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Immunity of High State Representatives with regard to International Crimes



Are Heads of State, Heads of Government
and Foreign Ministers Still Untouchable?

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Summary

Many changes have occurred in the area of immunity for high state officials during the last century. States and their High Representatives, such as Head of State, Head of Government and Foreign Ministers were at the beginning of the last century granted absolute immunities for all acts they conducted. Evolution has, however, produced new rules based more on their need to function properly and less on the state representative character what has entailed the restricting of immunities under certain circumstances.

The discussion that takes place today involves the questions of whether high state representatives are accorded immunity for international crimes. Those, most of which amount to grave breaches of human rights and humanitarian law, are; slavery, piracy, genocide, war crimes, crimes against humanity, torture and aggression. They are considered so foreign to the international society of today that special measures are considered motivated. They entail the personal responsibility of the perpetrator, lie under universal jurisdiction and, it is asserted by some, remove immunity for former high state officials. The question elaborated on in the thesis is thus whether high state representatives, at least those no longer in office, are accorded immunity for international crimes.

Most scholars agree that the state and the state representative should bear responsibility for the acts but how to circumvent the provisions on immunity has proved to be one of the most complicated problems of modern international law. A great part of the problem lies in the characterization of the criminal act. If the Head of State is to be tried, the act needs to be characterized as private since only private acts do not entail immunity. If the act in accordance to that is classified as private, the state cannot at the same time be held responsible at the international level, since private acts of the High State Representative are not attributable to the state, according to the rules on state responsibility. These two are separated areas but it would not be possible to characterize the same act as private in one area and as official in the other.

To come around this circle of impunity some national courts, international tribunals, institutions and legal scholars have envisaged the creation of an exception to state immunity. On the international arena the issue is clear, no immunity is accorded, this irrespective of the official status of the person. The basis therefore is the statutes of the war crime tribunals. It is however asserted that international customary law provides a rule that removes immunity from commission of international crimes, even when it comes to national courts. This is held plausible in the society of today that demands respect for democratic values such as the rule of law, justice through punishment and imprisonment of the individuals responsible and compensation to the victims. It is asserted that the rule has its foundation in the Nuremberg Charter that stated the irrelevancy of the official capacity of

the perpetrator, which's status as customary law was affirmed in a resolution by the UN General Assembly. The rule was later affirmed by the statutes of ICTY, ICTR, ICC and in state practice, amongst others, by the Pinochet case and the Eichmann case. Further evidence the war crime tribunals provide is the political will of the international society to remove the immunities of the perpetrators as well as the customary status of the relevant provision, what makes it applicable on the national arena as well.

After trying the above asserted, I arrive at the conclusion that it is not tenable. High state representatives are still accorded immunity, even for commission of international crimes and even after the officials cease to hold office. As for the immunity *ratione personae* accorded to the state official while in office, it is steadily affirmed by a massive amount of state practice, in treaties and by international institutions. While in office, the person is untouchable. The above asserted rule would, however, come into operation after the person ceases to hold office. It is thus asserted that the immunity *ratione materiae* is removed when international crimes have been committed i.e. the immunity accorded due to the official or sovereign character of the act. The state practice of today does, however, not seem to support the asserted. The Pinochet decision, where the former Chilean leader was not accorded immunity by the United Kingdom House of Lords, was undeniably leading the evolution in that direction. This evolution was however abruptly stopped by the ICJ in the much criticized Yerodia-case that confirmed the unrestricted immunities of high state officials, even after they cease to hold office. The European Court for Human Rights held as well in three cases that state immunity still prevailed. Only immunity for the private acts is removed after cession of office.

It is thus concluded that the evidence for such an asserted rule is not strong enough in face of contrary state practice and decisions by ICJ and ECHR. State high representatives are still accorded immunities, even for commission of international crimes and even after the official ceases to hold office.

The solution for the future might lie in the classification of the criminal act. It has been suggested that, if the international crime was to be classified differently, there would be no hinders for states to initiate proceedings against former dictators. Today the act is classified as sovereign or official what thus entails immunity. To classify it as private, as is done by some, would entail several unwanted consequences. Suggestions have thus been made that if it was to be classified as, for example, 'an act committed for official purposes' the immunity could be removed without any absurd consequences, as would follow if the classification was private or official.

Even though a theoretically valid definition was to be found in the near future, what lacks today is the political courage to indict former high state officials of foreign states in national courts. The ICJ has a chance to make the customary law move in one of the directions, in the pending case

between France and Congo that involves questions of immunity for international crimes.

Abbreviations

ECHR – European Court for Human Rights
ECSI – European Convention of State Immunity
EJIL – European Journal of International Law
GA – General Assembly
ICC – International Criminal Court
ICJ – International Court of Justice
ICLQ – International and Comparative Law Quarterly
ICTY – International Criminal Tribunal for Yugoslavia
ICTR - International Criminal Tribunal for Rwanda
ILA – International Law Association
ILC – International Law Commission
LJIL – Leiden Journal of International Law
UN – United Nations

1 Introduction

1.1 Background

The respect for human rights and the clear repudiation of international crimes have since the creation of the United Nations received ever-increasing importance. Milestone events during the last century were the Nuremberg and Tokyo Trials, where the perpetrators of the gravest crimes the civil humanity had envisaged, committed during the Second World War, were placed on trial. The absolute immunity, then granted to high state officials for all acts, could not serve as a shield in front of the heinous crimes they were to be held responsible for and was thus removed. The international community promised then, never to let something horrible like that, to occur again.

Horrible events did however take place again, not at least in Rwanda and in the former Yugoslavia, despite the strong commitment of the international society never to let them occur again. International tribunals were once again set up to ensure justice by indicting the highest officials responsible for the atrocities and the awful crimes committed. Their immunity was as well removed in the statutes of the tribunals in order to achieve the goals of justice. Horrible events occurred as well on other places and only a few of them, Sierra Leone for example, succeeded to involve the international community that engaged in creating hybrid courts with the government. There the high state representatives could be tried without the right to invoke immunity that otherwise was granted by customary law.

One of the greatest achievements, in striving for respect for human rights and dignity, was the creation of the International Criminal Court, the ICC. The international community thus left the unrealistic never-again-mentality and created something well needed and lasting. According to the ICC-statute, every official may be tried, even head of state or government, incumbent or not, for commission of certain international crimes such as war crimes and crimes against humanity. This is great progress since the court, when acceded to, has full jurisdiction and another temporal international tribunal does not have to be established for every new breach of law that is amounting to an international crime. This way the rule of law is affirmed on the international arena, where otherwise political considerations guide the decisions on whether to act or not. The reality of today unfortunately demands a court of this kind. The international crimes committed at this very moment in the Sudanese region of Darfur serve as an unpleasant reminder of that fact.

1.2 The Subject

At the end of last century, a discourse on the domestic courts' role within the international justice system emerged. The rule of universal jurisdiction was spreading, demanding universal criminalization of certain crimes and every country's cooperation in putting the responsible officials on trial. United Kingdom acted in accordance to the new developments and in 1998 initiated proceedings against the former Chilean leader, Senator Augusto Pinochet, for commission of the international crime of torture. The decision of the Law Lords not to grant the Senator immunity, that he according to customary law until that point was entitled to, was massively celebrated in human rights contexts but at the same time criticized in others. When the Belgian authorities issued and internationally circulated an arrest warrant against the Congolese Prime Minister, Mr. Yerodia, the matter ended before the International Court of Justice. The ICJ decided, as interpreted by most, that incumbent high state officials are entitled to immunity, even for international crimes, as well as after the cession of office, if not the crime was committed in a private capacity. The ICJ thus, with this case, headed at the opposite direction compared to the latest developments led by the Pinochet case and thus left the international arena at an uncertain point.

As the ICJ stated in the Yerodia-case, a former high state official could be held accountable at domestic courts only for crimes that were committed in a private capacity. The question thus arose on the characterization of the international crime. Can an act that is conducted through state organs and often with political purposes be regarded as private? And if it is characterized as private and thus the official responsible would lose his immunity, how was then the state at the same time to be held responsible for its involvement? According to the rules on state responsibility, only official acts of state representatives are attributable to the state what made it difficult, in the area of state immunity, to simply attribute the private act of the official to the state. Although those two are different areas of international law, they still offer interpretation guidance for each other since many issues are dealt with within both what makes it unwanted to develop not-corresponding rules. It would as well not be logical to characterize one and the same act differently in those two areas, just to make it fit.

1.3 Purpose and Questions

The discourse of a changing customary law, that is headed towards less immunities, has been the object of attention for some time now and not at least the creation of the ICC show the political will of the international community to deal with these issues. Evolution was far ahead with the Pinochet case but stopped abruptly with the Yerodia case. The purpose of the thesis is to establish exactly where the customary law of today stands concerning immunity of high state officials with regard to international crimes.

The international crimes that will be dealt with are those that most scholars agree on belong to this group i.e. slavery, piracy, war crimes, crimes against humanity, genocide, torture and aggression. The exact questions to be elaborated on are thus:

- What is the stand of international customary law, with regard to immunity of heads of state, heads of government or foreign ministers, in a context where international crimes were committed?
- What are the differences between their immunities on the international and the national arenas?
- How is the criminal act amounting to an international crime to be characterized? Is it a sovereign, non-sovereign, official, private or any other kind of act, and in what way is the characterization important?

1.4 Limitation

The question elaborated upon is the immunity accorded to high state officials, in case the crimes committed amount to international crimes. Less serious crimes, other state officials and purely diplomatic immunities will thus not be discussed, other than very shortly where that is necessary.

As already envisaged, in some parts of the thesis, the work of ILC with its codification of the state responsibility area is mentioned. This is done, not because that area is directly connected to the area of state immunity but because it in some parts can offer guidance for interpretation and understanding of the area of state immunity. When an act is attributable to the state within the area of state responsibility may offer guidance of what acts may be regarded as sovereign within the area of state immunity and so on. Both of them must as well be kept in mind when the discussion is on the classification of the criminal act.

1.5 Organisation and Method

Immunity of high state officials belongs partly to the wider area of international law, called state immunity. The first introduction chapter, is thus followed by a chapter, where state immunity i.e. the sovereign immunities, shortly are described. Here the general rules and treaties relating to immunity issues are portrayed. Immunity of the high state representatives is then presented separately in the third chapter. Here both their sovereign and personal immunities are described. Both second and third chapters contain descriptive first parts including a short historical and theoretical background on the evolution of the rules followed by a presentation of the most important treaties and codification projects. These parts should be regarded as a necessary factual background that offers the

reader a deeper understanding of the questions to follow and at the same time provides information on the origin of customary law. The greatest part of the third chapter is, however, designed to describe and analyse the stand of customary law regarding international crimes, where, as a part thereof, relevant cases and doctrine are portrayed and discussed. Here, the case law is divided between international tribunals and national courts since the rules of immunity have evolved differently in the two areas. The decision of ICJ is as well presented here since that decision is most suitably discussed together with national decisions. Minor conclusions are made in some of the paragraphs to help the reader create a context for better understanding of the next paragraph. At the end of every chapter a conclusion of the most important findings is however afforded, also with some hints as for *lex ferenda*.

Chapter four initially contains a description of how a classification of the criminal act may be done. Here as well, an analysis is afforded to show how significantly the question of characterization affects both the immunity of high state officials and the perhaps arising responsibility of the state. Most space is dedicated the question of how to characterize the criminal act amounting to an international crime where some state practice as well as the view of leading doctrine is presented. This chapter is as well shortly concluded.

In the last chapter, a conclusion of the three previous chapters is afforded. Findings from those are intertwined and the area is related to recent developments. A description of *lex ferenda*, according to a part of the doctrine is as well presented in order to mirror where development might be headed in the future.

For the sake of fluent reading, a high state representative is principally referred to in the male form to avoid forms like: he/she, his/her etc. What regards the sources used in the thesis, and then primarily the doctrine used and quoted, some remarks need to be done. My original purpose of the thesis was to prove the existence of a customary rule that removes immunity accorded to former high state representatives when international crimes were committed. I however soon enough discovered that the great lack of state practice and the outcome of the Yerodia case would hardly let me provide the empirical evidence that was needed. Even though, I choose to refer to the legal scholars of high standing that support my initiative thoughts, such as Cassese and Bassiouni, as far as they provide tenable grounds for their assertions, although they might be regarded as idealists in some contexts. The lack of state practice in that direction, as well as the Yerodia case are the greatest counterweights I present and which force me to admit the prevalence of immunity. The great wish of mine to see the immunities restricted is as well the reason why I provide some thoughts on where the trend is headed, although trends have nothing to do with positive law which only can be established as providing immunity or not.

2 Immunity Afforded to States

2.1 Introduction

State immunity is the branch of international law that grants states immunity. The immunities of High Representatives of State, are partly to be seen as a part of those immunities belonging to the State. The other part is their personal immunities. Those will be dealt with separately in chapter three. In this chapter, the overall picture and regulations of state immunity, i.e. the sovereign immunities, are portrayed in order to show how the rules evolved and primarily what the exceptions to state immunity are.

The spirit of state immunity lies in the concept of sovereignty, equality and non-interference. All states are equal, what amongst others is confirmed in the United Nation Charter, article 2 (1).¹ This entails the consequence that no state is allowed to pass judgement on the acts of another state.² The immunity offers effective and unproblematic performance of the duties and functions of the state as well as secures the orderly and peaceful conduct of international relations. Today, there is no rule that requires from states to publicly announce whether their national courts will refrain adjudication in a case merely because it involves a foreign state. There does, however, exist a hard core of rules that grants foreign states immunities under the proper circumstances.³ In this chapter, some light is shed on those rules and their evolution with the purpose of creating a solid background for the discussion of immunities of high state representatives that will follow in the next chapter.

As already mentioned in the introduction chapter, it is helpful to speak of state responsibility when it comes to certain aspects of state immunity. The area of state responsibility often offers guidance for understanding and interpreting the area of state immunity although the both areas are and must be clearly separated from each other. Many subjects are however discussed within both areas, such as what acts are state acts, are there state crimes etc. That is the reason for why the area of state responsibility is mentioned in some parts of the thesis.

2.2 Evolution of State Immunity

All states possess sovereignty. One great element thereof is immunity from jurisdiction of foreign states. It follows thus from the equality between states, that no state can pass judgement over the acts and omissions of

¹ The Charter of United Nations, signed at San Francisco on 26 June, 1945

² G. Dahm et al, *Völkerrecht – die Grundlagen. Die Völkerrechtssubjekte. Band I/1* 1988:453

³ H. Fox, *The law of state immunity*, 2002:1

another state. According to Fox, three different phases in the evolution of immunity could be envisaged: the absolute, the restrictive and the post-modern phase of immunity.⁴ Older notions of absolute immunity, when the relationships on the international arena was between states only and where full and unrestricted immunities were granted, have today cleared way for more restrictive and qualified notions. This has partly to do with the change in international society where the fight against impunity has increased but as well with the fact that states started to engage in more and more areas of the community. Today almost all states have taken steps in implementing the doctrine of restrictive immunity. Fox, as mentioned above, is even advocating the post-modern era, where the state is accorded few immunities and where the individual, with its own international rights and responsibilities, has taken a step forward as a subject of international law.⁵ This is an era no one could envisage a hundred years ago. The dismissal of absolute immunity creates however other problems, one of which is where to draw the line between immune and non-immune activities of a State.⁶ This question will be elaborated in the paragraphs following below, as soon as some theoretical background has been presented.

