

STATE OFFICIALS AND IMMUNITY IN INTERNATIONAL LAW*

Introduction:

It is a basic principle of international law that a sovereign state does not adjudicate on the conduct of a foreign state. The foreign state is entitled to procedural immunity from the processes of the forum state. This immunity extends to both criminal and civil liability. State immunity probably grew from the historical immunity of the person of the monarch. In *R v Bow Street Metropolitan Stipendiary Magistrate and others, ex parte Pinochet Ugarte (Amnesty International and other Intervening) (No. 3)*¹, Lord Browne-Wilkinson articulated the customary law position as follows:

*In any event, such personal immunity of the Head of State persists to the present day: the Head of State is entitled to the same immunity as the state itself. The diplomatic representative of the foreign state in the forum state is also afforded the same immunity in recognition of the dignity of the state, which he represents. This immunity enjoyed by a Head of State in power and Ambassador in post is a complete immunity attaching to the person of the Head of State or Ambassador and rendering him immune from all actions or prosecutions whether or not they relate to matters done for the benefit of that state. Such immunity is granted *ratione personae*.*

The immunities *ratione personae* or (*personal immunities*), is predicated on the notion that, any activity of a head of state or government, or diplomatic agents² or foreign minister must be immune from foreign jurisdiction. This is to avoid foreign state either infringing sovereign prerogatives of states or interfering with the official functions of a foreign state agent under the guise of dealing with an exclusively private act. Historically, this immunity stems from the time when heads of state were seen as personifying the state or the very embodiment of the state itself.

*On the other hand, immunity *ratione materiae* or (limited immunity) is very different and is to be contrasted with immunity *ratione personae*, which gave complete immunity to all activities, whether public or private. This immunity operates to prevent the official and governmental acts of one state from being called into question in proceedings before the courts of another, and only incidentally confers immunity on the individual. It is therefore a narrower immunity but it is more widely available. According to Lord Millet:*

The immunity is sometimes also justified by the need to prevent the serving Head of State or diplomat, from being inhibited in the performance of his official duties by fear of the consequences after he has ceased to hold office. This last basis can hardly be prayed in aid to support the availability of the immunity in respect of criminal activities prohibited by international law.³

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¹ [1999] 2 All E.R. 97, House of Lords.

² International Law provides for exceptions to immunities of diplomatic agents for private acts (See Article 31, para. 1, of the Vienna Convention of Diplomatic Relations, 1961)

³ *Hatch v. Baez*, 7 Hun 596. In this case, the former President of St. Domingo was held protected by state immunity from civil suit in respect of acts done when President.

The Nature of State Immunity

State immunity is a restriction on the jurisdiction of states founded on international comity. It would be an affront to the dignity and sovereignty of a state for that state, or for an individual personifying that state, to be impleaded before the courts of another state. Immunity against such suit is because of immunity rationae personae.

The dignity of a state may also be affronted if those who are or were its officials are impleaded in relation to the conduct of its affairs before the courts of another state. In those circumstances, the state can normally extend the cloak of its own immunity over those officials. It can be said that to implead those officials amounts, indirectly, to impleading the state. Where immunity is accorded in these circumstances, it is on the grounds of the subject matter of the litigation or ratione materiae⁴.

These general principles of public international law are reflected in the approach of the courts. In Al-Adsani v. Government of Kuwait (No. 27)⁵, the claimant alleged that he had suffered torture in a security prison in Kuwait, and obtained leave to serve out of the Jurisdiction the Government of Kuwait (and three individual, one of whom was served) on the ground that he had in consequence suffered psychological damage after returning to and while in England. The Government of Kuwait applied to set aside the service on it, and for a declaration that it had immunity under S.1 (1) of the U.K. State Immunity Act of 1978. The Court of Appeal granted its application, holding that the Act was a comprehensive code, and that although international law prohibited torture, no express or implied exception to immunity existed in cases of torture. Mr. Al-Adsani took the issue to the European Court of Human Rights, claiming that such immunity infringed his right of access to the English Courts under article 6 of the European Convention on Human Rights. The European Court held by 9 to 8 that there had been no such infringement. It is important to note that both the majority and the minority considered that article 6 was prima facie engaged as a result of “the procedural bar on the national courts power to determine the right”⁶ claimed. So it was for the United Kingdom government to show that the restriction on access to its courts “pursued a legitimate aim and was proportionate”⁷. However, the majority considered that:

