# State or Diplomatic Immunity and the Limits of International Criminal Law

Lord Verdirame KC and Richard Ekins KC (Hon)

Foreword by Lord Macdonald of River Glaven KC

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Policy Exchange

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# Contents

# Foreword

*Lord Macdonald of River Glaven KC, Director of Public Prosecutions, 2003-2008*

The decision by the International Criminal Court to issue arrest warrants against Israeli prime minister Benjamin Netanyahu and former defence minister Yoav Gallant has naturally provoked extensive public discussion and controversy. For my part, I strongly support the existence of the ICC and its international role in mitigating impunity for grave crimes on the part of state actors. However, as a former prosecutor, I have serious concerns about the way in which the decision to issue these warrants was taken.

Firstly, the ICC Prosecutor, Karim A. A. Khan KC, decided to commission a panel of external lawyers to advise him on "whether there are reasonable grounds to believe that the persons named in the warrants have committed crimes within the jurisdiction of the Court."

Prosecutors do sometimes go to independent counsel, almost always in confidence, for advice about whether a given case meets the threshold for prosecution. That advice may be accepted by the prosecutor, or it may be rejected. The problem here is that in resolving publicly to assemble such a distinguished group of external lawyers to consider the determinative question, Mr Khan was, to all intents and purposes, bound to accept their conclusion: there would have been world-wide uproar had he failed to do so.

The effect is that the Prosecutor, who is accountable to the international community, outsourced his decision to an external panel, who are accountable to no one. But this is wrong in principle.

Secondly, if such a panel were to be created, the process by which its members were selected was of paramount importance. It should have been rigorous, transparent, and nonpartisan. At the very least, it should have resulted in a membership wholly unconnected to the Prosecutor's office, and it should have excluded anyone who had previously expressed an apparently settled view on the events in issue.

Finally, there is the question of complementarity. The ICC is a court of last resort, which intervenes only when the countries concerned are unable or unwilling to investigate and prosecute certain grave international crimes.

As Director of Public Prosecutions, I had many dealings with Israeli judges and prosecutors. Invariably I found them to be professionally competent and fiercely independent – and highly respected by the citizenry

of Israel for these very qualities. Indeed, in recent times, hundreds of thousands of Israelis of all political persuasions have taken to the streets successfully to protest any dilution of this institutional independence.

It is not clear to me that the state of Israel can be considered either unable or unwilling to investigate crimes on the part of its most senior officials. The prime minister himself is currently under criminal indictment, and very senior ministers have been imprisoned in the recent past.

But perhaps the greatest compliment paid to the uncompromising independence of Israeli prosecutors has been the remarkable claim by Mr Netanyahu's critics that they are so rigorous, and so independent, that the prime minister has been obliged deliberately to prolong a full-blown war just to protect himself from their unwelcome approaches. Mr Khan's actions are, at the very least, premature.

This paper by Lord Verdirame and Professor Ekins focuses on another aspect of the arrest warrants, namely the way in which they interact with, and possibly ride roughshod over, the immunity given to senior state officials by international law. It makes a compelling case for the proposition that, in issuing these warrants against Israeli citizens, when Israel is not a state party to the ICC, the Court is inviting state parties, including the United Kingdom, to breach international law by enforcing the arrest warrants.

It would be ironic if, in seeking to advance the cause of international law, the Court encourages—indeed requires—its breach. This is a timely and important contribution to an important subject, and it deserves a considered response from Ministers.

# Summary

In a paper published on 25 November 2024,[1] we made clear that it would be unlawful for the British Government to attempt to arrest Prime Minister Benjamin Netanyahu of Israel pursuant to the arrest warrant that the International Criminal Court (ICC) issued on 21 November 2024. If the Government were to attempt to enforce the ICC arrest warrant, it would be acting beyond the scope of the powers conferred on it by the International Criminal Court Act 2001 and would be placing the UK in breach of its obligations in international law to respect state or diplomatic immunity.

This paper develops this argument by considering three matters arising from our November 2024 paper.

First, we assess what the Government has said since then about the ICC arrest warrant and about its obligations as a matter of UK law in relation to those warrants. We show that the Government has either misunderstood or misrepresented its legal obligations and seems intent on maintaining a state of uncertainty about the enforceability of the ICC arrest warrant in UK law, a position that does the Government no credit and cannot be reconciled with respect for the rule of law.

Second, we consider again the immunity *ratione personae* of a serving Head of Government under customary international law. In our November paper, we took the view that State parties to the ICC Statute are still bound by the customary international law on immunities of senior State officials vis-à-vis non-State parties; most importantly for present purposes, they must observe the customary immunity ratione personae to which a serving Head of Government is entitled and which includes absolute immunity from arrest and from the exercise of foreign criminal jurisdiction. This view has received further support since we first outlined it. The UK would not be acting in breach of its international obligations in refusing to enforce the ICC arrest warrant against Prime Minister Netanyahu.

Third, we examine the position of former Defence Minister Yoav Gallant. Being no longer in office, Mr Gallant is entitled only to immunity *ratione materiae*, which includes immunity from arrest and from the exercise of foreign criminal jurisdiction but only in respect of official acts. It would however be wrong to assume that the effect of the *Pinochet* ruling is that the immunity *ratione materiae* of former Minister Gallant would not extend to the crimes under the ICC Statute of which he is accused. We argue that this interpretation of the *Pinochet* ruling is incorrect. It thus follows that the Government has no authority under UK law to enforce the ICC arrest warrant against Yoav Gallant and any attempt to enforce the warrant,

1. Lord Verdirame KC and Professor Richard Ekins KC (Hon), *The International Criminal Court Act 2001 and State or Diplomatic Immunity: The case of the Prime Minister of Israel* (Policy Exchange, 2024).

including by transferring the warrant to an appropriate judicial officer to endorse, would place the UK in breach of its international obligations.

# The Government's mystifying approach to the International Criminal Court Act 2001

In our November 2024 paper, we noted that the Government had chosen to equivocate about whether it would attempt to enforce the arrest warrant if Prime Minister Netanyahu was to be on British soil. We argued that such equivocation was unjustifiable and irresponsible and urged the Government to correct the 22 November statement by a No 10 Spokesman that was widely reported as indicating that the Government would seek to secure the arrest of Prime Minister Netanyahu.