2.3 The Absolute and the Restrictive Doctrine of Immunity

The absolute doctrine of immunity guarantees foreign states full and non-delimited liberation from internal jurisdiction.⁷ That is to say, a state could not formally be accused, sued, tried, sentenced or a matter of enforcement measures by another state. The absolute immunity is derived from the inherent sovereignty of a state, all states being equal. *Par in parem non habet imperium*, as the wise Bartolus once stated.⁸ The most enthusiastic followers of the absolute immunity until 50 – 60 years ago were the United States and United Kingdom. In modern times a shift towards socialist countries, such as China and Cuba, has occurred. It is difficult for them to fit in to the system, restrictions on state immunity where the state acts with commercial purposes and performs acts that private persons could have conducted. In such a system absolute immunity fits better.

With the gaining of wider support for the restrictive doctrine some elements changed. States were still regarded to have the inherent sovereignty but the

⁴ The third phase is not discussed by the greater part of the doctrine. It may however be argued that Fox rightly envisages it. There is an evolution going on with changing rules of immunities.

⁵ H. Fox, *The law of state immunity*, 2002:2

⁶ C. Schreuer, *State Immunity: Some recent developments*. 1988:6

⁷ G. Dahm et al, *Völkerrecht – die Grundlagen. Die Völkerrechtssubjekte. Band I/1*. 1988:458

⁸ Bartolus, *Tractatus Reppsalium*, Question I/3, para.10 1354. Quoted in Wirth, S, *Immunities, Related Problems and article 98 of the Rome Statute*. *Criminal Law Forum* Vol 12. 2001:430

international community did not any longer consider it necessary to grant the states full, unrestricted immunities on that ground. This is, amongst others, the necessary evolution of states taking more active part of the economic transactions on the international and national markets.⁹ A state would have enormous competitive and other advantages if it was to be completely exempt from market regulations and other provisions in foreign countries.¹⁰ It would also not be justifiable to deny private persons, with claims deriving from commercial transactions with the state, access to national courts.¹¹ When a state involves in transnational activities it should realize, as every private party realizes, the risk of foreign law being applied to the relationship if a dispute arises out of it.¹² These ideas came along with the functionalist approach that gained increased support during the last century, that granted states immunity only for the matters necessary to fulfil their functions effectively and nothing else and thus removed immunity for certain acts.

Fox contends that today, the word is no longer about a trend. The rule of restrictive immunity prevails.¹³ The assertion is supported by the newly adopted United Nations Convention on Jurisdictional Immunities of States and their Property that clearly adopts the restrictive doctrine with a list of exceptions to state immunity.¹⁴

2.3.1 Sovereign and Non-sovereign Acts

A distinction that the restrictive theory brought, which is crucial for state immunity today, was that between the different forms of state acts. The distinction is drawn between *acta jure imperii* i.e. acts in exercise of the public or sovereign powers of a state, where immunity is granted and *acta jure gestionis* i.e. acts performed as a private person or a trader, where no immunity is granted. The later are acts of a commercial character, acts of a private law nature that a private person could have conducted as well as some other acts.¹⁵ The two different types are as well identified as sovereign and non-sovereign acts.¹⁶

The distinction, however, entailed a problem that lies in the characterization of the act. What is a sovereign or a non-sovereign act? Where is the line to be drawn between the different kinds of acts? Several methods have been elaborated to find a dividing line between the different acts. Those are wider

⁹ I. Brownlie, Principles of Public International Law. 1998:330

¹⁰ B. Hess, Staatenimmunität bei Distanzdelikten – der Private Kläger im Schnittpunkt von Zivilrechtlichem und Völkerrechtlichem Rechtsschutz, 1992:41

¹¹ H. Fox, The law of state immunity, 2002:21-22, 37

¹² G. M. Badr, State Immunity: An analytical and Prognostic view. 1984:88

¹³ H. Fox, The law of state immunity, 2002:258

¹⁴ Articles 10-17 state exceptions to state immunity. United Nations Convention on Jurisdictional Immunities of States and their Property adopted in 2004. Convention available through: <http://www.un.org/law/jurisdictionalimmunities/>

¹⁵ H. Fox, The law of State Immunity, 2002:22

¹⁶ Malcolm N. Shaw, International law. Fifth edition, 2003:633

elaborated in the chapter on the classification of the act.¹⁷ Sovereign acts may for now be identified as acts in exercise of the public or sovereign powers of a state. Transactions related to the building of a new military compound is a good example. Non-sovereign acts are, amongst others, commercial acts and acts that a private person could have performed. Conduct relating to the building of a new restaurant to be used by the government may here be used as an example.

2.4 Treaty and Codification Regulations

The provisions of state immunity are principally derived from national state practice, national legislation and domestic courts decisions since the great lack of customary law provisions.¹⁸ This makes the area very comprehensive and quite difficult to describe. Attempts to codify the rules have however occurred. Here some of the most important codifications and international texts are shortly presented in order to show the evolution and origin of the rules applied today. At the end of the paragraph the exceptions to immunity they offer are listed.

One of the first codification attempts was the 1972 European Convention on State Immunity that was adopted and promoted by the Council of Europe.¹⁹ It did, however, not receive the great welcome it might have deserved. As of today, only eight states have ratified it.²⁰ It has, nevertheless, affected states and their courts. The convention has helped to spread the restrictive doctrine although it most likely contains a far too complex set of provisions for the states to accede to it.²¹

The *Institute de Droit International* adopted the first Resolution 11 September 1891, where, already, some restrictions on the absolute immunity were proposed.²² The second Resolution, finalized in Aix en Provence in 1954, could identify both the absolute immunity approach (supported amongst others by USA and UK) and the restrictive immunity approach (supported amongst others by Germany, France and Italy).²³ The third and last resolution, adopted at Basle in 1991,²⁴ was very debated and criticized,

¹⁷ See chapter 4

¹⁸ H. Fox, *The law of state immunity*, 2002:100

¹⁹ 1972 European Convention on State Immunity. Available at:

<http://conventions.coe.int/Treaty/en/Treaties/Html/074.htm>

²⁰ The eight ratifying states are: Austria, Belgium, Cyprus, Germany, Luxembourg, Netherlands, Switzerland and United Kingdom. Portugal has signed but not yet ratified. A list on ratifying states is available at:

<http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=074&CM=8&DF=25/01/05&CL=ENG> Last visited 05.05.19

²¹ H. Fox, *The law of state immunity*, 2002:100

²² *Institute de Droit International*, Resolution of 11 September 1891, Hamburg, ADI, II (1885-91)

²³ *Institute de Droit International*, Resolution of 30 April 1954, Aix en Provence, ADI 54-II,

²⁴ *Institute de Droit International*, Resolution of 2 September 1991, Basle, ADI 64-II.

Available through: http://www.idi-iil.org/idiE/navig_chon1993.html

primarily by developing countries that found it too west-oriented. Four years after the draft first was proposed, it had thus to be reformulated in over-general terms to be accepted, what made it difficult to use for further development of state immunity. National courts have seldom referred to it.²⁵

The International Law Association, in its turn, adopted Revised Draft Articles for a Convention on State Immunity in 1994. It started already 1952 with a resolution, advocating the restrictive approach and was followed by a Draft Convention adopted in Montreal, which thus was amended in 1994.²⁶ This codification was proposed to be used as an alternative codification to the draft under process by the International Law Commission²⁷ and was supposed to provide somewhat clearer provisions. Fox points to the fact that the draft, no matter how attractive, still expressed the Western countries' wish to increase the restrictive immunity and was therefore only cautiously to be regarded as a codification.²⁸

The most important codification today is the newly adopted United Nations Convention on Jurisdictional Immunities of States and their Property.²⁹ The Convention was prepared by the International Law Commission that forwarded its finalized draft articles to UN General Assembly for adoption in 1991.³⁰ Several issues were however contested what made the adoption of the text impossible for over 10 years. The GA finally adopted the Convention in December 2004.³¹ It grants states immunity from other states' jurisdiction for all cases other than enumerated in the convention. Those are related to commercial transactions, employment contracts, personal injuries etc.³² The Convention may in greater parts be regarded as expressing customary law, since it was prepared by the ILC for many years and there after rested on the UN General Assembly's agenda for several years until most states were satisfied about the content.

What the above-mentioned attempts towards codification and state practise of today have in common, without looking into detail regulations, can be regarded as the current state of law, with the reservation that the socialist countries, such as China, North Korea and Cuba do not regard the restrictive theory to be prevailing in all circumstances. A look at the content of the instruments reveals that the practice is to start with immunity and then to list exceptions. Whether this is a choice of editorial convenience or an indication of state immunity being the point of departure, is contested. Most

²⁵ H. Fox, The law of state immunity, 2002:90-1

²⁶ ILA Montreal Conference (1982) International Committee on State Immunity, Draft Montreal Convention ILA Rep. (1982) 5: reproduced in ILM 22 (1983) 287

²⁷ International Law Commissions work on the Draft Convention on Jurisdictional Immunities of States and their Property. Referred to the General Assembly for adoption Decision A/C.6/58/L.20

²⁸ H. Fox, The law of state immunity, 2002:93

²⁹ United Nations Convention on Jurisdictional Immunities of States and their Property adopted in 2004. Available through: <http://www.un.org/law/jurisdictionalimmunities/>

³⁰ International Law Commission. Decision A/C.6/58/L.20

³¹ Adopted by General Assembly on 2 December 2004 in A/Res/59/38

³² Article 5 grants immunity whereas articles 10-17 provide for the exceptions.

would however argue that immunity is the correct point of departure. At any case, the typical exceptions to state immunity are proceedings relating to commercial transactions, employment contracts, personal injuries, damage, ownership and possession of property, intellectual and industrial property, shareholding in companies as well as arbitration and ships in commercial service.³³

2.5 Immunity afforded to States and Criminal Jurisdiction

When state immunity is discussed, it is often referred to a state's involvement in civil proceedings – as seen above by the references to existing exceptions to state immunity. This is, amongst others, a consequence of the object of the proceedings. When liability under civil proceedings is determined, the outcome is mostly a form of restitution, payment for damages or another act or omission. The state is capable of that. When it, however, comes to criminal proceedings, the object is to determine the personal responsibility i.e. the guilt of the individual.³⁴ This intrinsic difference makes it difficult, in principle, to consider the notion of state immunity regarding criminal jurisdiction.

The distinction between civil and criminal jurisdiction concerning states has been discussed, amongst others by the ILC on its work with state responsibility. It was, however, rejected and carries today no real implications.³⁵ As mentioned above, the area of state responsibility often offers guidance for understanding and interpreting the area of state immunity. It may, despite the rejection by the ILC of the distinction, be valuable to shortly present the discourse, since there actually exist a discourse on the subject and since the reason for ILC to reject it was non-agreement between the states on its existence, not agreement on its non-existence.

Yang is of the opinion that the distinction between civil and criminal proceedings often, although, unnecessary is made when state immunity is discussed. According to him this distinction does not exist in neither doctrine nor current state practice. The ILC, in its comments to the 2001 Draft Articles on State Responsibility the ILC stated:

As far as the origin of the obligation breached is concerned, there is a single general regime of State responsibility. Nor does any distinction exist between the 'civil' and 'criminal' responsibility, as is the case in internal legal systems.³⁶

³³ Articles 10-17 in 2004 United Nations Convention on Jurisdictional Immunities of States and their Property. Available through: <http://www.un.org/law/jurisdictionalimmunities/>

³⁴ Jürgen Bröhmer, State Immunity and the Violation of Human Rights. 1997:45

³⁵ Today, the draft on state responsibility is adopted and the much-debated article 19 of the 1996 Draft that contained a provision on state criminal responsibility has been removed.

³⁶ ILC, Commentaries to the Draft Articles on Responsibility of States for Internationally Wrongful Acts adopted in 2001, Report of the International Law Commission on the Work

This would imply the non-existence of the distinction on the area of state immunity as well. One explanation for the distinction, when it is made, is that it originates from the evolution of the rules applied today. The prevailing theory of restrictive doctrine evolved exclusively in the field of civil proceedings, what had the result that exceptions to immunity solely evolved within those circumstances. The exceptions have thus not been founded on a civil/criminal distinction but simply evolved within the auspice of civil claims.³⁷

If the distinction shortly is to be upheld, it may be concluded that states enjoy immunity from criminal proceedings, at least before national courts of other states.³⁸ The shift from absolute to restrictive immunity in the area of civil proceedings has more or less left the development untouched on the criminal side.³⁹

One misunderstanding that lastly needs to be observed is that, although similarities in some parts, a distinction has to be upheld between the concept of state responsibility and the possibility to hold a foreign state liable in national courts under domestic law, what is protected by state immunity. This is not always easily done, what is shown in the case of *Princz v. Federal Republic of Germany*, where Judge Wald took the false assumption and confused the two different branches, what rendered her legal argumentation more or less void.⁴⁰ When a state violates a norm of international law, state responsibility arises but whether a national court may try that liability under international law is a completely different question.⁴¹ That last question is in part regulated by the law of state immunity in that it offers protection to states on the national arena.

2.6 Conclusions on Immunity afforded to States

Above, the evolution of the rules on state immunity have shortly been presented. It started with the doctrine of absolute state immunity that stemmed from times when state sovereignty was the strongest element in

of Its Fifty-third Session, Official Records of General Assembly, A/56/10, Chp IV.E.2, p. 127, commentary to art 12. Today the Draft is adopted as: Responsibility of States for Internationally wrongful Acts by UN General Assembly on 12 Dec 2001 in A/Res/56/83 available at:

<http://daccessdds.un.org/doc/UNDOC/GEN/N01/477/97/PDF/N0147797.pdf?OpenElement>

³⁷ X. Yang, State Immunity in the European Court of Human Rights: Reaffirmations and Misconceptions in *The British Year Book of International Law* 2003, p.346

³⁸ H. Fox, *The law of state immunity*, 2002:516; X. Yang, State Immunity in the European Court of Human Rights: Reaffirmations and Misconceptions in *The British Year Book of International Law* 2003, p.351

³⁹ H. Fox, *The law of state immunity*, 2002:503

⁴⁰ Decision of 1 July 1994 of the US Court of Appeals for the District of Columbia Circuit, *Hugo Princz v. Federal Republic of Germany*, 26 F.3d 1166. Dissenting Opinion of Judge Wald. II (p. 7).