The grant of sovereign immunity to a state in civil proceedings pursues the legitimate aim of complying with international law to promote comity and good relations between states through the respect of another’s sovereignty⁸ and that in consequence measures taken which reflect generally recognised rules of public international law on state immunity cannot in principle be regarded as imposing a disproportionate restriction on the right of access to court as embodied in article 6(1). Just as the right of access to court is an inherent part of the fair trial guarantee in that article, so some restrictions on access must likewise be regarded as inherent, an example being those limitations generally accepted by the community of nations as part of the doctrine of state immunity⁹.

The majority did not regard the decisions in Prosecutor v. Furundzija¹⁰ and R. v. Bow Street Metropolitan Stipendiary Magistrate, ex p. Pinochet Ugarte (No. 1)¹¹ on the criminal liability of an individual for alleged acts of tortures or any other international

⁴ Ibid.

⁵ (1996) 107 I.L.R., 536.

⁶ Ibid paras. 46 – 49.

⁷ Ibid para. 50.

⁸ Ibid para. 54.

⁹ Ibid para. 56.

¹⁰ Case IT095017/I-T; 10 December, 1998.

¹¹ (2000) 1 A.C., 61 and (No. 3 (2000) 1 A.C., 14).

instrument, judicial authority or material as providing any firm basis for concluding that, as a matter of international law, a state no longer enjoys immunity from civil suit in the courts of another country where acts of torture are alleged.

The reasoning in Al-Adsani was applied by analogy in Bouzari v. Islamic Republic of Iran¹² to article 14(1) of the International Covenant on Civil and Political Rights, which is similar in terms to article 6(1) of European Convention on Human Rights.

The fact is that international law is in the course of continuing development. For example the prohibition on systematic torture in international law constitute jus cogens, a “peremptory norm”. The majority in Al-Adsani referred to the House of Lords decision in R. v. Bow Street Metropolitan Stipendiary Magistrate, ex. p. Pinochet (No. 3)¹³ as establishing the same proposition and themselves endorsed the proposition with reference to article 3 of the Human Rights Convention. Having regard to the aforesaid, it would appear that there can be no derogation from such a norm and that immunity would constitute a derogation. But does the jus cogens nature of the prohibition on torture mean either necessarily or (as yet) in general practice that a state should no longer be treated as enjoying immunity from civil proceedings in the courts of another state or in which the alleged torture occurred? The answer is in the negative. The recognition under general principles of international law of civil immunity on the part of a state from civil suit in a state other than that of the alleged torture does not sanction the torture or qualify the prohibition upon it. However, it clearly circumscribes the jurisdiction in which and means by which the peremptory norm may be enforced. This as it were, brings to the fore the distinction between principles of substantive international law and other issues, such as jurisdiction and immunity in civil proceedings in any particular jurisdiction.

Article 14 of the Torture Convention provides:

- (1) Each state shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible. In the event of the death of the victim as a result of an act of torture, his dependants shall be entitled to compensation.*
- (2) Nothing in this article shall affect any right of the victim or other persons to compensation which may exist under national law.*

Article 14(1) does not state from whom redress must be available, and has no definite jurisdiction purview. Its focus is on redress for the “victim” of an “act of torture”¹⁴. Also, the article does not state expressly whether there must be any or what connection between the state which must ensure such redress and either the act or the victim. On the other hand, it remains to be seen whether the article intended that every state should ensure that its legal system provided redress for every act of torture by the public officials (or by other persons acting in an official capacity) of other states, wherever committed and whoever the victim. The United States when ratifying the Torture Convention for its part expressed its understanding to be that article 14 only required a state to provide a private right of action for damages for acts of torture committed in territory under such states jurisdiction¹⁵.

¹² (2004) Court of Appeal, Ontario.

¹³ See note 1.

¹⁴ That must at least mean redress from the offending “public official or other persons acting in an official capacity who cannot invoke superior orders as a justification.