Similar concerns were raised by Lord Wolfson of Tredegar KC, the Shadow Attorney General, in a letter to Lord Hermer KC, the Attorney General, as well as by other parliamentarians in debates in both Houses of Parliament. The Government has since clarified its understanding of the legal position, although the clarification is unsatisfactory in some key respects, as we now show.

On 27 November 2024, the Foreign Secretary, the Rt Hon David Lammy MP, said to the Foreign Affairs Committee, in answer to Q119:

> *We have to wait, in the coming days and weeks, for what they call a note verbale to make its way to our embassy, so that we get instructions that we are to enforce these warrants were they to arise. Under our legislation, section 2 of the International Criminal Court's legislation, there is an obligation on me to transmit to the courts should those named seek to come into our country. That does not allow me any discretion. I will issue that and transmit that to the courts, and then the courts will make their determination under our law, recognising that we are signatories to the Statute of Rome and these are very serious issues indeed.*[2]

Thus, the Foreign Secretary seems to understand the 2001 Act to impose upon him a categorical legal duty to transmit to a UK court (strictly, to "an appropriate judicial officer") a request from the ICC for the arrest and surrender of a person. It is then for the UK court to decide what is to be done.

The Attorney General replied to Lord Wolfson on 3 December 2024 in the following terms:

> *The UK will consider any request from the ICC to enforce an arrest warrant in accordance with our responsibilities under international law and the International*

2. Foreign Affairs Committee, "Oral evidence: Work of the Foreign, Commonwealth and Development Office", HC 385, 27 November 2024, https://committees.parliament.uk/oralevidence/15045/html/.

> *Criminal Court Act 2001. In the present context, if Mr Netanyahu were to seek to visit the UK, there would be a domestic legal process through our independent courts. This Government respects our international legal obligations, including those relating to the ICC and in relation to immunity and, under the ICC Act, it is for our courts to decide whether or not to endorse an arrest warrant.*
>
> *I do not consider it appropriate to seek to pre-empt any decision that a Court may make. I also do not consider it appropriate for His Majesty's Government to seek, as you propose, an immediate and authoritative 'decision' from the High Court on the ambit and effect of the relevant legislation. Such an approach would be unprecedented. And you will know, pursuant to section 26 of the Act, that the competent Court will be a Magistrates Court or, in Scotland, the Sheriff Court. I do not consider it appropriate for the Government seek [sic] form of declaratory relief from the High Court in a case that at present is hypothetical and in which it does not possess primary jurisdiction.*

This statement, by the British Government's senior law officer, must constitute the most considered statement that the Government has yet made about its understanding of the 2001 Act and the UK's relevant obligations in international law. The Attorney General's statement seems to echo the Foreign Secretary's understanding of section 2 of the 2001 Act when he says that "there would be a domestic legal process through our independent courts", a statement that implies that the Secretary of State has no choice save to transmit a request from the ICC to an appropriate judicial officer.

The Attorney General goes on to say that "it is for our courts to decide whether or not to endorse an arrest warrant", thus disavowing responsibility on the part of the Government to decide whether state or diplomatic immunity forbids the Government from transferring an ICC arrest warrant to an appropriate judicial officer in the first place. The letter fails to disclose what position, if any, the Government would take in any argument before a court about this matter and indeed rather implies that it would somehow be wrong for the Government to take a position.

The Attorney General says that it would be inappropriate "to seek to pre-empt any decision that a Court may make". This is obviously no reason for the Government to refuse to take a position about whether the 2001 Act permits (or requires) the arrest of the Head of Government of a state that is not party to the ICC Statute (the Rome Statute). Nor is there any reason for the Government not to take a position on whether the Head of Government (or Defence Minister or former Defence Minister) of a non-State party to the ICC Statute continues to enjoy certain immunities under customary international law; the French Government has rightly had no hesitation in taking such a position. Any position that the UK Government might take about its obligations under the 2001 Act, and thus about customary international law (see section 23(6)(c)), would of course be open to challenge before the High Court on judicial review proceedings.

The Government's position on the 2001 Act and international law in

this context seems to be that:

(a) the Secretary of State has a categorical duty to transfer an ICC arrest warrant to an appropriate judicial officer (in a Magistrates Court or the Sheriff Court), which officer will be responsible for deciding whether to endorse the warrant;

(b) the Government should not have a position (or at least publicly state a position now) about whether the judicial officer should, or may lawfully, decide to endorse the warrant, or about what any other court should do thereafter, including in proceedings challenging a warrant purportedly endorsed under section 2; and

(c) for the Government to make any statement about its understanding of customary international law on immunities would be inappropriate as it would "pre-empt" the decisions of the courts.

We do not think that the Government should apply to the High Court for a declaratory judgment, not because this would somehow be unprecedented or because any such application would be premature, but because the Government's clear responsibility is to take a view of its legal obligations and to act on that understanding. It is absurd for the Government to have no position about the meaning of section 23 of the Act; it suggests the Government does not take seriously the limitations that Parliament imposed on Part 2 of the Act.

The Government's equivocation amounts to a standing threat to arrest the Head of Government of a friendly state, in breach of customary international law on immunity ("state or diplomatic immunity" in the language of the 2001 Act). The Government's clear responsibility is to bring this uncertainty to an end. Leaving this question to the courts – to a single officer of the Magistrates Court no less – is not responsible.

The real question is about at what stage of the process set out in Part 2 of the Act any question about state or diplomatic immunity should properly arise. The most natural place is when the Secretary of State has to decide whether he is either under a duty to transfer the warrant to a judicial officer for endorsement or is actually forbidden from doing so by customary international law, the effect of which is saved by section 23 of the 2001 Act.