⁴¹ J. Bröhmer, *State Immunity and the Violation of Human Rights* 1997: 81

international relations and evolved into the restrictive doctrine, founded on a functional approach that better fitted the new international economic and social developments, this way creating exceptions to immunity. Today, it may with certainty be concluded that the restrictive theory prevails, with a reservation for some socialist states such as Cuba and China. The conclusion on the prevailing exceptions to immunity for state acts are at least proceedings relating to commercial transactions, employment contracts, personal injuries, damage, ownership and possession of property, shareholding in companies as well as arbitration and ships in commercial service.

The above enumerated exceptions all evolved around civil proceedings. This might mislead one to see a distinction on state immunity for civil respectively criminal proceedings, what today is not the correct approach. The exceptions evolved logically within the civil area, since the questions of to restrict state immunity solely arose there and states were willing to give away some of its sovereignty in order to fulfil the new functions and developments. The exceptions did thus not arise out of a distinction between civil and criminal proceedings.

3 Immunity of High State Representatives

3.1 Introduction

In the chapter to follow, the immunity conferred by international law on the highest representatives of a state, namely the immunity of heads of states, heads of governments and foreign ministers, is described. The current state of law is described under separate paragraphs with regard to immunity under national respectively international jurisdiction. Some scholars are of the opinion that this distinction should not be made. Since the development, however, is not at the same point in the two adjacent areas, it is here upheld.⁴²

The immunities for the three categories of high-ranking state officials are very similar and are therefore described under one heading.⁴³ Where there exists a difference that will be pointed at.

Throughout the following paragraphs, one has to be aware of the difficulty to discern the applicable rules of international law on personal immunities since the rules are mostly to be found in customary law, which in this area is complicated to interpret. The conduct of representatives of states at this level tends to be discrete and, consequently, practice of states that is publicly known is scarce.

Most space is designated to the interesting question of immunity of high state officials for international crimes. Those are crimes in breach of international customary law that are intended to protect values considered important by the whole international community. The characteristic of an international crime is that it entails the personal criminal liability of the responsible individual and that it lies under universal jurisdiction.⁴⁴ As to what crimes belong to this group is somewhat contested. Most scholars nonetheless agree on slavery, piracy, war crimes, crimes against humanity, genocide, torture, and aggression.⁴⁵ Some contend that state sponsored or –tolerated international terrorism belongs to this group as well.⁴⁶

⁴² Compare the different outcomes from the Yerodia case, where immunity was accorded, with the war crimes tribunals for former Yugoslavia and Rwanda, where immunity is removed.

⁴³ The Head of Government and the Foreign Ministers do not formally possess all the representative capacity as the Head of State but at in practice one will find their powers encompass the full scope of their state's international activities.

⁴⁴ A. Cassese, *International Criminal Law*, 2003:23

⁴⁵ A. Cassese, *International Criminal Law*, 2003:23; Principle 2. The Princeton Principles on Universal Jurisdiction. Available at: www1.umn.edu/humanrts/instree/princeton.html

⁴⁶ For a discussion on whether terrorism is regarded as an international crime see S. Zappala, *Do Heads of State in Office Enjoy Immunity from Jurisdiction for International Crimes? The Ghaddafi Case Before the French Cour de Cassation*, *EJIL* Vol.12, No 3. 2001

3.2 Evolution of Immunity Accorded to High State Representatives

Immunity of high state representatives can be described as a privilege of few high-ranking state officials to be exempted from the administrative, criminal and executive jurisdiction of another state. These individuals need to be free to move around the globe and perform the business on behalf of the state without other states imposing hindrances, such as putting them on trial or directing other executive measures against them. If that was allowed, it could lead to unfriendly relations or even atrocities between states.

The immunities conferred on this special group have as well a state representative aspect. Heads of States are in a special position as the highest representative of the state and are in some aspects regarded as a personification of the state. Immunity of Heads of governments and Foreign Ministers seem to be following the path of heads of states in most cases.⁴⁷

The heading immunity of high state representative, as used here, must not be misinterpreted. The immunities the High State Representative possesses belong to him, not because they are vested in him personally from international law, but because they belong to his state.⁴⁸

3.3 Theoretical Bases

Immunity is accorded to High State representatives on several grounds. They can be classified into two groups. In the 20th century and earlier, a theory relating to the representative character of the high-ranking official of the state dominated. Later on, as the sovereign feature of those state officials began to evaporate and the need of a functioning international coexistence grew, a shift toward the functional necessity theory occurred.

3.3.1 The Theories of Representative Character and of Functional Necessity

When nation states began to emerge, a sovereign form of immunity was to be observed. The ruler of the nation personified it and thus received all the privileges and immunities the state was entitled to because of its

⁴⁷ M.N. Shaw, *International Law*, 2003:658; ICJ Decision of 14 February, 2002, Case concerning the Arrest Warrant of 11 April 2000. (Democratic Republic of Congo v. Belgium); Preamble of the Institute Droit Resolution on "The Immunities from Jurisdiction and Execution of Heads of States and Heads of Government in International Law" states that in some countries the head of state only has representative character, thus making it necessary to equate the immunity rules for Heads of Governments as well. Available at: http://www.idi-iil.org/idiE/resolutionsE/2001_van_02_en.PDF

⁴⁸ A. Watts, *Heads of states, heads of governments and foreign ministers*. *Recueil des Cours* vol. 247. 1994:35 f

sovereignty. The sovereign was to be regarded as the highest representative of the state. At the first beginning he was even thought to *be* the state. The famous statement “L’etat, c’est moi.” after the French King Louis XIV, encompasses the notion. Today it is doubtful whether this theory still lies as ground for the rules of immunity.⁴⁹

As every branch of law, the law of immunities evolves and changes corresponding to the needs and desires of the international society. During the last century, the theory of functional necessity emerged. The high representative of the state was no longer seen to *be* the state. The need for the privileges and immunities was, however, still there to enable them to properly perform the various tasks. Their work now involved a great deal of travel and representation in other countries. In order to be able to pay visit to foreign states and to otherwise guarantee their free movement all over the globe without fearing prosecution, the High Representatives of States are accorded immunity. The immunity is thus no longer mainly accorded to the individual as a person but for the benefit of the tasks he is entrusted with.⁵⁰

3.4 Diverse Features of Immunity

Within customary international law, two different forms of immunities exist; immunity *ratione personae* or procedural immunity and immunity *ratione materiae* or substantive immunity. The two classes of immunities coexist and often overlap what makes the whole area a complicated branch of international law. They overlap in the sense that a High State Representative is protected by procedural immunity during the office period at the same time as the sovereign and official acts he performs are protected by substantive immunity. This way he is guaranteed immunity for the those acts even after leaving office, when procedural immunity does not offer any more protection. This holds true according to most legal literature. There exists a discourse on the continuance of the procedural immunity as well, regarding the sovereign and official acts and where the line should be drawn towards the continuing substantive immunity. That issue will here not be elaborated on since the great complexity of the subject. For the purpose of this thesis, the understanding of that discourse is as well not required. To understand the two concepts, normally portrayed as above and like that accepted and used in legal literature, offers great help and value in understanding the law of immunity of officials as a whole. This distinction was surprisingly not upheld by the ICJ in the Congo v. Belgium case⁵¹, which has been strongly criticized by a great number of legal scholars.⁵²

⁴⁹ A. Watts, Heads of states, heads of governments and foreign ministers. Recueil des Cours vol. 247. 1994:35

⁵⁰ A. Watts, Heads of states, heads of governments and foreign ministers. Recueil des Cours vol. 247. 1994:35-6

⁵¹ Case concerning the Arrest Warrant of 11 April 2000 (Congo v. Belgium), delivered on 14 February 2002 by the ICJ

⁵² See amongst others: A. Cassese, When May Senior State Officials Be Tried for International Crimes? Some Comments on the Congo v. Belgium Case. EJIL. Vol. 13 No. 4

3.4.1 Immunity Ratione Personae

As stated above, procedural immunity or immunity *ratione personae* is accorded to the individual because of his special status within the state. The immunity is linked to the very person in its official capacity as a high representative of the state. While in office he or she should be inviolable because of the position. Today, as an effect of the prevalence of the functional necessity theory, it may be argued that the rationale more rests in the need of the official to function properly.⁵³ The functioning of the state is that way protected since its highest officials are guaranteed freedom from foreign states' jurisdiction what enables them to carry out their functions as state representatives properly.⁵⁴ The ICJ in the Congo v. Belgium case explains:

...[T]he functions of a Minister for Foreign Affairs are such that, throughout of the duration of his or her office, he or she when abroad enjoys full immunity from criminal jurisdiction and inviolability. That immunity and that inviolability protect the individual concerned against any act of authority of another state, which would hinder him or her in the performance of his or her duties.⁵⁵

Traditionally, absolute conceptions of immunity and arguments on “dignity” made it impossible to apply the restrictive forms of immunity. With the functionalist approach, modern conception of immunity *ratione personae*, however, simply recognized the inviolability of the person while in office. Immunity is thus accorded for all acts, official and private, while the person holds office.⁵⁶ ICJ, in the Congo v. Belgium case, stated that immunity is accorded even for acts committed before the taking up of office.⁵⁷ A discussion on immunity for the serious international crimes when committed during office will follow below.

3.4.2 Immunity Ratione Materiae

Substantive immunity or immunity *ratione materiae* is accorded to the high representative of the state and relates to the status of the act he or she performs and thus not to the status or function of the person as an official within the state. It is the official or sovereign character of the *act* that creates immunity for the individual. Rationale underlying this form of immunity is the attribution of an official act to the state itself. The individual should not

2002:853 pp; Wirth. S. Immunity for Core Crimes? The ICJ's Judgement in the Congo v. Belgium case. EJIL 2002:891, vol 13, no 4

⁵³ ICJ Decision of 14 February, 2002, Case concerning the Arrest Warrant of 11 April 2000. (Democratic Republic of Congo v. Belgium) §53

⁵⁴ Wirth S, Immunities, Related Problems, and article 98 of the Rome Statute. Criminal Law Forum, Vol 12. 2001:432

⁵⁵ ICJ Decision of 14 February, 2002, Case concerning the Arrest Warrant of 11 April 2000. (Democratic Republic of Congo v. Belgium) Para 54.

⁵⁶ A. Cassese, When May Senior State Officials Be Tried for International Crimes? Some Comments on the Congo v. Belgium Case. EJIL. Vol. 13 No. 4 2002:864

⁵⁷ Case concerning the Arrest Warrant of 11 April 2000 (Congo v. Belgium), delivered on 14 February 2002 by the ICJ. Para 61

have to take responsibility for acts he conducts on behalf of the state. The consequence is that immunity for the qualified acts does not end upon leaving the office but continues to exist, irrespectively of the changing status of the person. Immunity *ratione materiae* is thus accorded to the High State Representative even after he has left office.

3.5 Diverse Forms of Acts

Since immunity is not accorded for all acts of the High State Representatives, they need to be characterized so as to see whether immunity should be accorded or not. Today it is well established that throughout the duration of office, the official is entitled to absolute immunity. This fact makes it irrelevant what kind of act was conducted. The asserted was affirmed amongst others in the Ghadaffi, Yerodia and in Lafontant v. Aristide cases.⁵⁸ After cession of office, on the other hand, the classification becomes relevant since immunity is not accorded for private acts what amongst others was confirmed by the ICJ in the Yerodia case which thus held that the former official might be put on trial in a foreign country.⁵⁹

It was never contested that immunity was accorded for acts of sovereign, governmental or public nature. This assertion is widely supported by a great number of national decisions and state practice.⁶⁰ A High State Representative is thus always protected in regard to official, sovereign acts. Immunity *ratione personae* will protect him while in office because of his status and function and immunity *ratione materiae* after leaving office because of the official and sovereign character of the act.

Today, a new view might be said to prevail for acts performed in official capacity but that are of a non-sovereign character. Non-sovereign character could be said to ensue from commercial acts and from some acts of an essentially private law nature.⁶¹ A High State Representative that has bought a new automobile for business transportations is a good example. The 2004 UN Convention on Jurisdictional Immunities does not entitle states to

⁵⁸ Lafontant v. Aristide, 844 Fed. Supp.128 (Eastern Dist. N.Y. 1994); Ghadaffi - Arrêt n. 1414 du 13 Mars 2001 de la Cour de Cassation – Chambre Criminelle; ICJ Decision of 14 February, 2002, Case concerning the Arrest Warrant of 11 April 2000. (Democratic Republic of Congo v. Belgium) Para. 55

⁵⁹ ICJ Decision of 14 February, 2002, Case concerning the Arrest Warrant of 11 April 2000. (Democratic Republic of Congo v. Belgium) Para. 61

⁶⁰ See among others: Duke of Brunswick v. King of Hanover (1842) 2 HLC 1; Re Wadsworth and the Queen of Spain (1851) 17 QB 171; Ben Aïad c. Bey of Tunis (1914) Kiss, Répertoire de la pratique française en matière du droit international public, Paris. Edition du Centre National de la recherché scientifique, Vol III 1965 p.271

⁶¹ A. Watts, Heads of states, heads of governments and foreign ministers. Recueil des Cours vol. 247. 1994:60

immunity for non-sovereign acts.⁶² Its Commentaries reveal that the Head of State is equated with the state in his public capacity.⁶³ The Head of State is thus not entitled to immunity what regards the non-sovereign acts. The Convention does on the other hand not mention the official but non-sovereign acts. It may even though be argued that no immunity is accorded for them either since they still are non-sovereign, being official or not. Watts supports the last asserted as well.⁶⁴ That conclusion is however most uncertain since no positive support exists for the stated.

To conclude in the legal terms as presented above, a High State Representative is accorded immunity *ratione personae* for all acts while in office and immunity *ratione materiae* for the official and sovereign acts. He, however, might bear full responsibility for the private acts after leaving office, since they are not covered by immunity *ratione materiae*.⁶⁵

3.6 Treaty and Codification Regulations

Earlier, when clear rules on immunity of High State Officials not yet were much elaborated, it was accepted that those immunities were to be decided in accordance with diplomatic immunities.⁶⁶ The Vienna Convention on Diplomatic Relations from 1961⁶⁷ is here primarily relevant. It does not expressly deal with immunity of high state officials. It, however, provides help in the interpretation of the customary law regarding immunity of high state officials, since the two areas are very similar in that they both regulate immunities of foreign state's officials afforded by foreign states. Art 39 (2) stipulates that a protected person, after leaving his diplomatic post, has continued immunity for the acts carried out within the official duty but loses the immunity for the private acts.⁶⁸ The distinction between the two acts is elaborated in the chapter on classification of the act.

Convention on Special Missions from 1969⁶⁹ is a major convention dealing expressly with important aspects of the position of high state officials.⁷⁰ It

⁶² Articles 10-17 in 2004 United Nations Convention on Jurisdictional Immunities of States and their Property. Adopted by General Assembly on 2 December 2004 in A/Res/59/38.