¹⁵ It remains uncertain however, whether this formulation contemplated that state A would have to provide such redress for torture by State B officials in state A, but not for torture by A officials in state B. It would appear that the cogent explanation or interpretation is that a territorial limitation was omitted by inadvertence.

Another possible interpretation of article 14(1) is certainly that it is concerned to ensure a right of redress in the state where an act of torture is committed. The civil redress required under article 14(1) would on that basis mirror the criminal jurisdiction required to be introduced under article 5(1). But since torture is by definition, an act inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in a public capacity, it would seem curious if each state were not required to ensure a civil right of redress in respect of torture committed abroad by one of its officers-parallel to the criminal jurisdiction required under article 5(1) (b) in each state in respect of an alleged offender who is a national of that state. Suppose (as would be likely) that the official committing the torture had returned home, one would expect it to be the duty of the state of which he is a national to ensure that civil redress could be obtained against him as much as, against the state itself.

The basis for criminal jurisdiction under article 5(1)(c) is that the victim of torture is one of its nationals, if it considers it appropriate. This reinforces the improbability of a construction of article 14(1) that would require a state to establish civil jurisdiction in such a case. In any case, article 14(2) in preserving any right to redress; which may exist under national law clearly envisages that there may be existing national legal provisions for redress against torture, which go wider than the right required being available under article 14(1). Article 14(2) may well have been framed having in mind national legislations such as the Alien Tort Statute of 1789 and the United States jurisprudence¹⁶.

At this juncture, it is apposite that a distinction should be drawn between (I) acts or omissions which could be said to be part of the functions of a state and (II) other acts or omissions (of which systematic torture is an example) which could not possibly be said to be a state function. The reasoning is that, the latter type of acts or omission by any stretch of imagination should not give rise to any claim to immunity. In this connection, there are a number of authorities, which we shall consider later¹⁷.

*There are however, important distinctions between the considerations governing (a) a claim to immunity by a state in respect of itself and its serving head of state and diplomats and (b) a state's claim for immunity in respect of its ordinary officials or agents generally (including former heads of state and former diplomats). As noted earlier¹⁸, at common law, the state itself and its serving Heads of State, Heads of Diplomatic Missions and their families and servants enjoyed, because of their very special status personal immunity (immunity *ratione personae*) in respect of any acts, whatever their character¹⁹. It is that immunity, which has in the case of the state, been restricted first by common law developments²⁰. From the foregoing, in relation to immunity *ratione personae*, there has therefore been a change in perspective from status to function. But personal immunity of this nature as always is narrowly available. It is not available to serving heads of government who are not also heads of state, military commanders and those in charge of the security forces.*

*Thus in the Pinochet case itself, Senator Pinochet as a former Head of State could claim no more than subject-matter immunity (immunity *ratione materiae*). Bearing in mind the*

¹⁶ *Tachiona and others v. Mugabe & other*, 169, F. Supp. 2d, 259 (SDNY 2001).

¹⁷ *Ibid.*

¹⁸ See notes 33 – 36.

¹⁹ See note 1 *Ibid* per Lord Hope at p. 247, per Lord Millet at pp. 268 – 9 and per Lord Phillips at p. 285; Brownlie, *Principles of Public International Law*, 6th Ed. P. 326.

²⁰ In *Trendtex Trading Corp. v. Central Bank of Nigeria* (1977) Q.B., 529, (where Lord Denning was able to pursue thoughts which had been met coldly by other members of the House when first ventilated in his speech in *Rahimtoola v. Nizam of Hyderabad* (1958) A.C. 379, overruling (1957) ch. 157, and I Congreso del Partido, and now by statute in the form of 1978 Act.

difference between (a) the personal immunity available to a state and its serving Head of State and diplomatic representative and (b) the subject matter immunity, which is otherwise available to a state to assert in respect of its officials.

Municipal Law and State Immunity:

There is a potential interplay between issues of state immunity and issues of jurisdiction, which inevitably raises the question whether state immunity is a conclusive objection or bar to an action against an individual.

The starting point is the domestic jurisdiction resolution. For example, section 1(1) of the United Kingdom State Immunity Act 1978 provides:

A state is immune from the jurisdiction of the courts of the United Kingdom except as provided in the following provisions of this part of this Act.