The Attorney General seems remarkably keen on avoiding the question of whether immunity prevents enforcement of the arrest warrant, which maintains a state of legal uncertainty. It is hard to square this approach with respect for the rule of law, which the Attorney General has previously described as "the lodestar for this government".[3]

The Government's assertion that the Secretary of State has no choice but to transmit an ICC arrest warrant to an appropriate judicial officer is an error of law. The 2001 Act clearly does not impose any such duty

3. "Attorney General swearing-in speech: Rt Hon Richard Hermer KC", 16 July 2024, https://www.gov.uk/government/speeches/attorney-general-swearing-in-speech-rt-hon-richard-hermer-kc

if enforcing an ICC arrest warrant would be incompatible with state or diplomatic immunity attaching to a person by reason of a connection with a state that is not party to the ICC Statute.

Part 2 of the Act is entitled Arrest and delivery of persons. Section 2 provides in part:

> (a) *Where the Secretary of State receives a request from the ICC for the arrest and surrender of a person alleged to have committed an ICC crime, or to have been convicted by the ICC, he shall transmit the request and the documents accompanying it to an appropriate judicial officer.*
>
> (b) *If it appears to the Secretary of State that the request should be considered by an appropriate judicial officer in Scotland, he shall transmit the request and the documents accompanying it to the Scottish Ministers who shall transmit them to an appropriate judicial officer.*
>
> (c) *If the request is accompanied by a warrant of arrest and the appropriate judicial officer is satisfied that the warrant appears to have been issued by the ICC, he shall endorse the warrant for execution in the United Kingdom.*

Section 23(1) provides:

> *Any state or diplomatic immunity attaching to a person by reason of a connection with a state party to the ICC Statute does not prevent proceedings under this Part in relation to that person.*

For the reasons set out in our earlier paper, it follows that state or diplomatic immunity attaching to a person by reason of a connection with a state that is not party to the ICC Statute does prevent proceedings under this Part in relation to that person.

As noted, the Government's position is that, once the request has been transmitted to an appropriate judicial officer pursuant to the duty which the Government considers (wrongly) the Secretary of State to be under, any question about section 23, and the application of state or diplomatic immunity, will then be for "the courts", by which the Government presumably means the appropriate judicial officer in the Magistrates Court or Sheriff Court, but, we add, is more likely to mean the High Court on an application for judicial review proceedings on a challenge to the warrant which that officer is likely to think he or she has a duty to issue. (We say "presumably" because strictly the question of whether to endorse an ICC arrest warrant is a decision to be made by a judicial officer but not by a court as such, a point to which we return below.)

Quite aside from the fact that initiating a process to arrest a foreign Head of State or Head of Government, by transmitting the ICC request to an appropriate judicial officer, might already constitute a breach of state or diplomatic immunity, the role of the appropriate judicial officer under section 2(3) of the Act is simply to endorse a warrant that appears to the officer to have been issued by the ICC. The Act does not make obvious provision for a contested hearing about whether a warrant should be endorsed, not least since this stage of proceedings is to be determined by

"an appropriate judicial officer" rather than by "a competent court". (The Attorney General's letter fails to differentiate the two and implies that it is a competent court that endorses the arrest warrant, which is not the case.)

Contrast section 5, which concerns whether "a competent court" should make a delivery order in relation to a person arrested under a section 2 warrant. (A "delivery order" is an order that the person is to be delivered into the custody of the ICC or, if the person has been convicted by the ICC, to the state of enforcement.) The role of the court in relation to section 5 remains highly limited, but there is at least provision at this stage for the person who is the subject of the warrant to be involved in the proceedings.

The Government may have considered that it is at a section 5 hearing that there will be argument about state or diplomatic immunity and the meaning of section 23. But this would be to infer that Parliament acted on the absurd intention to tolerate – indeed, positively to *require* – a series of breaches of state or diplomatic immunity, up until a section 5 hearing is held. In enacting section 23, it is crystal clear that Parliament had no such intention.

Let us return to the contrast between section 5 and section 2. It is entirely foreseeable that an appropriate judicial officer will endorse an arrest warrant under section 2(3) without the person who is the subject of the warrant having notice of the process or an opportunity to challenge it by way of section 23. Perhaps that person – Prime Minister Netanyahu or an officer of the State of Israel on his behalf – could in principle attempt to make submissions to the appropriate judicial officer to the effect that the officer had no power under the 2001 Act to endorse an ICC arrest warrant made against him, in the light of customary international law and section 23.

If such submissions were made, then natural justice would require the judicial officer to consider them and they should persuade the officer that the warrant cannot be endorsed. But the scheme of the Act is clearly not for questions about section 23 to be determined by an appropriate judicial officer under section 2(3) after hearing reasoned argument. On the contrary, the scheme of the Act is for the judicial officer to endorse arrest warrants that appear to have been made by the ICC, without hearing argument or exercising any kind of discretion.

Thus, the approach suggested by the Government would almost certainly lead to arrest, and thus immediately place the UK in breach of state or diplomatic immunity, which reinforces the point that the Secretary of State must consider state or diplomatic immunity before transmitting a request to the judicial officer. Section 2 makes referral from the Secretary of State a condition precedent to the judicial offer having power to endorse the warrant. The Secretary of State must consider section 23 before transmitting the request.

The background to section 23 is the general rule that state or diplomatic immunity makes it unlawful, in domestic law as much as in international law, to arrest a Head of State, a Head of Government or an

Ambassador amongst others. Section 23 qualifies this general rule, such that proceedings under the Act, which would otherwise breach state or diplomatic immunity, are lawful in domestic law, which mirrors the position in international law insofar as state parties to the ICC Statute have agreed that state or diplomatic immunity does not bar arrest or prosecution. When the qualification does not apply, then the Act provides that proceedings under the Act are not possible and will not be lawful.

The Secretary of State must thus take a view on the application of state or diplomatic immunity, and the meaning of section 23, in order to determine whether it is lawful for him to transmit the arrest warrant to an appropriate judicial officer. It is an abdication of duty for the Government to assert that questions about immunity are somehow a matter for the courts alone to decide, on which it would be inappropriate for the Government to take a view. The Government purports to devolve to a single judicial officer in a Magistrates Court or the Sheriff Court a question that is obviously not within the competence of that officer.