Available through: <http://www.un.org/law/jurisdictionalimmunities/>

⁶³ ILC Commentary to art 1 and 3 of Draft Articles on Jurisdictional Immunities of States and their Property 1991. YBILC, 1991, Vol. II Pt. 2, p. 13

⁶⁴ A. Watts, Heads of states, heads of governments and foreign ministers. Recueil des Cours vol. 247. 1994:61.

⁶⁵ Jürgen Bröhmer, Diplomatic Immunity, Head of State Immunity, State Immunity: Misconceptions of a Notorious Human Rights Violator. LJIL, Vol. 12 1999:367

⁶⁶ H. Fox, The law of state immunity, 2004:442

⁶⁷ Vienna Convention on Diplomatic Relations adopted on 14 April 1961. Available at: <http://www.un.org/law/ilc/texts/diplomat.htm#abstract>

⁶⁸ R.G. Feltham, Diplomatic Handbook, 1998:42

⁶⁹ Convention on Special Mission (1969), UN Treaty Series, vol.1400 p. 231. Available at: <http://www.vilp.de/Enpdf/e018.pdf>

⁷⁰ The convention was first adopted by ILC in 1967 (YBILC, 1967, Vol II, p. 235) and later by the General Assembly (Res. 2350. XXIV 1969)

has not been ratified by a great part of the international community⁷¹ but Watts is of the opinion that its value as evidence of, or as a contribution to, customary international law cannot be disregarded. The fact that it was created by the ILC and adopted by the General Assembly without any dissenting votes carries certain weight.⁷² The definition of special mission in article 1 (a) is wide enough to include official visits of a High Representative of a State to another state. Article 31 states absolute immunity from criminal jurisdiction for the Head of Government and the Foreign Minister. The provision is a clear statement of international law.

Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, 1973, which also was created by ILC and adopted by GA, expressly grants Heads of States protection.⁷³

When it comes to general treaties with regard to Head of State some attention should be directed at the United Nations Convention on Jurisdictional Immunities of States and their Property, prepared by ILC and adopted by General Assembly in 2004.⁷⁴ In the Commission's Commentary on article 1 and 3, the Head of State is equated with the state.⁷⁵ Accordingly, immunity for the head of state is granted to the same extent as to the state itself. The Convention does not grant immunity for acts of commercial character, some acts of a private law nature etc.⁷⁶ The head of state is thus not accorded immunity for non-sovereign acts.

In 2001, the *Institute de Droit* adopted a resolution on "Immunities from Jurisdiction and Execution of Heads of State and of Government in International Law".⁷⁷ The resolution was set to establish clear rules, based on state practice, in order to help national courts to decide whether jurisdiction is at hand. One of the main policies of the committee, responsible for the task, was to restrict the immunity of heads of states and governments to that minimum necessary for their representative role and that they, apart from that, should be treated as private persons. This way remedies were guaranteed for private persons or entities in the case of a dispute.⁷⁸ The resolution states absolute immunity for a serving head of state but no immunity for the former head of state, other than for his official acts. International crimes are expressly exempted from the official functions from

⁷¹ 31 parties as of 18.01.2005

<http://untreaty.un.org/English/sample/EnglishInternetBible/partI/chapterIII/treaty9.asp>

⁷² A. Watts, Heads of states, heads of governments and foreign ministers. *Recueil des Cours* vol. 247. 1994:38

⁷³ Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents. Art. 1 (1) (a) YBILC, 1972, Vol II, p.312. Adopted by UN GA in Res. 3166 (XXVIII) 1973

⁷⁴ United Nations Convention on Jurisdictional Immunities of States and their Property, adopted by General Assembly on 2 December 2004 in A/Res/59/38

⁷⁵ ILC Commentary, YBILC, 1991, Vol. II Pt. 2, p. 13

⁷⁶ Articles 10-17, United Nations Convention on Jurisdictional Immunities of States and their Property

⁷⁷ Available at: http://www.idi-iiil.org/idiE/resolutionsE/2001_van_02_en.PDF

⁷⁸ 13.th Commission, Preliminary Report of Rapporteur, para 16, ADI 2001, I-Vancouver

a head of state, this way solving the problem of the classification of the criminal act.⁷⁹

Fox discusses the accordance of the Resolution with state practice. She confers that the provisions stipulating absolute immunity for serving heads of state or government are broadly supported but that uncertainty prevails concerning the removal of immunity for former heads of states in certain situations. One case at least, (Pinochet) is in support of the provisions. Whether or not reflecting state practice, the resolution offers a workable compromise in abandoning the distinction between functional and personal immunity, thus removing impunity when grave crimes have been committed. Lady Fox as well sees the implications the Resolution could bear for the future:

By removing immunity *ratione materiae* from international crimes...the Resolution may be opening the door to the removal of immunity of the State it self from civil claims for compensation for such wrongful acts...⁸⁰

The Princeton Principles on Universal Jurisdiction 2001 is one of the latest codification projects directly relevant for the law of head of state immunity.⁸¹ It was drafted by internationally recognized jurists, under the lead of Professor M. C. Bassiouni, in order to create greater clarifications in the growing area of international criminal law, namely prosecution of international crimes under universal jurisdiction.⁸² Principle 5 states that the official capacity of any accused person, despite their function as head of state or government shall not relieve from criminal responsibility or mitigate punishment.⁸³ The principles may in some parts be regarded as statement of law and as guiding and aspirating in others. They offer guidance in the case of competing claims but none regarding the difficult issues of inconsistent practice.⁸⁴

From the texts presented above, it may be deduced that high state officials are from customary law accorded absolute immunity while in office and that immunity remains in place for the official and sovereign acts, even after they have left office. The immunity for private acts is however removed when the official no longer holds his post. What concerns the international crimes will be elaborated below.

⁷⁹ Art 2 and 13. Institute Droit Resolution on "The Immunities from Jurisdiction and Execution of Heads of States and Heads of Government in International Law

⁸⁰ H. Fox, "The Resolution of the Institute of International Law on the Immunities of Heads of State and Government," 51 ICLQ 119 2002:125

⁸¹ The Princeton Principles on Universal Jurisdiction. Available at: www1.umn.edu/humanrts/instree/princeton.html

⁸² S. Macedo (edt), The Princeton Principles on Universal Jurisdiction, Princeton Project on Universal Jurisdiction, . 2001:11

⁸³ Principle 5, The Princeton Principles on Universal Jurisdiction.

⁸⁴ Chandra Lekha Sriram, New mechanisms, old problems? Recent books on universal jurisdiction and mixed tribunals. International Affairs Vol. 80 No 5. 2004:974

3.7 International Crimes in Front of International Tribunals

Some crimes, today recognized as international crimes, are regarded as so terrible and foreign to the greatest part of the international community that special measures are considered motivated. The international community has started to criminalize these acts and to impose an obligation of prosecution on them.⁸⁵ What crimes belong under the definition of international crimes is not yet fully settled but agreement prevails more or less for slavery, piracy, war crimes, crimes against humanity, genocide, torture, aggression and, some contend, state sponsored or -tolerated international terrorism.⁸⁶ The question of immunity for these crimes is very intricate since the area still is evolving, not least following the establishment of the International Criminal Court and its statute and the statutes and practice of the International Criminal Tribunal for the former Yugoslavia and Rwanda. The three statutes have helped make and are still making the progress of customary law move in the direction towards no immunities for international crimes. Today, it is well established that a high-ranking state official may be tried in front of an international tribunal without the right to invoke immunity. This depends on the constituent treaty and the tribunal it establishes.⁸⁷ The Charter of the International Military Tribunal at Nüremberg, 1945 (art 7), the Statutes of the Yugoslav and Rwanda War Crime Tribunal (art 7 respectively art 6) and the Rome Statute of the International Criminal Court 1998 (art 27) all contain provisions expressly stating the individual criminal responsibility irrespective of the official status of the individual, even for head of state.

The most far-reaching treaty provision is art 27 of the ICC Statute that provides for the total irrelevance of official capacity:

1. This Statute shall apply equally to all persons *without any distinction based on official capacity*. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence.
2. Immunities or special procedural rules which may attach to the *official capacity* of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person.⁸⁸

The statute thus allows no immunity to be accorded for the crimes of genocide, crimes against humanity, war crimes and the crime of aggression. This applies for both immunity *ratione materiae* (art 27 (1)) and immunity *ratione personae* (art 27 (2)). The provision in 27 (2) is the great novelty

⁸⁵ P. Sands, *International Law Transformed? From Pinochet to Congo...?* LJIL, 16, 2003:44

⁸⁶ A. Cassese, *International Criminal Law*, 2003:24; The Princeton Principles on Universal Jurisdiction. Principle 2. To be found at: www1.umn.edu/humanrts/instree/princeton.html

⁸⁷ M. N. Shaw, *International law.*; Cambridge 2003:656

⁸⁸ Rome Statute of the International Criminal Court, Rome 17 July 1998, Doc A/CONF.183/9, in force since 1 July 2002. Emphasis added.

since, as stated above, immunity *ratione personae* has been considered absolute until the creation of the statute.

It is, however, too early to claim that the above mentioned passage of the ICC-statute is a reflection of international customary law. In the first place it is questionable whether the treaty provisions have a customary law status as well or whether they only express treaty regulations. We nevertheless seem to be headed towards a future with less, or even no, immunities for international crimes. Article 27 (1), as a statement of a customary rule, has great support from scholars and national judgements as will be shown below. The accordance of art 27 (2) with customary provisions is on the other hand more debated. Some commentators have claimed that the practice of ICTY, ICTR and ICC, in not according immunity, only reflect treaty provisions respectively that the provisions contained there may be explained as a viewer by the UN member states of their grant of immunity.⁸⁹ Zappala confers that if these would have been solely treaty-based principles, the Tribunals would be allowed to apply retroactive law, despite that this would constitute a breach of the principle *nullum crimen sine lege* since the fact that they today have jurisdiction over crimes committed before the setting up the tribunal. In other words, if the irrelevance of official capacity already was not a customary rule, the officials charged could only bear responsibility for acts committed prior to the adoption of the statute, which is not the case today, Zappala continues.⁹⁰ Wirth, although questioning the customary value of the provisions in the statutes of ICTY and ICTR, admits the value of the statement in the Blaskic decision by ICTY as ‘an important statement of experts’ and ‘evidence of the state of international law in accordance with art 38 (1) (d) of the ICJ Statute.’⁹¹ The Tribunal in that case held:

The general rule under discussion is well established under international law and is based on the sovereign equality of states (*par in parem non habet imperium*)...[E]xceptions arise from the norms of international criminal law prohibiting war crimes, crimes against humanity and genocide. Under these norms, those responsible for such crimes cannot invoke immunity from national or international jurisdiction even if they perpetrated such crimes while acting in their official capacity.⁹²

⁸⁹ Wirth, S, Immunities, Related Problems and article 98 of the Rome Statute. Criminal Law Forum Vol 12. 2001:442.

⁹⁰ S. Zappala, Do Heads of State in Office Enjoy Immunity from Jurisdiction for International Crimes? The Ghadaffi Case Before the French Cour de Cassation, EJIL Vol.12, No 3. 2001:603

⁹¹ Wirth, S, Immunities, Related Problems and article 98 of the Rome Statute. Criminal Law Forum Vol 12. 2001:442. Art 38 (1 d) of the ICJ-Statute stipulates: The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply: [...]

d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

⁹² Prosecutor v. Blaskic (Case no. IT-95-14-A), Judgement on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997, 29 October 1997, para.41.

The newly founded Special Court for Sierra Leone, referred to as a hybrid court, deserves as well to be mentioned in this context. It is an UN-backed criminal tribunal, designed to prosecute those responsible for grave breaches of humanitarian law within Sierra Leone.⁹³ It was authorized by the UN Security Council Resolution 1315 (2000) and elaborated in a formal agreement between the UN and the government of Sierra Leone.⁹⁴ Today it seems well accepted, as formulated by the court itself, that it functions as an international tribunal.⁹⁵ In 2003, the Special Court tried the incumbent Head of State of Liberia, Charles Ghankay Taylor for committing international crimes one of which was crimes against humanity on Sierra Leone territory.⁹⁶ The Court's status as an international court has implications for the immunity issues raised. The Appeals Chamber stated that, according to their statutes and practice, President Taylor was not to be accorded immunity since it is established that sovereignty of states does not prevent prosecution of Head of States by international tribunals.⁹⁷

As indicated above, it is established that High Representatives of States may, within the auspice of international tribunals, be tried for committing international crimes both during office and after. Neither immunity *ratione materiae*, nor *personae* does protect them. This depends on the provisions contained in the statutes of the tribunals. Whether these principles have evolved and are valid even outside war crimes tribunals, i.e. whether they have become rules of customary international law, as Zappala confers, may be strongly questioned. As of today, strong evidence enough for such an assertion has not been presented. Keeping the above said in mind, it is very interesting to note how the asserted changes when it comes to national courts. It is namely asserted that on the domestic level the absolute immunity is still granted, no matter the gravity of the crime.

3.8 International Crimes in front of National Courts and the ICJ

The High State Representatives enjoy, broadly put, wide immunities from the criminal, civil and administrative jurisdiction of other states. The immunity grants that the proceedings, about to take place in another state, will be interrupted. Where the question is about an official act of the Head of State it is most likely that the proceedings will continue but charging the state instead, what has the consequence of applying the rules of state immunity. The immunity regarding criminal proceedings for high state officials is absolute, at least for normal criminal internal law of the foreign

⁹³ M. Ch. Bassiouni, Introduction to International Criminal Law. 2003:568-9

⁹⁴ Security Council Resolution 1315 (2000) of 14 August 2000, UN Doc S/RES/1315

⁹⁵ Special Court for Sierra Leone, 2003-01-I. Delivered at 31 May 2004, § 35 Available at: <http://www.sc-sl.org/Documents/SCSL-03-01-I-059.pdf>

⁹⁶ Special Court for Sierra Leone, 2003-01-I. Delivered at 31 May 2004, § 5

⁹⁷ Special Court for Sierra Leone, 2003-01-I. Delivered at 31 May 2004, § 43-57

state.⁹⁸ This might, however, not be the case for certain international crimes what will be dealt with below. Yang envisages new developments:

However, an absolute immunity from criminal proceedings for individuals, as opposed to States, is becoming less certain, especially in the context of former State officials being sued for human rights violations committed outside the territory of the forum State.⁹⁹

A look at the latest ICJ judgment on the current subject, where the Foreign Minister of Congo, Mr Yerodia, was sued for crimes against humanity in Belgium, shows that ICJ not yet is ready to remove immunity for high state officials.¹⁰⁰ The court stated in an obiter dictum, that foreign ministers¹⁰¹, after leaving office, may be charged responsibility for international crimes committed while in office, only if such crimes are regarded to be committed in their private capacity, thus confirming both immunity *personae* and *materiae*, even for the serious international crimes since they are most certainly not to be regarded as private acts. The judgment was and still is very criticized by legal commentators.¹⁰² Sands, amongst others, questions the Courts' referral to 'firmly established' rules of international law regarding immunity without any references at all to state practice, national or international courts' decisions.¹⁰³ He confers:

...[B]road presumptions in favour of immunities – as reflected in the ICJ's recent decision [Yerodia-case] can only lead to a diminished role for national courts, a watered-down system of international criminal justice, and greater impunity. This is all the more so when the reasons and reasoning which underpin such presumptions are not fully explained or explored.¹⁰⁴

3.8.1 A Customary Rule that Removes Immunity?

Sands and other writers that criticize the outcome of the Yerodia case advocate instead the existence of a customary rule stating removal of immunity for former high state officials for international crimes. According to the rule, no immunity *ratione materiae* is granted for international crimes. The official may, however, be tried first after leaving office since the

⁹⁸ A. Watts, Heads of states, heads of governments and foreign ministers. Recueil des Cours vol. 247. 1994:54

⁹⁹ X. Yang, State Immunity in the European Court of Human Rights: Reaffirmations and Misconceptions in The British Year Book of International Law 2003, p.407

¹⁰⁰ ICJ Decision of 14 February, 2002, Case concerning the Arrest Warrant of 11 April 2000. (Democratic Republic of Congo v. Belgium)

¹⁰¹ See para. 58 of the judgement The ICJ does not imply that this is state of law only in regard to foreign ministers thus ruling out the existence of such a customary rule for all state officials.