However, the Act makes no express reference to the position of individual officials of the state. Section 14(1), 2(2) provides:

- (1) The immunities and privileges conferred by this Part of this Act apply to any foreign or commonwealth State other than the United Kingdom; and references to a State include reference to –
 - (a) the sovereign or other head of that State in his public capacity;
 - (b) the government of that State; and
 - (c) any department of that government,But not to any entity (hereafter referred to as ‘separate entity’) which is distinct from the executive organs of the government of the State and capable of suing or being sued.
- (2) A separate entity is immune from the jurisdiction of the courts of the United Kingdom if, and only if –
 - (a) the proceedings relate to anything done by it in the exercise of sovereign authority; and
 - (b) the circumstances are such that a State (or, in the case of proceedings to which section 10 above applies, a State which is not a party to the Brussels Convention) would have been so immune.
- (3) If a separate entity (not being a State’s central bank or other monetary authority) submits to the jurisdiction in respect of proceedings in the case of which it is entitled to immunity by virtue of subsection (2) above, subsections (1) to (4) of section 13 above shall apply to it in respect of those proceedings as if references to a State were references to that entity.
- (4) Property of a State’s central bank or other monetary authority shall not be regarded for the purposes of subsection (4) of section 13 above as in use or intended for use for commercial purposes; and where any such bank or authority is a separate entity subsections (1) to (3) of that section shall apply to it as if references to the bank or authority.
- (5) Section 12 above applies to proceedings against the constituent territories of a federal State; and her majesty may by Order in Council provide for the other provisions of this Part of this Act to apply to any such constituent territory specified in the order as they apply to a State.
- (6) Where the provisions of this Part of this Act do not apply to a constituent territory by virtue of any such Order subsections (2) and (3) above shall apply to it as if it were a separate entity.

Section 14 (1) on its face reflects the personal immunity that those identified would, apart from it, enjoy under both international and common law. If, which we doubt, it goes in its express terms any further, then they must, on any view be read subject to qualification to reflect the distinction between personal and subject-matter immunity. Section 14(2) caters for any separate entity distinct from the executive organs of the government of the state and capable of being sued or suing, and it does introduce an express qualification, whereby immunity exists if and only if the proceedings relate to anything done in the exercise of public authority. In Propend Finance Pty Ltd. v. Sing²¹, the court held that the effect of article 14(1) was to give state officials protection “under the same cloak” as the state itself:

The protection afforded by the Act of 1978 to states would be undermined if employees, officers (or, as one authority puts it, “functionaries”) could be sued as individuals for matters of state conduct in respect of which the state they were serving had immunity. Section 14(1) must be read as affording to individual employees or officers of a foreign state protection under the same cloak as protects the state itself.

In the Church of Scientology Case²², the German Supreme Court observed that the claim to immunity by the defendant (the Head of New Scotland Yard) was not derived from his person, but was because the act on which the claimant sued was:

A sovereign act of state which can only be attributed to the British State and not to him or any other official acting on behalf of that state, because the state is always considered the actor when one of its functionaries performs acts which are incumbent on it.

The German supreme Court went on to recognise the traditional distinction between sovereign acts (acts jure imperii) and other acts entirely unrelated to the official activities of the agency concerned or the task entrusted to it. And that any attempt to subject state conduct to German jurisdiction by targeting the foreign agent performing the act would undermine the absolute immunity of sovereign state in respect of sovereign activity. It is therefore logical to conclude that the standard for determining whether immunity is warranted does not depend on the identity of the person or entity so much as the nature of the act for which the person or entity is claiming immunity.

In Schmidt v. Home Secretary²³, the Irish High Court acknowledges the immunity applicable under Irish common law to English police officers who (allegedly in breach of the plaintiff’s constitutional rights) were said to have deprived him of his right of free movement. In Holland v. Lampen-Wolfe²⁴, the claimant was employed at a U.S. military base in the U.K in an educational capacity. The defendant, also an employee of the U.S. made disparaging remarks about the claimants teaching. The claimant sued for libel and the U.S raised the defence of state immunity. The House of Lords held that the matter fell outside the U.K State Immunity Act, 1978; because it was related to, a function of the armed forces of a state and so was to be treated under the common law. Reference was made to the basic distinction between governmental acts (jure imperii) and other acts, including commercial acts jure gestionis²⁵. Lord Millet with whom a

²¹ (1997) 107 ILR 536.