The Attorney General's letter suggests that it will be for the magistrate to decide whether or not to endorse the arrest warrant – the Secretary of State being the mere agent of the ICC, dutybound to transmit the request to an appropriate judicial officer – who will have to consider any argument that may be made that state or diplomatic immunity applies. But if section 23 applies to the appropriate judicial officer – and it does – it applies just as much to the Secretary of State. And it applies to him first. The Secretary of State's decision to transfer an arrest warrant, having concluded that section 23 does not bar its transfer, is a condition precedent for an arrest warrant coming before the appropriate judicial officer at all. It is irresponsible of the Government, and unfair to the magistrate, for the Government to say that this is all a matter for "the courts". It is not.

If the Secretary of State understands the implications of section 23 properly and declines to transmit the ICC's request to the judicial officer, his decision may of course be challenged by way of judicial review proceedings and it would be open to the High Court to determine whether his reading of section 23 is an error of law. But the prospect of judicial supervision of his decision, which the Attorney General in any case downplays in his letter to Lord Wolfson, does not excuse the Secretary of State from the responsibility of reading section 23 and giving effect to its terms.

The position we have set out in our earlier paper and in this paper is entirely consistent with section 23(3) and (4), which make no sense on the Government's apparent understanding of the 2001 Act. Section 23(3) provides:

> *A certificate by the Secretary of State—*
>
> (a) *that a state is or is not a party to the ICC Statute, or*
>
> (b) *that there has been such a waiver as is mentioned in subsection (2),*

*is conclusive evidence of that fact for the purposes of this Part.*

The point of section 23(3) is to facilitate the application of section 23(2) and thus to make it lawful for proceedings to go ahead that would otherwise be blocked by state or diplomatic immunity.

In relation to a state that is not party to the ICC Statute, section 23(2) provides that state or diplomatic immunity is not a bar to proceedings under Part 2 of the Act if (and by implication only if) "waiver of that immunity is obtained by the ICC in relation to a request for that person's surrender". It follows that the Secretary of State cannot lawfully transmit a request from the ICC to an appropriate judicial officer in a case involving state or diplomatic immunity that attaches to a person by reason of connection to a state that is not party to the ICC Statute unless and until the Secretary of State determines that there has been a waiver, in which case he may issue a certificate to this effect. This would remove the bar that would otherwise apply to proceedings under the Act in relation to such a person.

In relation to the Prime Minister of Israel, a State that is not a party to the ICC Statute, the Secretary of State would need to consider whether there has been a waiver before transferring the ICC request to the appropriate judicial officer. As a power to issue a certificate under section 23(3) is intended to facilitate the application of subsection (2), to enable proceedings to go ahead that would otherwise be blocked by state or diplomatic immunity, it reserves the determination of those matters to the Secretary of State alone, rather than allowing them to be determined by a judicial officer or a court. Whether a state is or is not a party to the ICC Statute and whether there has been a waiver do not fall to be determined as part of "a domestic legal process through our independent courts", as the Attorney General put it in his letter. The Act clearly reserves these matters for the Secretary of State to determine with conclusive effect (an analysis that is consistent with any such determination being challenged by way of judicial review proceedings).

Section 23(4) provides:

> *The Secretary of State may in any particular case, after consultation with the ICC and the state concerned, direct that proceedings (or further proceedings) under this Part which, but for subsection (1) or (2), would be prevented by state or diplomatic immunity attaching to a person shall not be taken against that person.*

Thus, even when section 23 qualifies state or diplomatic immunity such that proceedings may be brought to enforce an ICC arrest warrant, the Secretary of State has a discretion to direct that proceedings "shall not be taken against a person". Section 23(4) is entirely incompatible with the Foreign Secretary's assertion, to which the Attorney General provides rhetorical cover but no meaningful legal support, that he has no choice under the 2001 Act save to transmit an ICC request to the appropriate judicial officer, with it being up to the courts to decide what happens next.

There is no way to square the Government's assertion that the Secretary of State has a categorical legal duty to transfer the ICC arrest warrant to the appropriate judicial officer with the proposition, set out on the face of section 23, that he has a discretion not to allow proceedings to continue, which must include not even to allow them to begin.

Section 23(4) does not apply in relation to the ICC arrest warrant relating to Prime Minister Netanyahu, but only because nothing in sections 23(1) or (2) qualifies the default rule that the Head of Government of a state that is not party to the ICC Statute enjoys state or diplomatic immunity and thus cannot be the subject of proceedings under Part 2 of the Act. The Government's reading of section 23 is perverse insofar as it affirms that (a) section 23 implies no qualification of the Secretary of State's categorical duty to transmit an ICC request to the appropriate judicial officer, and (b) section 23(4) does not apply to Israel because Israel is neither a state party to the ICC Statute (such that subsection (1) does not apply) nor has the ICC obtained a waiver of immunity from Israel (so that subsection (2) does not apply).

# The position under customary international law

It is a basic and trite principle of international law that, in the words of Article 34 of the Vienna Convention on the Law of Treaties, "[a] treaty does not create either obligations or rights for a third State without its consent." The Vienna Convention further provides that "[a]n obligation arises for a third State from a provision of a treaty if the parties to the treaty intend the provision to be the means of establishing the obligation and the third State expressly accepts that obligation in writing."

Neither the United States nor Israel are parties to the ICC Statute, and the ICC Statute cannot accordingly create obligations or rights for them. This includes any obligation to waive or limit immunities of their officials to which they are entitled under customary international law.

This position is also reflected in the terms of the ICC Statute, which were carefully drafted so as to prevent the possibility of a state party being forced to choose between breaching its obligations under the ICC Statute or breaching its international legal obligations in relation to the immunity of state officials. To wit, Article 98(1) of the ICC Statute reads:

> *The Court may not proceed with a request for surrender or assistance which would require the requested State to act inconsistently with its obligations under international law with respect to the State or diplomatic immunity of a person or property of a third State, unless the Court can first obtain the cooperation of that third State for the waiver of the immunity.*

However, in a series of much-criticised rulings, the ICC has adopted untenable interpretations of Article 98(1), holding that it does not bar the arrest and prosecution of high officials from a non-State party. As our previous paper described, in *Prosecutor v Al-Bashir* (2019) the Appeals Chamber of the ICC held that, notwithstanding Article 98, and the basic principles of international law which it reflects, the Head of State of a non-State party to the ICC would have no immunity from criminal prosecution in international courts, a decision that was extensively criticised at the time and since then. The ICC has recently adopted a similar approach in the case concerning Mongolia's refusal to arrest Vladimir Putin in September 2024.[4]