¹⁰² C. P.R. Romano and A. Nollkaemper, The Arrest Warrant Against The Liberian President, Charles Taylor. ASIL Insights June 2003 available at:

<http://www.asil.org/insights/insigh110.htm>

¹⁰³ P. Sands, International Law Transformed? From Pinochet to Congo...? LJIL, 16. 2003:48.

¹⁰⁴ P. Sands, International Law Transformed? From Pinochet to Congo...? LJIL, 16. 2003:53.

immunity *ratione personae* protects him while sitting.¹⁰⁵ An analogy from the area of diplomatic immunities, as interpreted by some, supports the asserted. According to the 1961 Vienna Convention on Diplomatic Relations (art. 39 (2)) the diplomat is accorded immunity after leaving the position, only for the official acts performed during office period. According to Fox, it seems however that the diplomat, after leaving his position, may be prosecuted for committing an international crime, even though it was committed within the official function.¹⁰⁶ The legal scholars contend that the alleged rule that removes immunity has evolved from the treaty provisions in the Nuremberg Charter¹⁰⁷ and subsequent state practice¹⁰⁸, which was confirmed in the charters and practice of the ICTY, ICTR and later ICC.¹⁰⁹ It was again confirmed through state practice when the Republic of Congo abstained from invoking state immunity in the Yerodia case referred to above and instead invoked diplomatic immunity under the Vienna Convention on Diplomatic Relations as well as lack of Belgian jurisdiction.

In Eichmann Case, the Supreme Court of Israel held that state agents acting in their official capacity may not be relieved responsibility if they commit international crimes. It also held that art 7 of the Nuremberg Charter reflects a rule of customary law.¹¹⁰ The UN General Assembly unanimously adopted Resolution 95 on 11 December 1946, whereby it affirmed the Principles recognized by the Charter of the Nuremberg one of which confirms responsibility of Head of State or Government for international crimes. More confirmation of the customary rule can be found in the adoption by ILC of the Draft Code of Crimes Against the Peace and Security of Mankind, which contain a provision stipulating the irrelevance of official status of the perpetrator.¹¹¹ Cassese also refers, at least in the case of genocide, to the ICJ Advisory Opinion on Reservations to the Convention on Genocide, where the court, according to him, implicitly held that, under

¹⁰⁵ A. Cassese, When May Senior State Officials Be Tried for International Crimes? Some Comments on the Congo v. Belgium Case. EJIL. Vol. 13 No. 4 2002:864 pp; M. C. Bassiouni, Introduction to International Criminal Law. 2003:81; Wirth. S. Immunity for Core Crimes? The ICJ's Judgement in the Congo v. Belgium case. EJIL, vol 13, no 4 2002:888; S. Zappala, Do Heads of State in Office Enjoy Immunity from Jurisdiction for International Crimes? The Ghaddafi Case Before the French Cour de Cassation, EJIL Vol.12, No 3. 2001:601

¹⁰⁶ H. Fox, The law of state immunity, 2004:456-7

¹⁰⁷ Art 7 of the Charter of Nuremberg International Military Tribunal

¹⁰⁸ Spanish National High Court in the case of Fidel Castro, Order no. 1999/2723; French Court de Cassation on 13 March 2001 in Ghaddafi; House of Lords, Judgement on Pinochet case of 24 March 1999 (Pinochet No. 3); Filartiga v, Peña-Illara in the USA 630 F 2d 876 (2.nd Cir. 1980), 77 ILR 192; Cavallo Case in Mexico, available at www.derechos.org/nizkor/arg/espana/mex.html

¹⁰⁹ See statements of ICTY in the cases of Karadzic and others (Trial Chamber I, 16 May 1995, at para.24), Furundzija (Trial Chamber II, 10 Dec. 1998, at para. 140) and Slobodan Milosevic (Trial Chamber III, 8 Nov. 2001, para. 28) where the Tribunal refers to such a customary rule. Art 7 (2) ICTY, art 6 (2) ICTR, art 27 (1) ICC.

¹¹⁰ Eichmann case, Supreme Court of Israel, judgement of 29 May 1962 §§ 309-312. English translation in 36 ILR 5-276

¹¹¹ See commentary to art 7 of the Draft Code of Crimes Against the Peace and Security of Mankind in Yearbook of the International Law Commission Vol. II (1996) 26-27. The Draft Code was as well complimented by the UN General Assembly in Res. 51/160 (1996)

customary law, any official status does not relieve responsibility. Immunity is removed in any case.¹¹²

In *Pinochet* No. 3 the Lords Millet and Philips held that the functional immunity could not protect *any* state official when international crimes were committed.¹¹³ The Lords held that international crimes never can be characterized as an official act, in face of being a crime against humanity and *jus cogens*.¹¹⁴ Lord Phillips even turned the whole question the other way around in taking the departure point in non-immunity:

I reach that conclusion on the simple basis that no established rule of international law requires state immunity *ratione materiae* to be accorded in respect of prosecution for an international crime...An international crime is as offensive, if not more offensive, to the international community when committed under colour of office.¹¹⁵

The lords' decisions in the Pinochet cases have broadly been supported by legal scholars and almost no critique was delivered from the states, although it has been a lot debate on the grounds the Lords reached their decision.¹¹⁶ Wirth regards the Pinochet case as evidence of the fact that the crimes of genocide, humanity or torture i.e. crimes where grave and systematic violations against human rights have occurred, may no longer be hidden behind the veil of the state. The value of the Pinochet cases lies in showing state practise and *opinio juris* for the part of Great Britain, in not according state immunity for international crimes.¹¹⁷ The case received as well active support from several countries, such as Spain, Belgium, Switzerland and France, that all requested extradition of Pinochet.¹¹⁸ The German *Bundesgerichtshof* issued as well proceedings in response to a charge against the Senator.¹¹⁹ This would show *opinio juris* from their side as well.

The Amsterdam Court of Appeal decided, on that same track, that *Bouterse*, the former head of state of Surinam, could not claim immunity against prosecution for the crime against humanity of torture, because that crime could not be considered one official duty of a head of state.¹²⁰

¹¹² A. Cassese, When May Senior State Officials Be Tried for International Crimes? Some Comments on the Congo v. Belgium Case. EJIL. Vol. 13 No. 4 2002:872. With references to ICJ Advisory Opinion on Reservations to the Convention on Genocide, ICJ Reports of Judgements, Advisory Opinions and Orders (1951), at 24. 1951

¹¹³ Ex Parte Pinochet Ugarte (No. 3), House of Lords, Judgement of 24 March 1999. Lord Millet §§ 171-9 and Lord Philips of Worth Matravers §§ 186-90

¹¹⁴ Ex Parte Pinochet Ugarte (No. 3), House of Lords, Judgement of 24 March 1999 at 203

¹¹⁵ Ex Parte Pinochet Ugarte (No. 3), House of Lords, Judgement of 24 March 1999, Lord Phillips at 289

¹¹⁶ P. Sands, International Law Transformed? From Pinochet to Congo...? LJIL, 16. 2003:50

¹¹⁷ Wirth S, Immunities, Related Problems, and article 98 of the Rome Statute. Criminal Law Forum, Vol 12. 2001:434 referring to M. Akehurst, Custom as a Source of International Law, 47 British Year Book of International Law. 1, 10 (1974-1975)

¹¹⁸ Wirth, S, Immunities, Related Problems and article 98 of the Rome Statute. Criminal Law Forum Vol 12. 2001:441

¹¹⁹ Bundesgerichtshof, Decision of 18 November 1998, 2 ARS 471/98 and 2 ARS 474/98

¹²⁰ Gerechtshof Amsterdam, 20 November 2000, Nederlandse Jurisprudentie (2001), 302 (No.51), 303. Translation available at www.icj.org/objectives/decisions.htm

Some writers are of the opinion that this rule even removes immunity for sitting high state officials. In the *Ghaddafi* case, French *Cour de Cassation* overruled the decision of a lower court that stipulated responsibility of the Libyan head of state, Colonel Ghadaffi. His complicity was alleged in terrorist acts resulting from destruction of a French civilian aircraft over the desert in Libya causing the death of all passengers. The *Cour de Cassation* held that, Colonel Ghadaffi as a serving Head of State is entitled to immunity.¹²¹ Zappala argues that while the court rejected terrorism as a crime of sufficient gravity to remove immunity for a sitting head of state, it implicitly stated that there may be other international crimes grave enough to remove it. Amongst these crimes he includes crimes against humanity, war crimes, torture and genocide.¹²²

Every piece of evidence that was exposed above does not suffice, in itself, as confirmation of the existence of a customary rule removing immunity for former heads of states for commission of international crimes but when put together, combined with the agreement of many scholars and restatement of the rule by the *Institute de Droit International*¹²³ as well as the Princeton Principles,¹²⁴ one may argue for its existence.¹²⁵ The success for such an argumentation might however be limited as will be envisaged below.

The rationale behind the alleged new customary rule lies, however, in the change that has occurred in the international arena. Today, the respect for human rights and demand for justice and punishment of the perpetrators are more highly valued than the traditional respect for state sovereignty. The creation of ICTY, ICTR and the ICC show, as well, the very strong political will of the international community to punish the perpetrators of the serious crimes, no matter their official capacity.

The immunity *ratione personae* is still firmly established and protects incumbent state officials as affirmed amongst others in the *Congo v. Belgium* case of 11 April 2000.¹²⁶ The ICJ held that the rules on immunities must prevail over the rules of international crimes so that the effective performance of the duties of Senior State officials never is hampered. This object is not obstructed by the alleged rule described above, since it comes into effect first after the High State Representative has left office. A former

¹²¹ Arret nr 1414, 13 Mars 2001, Cassation Criminale 1 at 2, 3

¹²² S. Zappala, Do Heads of State in Office Enjoy Immunity from Jurisdiction for International Crimes? The Ghadaffi Case Before the French Cour de Cassation, EJIL Vol.12, No 3. 2001:595

¹²³ Resolution on "Immunities from Jurisdiction and Execution of Head of State and of Governments in International Law", Institute de Droit International, Art 13 (2) states that the Head of State or Government enjoys immunity for the official acts, but not when they constitute an international crime.

¹²⁴ The Princeton Principles on Universal Jurisdiction. Principle 5. To be found at: www1.umn.edu/humanrts/instree/princeton.html

¹²⁵ A. Cassese, International Criminal Law 2003:270

¹²⁶ (§§ 51-57). ICJ Decision of 14 February, 2002, Case concerning the Arrest Warrant of 11 April 2000. (*Democratic Republic of Congo v. Belgium*); D. Akande, International Law Immunities and the International Criminal Court. AJIL 2004 Vol. 98:411

head of state, as Bröhmer observes, has not to be granted freedom of travel to other countries. There is no function for such a grant since there exist no need of essential contact between former heads of state and foreign countries. Bröhmer concludes:

Put bluntly, there is no need for international law to secure the freedom to travel for abdicated dictators.¹²⁷

The construction of the rule is more difficult to describe even though some evidence for its existence is to be found. Legal commentators have sought to base it on several different grounds. One of them is to refer the criminal act to the private sphere, since there exist no immunity, as was done in the Pinochet (No. 1).¹²⁸ Lord Phillips, in the Pinochet (No. 3) turned the question around and took departure in non-immunity, that way solving the question of support for the alleged rule. A rule stating impunity for international crimes has to be proved, he argued.¹²⁹

Akande is of the opinion that immunity cannot be invoked in proceedings relating to international crimes since the reasons underlying the immunity *rationa materiae* do not apply in the case when an international crime was committed. Firstly, the general principle stating that only the state is responsible for the official acts of the officials does not apply when the act amounts to an international crime. It is on the contrary well established that the official in person becomes a subject of international law and bears full responsibility for the criminal act, Akande argues and refers amongst others to the statutes of ICTY and ICTR.¹³⁰ Secondly, he continues, the international law has allowed the development of rules that permit domestic courts to have universal jurisdiction over certain crimes. Here, the second reason for immunity *materiae* disappears since that cannot logically coexist with the grant of universal jurisdiction. Such a grant of immunity would render the grant of universal jurisdiction void of meaning. The decision of the Lords in Pinochet case (no. 3) could be explained by this argument. The Lords held that since the Torture Convention limited the act of torture only to the official acts of a state representative, the granting of immunity would be inconsistent with the provisions in the Convention that provide for universal jurisdiction for the crime.¹³¹ As a consequence of that, the immunity *ratione materiae* must be regarded as displaced by the rules on universal jurisdiction, Akande concludes.¹³²

¹²⁷ Jürgen Bröhmer, Diplomatic Immunity, Head of State Immunity, State Immunity: Misconceptions of a Notorious Human Rights Violator. LJIL, Vol. 12 1999:370

¹²⁸ Ex Parte Pinochet Ugarte (No. 1), House of Lords, Judgement of 25 November, 37 I.L.M. 1302. 1998

¹²⁹ Ex Parte Pinochet Ugarte (No. 3), House of Lords, Judgement of 24 March 1999 Lord Phillips at 289

¹³⁰ D. Akande, International Law Immunities and the International Criminal Court. AJIL 2004 Vol. 98:414-415

¹³¹ Ex Parte Pinochet Ugarte (No. 3), House of Lords, Judgement of 24 March 1999, 126-127, 149, 179, 189.

