.

[93] UN Security Council Res. 731(1992).

[94] See the eloquent words of Professor Salmon, in the Pleadings before the International Court of Justice on 17 October 1997, CR 97/20, in the *Libyan Arab Jamahiriya v. United Kingdom* case, at www.icj-cij.org.

[95] This was the opinion expressed by the *Chambre d'accusation, supra* note 3. For an illustration of the conflicting paradigms underlying the international stigmatization of international crimes, see in general (with no reference to terrorism, however) Dupuy, 'Crimes et immunités', *RGDIP* (1999), at 289 *et seq*.

It is not possible within the limits of this paper to determine with certainty which forms of terrorism have turned into crimes under customary international law and which have not, nor whether the scope of customary norms fully includes the exclusion of immunity for state officials. However, according to the above-mentioned elements it seems appropriate to argue that aircraft bombing (leading to massive killing of innocent civilians) should be considered a crime under international criminal law and should not permit the plea of immunity for official acts.

6 Concluding Remarks

At this stage of development of international criminal law one must conclude that functional immunity cannot be granted to state officials that have committed crimes under international customary law. This exception to the principle of functional immunity must equally apply to Heads of State. On the other hand, the personal immunity of Heads of State from jurisdiction always covers official visits abroad. Additionally, private visits are also protected, although to a more limited extent. As to the latter, one might go so far as to suggest that restrictions to personal immunity may be imposed by a state, if it were proven that the state whose jurisdiction is triggered has refused to accept the Head of State concerned as a counterpart in foreign relations. In other words, national courts must never recognize functional immunity to a Head of State (nor to any other state official) for *crimina juris gentium*. Instead, a limited exception exists in terms of personal (thus temporary) immunity for accredited diplomatic agents, limited to the receiving state[96] and, irrespective of any territorial link, for those who generally represent the state in foreign affairs. This form of additional protection (for Heads of State or Government and Ministers of Foreign Affairs) is a privilege granted only to some 500–600 persons in the world,[97] because of the imperative need to preserve the stability of international relations.

These considerations should be taken into account by national judicial authorities when asked to pronounce upon jurisdictional claims involving Heads of State in office, and might lead to judicial self-restraint, where admissible under national law. Additionally, judicial authorities should be aware of the fact that it may be very difficult to determine the personal responsibility of a Head of State. Indeed, it would be necessary to *prove beyond reasonable doubt* that he or she either ordered or instigated the perpetration of the crimes of terrorism charged, or, despite having the effective power and authority to prevent or punish the persons responsible for the commission of those crimes, wilfully failed to do so.

It was probably with a view to overcoming these concerns that the *Cour de Cassation* — following the solicitations of the French Government (expressed through the organs of the Prosecution) — declined jurisdiction in the present case. Nonetheless, it is submitted that this could have been done on grounds more in line with current international customary law.

[96] Before being prosecuted they would have to be declared *personae non gratae* and given an opportunity to leave the country.

[97] See Watts, *supra* note 7, at 19.

In the case at issue, assuming that aircraft bombing is an international crime, the Court should have concluded that Colonel Ghaddafi was *not entitled* to functional immunity, because of the existence of an exception to jurisdictional immunity for crimes under international customary law. On the other hand, as *de facto* Head of State in office he should have been recognized as having personal immunity. Such a conclusion would not have been without consequences. It might have allowed French courts to uphold jurisdiction, on the one hand, on civil suits by the families of victims[98] and, on the other, on *in absentia* criminal proceedings (permitted under French law).[99] Nonetheless, any measure of *enforcement*, and above all the arrest of Colonel Ghaddafi, would always be precluded in case of *official* visits. As for private visits, if one shares the approach suggested in this paper, measures of execution would be possible to the limited extent that it may be proven that the competent authorities do not (or no longer) recognize Colonel Ghaddafi as an acceptable counterpart in foreign relations.

It would seem that the solution suggested here might, at least to some extent, strike a proper balance between two possibly conflicting requirements: the requirement that each state should be enabled to entertain political, diplomatic, economic and, in particular, commercial relations with foreign states and, hence, engage in smooth intercourse, based on comity, with the highest representatives of those states; and the requirement of nevertheless effectively safeguarding certain fundamental values in the international community and thus not allowing horrific crimes involving senior state officials which constitute egregious deviations from those values to go unpunished.

[98] Under Article 1382 of the *Code Civile*, in co-ordination with Articles 3 and 4 of the *Code de procédure pénale*.
[99] Cf. *supra* note 68.