The problem with the ICC's approach has been captured in a very carefully reasoned paper by the Advisory Committee on Public International law (CAVV), a statutory independent body that advises the government, the Senate and the House of Representatives of the Netherlands on

4. Finding under article 87(7) of the Rome Statute on the non-compliance by Mongolia with the request by the Court to cooperate in the arrest and surrender of Vladimir Vladimirovich Putin and referral to the Assembly of States Parties, ICC-01/22-90, 24 October 2024, https://www.icc-cpi.int/court-record/icc-01/22-90.

international law issues. In its Advisory Report no. 40, the Committee, having examined the jurisprudence on immunity of the ICC (and of the Special Court for Sierra Leone), made the following observations:

> *The judgments of the Special Court and especially the International Criminal Court are controversial. The core of the criticism is that international law does not permit a group of states to impose obligations on third states without the latter's consent. This is known as the principle of the relative effect of treaties. States cannot therefore simply decide among themselves that the immunity of a third state (or a representative of a third state) no longer applies, without the consent of the third state concerned. Even if it is recognised that a group of like-minded states can set up a tribunal to try the crime of aggression (in particular, by delegating jurisdiction to the tribunal), these states cannot, in principle, circumvent the immunity of a third state which was not involved in the establishment of the tribunal – and over whose officials the tribunal will exercise jurisdiction when the occasion arises. Ultimately, the only powers that states can delegate to an international tribunal are those that they themselves possess at the outset. States themselves do not have the power to disregard personal immunity. It follows that they cannot, in principle, delegate that power to an international tribunal. Another important criticism concerns the concept of an 'international tribunal'. Not every international tribunal acts on behalf of 'the international community as a whole', and it is unclear what makes a tribunal 'truly international'. Without a clear definition of the characteristics that make a tribunal sufficiently 'international' to warrant not recognising personal immunity, the reasoning of the Special Court and the International Criminal Court leaves individuals entitled to claim personal immunity in a vulnerable position.*
>
> *The CAVV finds this criticism convincing. Since the ICJ held in the Arrest Warrant case that heads of state, heads of government and ministers of foreign affairs can claim personal immunity before the national courts of other states – even if they are suspected of committing international crimes – it would seem that an international tribunal which has not been established by the suspect's home state, and which lacks a Chapter VII basis must also respect this personal immunity.*[5]

The CAVV's position on the immunity *ratione personae* is consistent with the current thinking of the International Law Commission (ILC), which has been considering the topic of the immunity of State officials from foreign criminal jurisdiction since 2007. While some caution is needed in citing the work of the ILC on a matter still under consideration, not least because "the procedural complexity of the treatment of a topic by the Commission may make it hard to grasp precisely where matters stand",[6] it is noteworthy that one of the draft articles says that "[t]he present draft articles do not affect the rights and obligations of States under international agreements establishing or relating to the operation of international criminal courts and tribunals as between the parties to those agreements" (emphasis added);[7] the necessary (and manifestly correct) corollary is that relations between a

5. Advisory Committee on Public International Law, "40. Challenges in prosecuting the crime of aggression: jurisdiction and immunities", 12 September 2022, pp. 11-12, https://www.advisorycommitteeinternationallaw.nl/publications/advisory-reports/2022/09/12/challenges-in-prosecuting-the-crime-of-aggression-jurisdiction-and-immunities.
6. Sir Michael Wood, "The ILC's First Reading Draft Articles on 'Immunity of State Officials from Foreign Criminal Jurisdiction' (2022)", *Max Planck Yearbook of United Nations Law* 26(1) (2023), p. 150.
7. See Draft Article 1(3), adopted at first reading by the ILC, Report of the ILC at its Seventy-third session, UN Doc. A/77/10 at pp. 188ff https://legal.un.org/ilc/guide/4_2.shtml

   The Commentary to Draft Article 1(3), adopted at first reading with the text of the article, says:

   *The intention here is to highlight that conventional legal regimes applicable to international criminal tribunals, as a matter of treaty law, apply only as between the parties to the agreement establishing a particular international criminal court or tribunal. (Ibid. at p. 203).*

party and a non-party are unaffected by those agreements. Moreover, the ILC's draft article on the immunity *ratione personae* of the so-called troika – i.e. the three most senior State officials in the eyes of international law, that is the Head of State, the Head of Government and the Minister of Foreign Affairs – provides for no exception, in relation to international crimes or else: "[s]uch immunity *ratione personae* covers all acts performed, whether in a private or official capacity, by Heads of State, Heads of Government and Ministers for Foreign Affairs during or prior to their term of office".[8]

Citing the ICJ's judgment in the *Arrest Warrant* case, which we discussed in our earlier report, the latest draft of the ILC Commentary notes:

> (6) … *As the International Court of Justice stated in the Arrest Warrant case, with particular reference to a Minister for Foreign Affairs, extension of immunity to acts performed in both a private and an official capacity is necessary to ensure that the persons enjoying immunity* ratione personae *are not prevented from exercising their specific official functions, since* "[t]*he consequences of such impediment to the exercise of those official functions are equally serious … regardless of whether the arrest relates to alleged acts performed in an 'official' capacity or a 'private' capacity". Thus, "no distinction can be drawn between acts performed by a Minister for Foreign Affairs in an 'official' capacity, and those claimed to have been performed in a 'private capacity'". The same reasoning must apply,* a fortiori, *to the Head of State and Head of Government.*
>
> (7) *The fullness of immunity ratione personae is also reflected in the present draft articles, which do not establish any limitation or exception applicable to this type of immunity, in contrast to the case of immunity* ratione materiae *by virtue of draft article 7.*[9]

These views enjoy very considerable support in both state practice and academic literature. There would be little benefit in setting out all of these materials, which are examined thoroughly in the various reports of the ILC on this topic.