¹³² D. Akande, International Law Immunities and the International Criminal Court. AJIL 2004 Vol. 98:415

Other constructions have been proposed as well when international crimes have been committed, such as implied waiver of immunity or forfeiture of it, founded on the gravity of the crime. The suggestions are not here any wider elaborated since they do not confer any state practice as support what makes them difficult to accept. The construction of a rule that removes the immunity is thus under discussion, but many scholars nonetheless agree on the result; no immunity must be accorded when international crimes have been committed.¹³³

Despite what has been brought forward, the greatest part of state practice points to the contrary. Most domestic courts, as well as ICJ and ECHR, uphold the traditional rule and grant immunity.¹³⁴ The appropriateness of proceedings against state officials in foreign courts, as the asserted rule advocates, could as well be questioned. Those could stimulate unfriendly relations between states or even open atrocities. They might as well stimulate rebellious movements within the state to seize the power when the state is busy defending its officials in foreign courts. On the other hand, it could at the same time be argued that although these are qualified arguments, they should not be taken too far. A former head of state or other former high state officials do not possess such important functions within the state, that it is plausible to cause great problems internally or externally, would they be prosecuted in domestic courts of other countries.

3.8.2 New State Practice

Although the subject of international crimes, universal jurisdiction and immunities are widely discussed, they do not very often end up in national courts. Once they do, they mostly are decided in favour of immunity. For example, Belgium dismissed a case against Israeli Prime Minister, Ariel Sharon, in 2003; France dismissed a case against Libyan leader, Colonel Ghaddafi, in 2001; Spain dismissed a case against Cuban leader, Fidel Castro, in 1999 and the UK refused a private application for an extradition warrant against Zimbabwean President, Robert Mugabe in 2004. The European Court of Human Rights recently upheld the traditional rule and granted immunity. The Court is of the opinion that it is no breach of the European Convention on Human Rights to grant immunity in a case where that would have been justified under international law, although international crimes were in breach in the Al-Adsani case.¹³⁵ The court held, with 9 votes to 8 that in this case it could not discern ‘any firm basis for concluding that, as a matter of international law, a state no longer enjoys

¹³³ See L. M. Caplan, State immunity, human rights, and *jus cogens*: a critique of the normative hierarchy theory. AJIL Vol. 97 2003:781

¹³⁴ ECHR: Al-Adsani v. United Kingdom, No. 35763/97 (21.Nov.2001); Fogarty v. United Kingdom, ECHR 37112/97. (21 Nov. 2001); McElhinney v. Irland. No. 31253/96 (21 Nov. 2001) All available at: <http://www.echr.coe.int/Eng/Judgments.htm>

¹³⁵ ECHR: Al-Adsani v. United Kingdom, No. 35763/97 (21.Nov.2001); Fogarty v. United Kingdom, ECHR 37112/97. (21 Nov. 2001); McElhinney v. Irland. No. 31253/96 (21 Nov. 2001) All available at: <http://www.echr.coe.int/Eng/Judgments.htm>

immunity from civil suits in the courts of another state where acts of torture are alleged', the court thus upheld the immunity.¹³⁶

On the other hand, the case against Pinochet in UK from 1999 point at a different direction. One case might though not be strong enough to carry a heavy burden like this, although it has worldwide been celebrated as one of the greatest judgments of the century. A look at recent state legislation does not alleviate its burden.

Belgium used to have the most far-reaching legislation concerning universal jurisdiction that stated jurisdiction for any international crime, committed by anyone, anywhere.¹³⁷ There, attempts to bring cases against world leaders have occurred, including the Israeli Prime Minister, Ariel Sharon, the Cuban president, Fidel Castro, the Palestinian leader, Yasser Arafat, and the former Iranian president Hashemi Rafsanjani. None of these were successful. The Belgian Cour de Cassation, in a case from February 2003 where Mr. Sharon was indicted for genocide, found that it may try the case, but first after the Prime Minister leaves office.¹³⁸ The rules of immunity for sitting high state officials protected him at that point of time. Two months later, after massive diplomatic pressure by the state of Israel as well as by the USA following another high-profile lawsuits, namely against Mr George Bush for acts during the first Gulf War 1991, the law was twice amended during 2003 forcing the court to dismiss the pending cases. Today, the world leaders can only be tried in Belgium, if a strong link to the country is established, thus most of the universality has been removed. A look at other states' legislation show that a large number of states have enacted legislation concerning international crimes but none stipulates the principle of universality in its most far-reaching and, one could argue, natural form. Dixon states in the latest textbook on international law:

So, it seems that despite indications [...] the grant of immunity continues to take precedence over other rules of international law, even those rules designed specifically to protect individuals (human rights) and those rules permitting the punishment of individuals under international law.¹³⁹

Romano and Nollkaemper reach the similar conclusion but envisage the gradual reducing of high state officials immunities, although clear standards not yet have emerged since state practice, according to them, remains

¹³⁶ Al-Adsani v. United Kingdom, No. 35763/97 (21.Nov.2001), Para. 61, 66.

¹³⁷ A law enacted on 16 June 1993, *Loi relative à la répression des infractions graves aux Conventions de Genève du 12 août 1949 aux Protocoles I et II du 8 juin 1977* (named the 1993 law), gave courts universal jurisdiction over grave breaches of the Geneva Conventions and Protocol I and violations of Protocol II, all of which have been ratified by Belgium. The law was amended in February 1999 by the *Loi relative à la répression des violations graves du droit international humanitaire* (Act Concerning the Punishment of Grave Breaches of International Humanitarian Law) which expanded its scope to include genocide in Section 1 of Article I and crimes against humanity in Section 2 of that article.

¹³⁸ Decision of the Belgian Cour de Cassation on 12 february 2003 No. P.021139.F/1

¹³⁹ M. Dixon, Textbook on International Law. 2005:187

fluid.¹⁴⁰ Dixon concludes that international law does not require states to abstain from indicting persons responsible for breach against international law and indeed in certain cases may require them to abstain from granting immunity since states today are subject to international law, not national. On the other hand, he as well admits that neither international law nor most municipal courts seem today to be ready to take that last step.¹⁴¹

3.9 Conclusions on Immunity accorded to High State Representatives

The rules concerning immunities for state officials are one of the most complex areas of international law. What makes it so intricate is the path of balance it has to walk and still evolve according to new values of today's society. On one hand there is the urge for respect of human rights, the urge for criminalization of heinous crimes such as genocide, war crimes, crimes against humanity and the urge for punishment of perpetrators of these crimes. On the other hand there is state sovereignty and the globalization with the tremendously growing exchange and interdependence between states with the need of confirming the rules of immunities and keeping them as absolute as possible.

From what has been stated above, it may be concluded that High State Representatives, while in office, are accorded absolute immunity for all acts, may they even be performed before the taking up of office. After cession of the duties, the high ranking state official loses the immunity only for the private acts committed during office. The sovereign and official acts are however always protected. Uncertainty prevails regarding the non-sovereign but official acts. Immunity for non-sovereign acts is denied to the state so it could be deduced that the same applies a fortiori to state officials. The acts is however still an official acts, for which immunity normally is afforded. The current state of law is thus uncertain at this point.

Here the question of classification of international crimes arises and complicates the situation by offering two alternatives. It may be qualified as official and entail immunity or private and not entail immunity. The question will be further elaborated on in the next chapter. For now one may conclude that a great number of legal scholars support the existence of the new customary rule that states removal of immunity for former high state officials in case international crimes were committed. The support for the rule rests mainly on the cumulative effect of the evolution of higher respect for human rights, the setting up of the international war crimes tribunals and the Pinochet cases.

¹⁴⁰ C. P.R. Romano and A. Nollkaemper, The Arrest Warrant Against The Liberian President, Charles Taylor. ASIL Insights June 2003 available at:

<http://www.asil.org/insights/insigh110.htm>

¹⁴¹ M. Dixon, Textbook on International Law. 2005:174

The new alleged rule must be thoroughly elaborated on and all its consequences clear, before it becomes safe to widely apply it through state practice. The rule would enable any national court to initiate proceedings against any former high state official, alleged to have committed an international crime. As at the end of the last chapter, it is here suitable to question the appropriateness of using domestic courts to adjudicate on the delicate issues of immunity for High State Representatives. On the other hand, indicting former high state officials would not be open to many different risks, either what regards foreign relations or what regards the internal situation of the state. The former officials do not any longer possess essential functions within the state, worthy of protection in the face of the urge for punishment for international crimes, it can successfully be argued.

Although some support for the rule removing immunity for former high state officials may be found, most of which is amongst legal writers that work hard to prove its existence, wide state practice points to the contrary in that today almost all states still guarantee foreign high state officials immunity, no matter the gravity of the crime or the fact that the act is contrary to international law. The attraction to the direction of immunities must be regarded as stronger, today still, since customary law is not easily proved without wide and consistent state practice, what here obviously lacks.

The question that was intended to be elaborated on in this chapter must thus be answered with a yes. High states representatives are still accorded immunity by international customary law when international crimes have been committed.

4 The Classification of the Act

4.1 Introduction

In order to advance in the discussion of immunity for high state officials what regards international crimes, the criminal act needs to be localized and characterized. This is in particular necessary with the acceptance of the restrictive doctrine of immunity that does not grant immunity for all state acts. The localization of the criminal act and the allocation of responsibility for the act may not always cause much of a problem, since the criminal moment, when we speak of international crimes, is quite clear thanks to treaties and customary law. What on the other hand is more complicated is the decision on how to characterize the criminal act. The assertion that international law only allows the distinction between acts *jure imperii* and *gestionis* or in other words between sovereign and non-sovereign acts, may have been tenable 20 years ago. Today it is, however, clearly obsolete, as is shown by wide practice to the contrary.¹⁴² Today there are as well distinctions between official and private acts and between non-sovereign but official acts.¹⁴³ Whether the problem is only of terminology or of content as well, will be further examined. To begin with, a clarification of how the classification of the criminal act is done is attempted.

4.2 Sovereign and Non-sovereign Acts

The theory of restrictive immunity that is said to prevail today, constructed the distinction between sovereign and non-sovereign acts. The distinction however, entailed several problems. How was a domestic court to decide whether an act is sovereign or non-sovereign and thus decide whether to grant the state immunity or not?¹⁴⁴ The different courts around the world have used different methods but some common features are to be discerned. One feature is that the difference between the sovereign and non-sovereign acts is to be based on objective grounds. The European Convention on State Immunity from 1972¹⁴⁵, amongst others, and the states that have enacted legislation are stating objective criteria to compare the act against. They declare that no state immunity is accorded for commercial acts, acts of a private law nature and list some other objective measures.¹⁴⁶ The problem that arises next is how to decide what constitutes a commercial act, an act of private law nature and so on. Several tests to this aim have been elaborated,

¹⁴² Jürgen Bröhmer, *State Immunity and the Violation of Human Rights*. 1997:69

¹⁴³ M. N. Shaw, *International law.*; Cambridge 2003:657 referring to the ILC Draft Articles on Jurisdictional Immunities of States and their Property, 1991, pp 16, 24-5 and 35.

¹⁴⁴ B. Hess, *Staatenimmunität bei Distanzdelikten – der Private Kläger im Schnittpunkt von Zivilrechtlichem und Völkerrechtlichem Rechtsschutz*, 1992:42-3

¹⁴⁵ European Convention on State Immunity (1972) Art 7 for example.

¹⁴⁶ G. Dahm et al, *Völkerrecht – die Grundlagen. Die Völkerrechtssubjekte. Band I/1*. 1988:467

i.e. with the objective to find out whether an act is sovereign or non-sovereign.

The predominant test used to focus on the nature of the act.¹⁴⁷ It had to be established whether the act performed was an official act i.e. an act the state under normal circumstances performs or an act that a private persons is able to perform as well.¹⁴⁸ State acts have generally connection to the state's military power, foreign relations, legislation and enforcement.¹⁴⁹ It was however, soon enough discovered, and is now regulated in the United Nations Convention on Jurisdictional Immunities of States and their Property that one has to take the purpose of the act into consideration as well. The whole context has to be looked at. Art 2 (2) provides:

In determining whether a contract or transaction is a "commercial transaction" under paragraph 1 (c), reference should be made primarily to the nature of the contract or transaction, but its purpose should also be taken into account if the parties to the contract or the transaction have so agreed or if, in the practice of the state of the forum, that purpose is relevant to determining the non-commercial character of the contract or transaction.¹⁵⁰

The interesting question to be dealt with below is whether an international crime is an act of sovereign authority and whether it thus entails immunity.

4.3 The Public Private Dimension

Another distinction is that between public or official acts on one side and private on the other. This one is constructed in many areas of the law and not just in law relating to state immunity. One field where the distinction plays a great role is in the law of state responsibility stipulating responsibility only for public acts i.e. where the act may be attributed to the state through acting of state organs and persons or entities exercising elements of governmental authority.¹⁵¹ This may serve as guidance for the rules on state immunity.

Diplomatic immunity is a closely adjacent area, which also can offer guidance. Article 39 (2) of the Vienna Convention on Diplomatic Relations from 1961¹⁵² states:

When the functions of a person enjoying privileges and immunities have come to an end, such privileges and immunities shall normally cease at the moment when he leaves the

¹⁴⁷ Malcolm N. Shaw, *International law*. 2003:633

¹⁴⁸ G. Dahm et al, *Völkerrecht – die Grundlagen*. Die Völkerrechtssubjekte. Band I/1. 1988:469

¹⁴⁹ Church of Scientology, NJW 32 (1979), decision from 26. September 1978, BGH,1101

¹⁵⁰ United Nations Convention on Jurisdictional Immunities of States and their Property, adopted by General Assembly on 2 December 2004 in A/Res/59/38

¹⁵¹ Art 4 and 5. Responsibility of States for Internationally Wrongful Acts adopted by UN General Assembly on 12 Dec 2001 in A/Res/56/83. Available at:

<http://daccessdds.un.org/doc/UNDOC/GEN/N01/477/97/PDF/N0147797.pdf?OpenElement>

¹⁵² Vienna Convention on Diplomatic Relations adopted on 14 April 1961. Available at: <http://www.un.org/law/ilc/texts/diplomat.htm#abstract>

country [...] However, with respect to acts performed by such a person in the exercise of his functions as a member of the mission, immunity shall continue to subsist.