²² (1978) 65 ILR, 193 (that acts of the defendant, as the expressly appointed agent of the United Kingdom for the purpose of performance of a treaty between the United Kingdom and Germany, cannot be attributed as private activities to the person authorised to perform them in any given case).

²³ (1994) 103, ILR, 322.

²⁴ [2001] 1 WLR 1573, House of Lords.

²⁵ Ibid per Lord Hope at p. 1577.

majority of other Law Lords expressly agreed, said that the doctrine of state immunity, “operates to prevent the official and governmental acts of one state from being called into question in proceedings before the courts of another”, and that “here the immunity applies, it covers an official of the state in respect of acts performed by him in an official capacity”²⁶.

This examination of other common law authority, recognising state immunity in respect of acts of agents, shows that none of the relevant cases was concerned with conduct which should be regarded as outside the scope of any proper exercise of sovereign authority or with international crime, let alone with systematic torture. However, in Saudi Arabia v. Nelson²⁷, the United States Supreme Court was concerned with allegations of, inter alia, torture, apparently brought against The Kingdom itself, Hospital Corporation of the America (“HCA”) which had recruited Mr. Nelson to work in a Saudi Arabian Hospital, and Royspec, a Saudi Corporation owned and controlled by the Kingdom, which acted as purchasing agent for the Hospital. All three were treated by the majority as qualifying as the state (including by definition an agency or instrumentality of the state) and as therefore entitled to immunity.

International Crime and Immunity

By its very nature, a successful plea of immunity removes either a state or an individual from the jurisdiction of a local court. This is a consequence of the need to preserve the sovereign equality of states on a practical as well as on a theoretical level. Then, what is the position where the state or individual claiming immunity is alleged to have committed an act, which is itself contrary to international law, such as a gross violation of human rights. In such a situation, there is a conflict between those rules of International Law requiring immunity to be given and other rules of international law regarded as pivotal to the international legal order and for violation of which an individual may be held personally responsible in addition to engaging the responsibility of the state. The issue is, is immunity or human rights to prevail?

Before giving an answer, it is pertinent to look more closely at the Torture Convention. Article 1 provides:

1(1) For the purposes of this Convention, the term “torture” means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person had committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is 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. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

The Convention has received very wide spread international support²⁸. But S.5 of the United Kingdom State Immunity Act, 1978, provides no relevant insight into lifting of state immunity from civil suit under English Law, particularly if the alleged torture occurred outside the United Kingdom. The existence of at least some limitations on the immunity in respect of officials is consistent with approach adopted by court in the

²⁶ Ibid p. 1583.

²⁷ (1993) 507, U.S., 349.

²⁸ In domestic English Law, the United Kingdom’s adherence led to s.134(1) of the Criminal Justice Act, 1988.

Church of Scientology Case²⁹, Chuidian v. Philippine National Bank³⁰ and Holland v. Lampen-Wolfe³¹. These cases all drew a general distinction between official and private acts when identifying the extent of state immunity for acts or omissions of officials.

However, this distinction is itself not always clear cut or easy to apply³². A pointer towards potential difficulties is also present in the dicta in Chuidian, and Holland v. Lampen-Wolfe provides a positive example. However, difficulty in categorising cases according to their subject matter also exists in parallel areas, e.g. in distinguishing between governmental and commercial acts.

Criminal Immunity

The recognition that individuals may be held criminally responsible for offences against international law goes back at least to principles stated in the charter of the International Military Tribunal of Nuremberg. This was reechoed by the General Assembly of the United Nations in 1946, when directing the International Law Commission to treat as a matter of primary importance plans for their formulation. The Commission in 1950 set out the following principle and commentary in its paragraph 103³³:

The fact that a person who committed an act which constitutes a crime under international law acted as head of state or responsible Government official does not relieve him from responsibility under international law.

This principle is based on article 7 of the Charter of the Nuremberg Tribunal. According to the charter and the judgment, the fact that an individual acted as head of state or responsible government official did not relieve him from international responsibility. In addition, the 1954 International Law Commission's Draft Code of Offences against the Peace and Security of Mankind, provided in Article 111:

The fact that a person acted as head of state or as the responsible Government official does not relieve him of responsibility for committing any of the offences defined in the code.