It is, however, worth noting that, since the publication of our paper, a number of authors have written critiques of the Pre-Trial Chamber's decision to issue arrest warrants along similar lines. Olivia Flasch has argued that "in its attempt to expand its jurisdictional reach in order to hold more individuals to account, it seems the ICC has rather created a path for States to choose which laws to adhere to based on what may benefit them more politically in the circumstances" and suggested that "the ICC may have instead politicised the law" in favour of well-connected countries by its reading of Article 98.[10] Keiichiro Kawai has meanwhile urged the ICC to reconsider this line of cases, lest it undermines its own authority.[11]

As noted, a number of State parties, including South Africa, the Democratic Republic of Congo, Jordan, Chad, Nigeria, and Mongolia, have disagreed with the ICC and refused to execute arrest warrants in respect of individuals whom they considered to be entitled to immunity under international law. France has now also indicated it considers that

8. Draft Articles 4, pp. 222-223.
9. Commentary to Draft Article 4.
10. Olivia Flasch, "The interplay between Articles 27 and 98 of the Rome Statute: A familiar friend makes a new appearance in the arrest warrants against Netanyahu and Gallant", *EJIL:Talk!* 10 December 2024, https://www.ejiltalk.org/the-interplay-between-articles-27-and-98-of-the-rome-statute-a-familiar-friend-makes-a-new-appearance-in-the-arrest-warrants-against-netanyahu-and-gallant/
11. Keiichiro Kawai, "The ICC's Turn to Cynical Solipsism: The PTC II's Finding of Mongolia's Non-compliance in the Case against Putin)", *EJIL:Talk!* 26 November 2024, https://www.ejiltalk.org/the-iccs-turn-to-cynical-solipsism-the-ptc-iis-finding-of-mongolias-non-compliance-in-the-case-against-putin

"Prime Minister Netanyahu and the other ministers concerned" do have immunity under international law which is not displaced by the ICC.[12] Germany has also suggested that it will not enforce the warrant, with chief government spokesperson Steffen Hebestreit telling journalists that it's "hard to imagine that arrests could be made in Germany on this basis."[13] Czech prime minister Petr Fiala called the issuing of the warrants an "unfortunate decision" which "undermines its authority in other cases when it equates the elected representatives of a democratic state with the leaders of an Islamist terrorist organization."[14] And most recently, the Italian government has reportedly affirmed "that Netanyahu and Galant are entitled to immunity under international law while visiting Italy."[15] This is in addition to the reactions of leading non-state parties, such as the United States.

Some commentators have rejected the negative reaction to the arrest warrants as an example of Western double standards. In June 2024, a group of German academic lawyers published an open letter calling for "an effective International Criminal Court", in which they argued that to enforce the arrest warrant against Vladimir Putin but not against the Israeli officials would expose Germany "to the accusation of applying double standards and acting *à la tête du client*, depending on how close its relationship was to the home State of the person wanted." Given the fact that the Russian Federation is, like Israel, neither a state party to the ICC nor has otherwise agreed to submit to the ICC's jurisdiction, this criticism is not without merit. Of course, Mr Netanyahu is a head of government whereas Putin is a head of state; but it is generally accepted that heads of state and heads of government enjoy the same *ratione personae* immunity in addition to personal inviolability. The position may have been different in the case of President Bashir, since there was a relevant United Nations Security Council resolution, although the Appeal Chamber did not justify its decision in *Bashir* on that basis.

In any case, we should not overplay the inconsistency between the positions taken by Western and other state parties on arrest warrants against officials of different states. The decision to adopt or not to adopt stances in their connection reflects a matrix of legal and political considerations, so that it can be proper for a state to speak up about the infringements of the rights of a friendly state and not to do so, or to be less forthright in so doing, when the rights of an unfriendly state are being violated. This said, the political force of these accusations suggests that Western governments need to become more thoughtful and strategic than has hitherto been the case when taking a public stance on international legal issues. Too often, ministers adopt legally problematic or even erroneous positions simply because they are politically expedient. Ministers should resist these temptations, and always have wider interests and considerations in mind.

We do appreciate the intuitive reluctance to accept the view that the UK should state (as other states have done before) that in this case it cannot execute an arrest warrant by an international court. But the key question is this: would the UK be in breach of international law if it did refuse to

12. France Diplomacy, "Israel – International Criminal Court (27 November 2024)", https://www.diplomatie.gouv.fr/en/country-files/israel-palestinian-territories/news/2024/article/israel-international-criminal-court-27-11-24

13. Seb Starcevic, Elena Giordano, And Ketrin Jochecová, "Netanyahu arrest warrant: Where can he still go in Europe?" *Politico*, 22 November 2024, https://www.politico.eu/article/benjamin-netanyahu-arrest-warrant-war-crimes-gaza-travel-arrest-europe/

14. https://x.com/P_Fiala/status/1859669494635053524

15. Guy Azriel, "Italy joins France in granting immunity to Netanyahu, rejecting ICC arrest warrants" i24 News, 15 January 2024, https://www.i24news.tv/en/news/international/europe/artc-italy-joins-france-in-granting-immunity-to-netanyahu-rejecting-icc-arrest-warrants

execute an arrest warrant against the Israeli prime minister? In our view, it would not.

Admittedly, the ICC's mistaken interpretation of international law and of the ICC Statute has created a tension between two views of what the law requires. But such tensions are not uncommon within an international legal system that has become much more fragmented in recent decades, with far less coherence than hitherto. This type of conflict cannot simply be addressed by the Government with a *non liquet* (i.e. a declaration of the law being unclear), as such a policy undermines the rule of law at a very fundamental level, where clarity and predictability are concerned. As the primary creators and users of international law, including of customary international law, states should state clearly where they stand in the case of such conflicts, and, as observed above, they should beware of the risks of remaining silent, even where it might be tactically convenient to do so, in particular the risk that such silence may end up providing support to the wrong conclusion about customary international law.

In the current case, the choice facing the UK is this: if the UK decides to enforce the warrants on the occasion of a visit by Mr Netanyahu, it would certainly commit a breach of customary international law. The fact that the ICC may, in a future case concerning the UK's decision not to arrest him, repeat its error and wrongly hold the UK in breach of the ICC Statute would not justify or excuse this breach. In other words, to execute the warrant will mean to commit a clear breach of international law, on the basis that the ICC may hold the UK in breach of international law if it does not breach international law now. The principled position for the UK to adopt is to take the law as it exists, and to defend the UK's compliance with the law in any future proceedings before the ICC, not least in order to encourage the Court to correct its mistaken approach, which is possible as the ICC is not bound by its own precedents.