Diplomats are thus immune, even after leaving their post, but only for the official acts committed during office. The interesting question is how 'official acts' has been interpreted and where the line is drawn towards the 'private acts'. Denza, in a commentary to the Convention holds that this residual immunity is only accorded for acts performed on behalf of the sending state or that are imputable to it.¹⁵³ This would imply that, in practice, immunity is accorded in most cases since this interpretation may include both sovereign and official acts. States are, however, very careful about putting each other's diplomats on trial. The same is affirmed in the commentary to article 38 (1) that states for immunity to be accorded to the diplomats that are citizens of or permanently residing in the receiving state, 'only...in respect of official acts performed in the exercise of his functions'.¹⁵⁴ The official acts are thus only acts performed on behalf of the sending state.¹⁵⁵

When the restrictive theory started to gain support, a convenient rule was proposed considering those acts of a foreign state performed under public law as public and those acts governed by its private law as private. Soon it was discovered that this distinction was not tenable since, amongst others points of critique, the domestic laws of different countries vary a lot on this point. What is a public act in one country might not be that in another. This fact would make it difficult to accept any judgement, since always the distinction of only one country would be applied, leaving the other country discontent. Because of these difficulties, the courts started to concentrate not on the legal facts, but on the factual. Consequently, the method commonly used today is to examine whether private persons as well can perform a similar act to that disputed one. If only a state can perform the act, then it is considered public but if the act is open to private persons or entities, it is considered as private. After nearer examination of this later test one sees that it entails the same difficulties. What private persons may perform in one country might not be what they may perform in another country, which leaves us principally at the same point as the first method. The later test is as well especially difficult to apply in socialist countries, such as China, North Korea and Cuba, where foreign trade lies under the state monopoly.¹⁵⁶

Badr is of the opinion that it does not have to be that complicated to create a test to tell the difference between public and private acts after localizing a few objective and stable criteria what lets itself to be done. According to him, a starting point may be that a public act of the state is always a unilateral act of authority over the another part. The act is characterized by a

¹⁵³ E. Denza, *Diplomatic Law – A Commentary on the Vienna Convention on Diplomatic Relations*. 1998:363

¹⁵⁴ Article 38 (1), Vienna Convention on Diplomatic Relations adopted on 14 April 1961. Available at: <http://www.un.org/law/ilc/texts/diplomat.htm#abstract>

¹⁵⁵ E. Denza, *Diplomatic Law – A Commentary on the Vienna Convention on Diplomatic Relations*. 1998:342

¹⁵⁶ G. M. Badr, *State Immunity: An analytical and Prognostic view*. 1984:63-4

vertical and unequal relationship that reflects the superiority of the state over the other part. The state may even induce coercive measures to insure compliance. On the other hand, a private act of the state is characterized by an equal, horizontal and bilateral relationship between the parties. Badr concludes:

Those differences are inherent in the nature of the act, are objectively discernible, are not affected by and are unrelated to the particular social and economic system of the state.¹⁵⁷

Fox admits that the distinction between state and non-state acts is hard to draw in complicated cases but its wide use in so many branches of law must be seen as evidence of its usefulness although it first has to be accepted that it contains some limitations concerning its logic and objectivity. After comparison and evaluation of the different fields where the distinction is used, Lady Fox could envisage six generalizations that may help in the characterization of the act for the purpose of state immunity:¹⁵⁸

1. State acts based on regulatory power stemming from statute or prerogative are almost always classed as governmental.
2. Acts based on contract are normally private law acts. One must however look further and examine whether the acts as well contains any public law elements that can convert the act into a public act.
3. To use function in order to classify the act is not helpful. An act, even though conducted in a public form, may require commercial feasibility.
4. The amount of control the state possesses over the act is as well a misleading test. The control, conducted directly through decision-making or indirectly through financial participation, is a matter of quantity, making it impossible to specify a minimum amount that has to be met in all situations in order to classify as governmental.
5. The relativity of the result after drawing a distinction between private and public acts, although negative in general, may be considered positive, as long as it increases certainty in transactions.
6. Some, in advance, elaborated guidelines on where the line will be drawn as well as outspoken uncertainty on the subject increases good faith and transparency between the parties.

4.4 The Criminal Act Amounting to an International Crime

The interesting question here is how we should characterize the criminal act amounting to an international crime. The act that constitutes the crime is in most cases easy to localize. Treaties that are widely acceded to and customary law provide crime requisite that makes it easy to establish whether a crime has been committed or not. What on the other hand is more

¹⁵⁷ G. M. Badr, *State Immunity: An analytical and Prognostic view*. 1984:65

¹⁵⁸ H. Fox, *The law of state immunity*, 2002:44-5

difficult is, as already indicated, how to classify the criminal act. Is it sovereign, non-sovereign, governmental, official or private? The classification is necessary in order to establish the immunity or non-immunity of the responsible official. How is one to classify the international crime so that it removes immunity for high state officials and at the same time may be attributed to the state so that state responsibility may arise for the omissions of the state to hinder the commission of the crime?

Several suggestions have been put forward to solve the question posed above. The majority of the Lords in Pinochet (no. 1) argued that the act constituting an international crime, torture in that case, should classify as a private act, hence no immunity was accorded to Senator Pinochet. The ground conferred was the seriousness and awfulness of the act and that international law does not accept such conduct.¹⁵⁹

The reasons for the decision in the Pinochet case (No.1) have widely been criticized. The Lords tried to circumvent the question of immunity *ratione materiae* by simply removing the international crime from the functions of a head of state and by placing it under the private sphere. Most legal scholars find it difficult to regard an act conducted by the Head of State, through the use of state apparatus and with political purposes, as a private act. Bröhmer confers that:

Whereas it is not inconceivable and perhaps not even uncommon for dictators to use their power to rid themselves of personal enemies, the main force behind the systematic torture or repression is the perceived threat of the nation by some more or less defined enemy. That does not excuse anything but speaks against the notion that Pinochet acted privately.¹⁶⁰

In Pinochet (no. 3), the Lords reached the same conclusion not to accord immunity, but on somehow different grounds. They held that an international crime never can be characterized as an official act, in the face of being a crime against humanity and *jus cogens*.¹⁶¹

Shaw cautiously sees indications for regarding these acts as non-official, making reference to the Ex parte Pinochet (No. 3). He admits that the definition of an official act is unclear but sees the possibility that acts in clear violation of international law are excluded from there.¹⁶² Any certain conclusion, on that evolution has come that far, can thus not be assumed, he concludes.

ICJ did not afford a great deal of clarification in the Congo v. Belgium case where it held that after leaving the position, the official might be prosecuted in the courts of another country for the acts committed before and after the office period as well as for the act during that period but committed in an

¹⁵⁹ House of Lords, Judgement on Pinochet case of 25 November 1998. Pinochet No. 1.

¹⁶⁰ Jürgen Bröhmer, Diplomatic Immunity, Head of State Immunity, State Immunity: Misconceptions of a Notorious Human Rights Violator. LJIL, Vol. 12 1999:370

¹⁶¹ R. v. Bow Street Stipendiary Magistrate and others, ex Parte Pinochet Ugarte (No. 3), United Kingdom, House of Lords, Judgement of 24 March at 203

¹⁶² M. N. Shaw, International law. 2003:658

private capacity.¹⁶³ Shaw interprets this as if the Court left the question of prosecution of international crimes open ‘unless these are deemed to fall within the category of private acts’.¹⁶⁴ Most writers however interpret the decision as if the court granted immunity even for international crimes, since these crimes most certainly are not classified as private. The judges Higgins, Kooijmans and Buergenthal, in their Joint Separate Opinion mentioned the view that international crimes may not be regarded as official acts because they are neither normal state functions nor functions that a state alone, in contrast to an individual, can perform.¹⁶⁵ It seems though, that the three judges did not expressly support such a view.

Cassese delivers criticism regarding the Court, in a context of alleged international crimes, makes a distinction between acts performed ‘in a private capacity’ and ‘official acts’. He, in this context, finds that ‘ambiguous and indeed untenable’.¹⁶⁶ That international crimes are not committed in a private capacity is evident since those crimes are committed through the individual’s use or rather misuse of the official function, Cassese argues. It is their rank and position that creates the possibility to order or carry out the serious offences. He arrives at the conclusion that the distinction becomes irrelevant when the rule, removing functional immunity from the official that committed an international crime, comes into operation. At that point no distinction needs not to be made, since the individual at that point has no immunity at any case.¹⁶⁷ The existence of such a rule, that Cassese is very certain of, is discussed above in paragraph 3.8.1. Bröhmer is of the opinion that these kind of crimes cannot be regarded as private since the responsible official does not torture or kill his people because he personally wants to see them suffer or die but with the aim of removing a threat against the nation. It is thus the dictators nation that he protects, no matter how legitimate or illegitimate the threat may be.¹⁶⁸

The Institute de Droit constructed a straightforward solution to the characterization of the act-problem in their 2001 resolution on “The Immunities from Jurisdiction and Execution of Heads of States and Heads of Government in International Law”. In the preamble of the Resolution one of the stated aims of the project was the desire to dispel uncertainties concerning the immunities of heads of states or governments in front of national courts. The resolution thus states full immunity for official acts of

¹⁶³ ICJ Decision of 14 February, 2002, Case concerning the Arrest Warrant of 11 April 2000. (Democratic Republic of Congo v. Belgium) Para. 61

¹⁶⁴ M. N. Shaw, *International law*. 2003:659

¹⁶⁵ ICJ Decision of 14 February, 2002, Case concerning the Arrest Warrant of 11 April 2000. (Democratic Republic of Congo v. Belgium). Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal. Para. 85

¹⁶⁶ A. Cassese, *When May Senior State Officials Be Tried for International Crimes? Some Comments on the Congo v. Belgium Case*. EJIL. Vol. 13 No. 4 2002:867

¹⁶⁷ A. Cassese, *When May Senior State Officials Be Tried for International Crimes? Some Comments on the Congo v. Belgium Case*. EJIL. Vol. 13 No. 4 2002:869

¹⁶⁸ Jürgen Bröhmer, *Diplomatic Immunity, Head of State Immunity, State Immunity: Misconceptions of a Notorious Human Rights Violator*. LJIL, Vol. 12 1999:370

the state representative but explicitly exempts international crimes from their official duties and this way solving the problem of how to characterize the criminal act.¹⁶⁹ Fox hesitates over the congruence of the resolution with state practice and that it removes immunity for former heads of states but approves of the solution of removing international crimes from the official functions of a state representative.¹⁷⁰

Wirth correctly concludes that that the issue on how to define official acts has not yet been settled and that the area needs further consideration in order to find a construction suitable for all different situations.¹⁷¹ Some of the proposed constructions, such as considering the international crime as a private act, might lead to unwanted results such as making it impossible to impose responsibility on the individual at the same time as on the state, since, on the international arena, only official acts are attributable to the state, according to the rules on state responsibility. Regarding it as an official acts, shields on the other hand the responsible individual, as the rules are formulated today.

It may however be concluded that high state representatives are accorded immunity for international crimes. Up until today, the crimes have almost in every case been classified as sovereign or official and thus have entailed immunity. The classification between these two, has thus no real implications, since immunity is granted for both.

¹⁶⁹ Art 2 and 13, Institute de Droit Resolution on “The Immunities from Jurisdiction and Execution of Heads of States and Heads of Government in International Law. Available at: http://www.idi-iil.org/idiE/resolutionsE/2001_van_02_en.PDF

¹⁷⁰ H. Fox, “The Resolution of the Institute of International Law on the Immunities of Heads of State and Government,” 51 ICLQ 119 2002:125

¹⁷¹ Wirth. S. Immunity for Core Crimes? The ICJ’s Judgement in the Congo v. Belgium case. EJIL, vol 13, no 4 2002:891 Note 94

5 Conclusions and the Way Ahead

In this, rather short chapter, an over-all conclusion of the whole thesis is offered and some proposals *lex ferenda* are shortly discussed.

The customary law of today grants states, the high state representatives immunity in most cases, even when international crimes were committed. This applies even after they have left their official duties. A great part of legal scholars, international tribunals and institutions agree on that restricting immunity in the case of international crimes has to be done. It is thus asserted that a new rule has evolved within customary law, that removes the immunity of former high state officials when international crimes were committed. That is however not enough. There has as well to follow a uniform state practice and *opinio juris* from the states, which is not the case today. It is obvious that the political will to outlaw these crimes, punish those responsible and compensate the victims is great. This cannot at least be envisaged from the intense willingness of the international community to create war crimes tribunals and the International Criminal Court. What today lacks is, however, the preparedness of nations to use domestic forums to achieve these aims. The heavy chain of sovereignty hangs tight around the shoulders of states, what renders them unwilling and causes anxiety of intrusion in other states' sovereignty. This depends on the difficulties to construct a system that removes the immunities but without the entailing negative effects, such as unfriendly relations between states i.e. a system that functions properly and finds a golden way in the middle of the two opposing interests. That is the interest of the state to protect itself and the proper and easy conduct of its functions on one side and the interest of the international community not to accept the commission of international crimes against its populations on the other.

One reason for that immunity is granted is that the state has to function properly at all times, that way being able to grant peace and security for its citizens and the rest of the international community. Would imprisonment of the leader of the state follow, inner opposition movements could grab the opportunity to take the power in the country, which also could destabilize whole areas where the country is situated. On the other hand, this must not be the only justification for international community to sit and watch despotic leaders and their states that have committed horrible crimes, go unpunished. The rule proposed, removing immunity *ratione materiae* after the official ceases to hold office, would not render the state in such a critical situation. A former high state official does not possess such an essential role within the state and the risk of accountability of the state will function preventive. The rule must though be constructed in such a way that it enables responsibility of both the state and the individual. They are on the

same boat throughout the commitment of the crime and should be treated in accordance to that.

The theoretical structure of such a rule is however very difficult to construct although qualified suggestions are starting to show up. As showed above, much of the problem lies in the characterization of the criminal act. If the crime is characterized as private and the former head of state loses his immunity, then the crime could not be attributable to the state on the international arena as well. If it, on the other hand, is characterized as official so that the state can be held responsible, then the former leader, that actually is responsible for the act, retains his immunity.

Wirth proposes a solution of how to reconcile the outcome of the Yerodia case, where immunity was granted, with new trends towards less immunity, through the proper usage of the term 'official act'. In that case ICJ stopped the evolution of restricting the immunities for high state officials that just had started on the national level with the Pinochet cases. Wirth considers that, to define the term in such a way that it per definition excludes commission of international crimes, as is done by some of the Lords in the Pinochet case¹⁷² as well as in Bouterse decision,¹⁷³ would entail several absurd consequences. Since the term 'torture' according to the Convention Against Torture is defined as pain or suffering that is inflicted by a public official or other person acting in an official capacity,¹⁷⁴ the exclusion of international crimes from the term 'official act' would mean that torture always is conducted in a private capacity and would per definition not any longer be subject to the convention. This would as well imply that these crimes could not be attributable to the state in the context of state responsibility since only official acts are attributable to the state.¹⁷⁵ This in turn would mean that the European Court of Human Rights under no circumstances would be able to order compensation from a state to victims of international crimes. The proposition of Wirth is thus to define official acts as something similar to 'acts committed for official purposes'. This sentence would be interpreted as not according immunity for commission of international crimes, but at the same time according immunity for other acts with an official purpose.¹⁷⁶

ICJ has received a great chance to offer clear rules and to either confirm the state of law of today or to help changing it in a case, very similar to the

¹⁷² Ex Parte Pinochet Ugarte (No. 3), House of Lords, Judgement of 24 March 1999, Lord Hutton at 899

¹⁷³ Gerechtshof Amsterdam, 20 November 2000, *Nederlandse Jurisprudentie* (2001), No.51, 302-3

¹⁷⁴ Art. 1, Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Adopted by UN General Assembly 10 December 1984. Available at: http://www.unhchr.ch/html/menu3/b/h_cat39.htm

¹⁷⁵ Art 4 and 5. Responsibility of States for Internationally Wrongful Acts adopted by UN General Assembly on 12 Dec 2001 in A/Res/56/83. Available at: <http://daccessdds.un.org/doc/UNDOC/GEN/N01/477/97/PDF/N0147797.pdf?OpenElement>

¹⁷⁶ Wirth. S. Immunity for Core Crimes? The ICJ's Judgement in the Congo v. Belgium case. *EJIL*, vol 13, no 4 2002:890-891

Yerodia case, where Congo has issued proceedings against France.¹⁷⁷ This time French courts had initiated proceedings against the Congolese President and several high-ranking officials alleging crimes against humanity and torture.

