CHAPTER 2

The Immunity of Heads of State and Other State Officials as Rules of Customary International Law

According to the traditional approach, immunity of Heads of State was understood as having its source in the courtesy owed towards the State they represent. The exemption of Heads of State from foreign domestic jurisdiction was regarded as politeness adopted in international relations being of mutual benefit to the States. The refusal to subject Heads of another State to jurisdiction was seen as an expression of good manners and respect for the foreign State rather than a binding legal obligation to abstain from instituting criminal proceedings. Rousseau enunciated this principle so: “les immunités [du chef de l’Etat] sont de pure courtoisie et s’expliquent par le souci de ne porter aucune atteinte, même indirecte, à l’indépendance de l’Etat qu’il représente.”1 Chief Justice Marshall emphasised in The Schooner Exchange v. McFaddon that as a matter of comity, States had implicitly consented to waive their exclusive territorial jurisdiction when the “person of the sovereign”, that is a foreign Head of State, was involved.2 The influence of deliberations based on comity on the determination of Heads of State immunity in US decisions may be explained by the fact that the exemption from jurisdiction is contingent on a suggestion of immunity of the executive branch, i.e. a political authority. In Tachiona v. Mugabe, a US district court pointed out that “[t]he grant of immunity is . . . a matter of grace and comity entirely within the discretion of the Executive Branch.”3 Yet, in many other cases, the considerations leading the executive

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1  Rousseau, Droit international public, 334. See also Caplan, “Normative Hierarchy Theory,” 748 and 755; Zappalà, “Heads of State in Office,” 599; McGregor, “Torture,” 913; Summers, “Immmunity or Impunity?,” 467; cf. Finke, “Sovereign Immunity,” 874–877, arguing that immunity has to be understood as a legally binding principle and not as a rule of customary international law.
2  The Schooner Exchange v. McFadden, 11 U.S. 116 (1812) at 137.
3  Tachiona v. Mugabe, 169 F. Supp. 2d 259 (S.D.N.Y. 2001) at 292. According to the decision in Hilton v. Guyot, 159 U.S. 113, 16 S.Ct. 139 (1895) at 143, comity has to be understood as a concept situated between an absolute obligation and pure courtesy or good will: “it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and the rights of its own citizens or of other persons who are under the protection of its laws.” See also Verlinden B.V. v. Central Bank of Nigeria, 461 U.S. 480, 103 S.Ct. 1962 (1983) at 1967–1968
branch and the courts to their findings can be found in customary international law. In a decision relating to the former Head of State of the Philippines, Ferdinand Marcos, and his wife, a US Court of Appeals substantiated that “[h]eads-of-state immunity is a doctrine of customary international law.” It may thus be inferred that in US case law, the considerations regarding comity gave way to considerations based on customary international law. This also reflects the modern approach to the immunity of Heads of State and other State officials: they are regarded as rules of customary international law.

In general terms, immunity of Heads of State and other State officials is governed by international law as it concerns the relationship between on the one hand, the forum State or an international court and on the other hand, the State to which the person involved belongs. Today, it is well established that the rule relating to immunity finds its source in customary international law. The ICJ stated in the *Arrest Warrant* case, which is also applicable to Heads of State and Republic of Austria v. Altmann, 541 U.S. 667, 124 S.Ct. 2240 (2004) at 2248, following the same approach with respect to State immunity.