Such a solution to the tensions resulting from the ICC's mistaken approach may appear counterintuitive, and even unattractive, to those whose legal mindset is entirely shaped by the concepts and assumptions that inform a domestic legal order. The international legal order does not always operate on the basis of those same concepts and assumptions. The ICC is not a judicial organ of the international legal order in the same way in which a domestic court is a judicial organ of the domestic legal order. International courts do not derive their authority from a 'world state'. The ICC is the creation of a treaty to which a large number of states have chosen not to become a party. While domestic courts are always in some sense the arbiters of justiciable disputes submitted to them, with the highest court within a particular domestic legal order normally having the authority to be the final arbiter of such disputes, the nature of the international legal order is such that a treaty-based court like the ICC cannot be the *final* arbiter of a question concerning the legal rights and obligations of a non-State party to that treaty – and that was indeed the point of Article 98 of the ICC Statute.

# The *Pinochet* judgment and the jurisdiction *ratione materiae* of former State officials

Former Minister Gallant is in a different position from Prime Minister Netanyahu. To begin with, he was a Minister of Defence and thus not a member of the 'troika' of senior officials, although it is widely accepted that the 'troika' is not exhaustive and, given the importance of his functions, a defence minister would be the next most obvious candidate for absolute immunity *ratione personae* coextensive with that of the troika. Mr Gallant's position, however, differs in a more fundamental respect: he is no longer serving as defence minister. Former officials, whatever their level of seniority within the State, are entitled to immunity *ratione materiae*.

Immunity *ratione materiae* applies to acts performed in an official capacity and continues even after the individuals have ceased to be State officials. It evidently thus applies to Mr Gallant in respect of all his acts while minister of defence.

Turning to the effects of the *Pinochet* extradition cases on the immunity of former high state officials, in *Pinochet (No 1)* the House of Lords held by a margin of 3 to 2 that Senator Augusto Pinochet, formerly President of Chile, did not enjoy immunity *ratione materiae* for certain international crimes, namely torture, genocide, and the taking of hostages, committed during his presidency. The decision was set aside in *Pinochet (No 2)* and the case was reheard before a panel of seven, which in *Pinochet (No 3)* affirmed the holding in *Pinochet (No 1)* but limited its temporal application in the UK to after the entry into force of section 134 of the Criminal Justice Act 1988, which gave UK courts universal jurisdiction over torture.

The exact ratio of *Pinochet (No 3)* has been the subject of much discussion, since there were seven separate speeches by their Lordships. A clear majority of five judges however held that certain provisions in the Convention Against Torture (CAT) entailed a waiver or qualification of immunity *ratione materiae* for torture.[16]

This narrow reading of the *ratio decidendi* of *Pinochet* has been confirmed subsequently, e.g. in *Kumar Lama* where the Court of Appeal (Hallet LJ, Lloyd Jones LJ, Green J) said:

> (30) *We have come to the clear view that the ratio decidendi of* Pinochet (No. 3) *is to be found in a much narrower principle, namely that as between*

16. *R. v Bow Street Metropolitan Stipendiary Magistrate Ex p. Pinochet Ugarte* (No.3), [2000] 1 A.C. 147. See: Lord Browne-Wilkinson at pp. 204H-205A; Lord Hutton pp. 261F-G and 263E; Lord Saville p. 267C-D; Lord Millet p. 277E; Lord Phillips p. 290F-G

> *the States party to the Convention against Torture, the Convention excludes the operation of immunity ratione materiae. A number of the judges in the majority in Pinochet (No. 3) pointed out that since the offence of torture in Article 1(1) was limited to acts of torture performed in an official capacity, every case would otherwise be met by a plea of immunity. The immunity would be exactly co-extensive with the offence created by the Convention. In these circumstances a clear majority concluded that the parties to the Convention against Torture must be taken to have decided that immunity ratione materiae should not be available in such cases. These views are expressed in different ways. However, whether it is said to be the result of an express agreement, an implied agreement or a waiver, the various formulations all share the core conclusion that the availability of immunity would be incompatible with the Convention against Torture and would defeat its purpose.*[17]

The charges against Mr Gallant concern "the war crimes of starvation as a method of warfare and of intentionally directing an attack against the civilian population; and the crimes against humanity of murder, persecution, and other inhumane acts from at least 8 October 2023 until at least 20 May 2024." The argument based on CAT does not apply to him.

It is, however, the case that the argument that immunity ratione materiae should not apply more generally to certain crimes under international law has received some support. Most notably, in 2022, the ILC has adopted draft Article 7 on first reading which provides as follows:

> *Immunity ratione materiae from the exercise of foreign criminal jurisdiction shall not apply in respect of the following crimes under international law:*
>
> *(a) crime of genocide;*
>
> *(b) crimes against humanity;*
>
> *(c) war crimes;*
>
> *(d) crime of apartheid;*
>
> *(e) torture;*
>
> *(f) enforced disappearance.*

As the ILC Commentary itself notes, the adoption of this article has given rise to a long debate. It has attracted considerable opposition, with the US, Russian, Chinese, UK and German members of the ILC voting against it. The British member, Sir Michael Wood KC, was particularly critical, as were a number of governments, including the US and the UK Governments, in their comments.