A valid theoretic construction on how to classify the criminal act will soon be at hand, if it does not already exist. What on the other hand lacks as well, in order to arrive at a point where no immunity is granted for international crimes, is the political and diplomatic courage of states to initiate proceedings against foreign state's former officials. In the political and diplomatic international society of today, that is not a possibility for states. If such a possibility is however wanted, only states themselves are able to create it. Whether the ICJ will take the chance that is offered and help to change the rules that must be said to be mature for changes, remains to be seen in the future.

¹⁷⁷ Case concerning certain criminal proceedings in France (Republic of the Congo v. France), International Court of Justice

Bibliography

Akande Dapo, “International Law Immunities and the International Criminal Court”, *American Journal of International Law*. Vol. 98, (407 - 433) 2004

Badr Gamal Moursi, *State Immunity: An analytical and Prognostic view*. Martinus Nijhoff Publishers, The Hague. 1984

Bassiouni M. Cherif, *Introduction to International Criminal Law*. Transnational Publishers, New York. 2003

Bianchi, “Denying State Immunity to Violators of Human Rights”, Vol. 46 *Austrian Journal of Public and International Law*. (195 – 229) 1994

Brownlie Ian, *Principles of Public International Law*. Oxford University Press, Oxford. 1998

Bröhmer Jürgen, “Diplomatic Immunity, Head of State Immunity, State Immunity: Misconceptions of a Notorious Human Rights Violator”. *Leiden Journal of International Law*, Volume 12, no. 2 (361-371) 1999.

Bröhmer Jürgen, *State Immunity and the Violation of Human Rights*. Martinus Nijhoff Publishers, Kluwer Law International, The Hague. 1997

Caplan L. M., “State immunity, human rights, and jus cogens: a critique of the normative hierarchy theory”. *American Journal for International Law* Vol. 97, No. 4 (741-781) 2003

Cassese Antonio, *International Criminal Law*, Oxford University Press, New York. 2003

Cassese Antonio, “When May Senior State Officials Be Tried for International Crimes? Some Comments on the Congo v. Belgium Case”. *European Journal of International Law*. Vol. 13 No. 4 (853-876) 2002

Dahm Georg, **Delbrück** Jost, **Wolfrum** Rüdiger, *Völkerrecht – die Grundlagen. Die Völkerrechtssubjekte*. Band I/1. Walter de Gruyter & Co, Berlin. 1988

Denza Eilene, *Diplomatic Law – A Commentary on the Vienna Convention on Diplomatic Relations*. Second Edition. Clarendon Press, Oxford. 1998

Dixon Martin, *Textbook on International Law*. Fifth Edition. Oxford University Press, Oxford. 2005

Dugard John, “Criminal Responsibility of States” in M. Cherif *Bassiouni* (edt), *International Criminal Law*. Second Edition. Volume I. Transnational Publishers, Inc. New York (239-256) 1999

Feltham Ralph George, *Diplomatic Handbook*. Seventh Edition. Addison Wesley Longman Inc, New York.1998

Fox Hazel, *The law of state immunity*, Oxford University press, Oxford. 2002

Fox Hazel, “The Resolution of the Institute of International Law on the Immunities of Heads of State and Government”. Vol. 19 *International and Comparative Law Quarterly*, (91-117) 2002.

Hess Burkhard, *Staatenimmunität bei Distanzdelikten – der Private Kläger im Schnittpunkt von Zivilrechtlichem und Völkerrechtlichem Rechtsschutz*, Münchener Universitätschriften, Band 91. C.H. Becksche Verlagsbuchhandlung, München 1992

Macedo Stephen (editor), *The Princeton Principles on Universal Jurisdiction - Princeton Project on Universal Jurisdiction*, Program in Law and Public Affaires, Princeton University. 2001

Sands Philip, “International Law Transformed? From Pinochet to Congo...?” *Leiden Journal of International Law*, 16. (37-53) 2003

Shaw Malcolm N., *International law*. Fifth edition, Cambridge University Press. Cambridge 2003

Schreuer Christoph H., *State Immunity: Some recent developments*. Grotius Publications Limited, Cambridge. 1988

Sriram Chandra Lekha, “New mechanisms, old problems? Recent books on universal jurisdiction and mixed tribunals”. *International Affairs*, Chatham House. Vol. 80, No 5. (971-979) 2004

Yang Xiaodong, “State Immunity in the European Court of Human Rights: Reaffirmations and Misconceptions”. *The British Year Book of International Law*, Oxford University Press, Oxford (333-408) 2003

Watts Arthur, “The legal position in International Law of Heads of States, Heads of Governments and Foreign Ministers”. *Academie de Droit International. Recueil des Cours* Vol. 247, No. III (19-130) 1994

Wirth Steffen, “Immunities, Related Problems, and article 98 of the Rome Statute”. *Criminal Law Forum*, Vol 12 (429-458). 2001, Kluwer Academic Publishers, Netherlands

Wirth Steffen, “Immunity for Core Crimes? The ICJ’s Judgement in the Congo v. Belgium case”. *European Journal of International Law*. Vol. 13 No 4 (877-894) 2002

Zappala Salvatore, “Do Heads of State in Office Enjoy Immunity from Jurisdiction for International Crimes? The Ghadaffi Case Before the French Cour de Cassation”, *European Journal of International Law*, Vol.12, No 3. (595-312) 2001

International Instruments and Commentaries (Chronological order)

Institute de Droit International, *Resolution of 11 September 1891*, Hamburg, ADI, II (1885-91)

Institute de Droit International, *Resolution of 30 April 1954*, Aix en Provence, ADI 54-II

The *Charter of United Nations*, signed at San Francisco on 26 June, 1945

Statute of the International Court of Justice. 1945. Acts and Documents Concerning the Organization of the Court. No.1 Also available at: http://www.icj-cij.org/icjwww/basicdocuments/basictext/basicstatute.htm#CHAPTER_II (Last visited 31 May 2005)

Charter of International Military Tribunal at Nuremberg, 1946. Trial of the Major War Criminals before the International Military Tribunal, Published at Nuremberg, Germany 1947 (10-16)

Vienna Convention on Diplomatic Relations adopted on 14 April 1961. United Nations, Treaty Series, vol. 500, p.95. Also available at: <http://www.un.org/law/ilc/texts/diplomat.htm#abstract> (Last visited 31 May 2005)

Convention on Special Mission (1969), UN Treaty Series, vol.1400, p. 231. Also available at: <http://www.vilp.de/Enpdf/e018.pdf> (Last visited 31 May 2005)

The European Convention on State Immunity, 1972. Council of Europe, European Treaty Series, 074. Also available at: <http://conventions.coe.int/Treaty/en/Treaties/Html/074.htm> (Last visited 31 May 2005)

Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents. YBILC, 1972, Vol II, p.312. Adopted by United Nation General Assembly in Resolution 3166 (XXVIII) 1973

International Law Association, Montreal Conference (1982) International Committee on State Immunity, *Draft Montreal Convention* ILA Rep. (1982) 5: reproduced in ILM 22 (1983) 287.

International Law Association, *Revised Draft Articles for a Convention on State Immunity*, Report of the Sixty-Sixth Conference, Buenos Aires. 1994

Commentary to the *Draft Code of Crimes Against the Peace and Security of Mankind*, Yearbook of the International Law Commission Vol. II (1996) 26-27.

Institute de Droit International, Resolution “*Immunities from Jurisdiction and Execution of Head of State and of Governments in International Law*” adopted on 2 September 1991, Basle, ADI 64-II. Also available through: http://www.idi-iil.org/idiE/navig_chon1993.html (Last visited 31 May 2005)

Rome *Statute of the International Criminal Court*, Rome 17 July 1998. UN Doc A/CONF.183/9.

Agreement between the United Nations and the government of Sierra Leone in Security Council Resolution 1315 (2000) of 14 August 2000, UN Doc S/RES/1315

The Princeton Principles on Universal Jurisdiction (2001). Published in Stephen **Macedo** (editor), *The Princeton Principles on Universal Jurisdiction - Princeton Project on Universal Jurisdiction*, Program in Law and Public Affairs, Princeton University. 2001 (28-36) Also available at www1.umn.edu/humanrts/instree/princeton.html (Last visited 31 May 2005)

International Law Commission, *Commentaries to the Draft Articles on Responsibility of States for Internationally Wrongful Acts adopted in 2001*, Report of the International Law Commission on the Work of Its Fifty-third Session, Official Records of General Assembly, A/56/10, Chapter IV.E.2

Responsibility of States for Internationally Wrongful Acts, adopted by UN General Assembly on 12 December 2001 in A/Res/56/83

United Nations Convention on Jurisdictional Immunities of States and their Property, 2004. Adopted by General Assembly in December 2004 in Resolution A/Res/59/38. Also available through: <http://www.un.org/law/jurisdictionalimmunities/> (Last visited 31 May 2005)

Miscellaneous

Belgian legislation regarding universal jurisdiction; Adopted on 16 June 1993, *Loi relative à la répression des infractions graves aux Conventions de Genève du 12 août 1949 aux Protocoles I et II du 8 juin 1977*.

Amended by *Loi relative à la répression des violations graves du droit international humanitaire*.

C. P.R. **Romano** and A. **Nollkaemper**, *The Arrest Warrant Against The Liberian President, Charles Taylor*. ASIL Insights June 2003. Only available at: <http://www.asil.org/insights/insigh110.htm> (Last visited 31 May 2005)

Table of Cases

International:

International Court of Justice

Advisory Opinion on Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, ICJ Reports of Judgements, Advisory Opinions and Orders (1951), pp. 15-69. Layden A. W. Sijthoffs Publishing Company, 1951

Application of the Convention on the prevention and punishment of the crime of genocide. (Bosnia and Herzegovina v. Yugoslavia). Order of 17 December, 1997. Reports of Judgements, Advisory Opinions and Orders (1997) pp 232-297

Decision of 14 February 2002, *Case concerning the Arrest Warrant of 11 April 2000*. (Democratic Republic of Congo v. Belgium or Yerodia case) General List, 2002 No. 121 pp.1-30

Case concerning certain criminal proceedings in France (Republic of Congo v. France). (Pending). For the moment only available at www.icj-cij.org

European Court of Human Rights

Al-Adsani v. United Kingdom, No. 35763/97 (21.Nov.2001)

Fogarty v. United Kingdom, No. 37112/97. (21 Nov. 2001)

McElhinney v. Irland. No. 31253/96 (21 Nov. 2001).

All available at: <http://www.echr.coe.int/Eng/Judgments.htm> (Last visited 31 May 2005)

International Criminal Tribunal for Yugoslavia

Statement in *Karadzic and others* (Trial Chamber I, 16 May 1995)

Prosecutor v. *Furundzija* (Trial Chamber II, 10 Dec. 1998) 38 International Legal Materials (1999) 317 pp.

Statement in *Slobodan Milosevic* (Trial Chamber III, Decision on Preliminary Motions, 8 Nov. 2001)

Prosecutor v. Blaskic (Case no. IT-95-14-A), Judgement on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997, 29 October 1997. (1997) 110 International Law Reports 607 pp.

Special Court for Sierra Leone

Decision by Special Court for Sierra Leone regarding Charles Ghankay Taylor, 2003-01-I. Delivered at 31 May 2004

National:

Belgium

Belgian Cour de Cassation, 12 February . *Indictment against Ariel Sharon*, 2003 No. P.021139.F/1

France

Ghadaffi case - Arrêt n. 1414 du 13 Mars 2001 de la Cour de Cassation –
Chambre Criminelle

Germany

Bundesgerichtshof proceedings against Pinochet, Decision of 18 November 1998, ARS 2 471/98 and ARS 2 474/98

Church of Scientology case, Neue Juristische Wochenschrift (NJW) 32 (1979), decision from 26. September 1978, Bundesgerichtshof, 1101

Israel

Eichmann case, Israel, Supreme Court, judgement of 29 May 1962, English translation in 36 International Law Reports 5-276

Mexico

Cavallo Case in Mexico, available in Spanish at www.derechos.org/nizkor/arg/espana/mex.html (Last visited 31 May 2005)

Netherlands

Bouterse decision, Gerechtshof Amsterdam, 20 November 2000, Nederlandse Jurisprudentie (2001), 302 (No.51), 303.

Spain

Spanish National High Court in the *case of Fidel Castro*, Order no. 1999/2723;

Tunis

Ben Aïad c. Bey of Tunis (1914) Kiss, Répertoire de la Pratique Française en Matière du Droit International Public, Paris. Edition du Centre National de la Recherche Scientifique, Vol. III 1965 p.271

United Kingdom:

Duke of Brunswick v. King of Hanover (1848) 2 House of Law Cases (HLC) 1

Re Wadsworth and the Queen of Spain (1851) 17 Queens Bench (QB) 171

R. v. Bow Street Metropolitan Stipendiary Magistrate and others, *ex Parte Pinochet Ugarte (Pinochet No. 1)*, United Kingdom, House of Lords, Judgement of 25 November 1998, 37 International Law Materials. 1302

R. v. Bow Street Stipendiary Magistrate and others, *ex Parte Pinochet Ugarte (Pinochet No. 3)*, United Kingdom, House of Lords, Judgement of 24 March 1999 in 1999 2 All England Reports 97-192

United States of America

Decision of 1 July 1994 of the US Court of Appeals for the District of Columbia Circuit, *Hugo Princz v. Federal Republic of Germany*, 26 F.3d 1166.

Filartiga v. Peña-Ilara. 630 F 2d 876 (2.nd Circuit, 1980), 77 International Law Reports 192

Lafontant v. Aristide, 844 Federal Supplement 128 (Eastern District. New ork, 1994)

Von Dardel v. Union of Sovjet Socialist Republics, 623 F.Supp 246 (United States District Court, District of Columbia, 1985) = 77 International Law Reports (1988) p.258 et seq.