In Pinochet (No. 3), Pinochet, the ex-Head of State of Chile, had been detained in London pending an extradition request from Spain. It was alleged that he had authorised acts of torture while in office against some Spanish nationals. Senator Pinochet claimed immunity as an ex-Head of State. One issue was whether he could be immune in respect of acts that might be regarded as crimes of universal jurisdiction under customary international law and which, in any event, attracted universal jurisdiction under the Torture Convention. The House of Lords held that there could be no immunity. In fact, Lords Brownlie-Wilkinson and Hutton expressed their sentiment in the following words: "How can it be for international law purposes an official function to do something which international law itself prohibits and criminalizes"³⁴. It was pointed out that Senator Pinochet's alleged tortures were not carried out by him in his private capacity for his private gratification.

Conclusion:

One thing is clear, since the end of the Second World War, there has been a clear recognition by the international community that certain crimes are so grave and so

²⁹ Ibid.

³⁰ (1990) 912, F 2d, 1095; 92 ILR 480.

³¹ [2000] 1 W.L.R., 1573.

³² See note 1 Per Lord Hutton in Pinochet (No. 3) at p. 252;

³³ Lord Hutton quoted this at p. 258 in Pinochet (No. 3).

³⁴ Ibid at pp. 205 – 6.

inhuman that they constitute crimes against international law, and that crimes like torture cannot be a function of any Head of State under international law.

Ordinarily, the principle of immunity rationae protects all acts, which the head of state has performed in the exercise of the functions of government. In addition, the purpose for which they were performed protects these acts from any further analysis. There are two recognised exceptions under customary international law, the first has to do with criminal acts which the Head of State did under the colour of his authority as head of state, but which were in reality for his own pleasure or benefit. The second relate to acts the prohibition of which has acquired the status under international law of jus cogens.³⁵ The court in Pinochet's case,³⁶ citing the Supreme Court of Israel's decision in A.G. of Israel v. Eichmann,³⁷ stated that no immunity survived in respect of international crimes committed by state officials which were both: (a) contrary to jus cogens and (b) so serious and on such a scale as to amount to an attack on the international legal order. It is therefore axiomatic that a plea of immunity ratione material must be consistent with these recognized exceptions.

In the context of genocide, would international law have required a court to grant immunity to a person upon his demonstrating that he was acting in an official capacity? In our view, it plainly would not.

It appears that a different result is the case in the case of immunity ratione personae. In the case concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium),³⁸ A Belgian investigating judge had issued an international arrest warrant against the serving Congolese Minister of Foreign Affairs. The warrant was in respect of alleged serious violations of international humanitarian law, including crimes against humanity. Congo claimed that this constituted a violation of the sovereignty of the Congo and a contravention of the sovereign equality of states. An essential issue was whether the Minister was entitled to immunity from the Belgian criminal process while a serving Minister, even though the alleged crimes would, if proven, amount to serious breaches of international law. The court found that in customary international law, the immunities accorded Ministers of Foreign Affairs is to ensure the effective performance of their functions on behalf of their respective states and not for their personal benefit. The court further observed that a Minister for Foreign Affairs responsible for the conduct of his or her states 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 office³⁹. However, the court stated that they did not consider that immunity amounted to impunity. Nevertheless, that such individual is criminally accountable subject to the following exceptions:

- (a) where a case is brought in the individual's own domestic Courts.*
- (b) where the State concerned decides to waive immunity.*
- (c) once the individual ceases to hold office.*
- (d) where a person is brought before an international criminal tribunal "in respect of acts committed prior or subsequent to his or her period of office as well as in a private capacity"⁴⁰*

³⁵ *Ibid* p. 242.

³⁶ *Ibid* pp. 273 – 5.

³⁷ 36 ILR 5.

³⁸ (2002) I.C.J. Rep. 14.

³⁹ *Ibid* para. 53, 54 & 55

⁴⁰ See the separate and dissenting opinions on the criticisms of the court's reasoning, in particular the separate opinion of judges, Kooijmans and Buergenthal and the dissenting opinion of judge Van Den Wyngaert