The UK Government made its position clear in 2023 when it said that the ratio of the Pinochet decision was based on two specific provisions of CAT, the effect of which "was such that – as a matter of treaty law – any immunity *ratione materiae* available under general international law would be displaced or 'waived'". The UK added that it "is not aware of

17. *KL v Regina*, [2014] EWCA Crim 1729

similar reasoning in judgments in respect of other treaties which require the criminalisation of certain conduct and the assertion of extra-territorial jurisdiction."[18]

The ILC Commentary, reflecting the position of the majority of the members, justified the inclusion of this provision principally on the basis that "there has been a discernible trend towards limiting the applicability of immunity from jurisdiction *ratione materiae* in respect of certain types of behaviour that constitute crimes under international law".[19]

But the formation of a new rule of customary international law requires more than a vague trend. What is needed is sufficient evidence both of state practice and of states viewing that practice as obligatory in nature. But no such evidence has emerged in this case. As Sir Michael Wood observed, in the debate in the ILC that led to the provisional adoption of this article, "*[f]ew members, if any, said clearly that the draft reflected existing law. Others supported it as a proposal lex ferenda; yet others were clear that it did not reflect lex lata, nor should it be adopted as new law.*"[20]

The trenchant criticism of the objecting members of the Commission was summarised in the ILC Report as follows:

> *… they [the objecting members] opposed draft article 7, which had been adopted by vote, stating that: (a) the Commission should not portray its work as possibly codifying customary international law when, for reasons indicated in the footnotes below, it is clear that national case law, national statutes, and treaty law do not support the exceptions asserted in draft article 7; (b) the relevant practice shows no "trend", temporal or otherwise, in favour of exceptions to immunity* ratione materiae *from foreign criminal jurisdiction; (c) immunity is a procedural matter and, consequently, (i) it is not possible to assume that the existence of criminal responsibility for any crimes under international law committed by a State official automatically precludes immunity from foreign criminal jurisdiction; (ii) immunity does not depend on the gravity of the act in question or on the fact that such act is prohibited by a peremptory norm of international law; (iii) the issue of immunity must be considered at an early stage of the exercise of jurisdiction, before the case is considered on the merits; (d) the lack of immunity before an international criminal court is not relevant to the issue of immunity from the jurisdiction of national courts; and (e) the establishment of a new system of exceptions to immunity, if not agreed upon by treaty, will likely harm inter-State relations and risks undermining the international community's objective of ending impunity for the most serious international crimes. Furthermore, these members took the view that the Commission, by proposing draft article 7, was conducting a "normative policy" exercise that bore no relation to either the codification or the progressive development of international law. For those members, draft article 7 is a proposal for "new law" that cannot be considered as either* lex lata *or desirable progressive development of international law.*[21]

As one of the States that has objected to this development, the UK cannot at present be said to have accepted to be bound by any new rule of customary international law purporting to introduce new limits to the

18. UK Mission to the UN, Comments and Observations of the UK Government on the Draft Articles on Immunity of State Officials adopted by the ILC, 1 December 2023.

19. Report of the International Law Commission, Seventy-third session (18 April–3 June and 4 July–5 August 2022), General Assembly Official Records Seventy-seventh Session Supplement No. 10 (A/77/10), p. 232, https://documents.un.org/doc/undoc/gen/g22/448/48/pdf/g2244848.pdf.

20. Sir Michael Wood, "The ILC's First Reading Draft Articles on 'Immunity of State Officials from Foreign Criminal Jurisdiction' (2022)", *Max Planck Yearbook of United Nations Law* 26(1) (2023), p. 160.

21. Report of the International Law Commission, Seventy-third session (18 April–3 June and 4 July–5 August 2022), General Assembly Official Records Seventy-seventh Session Supplement No. 10 (A/77/10), pp. 235-236, https://documents.un.org/doc/undoc/gen/g22/448/48/pdf/g2244848.pdf.

scope of immunity *ratione materiae*. Our leading domestic authority on the point, Pinochet, does not offer support for such an expansive reading.

In these circumstances, the Government should feel compelled to re-state the settled British position on the scope of immunity *ratione materiae* in no uncertain terms. It cannot be emphasised enough that, by remaining silent or adopting an ambiguous position, the UK risks negligently to acquiesce in the development of a new customary rule of international law to which UK has objected consistently over time. If, however, the Government has decided to support these developments, it has a duty to be transparent about its aims, not least because of the severe consequences that such developments may have on British interests, and on British relations with some of our closest allies and partners, including the United States.

# Conclusion

The ICC has placed State parties in a difficult position but, for the reasons set out above, State parties should continue to uphold the principle that they cannot be forced to impose on other States the rules of a treaty to which those States have chosen not to become a party.

The fight against immunity by some is part of a wider attempt to transform international law from a legal system grounded in the sovereign equality of States, the principle of State consent, and centrality of State practice in the formation and development of customary law, to an instrument for the pursuit of particular political agendas. As part of such an attempt, activist-led interpretations of international law – as is particularly evident in the field of international human rights law – have been championed, often to the detriment of the interests of states. Plainly put, the commitment to international law that many like to profess does not usually extend to the rules on immunities; this is not the sort of 'international law' that fits in well with certain political agendas, the relentless pursuit of which is putting the legitimacy of international law under strain. Immunities are, however, essential to the proper functioning of international relations and diplomacy – even more so at a time of conflict and greater divisions.

There are three principled and strategic reasons why the Government should state its position on the International Criminal Court Act 2001 and customary international law clearly.

First, for the reasons we have set out, this is what a genuine commitment to the rule of law requires. The terms of the ICC Act are clear, and so is customary international law on the matter. The Government cannot responsibly assert that this is a matter to be left to the courts; and if the Government were to transfer an ICC arrest warrant to a judicial officer for endorsement, when the warrant relates to a person who enjoys state or diplomatic immunity arising out of a connection to a non-State party to the ICC Statute, it would be acting unlawfully.

Secondly, by remaining silent, the UK is encouraging confusion about customary international law. With the issue of immunities under international law being so intensely debated, not least by the ILC, the Government's silence is irresponsible. It may be taken as supporting positions on immunity which are not only wrong as a matter of law, but also recklessly put the UK at odds with close allies. (If the legal strategy pursued by the Government is, however, to go against past policy and provide support to these positions, it has a duty to be candid about it.)

And the third reason is our relationship with the US. The US, our closest ally, has always objected to the position that its officials would

have no immunity before the ICC. The ICC's assault on the immunities of non-State parties has resulted in an all-too-predictable confrontation. It is striking that some in the US are now considering adopting sanctions against the ICC, as the legislation currently before Congress would provide. The Government should consider it a matter of priority to seek to defuse this confrontation with the US, and other non-State parties, by reiterating the basic principle that their immunities are unaffected by the ICC Statute.

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